No. 21-908

# In the Supreme Court of the United States

KATE MARIE BARTENWERFER,

*Petitioner,*

*v.*

KIERAN BUCKLEY,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## *AMICUS CURIAE* BRIEF OF ROBERT E. ZUCKERMAN IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICUS CURIAE*[1]

*Amicus curiae* is Robert E. Zuckerman, an individual debtor in bankruptcy proceedings pending before the Ninth Circuit Court of Appeals involving issues similar to those before this Court, including the central question of whether an individual debtor can be barred from discharge under 11 U.S.C. § 523(a)(2)(A) absent proof of individual culpability—namely, any act, omission, intent, or knowledge of her own. As we demonstrate below, the Ninth Circuit Court of Appeals' decision finding that nondischargeable fraud may be vicariously imputed to the debtor regardless of her individual knowledge, fraudulent intent, or personal culpability contravenes the decisions of this Court, undermines the purpose of the Bankruptcy Code, creates unnecessary conflicts with several other circuit courts, and fundamentally misconstrues the meaning of "actual fraud" as used in 523(a)(2)(A). Vicarious liability under state law is not sufficient to preclude dischargeability under federal bankruptcy law; nor is imputation without proof of specific intent to deceive.

Mr. Zuckerman, who was barred from discharge based on a judgment resting in part on theories of vicarious liability and absent record proof of specific intent to deceive has a strong interest in obtaining clarity on the standards governing vicarious/imputed

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[1] Pursuant to Rule 37.6, no counsel for a party has authored this brief and no person or entity, other than *amicus curiae* or his counsel, has made a monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk of Court.

liability as grounds for precluding discharge and, for the reasons below, urges reversal. This Court should confirm that which was recognized in *Field v. Mans*, 516 U.S. 59 (1995), and adopted by the circuit courts decades ago—that fraud under 523(a)(2)(A) means actual fraud, not imputed fraud, and that the debtor's personal culpability and his specific intent to deceive are necessary predicates to precluding discharge.

## SUMMARY OF ARGUMENT

This Court has recognized that fraud within the meaning of 11 U.S.C. § 523(a)(2)(A) means actual fraud, which, as understood at common law, requires proof that the debtor acted with intent to deceive. Implied fraud, constructive fraud, or fraud at law is insufficient to preclude discharge; rather, proof of the individual debtor's fraudulent intent is required. That an individual debtor may be vicariously liable under state law is not determinative of whether she is also barred from obtaining discharge. These two inquiries are necessarily separate and distinct.

This Court has also recognized that other subsections of 523(a) require proof of the debtor's specific intent to injure the creditor (523(a)(6)) or her culpable state of mind (523(a)(4)). Imputed intent based on vicarious liability is irreconcilable with specific intent to injure or a culpable state of mind.

The courts of appeals also hold that 523(a)(2)(A) requires proof of the debtor's intent to deceive; constructive fraud cannot suffice to bar discharge.

The Opinion is an outlier, based on a decision that was effectively overruled, and which cannot be reconciled with the text and purpose of 523(a)(2)(A).

## ARGUMENT

### I. This Court and the Courts of Appeals Recognize That Fraud in 523(a)(2)(A) Means "Actual Fraud" and Nondischargeability Requires Proof of Personal Culpability and Intent to Deceive

#### A. This Court Requires Personal Culpability

Over 140 years ago, in *Neal v. Clark*, 95 U.S. 704 (1877) this Court considered the meaning of the term "fraud" in a section of the bankruptcy law of 1867 which provided that "'[n]o debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act.'" *Id.* Justice Harlan writing for a unanimous Court reversed the Supreme Court of Appeals of Virginia, which considered whether the law required actual fraud or, instead, "'whether it is enough that there is implied or constructive fraud, or gross negligence, which may be equivalent to fraud." *Id.* at 707.

