Supreme Court No. S240918

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Rana Samara,
Plaintiff and Appellant,

v.

Haitham Matar D.D.S.
Petitioner, Respondent and Defendant.

After a Decision Certified for Publication by the Court of Appeal
Second Appellate District, Division Seven, Case No. B265752
LOS ANGELES SUPERIOR COURT – NORTH CENTRAL
Case No. EC056720
The Honorable William D. Stewart, Judge

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF KENNETH BARTON'S *AMICUS CURIAE* BRIEF AND APPENDIX OF EXHIBITS FILED IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR D.D.S.

Patrick C. McGarrigle, Esq. (SBN 149008)
Email: patrickm@mkzlaw.com
Michael J. Kenney, Esq. (SBN 192775)
Email: michaelk@mkzlaw.com
MCGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
T: (818) 998-3300; F: (818) 998-3344

Pursuant to Evidence Code §§452(d) and 459, and California Rules of Court, rule 8.520(g), Kenneth Barton (**"Barton"**) respectfully requests that this Court take judicial notice of the following documents which are referenced within and in support of his *amicus curiae* brief (and copies of which are attached to his Appendix of Exhibits in support thereof), filed in connection with and in support of the Petition of Petitioner, Respondent and Defendant Haitham Matar D.D.S. Barton's documents – listed below and lodged concurrently herewith - are relevant to this Court's consideration of the issues of claim preclusion and the finality of judgments as discussed in *People v. Skidmore* (1861) 17 Cal. 261, and *DiRuzza v. County of Tehama* (2003) 323 F.3d 1147, et al. (but challenged by *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76), as they demonstrate the critical need for this Court to affirm the principles of claim preclusion and finality of judgments stated within *Skidmore* and avoid the endless relitigation of decided causes of action and the extraordinary burden on the courts and litigants:

Exhibit #	Title
1	Third Amended Complaint in Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.
2	Statement of Decision entered August 3, 2012 Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.
3	Judgment after Court Trial entered August 30, 2013 Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.
4	Court of Appeal Opinion entered December 9, 2014 in California Court of Appeal, Second District, Case No. B251722.
5	Amended Judgment After Court Trial And Appeal entered July 21, 2015 in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.

6	Plaintiff Kenneth Barton's ("Plaintiff") Notice of Motion and Motion for Summary Judgment/Partial Summary Adjudication ("MSJ") on Plaintiff's Adversary Complaint and Causes of Action for Non-Dischargeability against Defendant Zafar Khan ("Defendant") in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
7	Defendant Zafar Khan's Opposition To MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
8	Plaintiff Kenneth Barton's Reply in support of MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
9	Order granting Plaintiff's MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
10	Amended Judgment in Favor of Plaintiff following MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
11	Defendant Zafar Khan's Notice Of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
12	Plaintiff Kenneth Barton's Opposition to Defendant Zafar Khan's Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.
13	Defendant Zafar Khan's Reply In Support of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

14	Order Denying Defendant Zafar Khan's Notice Of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.
15	Appellant Zafar Khan's ("Appellant") Opening Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076; BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.
16	Appellee Kenneth Barton's ("Appellee") Responding Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076; BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.
17	Appellant's Reply Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076; BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.
18	United States Bankruptcy Appellate Panel Of The Ninth Circuit's Decision/Judgment in *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076.
19	Opinion of the United States Court of Appeals for the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton, et al.*, 9th Circuit Case No.: 15-60002; BAP Case No.: 14-1021.
20	Stipulation Re Stay Of Appellate Proceedings And Modification Of Briefing Schedule in the United States Court of Appeals for the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton, et al.*, 9th Circuit Case No.: 17-60010; BAP Case No.: 16-1075.

Judicial notice is the appropriate procedure for bringing these records before this court pursuant to Evidence Code sections 452(d) as they are records of the courts of the state of California and of the United States. Based on the foregoing legal authority, and for the foregoing reasons, Barton respectfully requests this Court grant his Motion for Judicial Notice.

