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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE DIVISION**

10
11 In re

12 RICHARD THOMAS LENZO AND
13 SUSAN LYNN LENZO,

14 Debtors.

15
16 CHRIS PETERS,

17 Plaintiff,

18 vs.

19 RICHARD THOMAS LENZO AND

20 SUSAN LYNN LENZO,

21 Defendants.
22
23

Case No.: 6:08-bk-14177-MJ

Chapter 13

Adv. No.: 6:08-ap-01222-MJ

DEFENDANTS' TRIAL BRIEF

DATE: January 5-6, 2008

TIME: 10:00 a.m.

COURTROOM: 302 Third Floor

3420 Twelfth Street

Riverside, CA 92501

24 To the Honorable Meredith A. Jury, United States Bankruptcy Judge, Plaintiff and His Attorney of
25 Record, and Interested Parties:

26 Defendants, Richard and Susan Lenzo (“the Lenzos”) by and through their attorney of record,
27 submit the following Trial Brief.

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1 **1. Introduction**

2 This is a Chapter 13 bankruptcy adversary proceeding revolving around an alleged oral promise by
3 Debtor-Defendants, Richard Lenzo and Susan Lenzo (“the Lenzos”), to the Lenzo’s son, Chris Peters.
4 Peters has alleged (among other claims) that the Lenzos defrauded him by making an oral promise that
5 he was an owner and then failing to pay him one-third the selling price of the family business. Mr.
6 Peters is seeking a determination that this claim be declared non-dischargeable in this bankruptcy
7 proceeding.

8 However, the evidence in this case will show that the Lenzos *never* made the promise alleged by
9 Peters. Rather, the evidence will show that the Lenzos offered Peters:

- 10 1) an opportunity to share in one-third of the profits of the business while employed,
11 2) a one-third discounted price on the store if Peters bought it from the Lenzos while employed,
12 or
13 3) one-third of the profits from the sale of the store to an outside buyer if and only if Peters
14 remained working as a manager for five years from the date of the promise (which would
15 allow Mr. Lenzo to retire at that time).

16 Not only will Richard and Susan Lenzo testify to these facts, but the Lenzos’ bookkeeper, Robert
17 Golledge, had personal knowledge of the Lenzos’ plan to *share profits* with Peters. He will testify to
18 the fact that the plan was *never designed for Peters to receive an immediate one-third ownership*
19 *interest*. Additionally, attorney Shaun Hanson will establish the foundation for a business record hand-
20 written by himself during a meeting with Mr. Lenzo in which Mr. Hanson wrote the details of the
21 Lenzos’ plan to share profits with Peters; the same note will reflect the state of mind of Richard Lenzo
22 -- that the Lenzos were to give a vested ownership interest to Peters only after a five-year vesting
23 period was completed.

24 The evidence in this case is clear: Mr. Peters never paid any consideration for an ownership share
25 of the business and had no reasonable expectation of a vested ownership interest after he quit.

26 The evidence will show that on April 15, 2004, Peters and the Lenzos had a disagreement over the
27 selling price of the store to Peters which erupted into a major family conflict. Mr. Peters quit the
28 family business at that time, on his own accord, never to return thereafter.

1 The Lenzos tried to repair the conflict by subsequently 1) offering to sell to Peters the store at his
2 asking price, or 2) having Peters come back to work as a salaried manager, to restore the situation to
3 the status-quo. Peters rejected both of these opportunities, and instead *now seeks over \$1,781,473.00*
4 *in damages* (including punitive) from this Court.¹

5
6 **a. Which facts are admitted requiring no proof**

7 1) Defendant, Susan Lenzo, is the mother of Plaintiff, Chris Peters; Defendant, Richard Lenzo, is
8 Susan Lenzo's husband and Chris Peters' step father.

9 2) In November of 1990, the Defendants opened a coffee shop in Temecula, California, known as
10 The Sweet Bean.

11 3) Between November of 1990 and January of 1992, Plaintiff used his time off from SkyWest to
12 assist the Defendants in opening and starting The Sweet Bean business.

13 4) Defendants asked Plaintiff to come work at The Sweet Bean full time and, in January of 1992,
14 Plaintiff began working full time at The Sweet Bean.

15 5) Plaintiff worked full time at The Sweet Bean from January 1992 through April 15, 2004.

16 6) Over the years, Plaintiff helped develop and build the business and by 1995 was in a
17 management position.

18 7) By 1996, Richard Lenzo was no longer working in the store—running it on a day to day basis.
19 By that time, Plaintiff ran the day to day operations of the store and Susan Lenzo filled in on his days
20 off. However, Richard Lenzo still participated in the business.

21 8) In November of 2000, Plaintiff got married.

22 9) In early 2001, Plaintiff and Mr. Lenzo met at a Carl's Jr. ("Carl's Jr. Meeting").

23 10) In May or June 2001, Plaintiff and Mr. Lenzo met with Attorney, Shaun Hanson to form the
24 corporation known as the Sweet Bean of Temecula, Inc. (sometimes referred to as "the Corporation").

25 11) In June and July of 2001, Mr. Hanson incorporated the Corporation. Mr. Hanson prepared the
26 Articles of Incorporation, which he filed with the California Secretary of State (Ex. 15). Mr. Hanson

27
28 ¹ Plaintiff's complaint contains eight counts and seeks a total amount of more than \$1,781,473 in damages to be declared
non-dischargeable in this bankruptcy proceeding (pp. 14-16).

