



1 make Stan and June Lund debtors for a debt they do not owe; 2) make that debt  
2 nondischargeable; and 3) recover non-estate property transferred from one non-debtor to  
3 another non-debtor.

## 4 **II. Background & Facts**

5 Lund Mortgage, Inc. (“Inc”) was a mortgage broker owned by Stan and June  
6 Lund (the “Lunds”) who listed it as an “AKA” on their bankruptcy schedules<sup>1</sup>. Stan Lund  
7 (“Stan”) was Inc’s president, director and responsible individual. Lisa Lund (“Lisa”),  
8 Stan's daughter, was the vice-president of Inc. The Biltmore Bank of Arizona  
9 (“Biltmore”) and Inc are parties to a Wholesale Broker Agreement under which Biltmore  
10 funded loans originated by Inc. The Lunds are not guarantors of the Biltmore debt.

11 A dispute under the Wholesale Broker Agreement in March of 2007 led to  
12 litigation. The Arizona Superior Court granted summary judgment in Biltmore’s favor  
13 against Inc, but not the Lunds, for over \$300,000 in May 2009. (“State Summary  
14 Judgment”).

15 Inc became insolvent in September 2007<sup>2</sup> and eventually closed its doors on June  
16 1, 2009.

17 In February 2009, Lisa and Matt Oliver, her husband, incorporated Lund  
18 Mortgage Team (“Team”). The Arizona Department of Financial Institutions granted  
19 Team a mortgage broker’s license on April 30, 2009. Stan was originally listed as the  
20 responsible individual for Team, but that title was later given to Lisa once she became a  
21 licensed broker.

22 It is undisputed that the purpose and operation of Inc and Team are virtually  
23 identical, that Team and Inc have the same business address (8765 W. Kelton Lane, Suite  
24 C-1, Peoria, Arizona 85382), phone number (623-875-9940), and website domain name  
25 (www.lundmortgage.com). Advertising for Team continues in the same way as for Inc –  
26 it is indistinguishable. For both entities, the focus of the advertising is consistently on  
27 Stan's experience and expertise without mention of Lisa.

28 <sup>1</sup> This simple act has spawned some of the theories presented in these adversary proceedings.

<sup>2</sup> A fact admitted by the Lunds in their response to a previous summary judgment motion before this Court.

1 Biltmore alleges that Stan and Lisa acted in concert to transfer the assets of Inc to  
2 Team in order to avoid the consequences of the State Summary Judgment. Beyond the  
3 physical address, phone number, and website, Biltmore alleges that Stan Lund transferred  
4 other Inc intangibles, such as its slogan, website content, customer contacts, workforce  
5 and goodwill as well as tangible assets such as office furniture, computers and other  
6 office related machines (“Asset Transfers”).

7 Biltmore also alleges that Stan caused monetary transfers in the form of equity  
8 distributions to himself, a gift to Lisa and a loan to Team (“Monetary Transfers”). The  
9 Asset and Monetary Transfers were, argues Biltmore, violations of the Arizona trust fund  
10 doctrine and thus non-dischargeable under §523(a)(4). Further, they are evidence of an  
11 intent to hinder, delay or defraud creditors under §727(a)(2) and thus support denial of  
12 the Lunds’ discharge. These are the contentions in adversary proceeding 09-1577  
13 (“1577”).

14 This Court granted partial summary judgment to Biltmore in 1577 in August 2010  
15 holding that certain monetary distributions in the amount of \$97,018.30 from Inc to Stan  
16 were a violation of the trust fund doctrine under Arizona law and therefore  
17 nondischargeable under §523(a)(4).<sup>3</sup> The Court held a trial in 1577 regarding the  
18 remaining transfers on September 13, 2010. The Court took the matter under advisement  
19 at that time.

20 Meanwhile, the Trustee and Biltmore brought a second adversary proceeding, 09-  
21 1689 (“1689”), this time against Lisa Lund and Team, alleging liability for an avoidance  
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23 <sup>3</sup> The Debtor has not raised as a defense either at summary judgment or at trial whether Biltmore had standing to bring  
24 the trust fund claim. Some courts have held that such a claim belongs to the estate and may only be brought by the  
25 trustee. See *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 333 n. 1 (Ariz. App. 1992); *N. Am.*  
*Catholic Educ. Programming Fund., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007). The underlying validity of this  
argument is suggested by Biltmore's acknowledgement that it is only entitled to its pro rata share of any recovery, as  
the initial judgment makes clear.