Dated: February 5, 2018

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By: _____

Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorneys for Kenneth Barton

DECLARATION OF MICHAEL J. KENNEY

I, Michael J. Kenney, declare:

1. I am an attorney, duly licensed to practice before this Court, and a principal of McGarrigle, Kenney & Zampiello, APC, counsel for Kenneth Barton (**"Barton"**). The following is based upon my personal knowledge and, if called upon, I could and would competently testify to the truth thereof.

2. Attached to the concurrently filed Appendix of Exhibits as Exhibit 1 is a true and correct copy of the Third Amended Complaint in Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.

3. Attached to the concurrently filed Appendix of Exhibits as Exhibit 2 is a true and correct copy of the Statement of Decision entered August 3, 2012 Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.

4. Attached to the concurrently filed Appendix of Exhibits as Exhibit 3 is a true and correct copy of the Judgment after Court Trial entered August 30, 2013 Los Angeles Superior Court in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.

5. Attached to the concurrently filed Appendix of Exhibits as Exhibit 4 is a true and correct copy of the Court of Appeal's Opinion entered December 9, 2014 in California Court of Appeal, Second District, Case No. B251722.

6. Attached to the concurrently filed Appendix of Exhibits as Exhibit 5 is a true and correct copy of the Amended Judgment After Court Trial And Appeal entered July 21, 2015 in *Kenneth Barton v. RPost International Limited, et. al.*, Case No. YC061581.

7. Attached to the concurrently filed Appendix of Exhibits as Exhibit 6 is a true and correct copy of Plaintiff Kenneth Barton's ("Plaintiff") Notice of Motion and Motion for Summary Judgment/Partial Summary Adjudication ("MSJ") on Plaintiff's Adversary Complaint and Causes of Action for Non-Dischargeability against Defendant Zafar Khan ("Defendant") in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

8. Attached to the concurrently filed Appendix of Exhibits as Exhibit 7 is a true and correct copy of Defendant Zafar Khan's Opposition To MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

9. Attached to the concurrently filed Appendix of Exhibits as Exhibit 8 is a true and correct copy of Plaintiff Kenneth Barton's Reply in support of MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

10. Attached to the concurrently filed Appendix of Exhibits as Exhibit 9 is a true and correct copy of the Order granting Plaintiff's MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

11. Attached to the concurrently filed Appendix of Exhibits as Exhibit 10 is a true and correct copy of the Amended Judgment in Favor of Plaintiff following MSJ in the United States Bankruptcy Court, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

12. Attached to the concurrently filed Appendix of Exhibits as Exhibit 11 is a true and correct copy of Defendant Zafar Khan's Notice Of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.

13. Attached to the concurrently filed Appendix of Exhibits as Exhibit 12 is a true and correct copy of Plaintiff Kenneth Barton's Opposition to Defendant Zafar Khan's Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.

14. Attached to the concurrently filed Appendix of Exhibits as Exhibit 13 is a true and correct copy of Defendant Zafar Khan's Reply In Support of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.

15. Attached to the concurrently filed Appendix of Exhibits as Exhibit 14 is a true and correct copy of the Order Denying Defendant Zafar Khan's Notice Of Motion For Certification Of Appeal For Direct Review In Court Of Appeals, Central District, *In re: Zafar Khan; Kenneth Barton v. Zafar Khan*, BK Case No.: 2:13-bk-l9713-WB, Adversary Case No. 2:13-AP-01752-WB.