1 prepared and signed the Minutes of First Organizational Meeting of Incorporators of Sweet Bean of
2 Temecula, Inc. (Ex. 17). Mr. Lenzo also signed those Minutes.

3 12) The Parties never prepared a shareholder agreement concerning the Corporation.

4 13) Richard Lenzo, Susan Lenzo and Chris Peters each became officers and directors of the
5 Corporation.

6 14) In an “S” corporation, taxes are not paid by the corporation. Instead, the profits and/or losses
7 are passed through to the shareholders in proportion to their ownership interest to be paid by those
8 shareholders.

9 15) IRS Form K-1 is the report provided by an “S” corporation to the IRS and to its shareholders
10 which indicates the profits or losses for which the shareholder is responsible to the IRS.

11 16) In order for a corporation to become an “S” corporation as of 2001-2002 it had to file an IRS
12 form 2553.

13 17) Mr. Hanson did not prepare and file an IRS Form 2553 for the corporation.

14 18) Mr. Robert Golledge provided bookkeeping services to the business from its formation
15 through its incorporation until the end of 2004.

16 19) Mr. Robert Golledge provided tax preparation services to the business from its formation
17 through its incorporation until the end of 2004.

18 20) On March 15, 2002, the Parties signed IRS Form 2553 prepared by Robert Golledge (Ex. 1).

19 21) A clerical mistake was made by Mr. Golledge on Form 2553. Specifically, he identified Chris
20 Peters by the wrong name; he identified him as Christopher W. Lenzo. Mr. Golledge intended to
21 identify Chris Peters when he wrote Christopher W. Lenzo.

22 22) The Social Security Number listed on Form 2553 for Christopher W. Lenzo belongs to Chris
23 Peters.

24 23) For every tax year beginning with 2001, the Corporation filed taxes and issued K-1 reports as
25 an “S” corporation (Exs. 2-11).

26 24) Plaintiff and the Defendants agreed that they would each receive an equal salary from the
27 Corporation until it was sold.

28

1 25) In late March or early April of 2004, the Defendants made a written offer to sell the Sweet
2 Bean to Plaintiff as stated in Trial Exhibit 21.

3 26) On April 15, 2004, a discussion over the sale of the business ended in an altercation between
4 Plaintiff and the Defendants. The specifics of that discussion and its meaning are in dispute.

5 27) At all times after April 15, 2004, the Defendants have asserted that Plaintiff was never a
6 shareholder of the Corporation.

7 28) Plaintiff did not return to the Sweet Bean to work after April 15, 2004.

8 29) Shortly after April 15, 2004, Plaintiff requested access to the Corporation's books and
9 Defendants refused to provide access.

10 30) Plaintiff requested access to the Corporation's books and records as defined by California
11 Corporations Code section 1601, et seq. on several occasions after April 15, 2004 and was refused by
12 Defendants until the books and records were provided in the course of litigation on November 14,
13 2006.

14 31) After April 15, 2004, no salary, benefits, or profits were paid to Plaintiff.

15 32) After April 15, 2004, the Corporation continued to pay salary, benefits, and profits to the
16 Defendants until the business was sold and the Corporation was dissolved.

17 33) The Defendants sold the Sweet Bean business belonging to the Corporation with escrow
18 closing on August 5, 2005.

19 34) The business was sold to Deron and Debbie Johnson.

20 35) The Defendants signed a Certificate of Dissolution of the Corporation on July 31, 2005 which
21 was filed in the Office of the Secretary of State of the State of California on December 27, 2005 (Ex.
22 28).

23 36) The proceeds from the sale of the Corporation's assets were distributed as indicated in
24 Exhibits 29, 36, 37 and 38 except that Defendants accepted \$20,000 as full payment from the
25 Johnsons on the Note for \$30,000 which is referenced in those documents.

26 37) None of the money from the sale of the business was paid to Plaintiff.

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b. Which issues of fact remain to be litigated

1) Plaintiff alleges and Defendants dispute that Plaintiff and Defendants reaffirmed their understanding about The Carrot from time to time. Defendants assert that they never mentioned the word “carrot” when offering Mr. Peters benefits or profit sharing, and that this is a fabrication.

2) Plaintiff alleges and Defendants dispute that around the time Plaintiff got married, Plaintiff discussed with Defendants that it was time for them to give him The Carrot which had been promised and make him a part owner. Defendants allege that this is a fabrication and never occurred.

3) Plaintiff alleges and Defendants dispute that in early 2001, Defendants agreed to make Plaintiff a part owner. Defendants allege that they never agreed to give Mr. Peters as equity share of their business.

4) The Parties have very different assertions about what was discussed and agreed upon at the Carl’s Jr. Meeting. Generally, Plaintiff asserts that he was told he was receiving The Carrot which consisted of a 1/3 ownership interest in the business which was to be converted into a corporation. The Defendants assert that Plaintiff was only to receive 1/3 of the profits and an option to buy the business.

5) What was discussed with attorney Shaun Hanson is in dispute.