26 Other cases suggest, without deciding, that a creditor has standing. *In re Weinberg*, 401 B.R. 19 (9th Cir.  
27 BAP 2009). Cases from other jurisdictions go further and hold that creditors have standing to the exclusion of the  
28 trustee. *In re Worldwide Wholesale Lumber, Inc.*, 372 B.R. 796, 815 (Bankr.D.S.C. 2007). However, having been  
resolved in Biltmore's favor in the summary judgment and not raised at trial, Biltmore's standing is the law of the case  
and will not be revisited.

1 and recovery of fraudulent transfer under §§ 544, 548, 550, and A.R.S. § 44-1001 *et seq.*,  
2 a violation of the trust fund doctrine by Lisa and Team, breach of fiduciary duty, aiding  
3 and abetting a breach of fiduciary duty, and successor corporate liability. Soon after the  
4 trial in 1577, the Trustee, along with Biltmore, brought a partial summary judgment in  
5 1689 against Team seeking a determination that Team is a mere continuation of Inc  
6 (“Trustee’s Summary Judgment”). It was puzzling that the Trustee’s Summary Judgment  
7 proceeded separately from the trial because both adversary proceedings involve many of  
8 the same parties and core facts, although the defendants are different. After a hearing on  
9 the Trustee’s Summary Judgment, the Court took the matter under advisement.

10 In February 2011, the Court did not decide the issues, but instead asked the parties  
11 to clarify two issues: 1) which claims lie against the Lunds, Inc and/or both; and 2) what  
12 effect, if any, a ruling on one matter will have on the other and why have they been  
13 presented in this way. The parties' subsequent filings and statements did not effectively  
14 address these issues and were not helpful to the Court. In the absence of such guidance  
15 from the parties, the Court will now decide the issues as it sees them.

### 16 **III. Analysis**

#### 17 *A. Trial – § 523(a)(4) Nondischargeability*

18 “A discharge under Sections 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this  
19 title does not discharge an individual debtor from any debt— ... for fraud or defalcation  
20 while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4).  
21 “[E]xceptions to discharge should be strictly construed against an objecting creditor and  
22 in favor of the debtor.” *In re Riso*, 979 F.2d 1151, 1154 (9th Cir. 1992). The core of  
23 Biltmore's claim is the trust fund doctrine under Arizona law. Officers become liable to  
24 creditors under the trust fund doctrine when a corporation transfers assets of the  
25 corporation to the officers while the corporation is insolvent. *In re Jacks*, 266 B.R. 728  
26 (9th Cir. BAP 2001); *In re Weinberg*, 410 B.R. 19, 34 n 10 (9th. Cir. BAP 2009).  
27 However, “payments or transfers to non-insider creditors in the ordinary course of  
28 business” are not violations of the trust fund doctrine. *Id.* As previously determined by

1 the Court, Stan is liable to Biltmore under the trust fund doctrine due to Inc's insolvency  
2 in September 2007 and Stan's position as president of Inc, not because of an independent,  
3 free standing debt between Stan and Biltmore. Thus, the §523(a)(4) issue at trial was an  
4 extension of the matter previously determined by the Court but with a different set of  
5 asset transfers at issue.

6 i. Monetary Transfers

7 Stan directed monetary transfers worth several hundred thousand dollars after Inc  
8 was insolvent.

9 According to the Lunds' answer to question 1 of the Debtors' Statement of  
10 Financial Affairs, Stan took almost \$235,000 in disbursements from Inc in 2007  
11 (\$85,876), 2008 (\$129,905), and 2009 (\$19,092). These figures are corroborated by Inc's  
12 and the Lunds' 2008 Federal Tax Returns which show a disbursement of \$129,905 to the  
13 Lunds in 2008. Stan testified that he took disbursements from Inc in lieu of paychecks  
14 because he could not afford to pay matching taxes such as Social Security. According to  
15 his testimony, he then used these funds to pay personal bills and some corporate bills. He  
16 provided no documentation showing the exact bills he paid.

17 In addition to the transfers to Stan, Inc transferred \$12,500 to Lisa and lent  
18 \$27,500 to Team on May 15, 2009. Stan characterized the \$12,500 transfer to Lisa as  
19 both as a belated wedding gift and a partial payment of unpaid past due wages of  
20 \$16,000. The loan, testified Stan, was repaid within the month.

21 The Court concludes that these transfers from Inc to Stan, Lisa, and Team are all  
22 violations of the trust fund doctrine. Stan, while a fiduciary of Inc, clearly transferred  
23 money to himself, an insider, and Lisa, an insider. Stan provided no evidence of what  
24 bills he paid – corporate or personal – with the transferred funds. There is no evidence  
25 that any of these distributions were used to pay creditors of Inc in the ordinary course.  
26 Further, and quite telling, in the Lunds' closing brief they claim that “[Stan] used those  
27 distributions to pay his personal ongoing living expenses and to attempt to bring current  
28

1 the obligation on other properties, which he eventually lost.” Closing Brief at p. 2 ll. 1-3  
2 (1577, Dkt #60).