16. Attached to the concurrently filed Appendix of Exhibits as Exhibit 15 is a true and correct copy of Appellant Zafar Khan's ("Appellant") Opening Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar*

Khan v. Kenneth Barton, BAP No.: CC-16-1076; BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

17. Attached to the concurrently filed Appendix of Exhibits as Exhibit 16 is a true and correct copy of Appellee Kenneth Barton's ("Appellee") Responding Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076; BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

18. Attached to the concurrently filed Appendix of Exhibits as Exhibit 17 is a true and correct copy of Appellant's Reply Brief re: Non Dischargeability Appeal, U.S. Bankruptcy Appellate Panel of the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076; BK Case No.: 2:13-bk-19713-WB, Adversary Case No. 2:13-AP-01752-WB.

19. Attached to the concurrently filed Appendix of Exhibits as Exhibit 18 is a true and correct copy of the United States Bankruptcy Appellate Panel Of The Ninth Circuit's Decision/Judgment in *In re: Zafar Khan; Zafar Khan v. Kenneth Barton,* BAP No.: CC-16-1076.

20. Attached to the concurrently filed Appendix of Exhibits as Exhibit 19 is a true and correct copy of the Opinion of the United States Court of Appeals for the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton, et al.*, 9th Circuit Case No.: 15-60002; BAP Case No.: 14-1021.

///

///

///

///

///

///

21. Attached to the concurrently filed Appendix of Exhibits as Exhibit 20 is a true and correct copy of the Stipulation Re Stay Of Appellate Proceedings And Modification Of Briefing Schedule in the United States Court of Appeals for the Ninth Circuit, *In re: Zafar Khan; Zafar Khan v. Kenneth Barton, et al.*, 9th Circuit Case No.: 17-60010; BAP Case No.: 16-1075.

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

Executed this 5th day of February, 2018, at Chatsworth, California.

Michael J. Kenney, Esq.

SUMMONS ON THIRD AMENDED COMPLAINT — **SUM-100**

(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

FEB 16 2011

John A. Clarke, Executive Officer/Clerk

By A. Allen, Deputy

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
RPOST INTERNATIONAL LIMITED; RPOST, INC., aka AVION MICROSERVICES, INC.; SYMANTEC CORPORATION; ZAFAR KAHN; TERRANCE TOMKOW; HENRI ISENBERG; CAROLE KRECHMAN; JAMES WATLINGTON; CHARLES BREED; ELLSWORTH ROSTON; and DOES 1 through 50, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
KENNETH BARTON

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. *¡**AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a* continuación

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):
Los Angeles Superior Court
825 Maple Avenue
825 Maple Avenue
Torrance, California 90503

CASE NUMBER:
(Número del Caso):
YC 061581 FILE BY FAX

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Patrick C. McGarrigle, Esq., SBN 149008 (818) 998-3300 (818) 998-3344
McGarrigle, Kenney & Zampiello, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311

DATE: 2/16/11 *(Fecha)* JOHN A. CLARKE Clerk, by A. Allen *(Secretario)*, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other *(specify):*

4. ☐ by personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. July 1, 2009]

SUMMONS

Legal Solutions Plus

Code of Civil Procedure §§ 412.20, 465

PATRICK C. McGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
McGARRIGLE, KENNEY & ZAMPIELLO APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Plaintiff
Kenneth Barton

SUPERIOR COURT OF STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - SOUTHWEST DISTRICT

FILE BY FAX

KENNETH BARTON, Plaintiff, v. RPOST INTERNATIONAL LIMITED; RPOST, INC., aka AVION MICROSERVICES, INC.; SYMANTEC CORPORATION; ZAFAR KHAN; TERRANCE TOMKOW; HENRI ISENBERG; CAROLE KRECHMAN; JAMES WATLINGTON; CHARLES BREED; ELLSWORTH ROSTON;and DOES 1 through 50, inclusive, Defendants.	CASE NO.: YC061581 [Assigned to Hon. Andrew Kauffman, Department "B"] **THIRD AMENDED COMPLAINT FOR:** **(1) CONVERSION;** **(2) BREACH OF FIDUCIARY DUTY** **(3) DERIVATIVE ACTION (BREACH OF FIDUCIARY DUTY);** **(4) [OMITTED]** **(5) DECLARATORY RELIEF;** **(6) [OMITTED]** **(7) FRAUD; AND** **(8) VIOLATION OF BUSINESS PROFESSIONS CODE §17200** ***[FILED PURSUANT TO FEBRUARY 9, 2011 ORDER RE: LEAVE TO AMEND]***

Plaintiff Kenneth Barton alleges as follows:

1. Plaintiff Kenneth Barton ("**Barton**") is, and at all times relevant herein was, an individual over the age of eighteen and is a resident of Los Angeles County,

California.