6) On April 15, 2004, a discussion over the sale of the business ended in an altercation between Plaintiff and the Defendants. The specifics of that discussion and its meaning are in dispute.

c. Issues of law remaining to be litigated

1) Whether Plaintiff had to pay consideration for corporate shares in order to later claim an equity ownership interest under California Corporations Code §409(a).

2) Whether there is a legally binding oral contract.

- a. Whether the contract lacks consideration.
- b. Whether any alleged promise made would be a mere gift.

3) Whether the Lenzos’ attached conditions (Peters must work for five years from date of promise) are valid conditions precedent to vesting of an ownership interest.

4) Whether an employee who quits his job has a legal right to access corporate books.

1 in converting the Sweet Bean to an S Corporation.¹⁷ In early 2001, Richard Lenzo approached
2 Golledge about how it might be possible to give Peters more of an incentive to stay with the Sweet
3 Bean until Richard’s retirement at age 62.¹⁸ The idea was entertained by Richard and Golledge that
4 Peters could be made a profit-sharing employee of the company, but not an equity owner.¹⁹ It was
5 clear that the intention was not to make Peters an owner, but only to participate in the profits.²⁰

6 Richard Lenzo wanted Peters to stay for at least five more years so that at the end of five years
7 Richard could sell the store (possibly to Peters) and retire at the age of 62.²¹ The Lenzos intended to
8 give Peters the option to eventually buy the Sweet Bean if he wanted it, but if the store was sold to
9 someone else while Peters was still working, Peters was promised the benefits of one-third of the
10 profit from the sale of the business (after deducting the Lenzos’ initial “seed” investment money).²²
11 Peters was told by Richard, *as Peters admits in his deposition*, that if Peters left before 2006, then he
12 would receive nothing.²³ At this point all of the parties, Richard, Susan, Peters, and Golledge, were
13 content with the agreement.²⁴

14 When Richard met with Golledge about the plan, Golledge suggested that one way for Peters to
15 avoid paying Social Security tax was to form an S Corporation.²⁵ Golledge also understood that the
16 intended condition for vesting of ownership to Peters was five more years of employment, or the sale
17 of the business, whichever came first.²⁶ The use of an S Corporation to achieve this purpose was
18 Golledge’s idea.²⁷ According to Golledge, “The whole point is that we wanted to give Peters an
19 incentive. That was the whole thing. And there was no intent for him to have ownership. That’s why
20 shares were not issued. The intent was to give him profits.”²⁸ The use of K-1s was also Golledge’s

21
22 ¹⁷ Depo. Chris Peters 59:10 to 59:13.

23 ¹⁸ Depo. Robert Golledge 80:22 to 82:7.

24 ¹⁹ *Id.* at 81:16 to 81:21.

25 ²⁰ *Id.* at 82:18 to 82:21.

26 ²¹ Depo. Richard Lenzo 74:2 to 74:25, 119:9 to 119:16 (Nov. 14, 2006); Exhibit “E” to the Declaration of Brian Pedigo.

27 ²² *Id.* at 77:19 to 77:24.

28 ²³ Depo. Chris Peters 66:3 to 66:6.

²⁴ *Id.* at 66:13 to 66:21.

²⁵ Depo. Robert Golledge 83:3 to 83:19.

²⁶ *Id.* 84:1 to 84:4.

²⁷ *Id.* at 84:5 to 84:7.

²⁸ *Id.* at 86:19 to 86:24.

1 idea for how to best distribute the profit-incentive to Peters.²⁹ Golledge filed Form 2253, and the K-
2 ls, under the belief that the forms were listing Peters as a profit sharer, not a shareholder.³⁰ Golledge
3 entered 33.3% in the pre-printed tax forms with the intent to list Peters a 1/3 profit-sharer, and not an
4 actual equity owner.³¹

5 After Golledge and Richard had discussed the specifics of the plan, Golledge recommended that
6 they meet with a lawyer.³² It was at this time, around July of 2001, that Peters and Richard went to see
7 attorney Shaun Hanson.³³ Richard told Hanson about the intended plan – to share one-third profit
8 with Peters and the possibility of using an S Corporation to achieve this plan.³⁴ Hanson offered no
9 alternative suggestions.³⁵ Hanson took notes during the meeting in which he wrote some of the details
10 of the plan: “Son to get benefits of one-third ownership for first five years. And then vest...”³⁶ Peters
11 paid no money for stock certificates at any time after the corporation was formed.³⁷

12 In 2003, Peters told Susan and Richard that he wanted out of the family business.³⁸ As a result, the
13 Lenzos decided it may be time to sell the store because the Lenzos did not want to run the store
14 without Peters.³⁹ As promised, the Lenzos were going to share one-third of the profit from the sale
15 with Peters.⁴⁰ The Lenzos put the store on the market and received a bid for \$425,000 from Johnny
16 Yi.⁴¹ The Lenzos’ accepted Yi’s offer, but then cancelled the deal and did not sell to Yi because Peters
17 had a change of heart and expressed that he wanted to buy the store.⁴² The Lenzos’ preferred the store
18 stay with the family over selling to an outsider.⁴³ Unfortunately for the Lenzos’, they did not close a
19

20 _____
²⁹ *Id.* at 88:4 to 88:11.

21 ³⁰ *Id.* at 91:8 to 91:20.

22 ³¹ *Id.* at 125:7 to 125:25.

23 ³² *Id.* at 83:16 to 83:19.