3 The timing of these transfers to Lisa and Team are no coincidence. At the end of  
4 April or the beginning of May 2009 Stan decided to shut down Inc and gave its  
5 employees 30 days’ notice; on May 15, 2009, the Superior Court entered the order  
6 granting Biltmore summary judgment; on the same day Inc made the loan and gave the  
7 “wedding gift”. The Court finds that Stan attempted to divert funds from Inc to himself,  
8 Lisa and Team.

9 The “wedding gift” to Lisa, who was at one time a vice president, was clearly  
10 made to an insider and not made in the ordinary course. Again, it was a violation of the  
11 trust fund doctrine.

12 The loan to Team is also a violation of the trust fund doctrine. Obviously, a loan  
13 made to a potential competitor is not made in the ordinary course. Arguably, the loan  
14 wasn’t made to an insider, but instead made to a separate company. But remember, Lisa  
15 and Stan were, respectively, the founder and responsible party of Team at this time, so  
16 that Team is, at the least, an insider of an insider. Moreover, there is no paper or other  
17 corroborating evidence that this loan was repaid. And if it was repaid, according to Stan  
18 Lund’s own testimony, the funds were used to repay his personal debt.<sup>4</sup>

19 ii. Amount of Monetary Transfers to be held non-dischargeable

20 Now for the numbers. Summary judgment was given for \$43,658.24. This  
21 represents Biltmore’s pro rata amount (as a creditor of Inc) of the \$97,018.31 in monetary  
22 transfers identified therein. The evidence at trial demonstrated an additional  
23 \$137,854.70. Thus, judgment for monetary transfers proven at trial will be entered in the  
24 amount of \$62,034.61.

25 \_\_\_\_\_  
26 <sup>4</sup> The Court has already determined on summary judgment that Stan received \$84,208.30 in payments and  
27 June \$310. Therefore, this total of \$84,518.30 is included within, and not in addition to, the \$234,873  
28 detailed in the body of this decision. In addition, the Court also considered the \$12,500 “gift” to Lisa in the  
summary judgment decision so that amount should be included only once in the judgment amount. In  
addition, the Plaintiff has proven an additional \$119,038 As these transfers affect all creditors, the Court  
will apply a factor of 45%, as previously determined, to calculate the amount of judgment in favor of  
Biltmore.

1 Biltmore requests 45% of an additional \$119,038 in transfers reflected in Ex. 2,  
2 the Statement of Financial Affairs. *See* Answer 23, filed in the administrative case. But  
3 there is no evidence of whether that amount is included in the amounts already found or  
4 from a different source. If from Team, for example, the trust fund doctrine would not  
5 apply as Biltmore is not a creditor of Team. Therefore, the proof fails as to this  
6 additional amount.

7 ii. Asset Transfers

8 In addition to the Monetary Transfers, Stan caused multiple Asset Transfers after  
9 Inc was insolvent.

10 Just before it closed, Inc sold its office equipment to Lund Realty – a corporation  
11 incorporated by Lisa – for \$3,000. Unsurprisingly, there is no paper work for either the  
12 sale itself or what the proceeds of the sale went to pay. Additionally, there is the transfer  
13 of the intangible assets. There is no doubt that Team is using Inc’s former phone number,  
14 internet address, slogan and physical address. Stan, as Inc’s fiduciary, made no attempt to  
15 capitalize these assets for the benefit of his creditors, but instead gave them to a  
16 competitor. The Asset Transfers are a violation of the trust doctrine.

17 However, there was no proof of the value of the assets transferred. Ultimate  
18 liability depends both on the proving liability and damages. Here, no damages were  
19 proven as to the non-monetary transfers and therefore judgment will not be given for any  
20 amount on that account.

21 *B. Trial – §727(a)(2) Denial of Discharge*

22 Under §727(a)(2) the Court can deny a discharge if the *debtor* “with intent to  
23 hinder, delay, or defraud a creditor” transferred property of the *debtor* or the *estate*. Inc is  
24 not a debtor. All the property transferred belonged to Inc. The Debtors are the Lunds.  
25 Biltmore has acknowledged that there is no separate pre-petition liability of the Lunds to  
26 Biltmore. Therefore, Biltmore has not shown that there was a transfer of property either  
27 of the estate or of the debtor.