In *Neal*, an executor "committed a *devastavit*" by wrongfully distributing assets to Mr. Griffith D. Neal, and the issue was the extent of Neal's liability for the executor's unlawful appropriation. The Virginia court concluded that while Neal was not chargeable with actual fraud, and had committed constructive fraud only, "fraud" within the meaning of the 1867 law included both constructive fraud and actual fraud; thus, Neal was "equally liable with the executor who had wasted the estate." *Id.*

This Court reversed, expressly finding that Neal was not guilty of actual fraud because the evidence did not show that he "entertained any purpose

himself to commit a fraud or aid the executor in committing one." *Id.* Justice Harlan then construed the 1867 statute exempting from discharge debts created by "fraud" and concluded that "fraud" as referenced "means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality." *Id.* at 709. Applying this construction, Justice Harlan found that the debt asserted against Neal was not "created by the fraud . . . of the bankrupt'" within the meaning of the statute and thus was subject to complete discharge. *Id.*[2]

Over 120 years later, in *Field v. Mans*, 516 U.S. 59 (1995), this Court considered whether the reliance element for excepting a debt from discharge as a fraudulent misrepresentation within the meaning of 523(a)(2)(A) is reasonable reliance or the less demanding standard of justifiable reliance. This Court noted that 523(a)(2)(A), enacted in the Bankruptcy Reform Act of 1978, had obvious antecedents in the Bankruptcy Act of 1898, which provided that debts that were "'liabilities for obtaining property by false pretenses or false representations' would not be affected by any discharge granted to a bankrupt." *Id.* at 64. The language changed only slightly, progressing from "'false pretenses or false representations' to 'false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an

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[2] But see *Strang v. Bradner*, 114 U.S. 555 (1885), which is addressed *infra*, Section II.

insider's financial condition.'" *Id.* Despite the absence of an express requirement of any type of reliance in 523(a)(2)(A), this Court found that justifiable (not reasonable) reliance is required.

In rejecting the claim that 523(a)(2)(A)'s failure to require reasonableness reliance as expressly demanded by 523(a)(2)(B) shows that (A) lacks such a requirement, this Court noted that such reasoning would also "eliminate scienter from the notion of fraud" in 523(a)(2)(A).[3] *Id.* at 67-68. The Court rejected the possibility that the debtor need not have misrepresented "intentionally" under 523(a)(2)(A), noting that Congress would have stated its intent to bar discharge to a debtor who made "unintentional and wholly immaterial misrepresentations." *Id.* at 69. "It would, however, take a very clear provision to convince anyone of anything so odd, and nothing so odd has ever been apparent to the courts that have previously construed the statute, routinely requiring intent, reliance, and materiality before applying 523(a)(2)(A)." *Id.* (citing *In re Phillips*, 804 F.2d 930 (6th Cir. 1986), *overruled on other grounds by Grogan v Garner*, 498 U.S. 279 (1991); *In re Martin*, 963 F.2d 809 (5th Cir. 1992); *In re Menna*, 16 F.3d 7 (1st Cir. 1994) *overruled on other grounds by Field v. Mans*, 516 U.S. 59, 70-71 (1995)).[4]

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[3] 523(a)(2)(B) requires an intent to deceive, which 523(a)(2)(A) does not expressly include, but which *Field* recognized is encompassed within the settled meaning of actual fraud.

[4] As discussed *infra*, Section I.B., these decisions which were cited with approval in *Field* clearly state that 523(a)(2)(A) requires that the debtor intended to deceive the creditor.

The Court expressly noted that unlike 523(a)(2)(B), the substantive terms of 523(a)(2)(A) refer to common-law torts, such that the operative terms of 523(a)(2)(A)—"'false pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art." *Id.* at 69. "They are common-law terms" which in the case of "actual fraud" "imply elements that the common law has defined them to include." *Id.* & n.9. Because common law required intentional and deliberate fraud (which does not require a duty to investigate) the Court held the less demanding standard of justifiable reliance applies to 523(a)(2)(A). *Id.* at 72 & nn. 11-12.[5]

This Court's decisions construing other sections of 523(a) are in accord in finding that intentional wrongdoing or fault is required to bar discharge. In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), this Court construed 523(a)(6), which bars discharge for "the willful and malicious injury by the debtor to another" as requiring actual intent to cause injury—not acts done intentionally that cause injury—and rejected the application of 523(a)(6) to a judgment attributable to negligent or reckless conduct. *Id.* at 61-62. "[N]ondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* ("Intentional torts generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.'")

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[5] The dissenting opinion agreed with the Court's holding that "'actual fraud' under 11 U.S.C. § 523(a)(2)(A) incorporates the common law elements of intentional misrepresentation." *Id.* at 79 (Breyer, J., and Scalia, J. dissenting).