2. Plaintiff is informed and believes, and on that basis alleges, that Defendant RPost International Limited (**"RPost, Ltd."**) is, and at all times relevant herein was, a Bermuda Corporation conducting business and has its principal place of business in the County of Los Angeles, State of California.

3. Plaintiff is informed and believes and on that basis alleges that at all times relevant herein Defendant RPost, Inc., currently also known as Avion Microservices, Inc. (**"RPost, Inc."**), is and was a Nevada Corporation conducting business and has its principal place of business in the County of Los Angeles, State of California.

4. Defendants RPost, Ltd. and RPost, Inc. are hereinafter collectively referred to as ***"RPost"*** or the ***"Company."***

5. Plaintiff is informed and believes and on that basis alleges that Defendant Symantec Corporation (**"Symantec"**) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Mountain View, California. Symantec has, since at least May 2004 and continuing to the present, held a position as a *de facto* director of RPost, Ltd., appointing (by virtue of its status as a Series D Shareholder of RPost, Ltd. and pursuant to the 2004 amended Bye-Laws) its own employee(s) as a director on RPost, Ltd.'s Board of Directors, participated in RPost's Board of Directors meetings through its employees appointed thereto and was and is aware of (and/or with the exercise of the required diligence, should have been aware of and/or is deemed aware of based on agency-principal and *respondeat superior* principles) and/or participated in the wrongful acts and omissions referenced hereinbelow and ratified same. At all times on and after May 2004 and continuing to the present, Symantec's responsibility and liability for the acts and/or omissions alleged hereinbelow also derive from Symantec's appointment of its own employees to RPost, Ltd.'s Board of Directors, which appointments were made by Symantec in furtherance of its own interests as a Series D Shareholder and with said Symantec employees acting at all times within the course and scope of their employment with Symantec.

6. Defendant Zafar Khan (**"Khan"**) is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the County of Los Angeles, State of California and is, and at all times relevant herein was, an officer and director of RPost and participated in and/or ratified the wrongful acts alleged hereinbelow.

7. Defendant Terrence Tomkow (**"Tomkow"**) is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the County of Los Angeles, State of California and is, and at all times relevant herein was, an officer and director of RPost and participated in and/or ratified the wrongful acts alleged hereinbelow. Plaintiff is informed and believes and on that basis allege that, at all times relevant hereto, Defendants Kahn and Tomkow collectively hold and/or control the majority of RPost, Ltd.'s shares.

8. Defendant Henri Isenberg (**"Isenberg"**) is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the County of Los Angeles, State of California and is, and/or was at all times relevant herein, a director of RPost, Ltd., an employee of Symantec (appointed by Symantec to serve on RPost, Ltd.'s Board of Directors in furtherance of Symantec's interests) and participated in and/or ratified the wrongful acts alleged hereinbelow.

9. Defendant Charles Breed (**"Breed"**) is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the State of California and is, and/or was at all times relevant herein, a director of RPost, Ltd., an employee of Symantec (appointed by Symantec to serve on RPost, Ltd.'s Board of Directors in furtherance of Symantec's interests) and participated in and/or ratified the wrongful acts alleged hereinbelow.

10. Defendant Carole Krechman ("**Krechman**") is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the County of Los Angeles, State of California, and is and/or was at all times relevant herein, an officer and/or director of RPost, participated in and/or ratified the wrongful acts alleged hereinbelow, and was (in her name or through a holding company or trust owned and/or controlled by

her) an owner of shares in RPost Ltd.