24 ³³ *Id.*

25 ³⁴ *Id.* at 99:13 to 100:16.

26 ³⁵ *Id.* at 130:8 to 130:9.

27 ³⁶ Depo. Shaun Hanson 20:1 to 21:5 (Sep. 20, 2007); Exhibit “F” to the Declaration of Brian Pedigo.

28 ³⁷ Plaintiff Chris Peters’ Response to Defendant Richard T. Lenzo’s Request for Admission, at 4:11 (Jan. 23, 2006); Exhibit “G” to Declaration of Brian Pedigo.

³⁸ Depo. Susan Lenzo 89:10 to 89:22.

³⁹ *Id.* at 91:11 to 91:18.

⁴⁰ *Id.* at 92:13 to 92:22.

⁴¹ *Id.* at 91:16 to 91:18.

⁴² *Id.* at 96:18 to 97:14.

⁴³ *Id.*

1 deal with Peters after this event.⁴⁴ From this point forward, it was a process of attempting to negotiate
2 a fair price between the Lenzos and Peters.

3 In early 2004, Richard made an offer to sell the store to Peters for \$325,000.⁴⁵ In March of 2004,
4 the Lenzos' made a more formal written offer to sell the store to Peters for \$290,000.⁴⁶ Subsequently,
5 Peters counter-offered with a price between \$200,000 to \$250,000.⁴⁷ Richard immediately rejected
6 this counter-offer.⁴⁸

7 The turning point for the parties occurred on April 15, 2004.⁴⁹ After Richard had returned to work
8 from minor surgery, Peters gave him a piece of paper offering \$250,000 for the store.⁵⁰ As Peters
9 handed Richard the offer, Peters said, "that's my price, and if I don't get the store at that price, I'm not
10 working here anymore. I'm out of here."⁵¹ Richard immediately rejected the offer.⁵² Richard became
11 upset by the low offer combined with Peters' ultimatum and threat to leave; angry and insulted,
12 Richard told Peters to get out.⁵³ Peters perceived Richard's demand to get out as a threat.⁵⁴ As Peters
13 was leaving the store, Peters' mother, Susan, said, "Chris, you don't have to buy the store. There's
14 nobody making you buy the store. We'll just put it back on the market and go forward like we planned
15 before."⁵⁵ Peters replied, "No, I'm not staying for that either."⁵⁶ Peters never returned to work after
16 this event took place. Richard and Susan continually asked Peters to come back to work, but he never
17 did.⁵⁷

18 Six days after the incident that occurred on April 15, 2004, in a final effort to keep the family
19 together, the Lenzos offered to sell the store to Peters for his asking price of \$249,000.⁵⁸ Peters did not
20

21 ⁴⁴ *Id.* at 97:15 to 97:16.

22 ⁴⁵ Depo. Chris Peters 82:6 to 82:14.

23 ⁴⁶ Depo. Susan Lenzo 99:15 to 100:18.

24 ⁴⁷ Depo Chris Peters at 91:4 to 91:7.

25 ⁴⁸ *Id.* at 91:8 to 91:15.

26 ⁴⁹ *Id.* at 93:25 to 97:2.

27 ⁵⁰ *Id.* at 95:9 to 95:22.

28 ⁵¹ Depo. Richard Lenzo 197:20 to 197:21(June 15, 2006).

⁵² Depo. Chris Peters at 95:9 to 95:22.

⁵³ *Id.* at 96:20 to 96:22.

⁵⁴ *Id.* at 101:17 to 101:21.

⁵⁵ Depo. Susan Lenzo at 103:25 to 104:3.

⁵⁶ *Id.* at 104:4.

⁵⁷ *Id.* at 155:7 to 155:24.

⁵⁸ *Id.* at 131:13 to 132:19.

1 accept the offer.⁵⁹ Peters did not return to work, and no further negotiations between Peters and the
2 Lenzos to sell the store were made after this date.

3 Nearly a year and a half later, on August 5, 2005, the Lenzos sold the store to Debbie and Deron
4 Johnson for \$530,000.⁶⁰ Because Peters had left his position and did not return to work, thereby
5 failing to meet his express condition precedent, the Lenzos paid Peters nothing out of the proceeds
6 from the sale.⁶¹

7 Peters filed suit in the Superior Court in the County of Riverside on January 23, 2006.⁶²
8 Approximately one month prior to going to trial (March 11, 2008), the Lenzos were asked by their
9 attorney to deposit \$15,000 by April 1, 2008, in order to continue trial preparations. The Lenzos were
10 financially wiped out by attorney fees combined with a failed investment of \$250,000. They could not
11 pay the bill. Subsequently, the Lenzos' lawyer asked to be released from representation, which the
12 Lenzos consented to. Upon their lawyers' recommendation, the Lenzos sought advice from a
13 Bankruptcy attorney, Charles Delgado, regarding their financial situation. On April 17, 2008, the
14 Lenzos filed for Chapter 13 Bankruptcy with Steven Diamond as their bankruptcy attorney.⁶³

15 3. Argument

16 a. There is Insufficient Evidence to Prove Fraud

17 It has been consistently held that a creditor must demonstrate five elements to prevail on any
18 claim arising under § 523(a)(2)(A).⁶⁴ The five elements, each of which the creditor must demonstrate
19 by a preponderance of the evidence, are: (1) misrepresentation, fraudulent omission or deceptive
20 conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3)
21 an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and
22 (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.⁶⁵

23
24 ⁵⁹ *Id.*

25 ⁶⁰ *Id.* at 171:12 to 172:6.