(quoting Restatement (Second) of Torts § 8A, comment *a*, p. 15 (1964) (emphasis added)).

The Court also noted legislative history reflecting that the statute covered "deliberate or intentional" injuries. *Id.* at n.3 (citing S. Rep. No. 95-989, p. 79 (1978); H.R. Rep. No. 95-595, p. 365 (1977)).[6]

In *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), this Court construed 523(a)(4) and, in particular, whether the term "defalcation" requires a culpable state of mind in order to bar discharge. This Court invoked *Neal*, which confirmed that fraud means positive (not implied) intentional fraud and extended its reasoning to "defalcation." As in *Neal*, which concluded that fraud refers to actual fraud involving "moral turpitude or intentional wrong; . . . and not implied fraud, or fraud in law," where the conduct at issue under 523(a)(4) "does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong." *Bullock*, 569 U.S. at. 273. Discussing, as noted in *Neal*, that "embezzlement" as used in the statute requires a showing of wrongful intent, felonious intent, intent to deprive, moral turpitude or intentional wrong, such that "fraud" must require an equivalent showing, the

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[6] As discussed in *Field*, Congress was not required to use the words "willful" or "intentional" to modify actual fraud in 523(a)(2)(A) because such elements were already encompassed within common law elements of fraud and thus necessarily incorporated. Given that only intentional (not constructive) fraud falls under 523(a)(2)(A), the reasoning in *Geiger* applies with equal force in requiring misrepresentations with actual intent to deceive the creditor—and not simply statements that are vicariously imputed or which are not intended to deceive.

Court in *Bullock* concluded that "defalcation" should be similarly construed. *Id.* at 274-75.

Even if the manner in which an intentional wrong may be established encompasses states of mind less culpable than specific intent to injure, nothing in *Bullock*, *Field*, *Geiger*, or *Neal* holds that implied, vicarious, imputed, or unintentional acts or states of mind can bar discharge. Imputation without intent or personal culpability is insufficient.

Here, the court of appeals' holding that the fraud of another may be imputed to the debtor to bar discharge absent proof of the debtor's personal culpability or specific intent to deceive contravenes the long-settled meaning of common law fraud and decisions above and should not be allowed to stand.

### B. Circuit Courts Require Intent to Deceive and Reject Implied Fraud to Bar Discharge

As this Court recognized in *Field*, the circuit courts of appeals have long recognized that fraud within the meaning of 523(a)(2)(A) means actual fraud under the common law, and that such elements include intentional wrongdoing and intent to deceive.

Indeed, the circuit court cases cited by *Field* as representative of 523(a)(2)(A) elements expressly reference the debtor's intent to deceive the creditor. *See In re Menna*, 16 F.3d at 10 (noting that 523(a)(2)(A) requires a showing by the creditor that "the debtor knowingly or recklessly made a material misrepresentation with intent to deceive the creditor" and the statutory language does not "remotely suggest that nondischargeability attaches to any claim other than one which arises as a direct

result of the debtor's misrepresentation or malice."); *In re Martin*, 963 F.2d at 813 ("Debts falling within section 523(a)(2)(A) are debts obtained by fraud involving moral turpitude and fraudulently made."); *In re Phillips*, 804 F.2d at 932 ("It is established that in order to except a debt from discharge under § 523(a)(2)(A) the creditor must prove that the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross negligence as to its truth. The creditor must also prove the debtor's intent to deceive.").

The Ninth Circuit has held (pre- and post-*Field*) that a creditor seeking to prove actual fraud under 523(a)(2)(A) must establish five separate elements: (1) that the debtor made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made. *In re Eashai*, 87 F.3d 1082, 1086 & n.3 (9th Cir. 1996) (noting that *Field* determined that Congress used the term "actual fraud" in 523(a)(2)(A) to refer to the general common law of torts, which "reaffirm[ed] the Ninth Circuit's practice of using the common law elements of fraud in exception to discharge cases.")