11. Defendant Ellsworth Roston ("**Roston**") is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of the County of Los Angeles, State of California, and is and/or was at all times relevant herein, an officer and/or director of RPost, participated in and/or ratified the wrongful acts alleged hereinbelow, and was (in his name or through a holding company or trust owned and/or controlled by him) an owner of shares in RPost Ltd.

12. Defendant James Watlington ("**Watlington**") is an individual over the age of eighteen, a resident (Plaintiff is informed and believes) of Bermuda, and is and/or was at all times relevant herein, an officer and/or director of RPost and participated in and/or ratified the wrongful acts alleged hereinbelow.

13. Defendants Symantec, Kahn, Tomkow, Isenberg, Breed, Krechman, Roston and Watlington are hereinafter collectively referred to as the "**Officer/Director Defendants**."

14. Plaintiff is ignorant of the true names and capacities of Defendants sued hereunder as Does 1 through 50, inclusive (the "**Doe Defendants**"), and, therefore, Plaintiff hereby names each of them by said fictitious names. Plaintiff will seek leave to amend this complaint to allege the Doe Defendants' true names and capacities when they are ascertained. Plaintiff is informed and believes, and on that basis alleges, that each Doe Defendant is responsible in some manner for the acts and/or omissions alleged herein and that the damages sustained by Plaintiff were and continue to be the direct, proximate and foreseeable result of the acts and/or omissions of the Doe Defendants, and each of them.

15. In 1999, Barton and Defendant Tomkow and another individual, Harry Keller, founded the RPost concept and business form, RPost, Inc. By late 1999, Barton and Tomkow were joined by Kahn as the founders of RPost, Inc. (founder and owner, Harry Keller, was subsequently bought out).

16. In late 2000, Barton, Tomkow and Kahn (collectively referred to herein as

the **"Founders"**) formed RPost, Ltd., and transferred their stock in RPost, Inc. into the RPost, Ltd. in exchange for common shares in RPost, Ltd.

17. During 2000 and 2001, RPost, Ltd. issued common stock in RPost, Ltd. to the Founders in three concurrent tranches. Barton was issued three million six hundred sixteen thousand five hundred (3,616,500) shares of RPost, Ltd. Common Stock in 2000 (reflected in the Company's records vis-a-vis Share Certificate No. 9), five hundred thousand (500,000) shares of RPost, Ltd. Common Stock through an 83b election to exercise options paid at $.01 per share. (reflected in the Company's records vis-a-vis Share Certificate no. 21) and one million nine hundred thousand (1,900,000) shares of RPost Common Stock was identified on the Company Records as certificate number 25. Barton's 6,016,500 RPost, Ltd. Common Shares are hereinafter referred to as **"Barton's Shares."** At the same time that RPost, Ltd. Common Stock was issued to Barton, by agreement of the Founders, RPost, Ltd. issued Common Stock to Khan and Tomkow, with the Founders' designated Share Certificate numbers being consecutive in each of the three tranches.

18. RPost, Ltd.'s 2004 Common Share Capitalization table affirmed and confirmed the above-referenced share transactions and the issuance of Barton's Shares by RPost, Ltd. for Barton's benefit. Moreover, in May 2004, at Rpost, Ltd.'s request, Watlington affirmed and represented in writing as part of the Series E Agreement that all of the common shares of RPost, Ltd. (which necessarily included Barton's Shares) were fully paid for. Thereafter, in July 2005, RPost, Ltd. and RPost, Inc. filed an action in the Los Angeles Superior Court, Case No. YC053346, wherein RPost affirmatively represented to Barton and to the Court that Barton had acquired Barton's Shares through a series of transactions[1]. Similarly, from at least 2003 through mid-2005, in multiple