26 ⁶¹ *Id.* at 154:16 to 154:25.

27 ⁶² Case No. RIC 443604; Exhibit "P" to the Declaration of Brian Pedigo

28 ⁶³ Case No. 6:08-bk-14177-MJ

⁶⁴ *See Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir.1991).

⁶⁵ *American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir.1996); *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086 (9th Cir.1996); *In re Slyman*, 234 F.3d 1081, 1085 (C.A.9,2000).

1 Here, the Peters lacks evidence on four elements required for a fraud claim.

2 **i. Peters Lacks Evidence as to any Misrepresentation**

3 The evidence does not point to misrepresentation. All parties knew that there was an express
4 condition precedent to the Lenzos' promise. And it is well settled that, "Under the law of contracts,
5 parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of
6 an act or event."⁶⁶

7 Peters alleges that he was the victim of the secret fraud of his mother, Susan Lenzo, his step-
8 father, Richard Lenzo, and the family business' bookkeeper, Robert Golledge. Peters alleges that
9 there was an oral agreement between himself and the Lenzos in 2001 to immediately vest one-third
10 ownership in the Sweet Bean. However, Peters admits in his deposition that Richard Lenzo directly
11 told Peters that *if Peters did not continue to work for the Sweet Bean for five years, then Peters would*
12 *not receive any ownership interest in the Sweet Bean.*⁶⁷ This admitted condition precedent was not
13 met because Peters voluntarily left his position at the Sweet Bean on April 15, 2004. Plaintiff, by his
14 own admission, demonstrates that there was no misrepresentation by the Lenzos in the oral agreement.

15 Plaintiff relies on the K-1 tax forms as circumstantial evidence that he was an in-fact one-third
16 equity owner. However, this is an insufficient basis to find fraudulent misrepresentation. At worst, this
17 is an instance of professional negligence by a third party who did not know or understand the meaning
18 of the forms. It was accountant Robert Golledge, not the Lenzos, who filled out and filed the tax forms
19 with the one-third share reflected in the K-1 tax forms for the purposes of profit-sharing.⁶⁸ Everyone
20 knew that the agreement was centered around profit-sharing, not ownership, and that ownership would
21 not vest for five years (if at all). Finally, the fact remains that no shares were ever issued to Peters, and
22 Peters never held equitable ownership of the company.

23 Other than the bald allegations in Plaintiff's complaint, there is no evidence that the Lenzos
24 intentionally misrepresented anything to Peters.

25 **ii. Plaintiff Lacks Evidence of Intent to Deceive**

27 ⁶⁶ *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].

28 ⁶⁷ Depo. Chris Peters 66:3 to 66:6.

⁶⁸ Depo. Robert Golledge 125:7 to 125:25.

1 Peters has not produced any evidence of the Lenzos’ intent to defraud, either as individuals or as a
2 network of conspirators. To the contrary, as Susan Lenzo expressed in her deposition, “I love this boy.
3 This is my child. I raised him from a baby. I only want happiness for him. There is no way in this
4 world that I would ever want to defraud him, hurt him, conversion (sic), whatever those words you
5 used, ever, Mr. O’Neill. Ever.”⁶⁹

6 Likewise, accountant Robert Golledge has no motive to be in on a secret plan to defraud Chris
7 Peters. Golledge himself admitted in his deposition that he understood that if Peters obtains a
8 judgment against the Lenzos, Golledge could be held jointly liable for the issuing of K-1s.⁷⁰ Golledge
9 demonstrated his good faith belief in the arrangement by recommending and seeking out the
10 independent advice of an attorney. There is no evidence that the Lenzos intended to deceive Peters,
11 and there is no evidence that Golledge intended to deceive Peters either.

12 **iii. Plaintiff Lacks Evidence that Plaintiff’s Reliance, if any, was Justifiable**

13 Reliance is ordinarily a question of fact. The Supreme Court of California has defined reliance in
14 the following way: “Reliance exists when the misrepresentation or nondisclosure was an immediate
15 cause of the plaintiff’s conduct which altered his or her legal relations, and when without such
16 misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered
17 into the contract or other transaction.”⁷¹ Although reliance is typically a question of fact, “... whether
18 a party’s reliance was justified may be decided as a matter of law if reasonable minds can come to
19 only one conclusion based on the facts.”⁷²

20 There is no evidence that Peters justifiably relied on any alleged misrepresentation. There is no
21 evidence that he *would not have*, in all reasonable probability, continued to work for the Sweet Bean if
22 he had known otherwise. Even assuming the facts in the light most favorable to Peters, that the
23 Lenzos’ 1) conspired from the beginning, 2) using false promises, 3) in order to induce their son to
24 continue working, 4) with no intent to make him owner, there is still no evidence that Peters would
25 have *not* continued working at the Sweet Bean. After all, Peters was earning a generous salary (ending
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27 ⁶⁹ Depo. Susan Lenzo 79:11 to 79:15.

⁷⁰ Depo. Robert Golledge 120:4 to 120:24.