In keeping with the common law, Ninth Circuit courts have repeatedly recognized that 523(a)(2)(A) requires proof that the debtor made a knowingly false representation and, separately, that the debtor intended to deceive the creditor. *See In re Harmon*,

250 F.3d 1240, 1248-49 n.10 (9th Cir. 2001) (stating that creditor must show debtor committed actual fraud; that "the debtor must have intended to deceive the creditor."); *In re Eashai*, 87 F.3d at 1090 (noting that "proof of [the debtor's] intent to deceive" is required under 523(a)(2)(A)); *In re Hashemi*, 104 F.3d 1122, 1125 (9th Cir. 1996) (debtor must have "made [representations] with the intention and purpose of deceiving the creditor."); *In re Britton*, 950 602, 604 (9th Cir. 1991) (citing elements, including debtor's intent to deceive); *Hart v. McLucas*, 535 F.2d 516, 519-21 (9th Cir. 1976) (noting fraud requires a knowingly false statement with intent to deceive and reversing for findings of actual knowledge of falsity); *Wright v. Lubinko*, 515 F.2d 260, 264 (9th Cir. 1975) ("[I]ntent to deceive is . . . necessary for nondischargeability under the false representations clause."); *In re Adams*, 833 Fed. Appx. 679, 682 (9th Cir. 2020) (affirming judgment for debtor where debtor "lacked an intent to deceive the [creditors]").[7]

Ninth Circuit courts expressly reject the assertion that constructive fraud satisfies the elements of 523(a)(2)(A) necessary to bar discharge. *In re Harmon*, 250 F.3d at 1248-49 n.10 (reversing summary judgment where judgment could have been

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[7] *See also In re Baldwin*, 249 F.3d 912, 917 (9th Cir. 2001) (noting § 523(a)(6)'s "willful and malicious injury" element requires "'a deliberate and intentional *injury*, not merely a deliberate or intentional *act* that leads to injury'") (quoting *Geiger*); *In re Peklar*, 260 F.3d 1035, 1038 (9th Cir. 2001) ("'[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of 523(a)(6).'") (quoting *Geiger*).

based on constructive fraud which is not identical to actual fraud under 523(a)(2)(A)); *see also In re Khalil*, 379 B.R. 163, 172 (9th Cir. BAP 2007) ("[A]ctual, rather than constructive, intent is required.")

More recently, the Ninth Circuit confirmed its view that 523(a)(2)(A) requires proof of culpability—that the debtor made false representations with the intent to deceive. *In re Sherman*, 658 F.3d 1009, 1014 (9th Cir. 2011) ("Even though the text of the statute does not state that the fraudulent conduct must have been the debtor's, we have nonetheless incorporated that assumption into our understanding."); *id.* ("'[T]o prove actual fraud, a creditor must establish . . . that *the debtor* made representations . . .'") (quoting *In re Eashai*, 87 F.3d at 1086)); *id.* ("'[M]aking out a claim of non-dischargeability under § 523(a)(2)(A) requires a creditor to demonstrate . . . [that] the *debtor* made representations; . . . that at the time he knew were false; [and] that he made them with the intention and purpose of deceiving the creditor.'") (quoting *In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010)). "In fact, we have recently suggested that the debtor's involvement in the fraudulent activity might be the *only* relevant consideration in determining whether the exception applies." *Id.* (noting that the court has "construed § 523(a)(2)(A) to apply only those cases where the debtor committed the fraud").

At issue in *In re Sherman* was whether the exception to discharge in 523(a)(19) applies when the debtor himself is not culpable for the securities violation that caused the debt. Drawing from its prior decisions involving 523(a)(2)(A), the court found that a debt cannot be nondischargeable when the

debtor himself had not committed the violation. *Id*. at 1012-14 (stating 523(a)(2)(A) is "best interpreted as targeting only debtors who are also wrongdoers" and that a contrary reading "would extend the discharge exceptions to the 'honest but unfortunate debtor,' *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934), in cases where the debtor was unwittingly involved with, and unknowingly received benefits from, a wrongdoer.")

It follows that if 523(a)(2)(A) requires proof of actual (not constructive) fraud; that the debtor was personally culpable—that he knowingly committed actual fraud with intent to deceive the creditor—then imputed, implied, or vicarious fraud based on the acts or intent of others is insufficient to bar discharge.