---

[1]In its Complaint in Case No. YC051416 (the **"Complaint"**), RPost affirmed and represented that, "As of July 24, 2000 Barton held 3,325,800 shares in RPost, Inc." (Complaint, p. 4:15-16) Further, that "The Founders exchanged their shares in RPost, Inc. for shares in RPost International Limited, and Barton received some 3,616,500 shares of RPost International Limited's Common Stock." (Complaint, p. 4:23-25) RPost also

filings with the United States Securities and Exchange Commission (the "**S.E.C.**"), RPost, Ltd. (acting and communicating through Khan under the penalty of perjury) repeatedly represented and affirmed to the SEC that Barton owned at least 10% of the outstanding stock of RPost, Ltd.

19. At all relevant times herein, RPost, Ltd. and the Officer/Director Defendants owed Plaintiff, as a shareholder of RPost, Ltd., a fiduciary duty including, without limitation, a duty to fully, completely and fairly disclose all facts which could or would materially affect Plaintiff's rights and interests in, for example, Barton's Shares. Notwithstanding the fiduciary obligations that the RPost, Ltd. and the Officer/Director Defendants, and each of them, owed to Barton at all relevant times, at no time, prior to Khan's admission in July 2009 and, later, only upon Khan's trial testimony in April 2010, did RPost, Ltd. and/or any of the Officer/Director Defendants notify and disclose to Barton (but, in fact and rather, fraudulently concealed from him) that RPost, Ltd. and/or the Officer/Director Defendants:

(1) contended that Barton allegedly had not paid for the Barton Shares and/or that Barton acquired his initial shares in exchange for his purported promise to serve as RPost, Ltd.'s legal counsel, that Barton allegedly did not serve as legal counsel and, therefore, RPost, Ltd. could cancel his shares and unwind his share acquisition transactions without notice and legal process;

(2) prepared falsified RPost, Ltd. Board of Directors resolutions purporting to "correct" (so as to suit said defendants fraudulent scheme, as alleged herein below) the original resolutions (which original resolutions affirmed Barton's acquisition of and payment for Barton's Shares);

(3) prepared and circulated falsified financial statements of RPost, Ltd. to attempt

---

affirmed and represented that in May, 2001 Barton was issued an additional 500,000 shares of common stock, and received an additional 1,900,000 shares of RPost International Limited common stock in August 2001, "...for a total of 6,016,500 shares. Today that represents 19% of the total number of issued and outstanding shares of RPost International Limited's Common Stock as converted." (Complaint, p. 5:12-16).

to "substantiate" the deceitful and secret assertion that Barton had not paid for his Shares;

(4) prepared and circulated false financial statements and information to RPost, Ltd.'s purported "auditors" to attempt to "substantiate" the deceitful and secret assertion that Barton had not paid for his Shares;

(5) submitted false "facts" and documents to Bermuda counsel, as part of RPost, Ltd.'s and its Officers/Director Defendants' scheme to secretly cancel Barton's Shares (and unwind the transactions whereby Barton acquired same) and return Barton's Shares to RPost, Ltd.'s treasury, so as to induce said counsel to offer a fraudulently premised "legal opinion" for use by RPost, Ltd. and the Officer/Director Defendants to justify their fraudulent scheme;

(6) refused to produce (despite Barton's requests and without a court order) the purported "legal opinion" letter and refused to provide testimony regarding same;

(7) notwithstanding a court order and representations by RPost, Ltd.'s counsel on the record (that all Rpost, Ltd. Corporate minutes had been produced), RPost, Ltd. withheld from production a full and complete copy of the original RPost, Ltd. Director Resolutions and delayed the production of certain corporate minutes (purporting to memorialize a directors meeting authorizing "corrections" to Directors Resolutions from 5 years earlier) until February 2010; and, among other things,

(8) concealed from Barton that RPost, Ltd., acting by and through the Officer/Director Defendants, had secretly in 2007 (or thereafter) canceled Barton's Shares (and unwound the transactions whereby Barton acquired same) and returned them to RPost, Ltd.'s treasury and continued to fail to produce, despite Court order, RPost, Ltd.'s documents regarding Barton's Shares (in particular, any business records evidencing the actual, purported cancellation of Barton's Shares (and unwinding of the transactions whereby Barton acquired same) and the return thereof to RPost, Ltd.'s treasury).