28

1           The gravamen of the Biltmore claim, however, is that Inc and the Lunds are one  
2 and the same and therefore transfer of assets of Inc are transfers of the Lunds, in effect  
3 piercing the corporate veil for this purpose. But Biltmore cannot have it both ways. Its  
4 non-dischargeability complaint is premised upon, indeed dependent upon, the  
5 separateness of Lund and Inc, otherwise the trust fund theory would be inapplicable.  
6 Having chosen that route for section 523, it is judicially estopped from switching course  
7 and taking a totally inconsistent route for purposes of Section 727. Thus, judgment on the  
8 denial of discharge claim will be given to the Lunds.

9           *C. Trustee's and Biltmore's Second Motion for Summary Judgment*

10           In the Trustee's Summary Judgment, the Trustee and Biltmore ask the Court to  
11 determine that Team is a mere continuation of Inc under Arizona law. Conflating Inc and  
12 Team does not present the same inconsistency issues as conflating Lunds and Inc as the  
13 other adversary proceeding contains no claims against Team. However, the Court must  
14 take care not to decide a state law claim in a vacuum. Instead, it has "arising in"  
15 jurisdiction, authorizing the entry of a final judgment, only if the state law claim is  
16 closely intertwined with an underlying bankruptcy issue. Otherwise, the issue is, at best,  
17 "related to" Title 11 and Article III concerns arise. *See Stern v. Marshall*, 131 S.Ct. 2594  
18 (2011).

19           Here, the controversy does not arise in this Title 11 case because resolution of this  
20 type of dispute cannot comfortably fit within any of relevant subsections of 28 U.S.C. §  
21 157(b). At first blush, the controversy appears to implicate the extent of property of the  
22 estate. Although § 157(b)(2) does not specifically list determination of whether certain  
23 property ostensibly owned by another is indeed property of the estate, it does so by clear  
24 implication. For example, five of the subsections of 157(b)(2) refer to the "estate" and, in  
25 particular, subsection O refers to actions relating to the liquidation of property of the  
26 estate. Code Section 541 defines property of the estate broadly to include all "legal and  
27 equitable" interests of the debtor in property, which appears to encompass interests  
28



1 determined by a court rightly to belong to the estate through the application of rules of  
2 law like piercing of the corporate veil or "mere continuation."

3 All of this would be comforting if the cause of action was to find that Team is a  
4 mere continuation of Stan, who, after all, is a debtor here. But that's not what the  
5 complaint seeks – rather it is to remove the distinction between Inc and Team, not the  
6 Lunds and Team. And, although the Lunds did list Inc as an AKA on their schedules, this  
7 one bit of either carelessness or conscious action cannot be the sole factor determining  
8 whether the Lunds and Inc are to be conflated as well. And, as noted above, Biltmore, at  
9 least, has already chosen separateness as the vehicle for its recovery. So can the trustee  
10 take a different tack? He may only do so if he first proves that Inc is a continuation of the  
11 Lunds and that has yet to be undertaken in adversary 1689. In short, this is an action by a  
12 trustee to conflate two non-debtor entities, which, even if successful, would not by itself  
13 enhance his estate. Therefore, the Court concludes that the Trustee's claim is only related  
14 to, but does not arise in, this Title 11 case. For that reason, it is non-core and a final  
15 judgment may not be entered by this Court.

16 Neither party has asked the Court to make a recommendation to the District Court  
17 on the pending motion for summary judgment and the Court will decline to do so without  
18 such request. Nevertheless, the Court does note that proceeding on that course without  
19 first addressing the nexus of Inc to the Lunds would seem ill-advised.

20 Therefore, the Court will deny the motion for summary judgment with prejudice  
21 as to Biltmore and without prejudice as to the Trustee. If the Trustee seeks relief  
22 consistent with this decision prior to the expiration of thirty days, final ruling will be  
23 deferred pending resolution of any such future motion. If such a motion is filed, the  
24 parties should also address the issues identified above under 28 U.S.C. §§ 1334 and 157.

#### 25 **IV. Conclusion**

26 In 1577, the Court determines that the Monetary Transfers are nondischargeable  
27 under § 523(a)(4) in the additional amount of \$62,034.61 and declines to award any  
28

1 damages for the non-monetary damages. The Court denies Biltmore's request for a denial  
2 of discharge under § 727(a)(2). Counsel for Biltmore is to upload a form of judgment.

3 In 1689, the Court denies Biltmore's motion with prejudice and the Trustee's  
4 Summary Judgment without prejudice, as more fully explained above. Counsel for Lisa  
5 and Team is to upload an order.

6

7


8 **So ordered.**

9 Dated: September 26, 2011

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CHARLES G. CASE II  
UNITED STATES BANKRUPTCY JUDGE

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14 COPY of the foregoing mailed by the BNC and/or  
sent by auto-generated mail to:

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All interested parties

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