On the issue of imputed fraud, courts in the Second, Seventh and Eighth Circuits have recognized that fraud imputed based on an agency relationship alone is insufficient without proof of the debtor's knowledge of or participation in the wrongful acts. In *In re Walker*, 726 F.2d 452, 454 (8th Cir. 1984), the court of appeals held that "[p]roof that a debtor's agent obtains money by fraud does not justify the denial of a discharge to the debtor [under 523(a)(2)(A)], unless it is accompanied by proof which demonstrates or justifies an inference that the debtor knew or should have known of the fraud" and reversed absent a specific finding that the debtor-husband knew or should have known of his wife's

fraud.[8] *See also In re Lovich*, 117 F.2d 612, 614-15 (2d Cir. 1941) (rejecting contention that denial of discharge can be based solely on agent's imputed fraud as "[n]o decision has been found which has actually gone to that extreme."). In *Sullivan v. Glenn*, 782 F.3d 378, 381-82 (7th Cir. 2015), Judge Posner invoked *Walker* and *In re Huh*, 506 B.R. 257, 266-71 (9th Cir. BAP 2014), to flatly reject the contention that an agent's imputed fraud is sufficient alone to bar discharge. *Id.* at 381 ("We don't think that [the agent's] fraud should result in the denial of the [principals'] discharge in bankruptcy.") As Judge Posner noted, that an agent's wrongdoing may be imputed to the principal for purposes of establishing liability does not mean that agent's fraud is grounds for denying the debtor's discharge in bankruptcy.[9] *Id.*

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[8] *Walker* spoke of a reckless indifference standard. *Id.* ("When the principal is recklessly indifferent to his agent's acts, it can be inferred that the principal should have known of the fraud.") (citing *David v. Annapolis Banking & Trust Co.*, 209 F.2d 343, 344 (4th Cir. 1953)). This standard conflicts with the decisions of this Court and the circuit courts requiring proof of the debtor's personal wrongdoing and culpability and the common law elements of actual fraud including specific intent to deceive. Notably, the cases relied on by the Eighth Circuit arose before the 1978 Bankruptcy Reform Act and before *Field*, *Geiger*, and *Bullock*. Even so, *Walker* illustrates that, at bare minimum, the court of appeals here erred in finding that fraud may be imputed based solely on the existence of an agency relationship without any proof of the debtor's knowledge, participation, or intent.

[9] In dismissing the claim that imputed liability bars discharge, Judge Posner remarked: "In other words you can do nothing bad but still be denied a discharge in bankruptcy—no fresh start for the innocent. . . . Yes, and debtors used to be sent to prison.").

Finally, in keeping with the authorities above, the legislative history of 523(a)(2)(A) supports the view that 523(a)(2)(A) as presently enacted tracks the elements of actual (not implied or imputed) fraud and is intended to target the debtor's own wrongdoing.

> [U]nder section 523(a)(2)(A) a creditor must prove that the debt was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Subparagraph (A) is intended to codify current case law *e.g.*, *Neal v. Clark*, 95 U.S. [5 Otto] 704 [24 L.Ed. 586] (1887), which interprets "fraud" to mean actual or positive fraud rather than fraud implied in law.

1978 U.S. Code Cong. Ad. News 5787, 6453 (cited in *In re Phillips*, 804 F.2d at 932).

No similar reference to *Strang v. Bradner*, 114 U.S. 555 (1885) is included in the legislative history.

Here, the Opinion is irreconcilable with the decisions above. It is an outlier and should not stand. The decisions of this Court and several other courts of appeals clearly find that fraud under 523(a)(2)(A) requires proof of actual fraud, not implied or constructive fraud, and tracks the common law elements, including the debtor's intent to deceive. There is no exception to these rules for principals.

The Opinion ignores the authorities, undermines the documented purpose of the 1978 Act, and wrongly conflates state law principles of imputation for purposes of establishing liability with the distinct federal statutory requirements for denying discharge.

### C. The Ninth Circuit Misconstrued Prior Law

The Opinion found that imputed fraud was sufficient to bar discharge under 523(a)(2)(A) based on *In re Cecchini*, 780 F.2d 1440, 1444 (9th Cir. 1986). Pet.App.5a-6a. *In re Cecchini* involved 523(a)(6), finding it requires only an intentional act and not specific intent to injure. The court then relied on "basic partnership law" to find that a partner's knowledge and intent in converting funds was imputed to the debtor-partner, thus barring the debtor's discharge, despite no proof of the debtor's direct involvement in the conversion. *Id.* at 1442-44.