⁷¹ *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, 44 CR2d 352.

⁷² *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [2 Cal.Rptr.2d 437].

1 up at \$58,000 per year), worked standard 40 hour workweeks, and shared in the company’s profits.
2 Even though the Lenzos never told Peters that he was an equity owner, even if they had under the
3 facts as alleged by Peters, it would not create a situation of justifiable reliance.

4 It is not justifiable reliance to assume one might become a one-third shareholder of a corporation
5 without 1) paying anything of value for the shares, or 2) receiving any stock certificates. Reasonable
6 minds can come to only one conclusion based on these facts – that reliance was not justified.

7 **iv. Plaintiff Lacks Evidence that there was any Cognizable Damage Caused by**
8 **the Alleged Fraud**

9 Even assuming, *arguendo*, that Peters reasonably relied on a misrepresentation of ownership, there
10 is no evidence that Peters was harmed or damaged. Peters suffered no out-of-pocket loss. Peters has
11 no expectation damages because he knew of the five year vesting condition precedent. Peters was not
12 damaged, but was put in a better position than he would be without the Lenzos by getting a generous
13 salary during his employment with the Sweet Bean, sharing in the profits of the Sweet Bean, and
14 avoiding Social Security taxes on much of his income distributed via the K-1, per his request.

15 **b. There was no Legally Binding Contract Due to No Meeting of the Minds, Coupled**
16 **with No Adequate Consideration Given by Peters.**

17 Under the California *Civil Code*, there are four essential elements to the existence of a contract:
18 (1) parties capable of contracting; (2) consent of the parties; (3) a lawful object; and (4) sufficient
19 cause or consideration.⁷³

20 The two elements at issue here are (2) consent or meeting of the minds, and (4) consideration.

21 **i. Ordinary Breach of Contract is not Grounds for Finding Non-Dischargeability**

22 In any event, it should be noted that *an ordinary breach of contract is not grounds for*
23 *nondischargeability* in bankruptcy under 11 U.S.C. 523(a)(2).⁷⁴ The Complaint rests its grounds for
24 nondischargeability on “11 U.S.C. 523(a)(2) and/or 11 U.S.C. section 523(c)(4).”⁷⁵ There is no
25 section (c)(4), however, section (a)(4) is grounds if the court finds “...fraud or defalcation while

26 ⁷³ California *Civil Code* §1550; *Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224 [13
Cal.Rptr.3d 544].

27 ⁷⁴ *Barbachano v. Allen*, 192 F.2d 836 (9th Cir.1951).

28 ⁷⁵ Complaint to Determine Nondischargeability of Debt Pursuant to 11 U.S.C. § 523(a), Paragraph 70; Exhibit
“B” to Declaration of Brian Pedigo.

1 acting in a fiduciary capacity, embezzlement, or larceny;” While fraud was discussed above, the
2 breach of contract will be addressed in the event the Court finds it necessary to reach the issue.

3 **ii. There was no Meeting of the Minds Sufficient to Form a Legally Binding Contract**

4 For there to be a meeting of the minds between the parties, the parties must agree on all material
5 contract terms.⁷⁶ “[T]he failure to reach a meeting of the minds on all material points prevents the
6 formation of a contract *even though the parties have orally agreed upon some of the terms, or have*
7 *taken some action related to the contract.*”⁷⁷ If there is no evidence to establish the parties’
8 manifestation of assent to the same subject matter, there is no mutual consent and no contract
9 formation.⁷⁸

10 There is no evidence that the Lenzos and Peters had a meeting of the minds on the material
11 contract terms. Even though there was an oral agreement and Peters took some action related to the
12 contract, there is no evidence to establish the parties’ manifestation of assent to the same subject
13 matter. Peters allegedly believed that he was an instant owner in 2001; the Lenzos believed that Peters
14 had to first earn his one-third share by staying with the business for five years.

15 **c. There was no Consideration Given for the Shares Alleged to be Owned by Plaintiff**
16 **Chris Peters**

17
18 **i. Consideration Generally**

19 The fourth and final essential element to the existence of a contract under California *Civil Code*
20 §1550 is “a sufficient cause or consideration.” “A promise is not enforceable unless consideration was
21 given in exchange for the promise.”⁷⁹

22 California *Civil Code* §1605 defines good consideration as:

23 “Any benefit conferred, or agreed to be conferred, upon the promisor, by any other
24 person, to which the promisor is not lawfully entitled, or any prejudice suffered, or
25 agreed to be suffered, by such person, other than such as he is at the time of consent

26 ⁷⁶ *Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421 [129 Cal.Rptr.2d 41].

27 ⁷⁷ *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 359, 72 Cal.Rptr.2d 598 (emphasis
in original).

28 ⁷⁸ *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208, 45 Cal.Rptr.3d 692. *See also Terry v. Conlan*
(2005) 131 CA4th 1445, 1459, 33 CR3d 603.

⁷⁹ *US Ecology, Inc. v. State* (2001) 92 CA4th 113, 128, 111 CR2d 689.

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lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.”