In extending *Cecchini* to the present case, the court of appeals overlooked several infirmities. First, the fundamental premise that 523(a)(6) does not require intent to injure was overruled in *Geiger*. Rather, 523(a)(6) *does* require proof of intent to injure, just, as this Court recognized, as 523(a)(2)(A). Imputing the consequences of an *act* that causes injury is not akin to imputing specific *intent* to injure. Second, relying on "basic partnership law" as Judge Posner pointed out is wholly insufficient to impute intent for purposes of barring discharge. *Cecchini* conflated the elements and thus should be rejected. That *Geiger* found only that 523(a)(6) requires intent to injure without also addressing imputation as grounds for discharge does not leave *Cecchini's* analysis intact. The point of *Geiger* (as well as *Field*, *Bullock* and *Neal*) is that the debtor's own personal culpability, including intent to injure or deceive, is required before a debt can be barred from discharge.

*Cecchini's* holding that discharge can be barred absent proof of the *debtor's* culpability or wrongful intent is wholly irreconcilable with the cases above.

Indeed, other courts in the Ninth Circuit have questioned the continuing viability of *Cecchini*. In *In re Lansford*, 822 F.2d 902, 904-05 (9th Cir. 1987), then-Judge Kennedy noted the conflict between "relying on strict agency or partnership principles" to preclude dischargeability "regardless of [debtor's] knowledge or own culpability" on the one hand and the "bankruptcy code's purpose of providing a fresh start" and "the decisions of other circuits refusing to apply agency principles absent some culpability on the part of the party to be charged" on the other hand. *Id.* (citing *Walker* and *Lovich*). Accordingly, Judge Kennedy concluded that "we believe the breadth of the proposition stated in *Cecchini* deserves more thorough consideration before its application to the circumstances presented in this case." *Id.* at 905; *see also In re Peklar*, 260 F.3d at 1037-38 (stating that "the reach of *Cecchini* was necessarily limited by the Supreme Court's decision in [*Geiger*]").

In *Peklar*, the Ninth Circuit noted that *Geiger* expressly rejected the assertion that negligent or reckless acts constitute willful and malicious injuries withing the meaning of 523(a)(6). 260 F.3d at 1068. Under *Geiger*, as construed in the Ninth Circuit, "'it must be shown not only that the debtor *acted* willfully, but also that the debtor inflicted the *injury* willfully and maliciously rather than recklessly or negligently.'" *Id.* (quoting *In re Jerich*, 238 F.3d 1202, 1207 (9th Cir. 2011)). The conclusion that *Cecchini* mandates imputation of fraudulent acts or

intent cannot be squared with the requirement that the *debtor* specifically intended to deceive or injure.[10]

## II. *In re Huh* Persuasively Explains Why Imputed Liability for Fraud Should Not Bar Discharge Absent Proof of the Debtor's Personal Culpability

In a case noted by Judge Posner in *Sullivan*, the en banc decision in *Huh* sets forth cogent reasons for rejecting a *per se* rule imputing fraudulent acts or intent for purposes of barring discharge. Under California law, partners can be held jointly and severally liable for partnership debts. Cal. Corp. Code § 16306(a). But as discussed in *Sullivan* and *Peklar*, liability under state law is not necessarily determinative of dischargeability under federal law. *See Grogan v. Garner*, 498 U.S. 279, 284 (1991) (Since 1970, . . . the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code."); *In re Huh*, 506 B.R. at 272.

The Ninth Circuit BAP decision in *Huh*, squarely addressed the question presented and concluded that under this Court's decisions in *Neal*, *Geiger*, and *Bullock* as well as the court of appeals' decisions in *Walker* and *Sherman*, fraudulent intent of the debtor's agent cannot be imputed to the debtor-principal for purposes of precluding discharge under

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[10] *Peklar's* reasoning illustrates that state law principles of agency establishing liability are not coextensive with the elements of actual fraud for purposes of precluding discharge. 260 F.3d at 1039 (noting that state court judgment for conversion based on "wrongful exercise of dominion" does not also necessarily mean that defendant caused "willful and malicious injury" within the meaning of 523(a)(6)).