Finally, the Ninth Circuit has held that there is no presumption of consideration for oral agreements.⁸⁰

Here, Peters now seeks more than one-third of the Lenzos’ investment after an alleged oral agreement in which Peters *invested no money* towards acquiring ownership of the business. Instead, Peters bases his claim on past consideration, or “sweat equity.”

ii. Past Consideration

In general, past consideration is not sufficient consideration to support a contract. Past consideration will not support a promise to the extent it exceeds an existing duty of the promisor.⁸¹ The key factor is that consideration must be given in exchange for the promise. It must be bargained for at the time.

In *Passante*, a company's corporate attorney arranged financing for the company. Later, the directors agreed to give him 3 percent of the company's stock, but then reneged on their promise. The attorney sued the company and two directors for breach of contract. The court found that the promise was merely a promise to make a gift and was not enforceable. The stock was not bargained for in exchange for arranging the loan. The attorney had already arranged the loan before the idea of giving him stock ever came up. Because there was no expectation of payment by either party when the loan was arranged, the promise to give the attorney stock was not bargained for and was therefore not enforceable.

Here, like *Passante*, the Lenzos agreed to give Peters one-third of the company stock if Peters stayed with the company for five years, or if the company was sold while Peters was employed. Here, unlike *Passante*, it was not a case of a reneged promise; rather, the Plaintiff prematurely abandoned his part of the performance and received what was promised - nothing. In the end, the Lenzos’ promise was merely a promise to make a gift, and it is not enforceable. The stock was bargained for in exchange for Peters’ actual performance of staying with the family business for five years. The

⁸⁰ See *Murphy v. T. Rowe Price Prime Reserve Fund, Inc.* (9th Cir 1993) 8 F3d 1420.

⁸¹ *Passante v. McWilliams* (1997) 53 CA4th 1240, 1247, 62 CR2d 298; *Leonard v. Gallagher* (1965) 235 Cal.App.2d 362, 373 [45 Cal.Rptr. 211].

1 Lenzos had already been paying Peters a salary for his services before the idea of eventually giving
2 Peters a profit sharing portion (and potential ownership) ever came up. Because there was no
3 expectation of payment for stocks by either party when the new business plan was arranged, the
4 promise to give Peters stock was not bargained for and is therefore not enforceable.

5 **iii. Consideration for Shares under California Corporations Code**

6 Under California *Corporations Code* § 409(a):

7 (a) Shares may be issued:

8 (1) For such consideration as is determined from time to time by the board, or by the
9 shareholders if the articles so provide, consisting of any or all of the following: money
10 paid; labor done; services actually rendered to the corporation or for its benefit or in its
11 formation or reorganization; debts or securities canceled; and tangible or intangible
12 property actually received either by the issuing corporation or by a wholly owned
13 subsidiary; but neither promissory notes of the purchaser (unless adequately secured by
collateral other than the shares acquired or unless permitted by Section 408) *nor future
services shall constitute payment or part payment for shares of the corporation;*
(emphasis added).

14 Here, Peters has admitted paying no money for shares of the corporation.⁸² Chris Peters never
15 received any shares. In fact, no shares were ever issued to anyone at the Sweet Bean.⁸³ It is also a fact
16 that Peters was paid a respectable salary for his prior services as an employee of the Sweet Bean, thus
17 eliminating the possibility that shares were given for labor done. The Lenzos never intended to give
18 away one-third of their investment without some form of consideration. The intended bargained-for-
19 exchange in this case was for Peters to continue working until the sale of the store. And, as California
20 law makes clear, Peters' promised future services are not adequate, as a matter of law, to constitute
21 permissible consideration for shares of a corporation.

22 **d. Peters Admitted to having Knowledge of the Five Year Vesting Clause and Peters Did**
23 **Not Meet Said Condition Precedent**

24 California *Civil Code* § 1436 provides that “[a] condition precedent is one which is to be
25 performed before some right dependent thereon accrues, or some act dependent thereon is performed.”
26 As stated by the California Supreme Court in *Platt Pac., Inc. v. Andelson* (1993), “a condition
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28 ⁸² Depo. Chris Peters 68:16 to 68:22.

⁸³ Depo. Susan Lenzo 162:11 to 162:12.

1 precedent is either an act of a party that must be performed or an uncertain event that must happen
2 before the contractual right accrues or the contractual duty arises.”⁸⁴

3 Whether a condition precedent exists depends on the parties' intent as expressed in the words they
4 have used in the contract.⁸⁵

5 California *Civil Code* §1439 provides:

6 Before any party to an obligation can require another party to perform any act under it,
7 he must fulfill all conditions precedent thereto imposed upon himself; and must be able
8 and offer to fulfill all conditions concurrent so imposed upon him on the like
9 fulfillment by the other party, except as provided by [CC §1440 on anticipatory
10 repudiation].

11 *Civil Code* §1439 reflects the common law rule that breach or failure of a material condition
12 precedent may excuse the other party from performance. A party cannot recover for the other party's
13 breach of contract unless the first party has fulfilled his or her obligations.⁸⁶

14 In *Wiz Technol.*, the defendant auditor, acting in accordance with standards of professional
15 responsibility, asked the plaintiff corporation to stop using its current securities counsel and obtain
16 more competent counsel before the auditor would agree to perform another audit. After learning that
17 the corporation did not do so, the auditor resigned. The court of appeal affirmed the trial court's grant
18 of summary judgment for the auditor, holding that its resignation was justified by the corporation's
19 failure to satisfy the condition precedent to the auditor's performance.⁸⁷

20 Here, like *Wiz Technol.*, the Lenzos agreed to give Peters one-third ownership of the business only
21 if he would stay with the company for five years from the date of the promise. Before completing this
22 express condition precedent, Peters resigned. Peters' resignation was a failure to satisfy the express
23 (and admitted) condition precedent to Peters' vesting of ownership.

24 Therefore, Peters' claims fail due to his failure to meet an express condition precedent.

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26 ⁸⁴ *Platt Pac., Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597]; *See also William R. Clarke*
27 *Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 885 [64 Cal.Rptr.2d 578]; *Realmuto v. Gagnard* (2003) 110
28 Cal.App.4th 193, 198 [1 Cal.Rptr.3d 569].

⁸⁵ *Realmuto*, 110 Cal.App.4th at 199.

⁸⁶ *Wiz Technol., Inc. v. Coopers & Lybrand LLP* (2003) 106 Cal.App.4th 1, 12 [130 Cal.Rptr.2d 263].

⁸⁷ *Id.* at 11.

1 **e. Peters’ Remaining Causes of Action are Based Upon the Alleged Oral Agreement**
2 **and, therefore, Fail to State Facts Sufficient to Constitute a Cause of Action**

3 Each of the causes of action in the Complaint pertain to the alleged oral agreement between Peters
4 and the Lenzos which, if found true, would entitle Peters to one-third of shareholder interest in the
5 Sweet Bean. However, if the Court finds for the Defendants' as to the first cause of action for fraud,
6 then the remaining causes of action - Conversion, Inspection of Books and Records, Breach of
7 Fiduciary Duty, and Accounting, also fail because Peters would not be entitled to the benefits of the
8 oral agreement. Without a vested one-third shareholder interest in Sweet Bean, Peters does not meet
9 each of the necessary elements of the remaining causes of action as discussed below.

10 **a. Conversion:** Conversion is any act of dominion wrongfully exerted over another's
11 personal property in denial of or inconsistent with his or her rights therein.⁸⁸ Justice Cardozo
12 wrote for the Supreme Court of the United States regarding a bankruptcy issue in 1934 saying,
13 “a willful and malicious injury does not follow as of course from every act of conversion,
14 without reference to the circumstances. There may be a *conversion which is innocent or*
15 *technical, an unauthorized assumption of dominion without willfulness or malice.*”⁸⁹

16 Because Peters did not have an ownership interest in the Sweet Bean, there was nothing for
17 the Lenzos to convert. Furthermore, even if the court finds that Peters actually did have some
18 ownership interest in the company, any conversion would be completely innocent, based on an
19 unauthorized assumption of dominion, and without any malice.

20 **b. Breach of Fiduciary Duty:** A number of legal relationships have been held *not* to
21 constitute fiduciary relationships, including the relationship of an *employer towards its*
22 *employees.*⁹⁰

23 Peters must have a fiduciary relationship with the Lenzos for there to be a duty. If Peters
24 does not own a one-third shareholder interest in the Sweet Bean, then the Lenzos do not owe
25 any fiduciary duty to Peters as a mere employee.

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27 ⁸⁸ *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 549 [176 P.2d 1].

⁸⁹ *Davis v. Aetna Acceptance Co.* 293 U.S. 328, 332, 55 S.Ct. 151, 153 (U.S. 1934) (emphasis added).

28 ⁹⁰ *See O'Byrne v. Santa Monica-UCLA Med. Ctr.* (2001) 94 Cal.App.4th 797, 811 [114 Cal.Rptr.2d 575];
Odorizzi v. Bloomfield Sch. Dist. (1966) 246 Cal.App.2d 123, 129 [54 Cal.Rptr. 533].

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c. **Accounting:** Plaintiffs must allege the relationship between themselves and each individual defendant which entitle them to an accounting and that the unknown balance is within the knowledge of each defendant.⁹¹

d. **Inspection of Books and Records:** Sweet Bean's accounting books and records “shall be open to inspection upon the written demand on the corporation of *any shareholder or holder of a voting trust certificate...*” (Emphasis added). *California Corporations Code* §1601.

Peters did not hold any shares, and therefore was not entitled to inspect the books and records.

All of the causes of action necessarily fail if the court finds that there is insufficient evidence as a matter of law on the fraud claim.

Dated: December 26, 2008

THE LAW OFFICES OF BRIAN PEDIGO

By: /s/ Brian T. Pedigo
Brian T. Pedigo, Esq., Attorney for
Debtor/Defendants,
RICHARD LENZO AND
SUSAN LENZO

⁹¹ *Kritzer v. Lancaster* (1950) 96 Cal App.2d 1, 7 [214 P.2d 407].

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of eighteen and not a party to the within action; my business address is: 7545 Irvine Center Drive, Suite 200, Irvine, CA 92618.

On December 26, 2008, I served the foregoing document described as:

DEFENDANTS' TRIAL BRIEF

on the following parties in this action by first-class mail by placing a true copy(s) thereof enclosed in a sealed envelope(s) addressed as follows:

The Law Office of William E. O'Neill
101 West Broadway, Suite 810
San Diego, CA 92101

I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Riverside, CA, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the foregoing is true and correct.

Executed on December 26, 2008, at Riverside, California

/s/ Brian T. Pedigo

Brian T. Pedigo