523(a)(2)(A) without proof of the debtor's culpability. 506 B.R. at 271-72. *Huh* held that despite California partnership law, and notwithstanding *Cecchini* and *Strang*, more than imputed intent is required to except a debtor's vicarious liability from discharge under 523(a)(2)(A)—instead, the creditor bears the burden of proof to establish the debtor's personal culpability and may not rely exclusively on the bad acts of another. *Id.* at 271. ("[D]ebts incurred as the result of the debtor's agent's fraud should not be excepted from discharge unless the debtor is culpable.") Under *Huh*, "more than a principal/agent relationship is required to establish a fraud exception to discharge." *Id.* "While the principal/debtor need not have participated actively in the fraud . . ., the creditor must show that the debtor knew, or should have known, of the agent's fraud." *Id.* at 271-72 ("Because this standard focuses on the culpability of the debtor, and not solely on the actions of the agent, we think it most properly comports with the recent holdings of the Supreme Court and the Ninth Circuit regarding discharge exceptions.")

*Huh* controlled in the Ninth Circuit BAP for seven years and its analysis is useful in this case.[11]

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[11] As discussed, under *Neal*, *Field*, *Geiger*, *Bullock*, as well as *Sherman*, and other decisions, 523(a) requires intent to injure and/or proof that the debtor knowingly made a false misrepresentation with the intent to deceive the creditor. We do not advocate for a "knew or should have known standard" as fraudulent intent may not be imputed and, absent proof of the debtor's intent to deceive, his debt is dischargeable. We cite *Huh* to illustrate the BAP's reasoning in reconciling *Strang* and rejecting a rule that imputed fraud is sufficient to bar discharge.

*Huh* examined *Neal* and *Strang*, followed *Neal*, and reconciled the "apparent contradictions" between the decisions by explaining the late nineteenth century view as to what relief a debtor was entitled to. *Id.* at 264. *Huh* noted that unlike the current Bankruptcy Code, the provisions of the 1867 Act were not liberally construed in favor of debtors, the exceptions were considerably broad, and obtaining discharge was "exceedingly difficult." *Id.* at 264. Against this backdrop, the *Strang* court imputed fraud (and, thus, liability for exception to discharge purposes) based on general theories of partnership and agency, which, at the time, were based on common law rather than any specific state statutes. *Id.* *Strang* relied primarily on then-existing partnership law; agency law, "as we understand it today" was not well developed. *Id.* Critically, *Strang* rested its analysis on imputed partnership liability, without deeply analyzing the separate question of whether that imputed liability also was sufficient to categorically bar discharge. As Judge Posner recognized in *Sullivan*, these questions are distinct; yet, *Strang* effectively conflated them.

In sharp contrast, while the current Bankruptcy Code is derived in part from the 1898 Act and its predecessors (including the 1867 Act), "the Bankruptcy Code embodies a shift in the fundamental policies and purposes of bankruptcy law" including that the "concept of the discharge . . . is much more expansive." *Id.*

Even further, as discussed, in adding "actual fraud" to the 1978 Act, Congress incorporated into the elements of nondischargeability the requirement of the debtor's specific intent to deceive. *Strang's*

imputation of vicarious liability to bar discharge is fundamentally irreconcilable with 523(a)(2)(A) and the central purpose of the Bankruptcy Code.

*Huh* further examined *Geiger* (requiring debtor's specific intent to injure) and *Bullock* (requiring debtor's "culpable state of mind"), concluding that they "appear to cut strongly against applying imputed fraud under 523(a)(2)(A) to except a debt from discharge in the absence of some showing of culpability on the part of the debtor." *Id.* at 267.

Indeed, there appears to be little support for the proposition that imputed fraud can be sufficient to satisfy the elements of actual fraud under 523(a)(2)(A) including that the debtor made a knowingly false representation with the purpose and intent of deceiving the creditor. Such a standard, which plainly requires proof of the debtor's culpable state of mind, cannot be satisfied vicariously, constructively, impliedly; it requires proof of the debtor's own acts, omissions, intent, and knowledge.

Put simply, that the debtor is vicariously liable under state law for the fraud of another that is barred from discharge does not automatically preclude the debtor's discharge by imputation absent proof of the debtor's own culpability, including intent to deceive.

## CONCLUSION

For these reasons, this Court should reverse the court of appeals and clarify that imputed liability for fraud under state law is not sufficient to bar discharge under 523(a)(2)(A) without proof that the debtor was personally culpable—that is, proof of each element of actual fraud, including specific intent.

Absent proof that the debtor committed actual fraud, and had the requisite fraudulent intent, her debt is dischargeable under 523(a)(2)(A).

Respectfully submitted,

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