20. The actual taking and conversion of Barton's Shares and said acts having

been undertaken in secretly and without notice thereof, any evidentiary basis therefor or due process to address such action, evidence the plan of RPost, Ltd. and the Officer/Director Defendants to increase their own percentage ownership of RPost, Ltd. and, thereby, their share value and corporate control by decreasing the number of outstanding common shares of RPost, Ltd., to attempt to insulate RPost, Ltd. and themselves from scrutiny and liability for their breaches of fiduciary duty, fraud and other wrongful acts, as alleged hereinbelow and to retaliate against and harm Barton for his criticism of RPost's management and directors' conduct.

FIRST CAUSE OF ACTION

(Damages for Conversion, Against RPost, Ltd., the Officer/Director Defendants, and DOES 1 through 50, Inclusive)

21. Plaintiff Barton refers to, realleges and incorporates by reference the allegations of Paragraphs 1 through 20 of this Second Amended Complaint as though fully set forth herein.

22. In or about July 2009, Barton first learned that RPost, Ltd. and the Officer/Director Defendants had wrongfully and unlawfully seized possession and control of and converted Plaintiff Barton's Shares (6,016,500 common shares of RPost, Ltd. stock), allegedly "cancelling" Barton's Shares and returning same to RPost, Ltd.'s treasury. Notwithstanding that the instant action was filed within three years of the date of the actual conversion (the taking and cancelling) of Barton Shares and of Barton learning thereof, (1) RPost, Ltd. and the Officer/Director Defendants, and each of them, are nonetheless equitably estopped (and they have unclean hands barring any attempt) to rely on and assert any statute of limitations by virtue of (a) their breaches of fiduciary duties of full and fair disclosure to Barton of all material facts concerning the Barton Shares and said defendants' fraudulent concealment thereof from Barton, and (b) the affirmative representations in the prior RPost, Ltd. Complaint, in RPost, Ltd's SEC filings under penalty of perjury (and signed by Khan) and in various RPost, Ltd. corporate records from 2000-2005; and (2) Barton's delayed discovery of the actual

taking and cancellation of Barton's Shares, despite his efforts to acquire information from RPost, Ltd., and based on the breaches of fiduciary duty and fraudulent concealment by RPost, Ltd. and the Officer/Director Defendants, renders the filing of the instant claim timely. Moreover, as the last overt act of the civil conspirants (RPost, Ltd. and the Officer/Director Defendants) was at least the cancellation and taking of Barton's Shares (which act Khan has testified occurred in 2007, but that fact and date of which was concealed from Barton by RPost, Ltd. and the Officer/Director Defendants and was not discovered until July 2009), Plaintiff's action herein is timely advanced.

23. Despite Barton's lawful ownership of the Barton Shares, RPost, Ltd. and the Officer/Director Defendants converted same for their own benefit. Further, RPost, Ltd. and the Officer/Director Defendants, and each of them, conspired with one or more of the others to convert and, in fact, did convert Barton's Shares, which act was and is wrongful; hence, in addition to the Officer/Director Defendants direct liability for their wrongful acts which resulted in the conversion of Barton's Shares, the wrongful acts of each of the Officer/Director Defendants are attributable to each of them and RPost, Ltd. RPost, Ltd. and the Officer/Director Defendants are liable for damages to Plaintiff based on their civil conspiracy to convert and take, via cancellation and return to RPost, Ltd.'s treasury, Barton's Shares. Moreover, the wrongful acts of Defendants Isenberg and Breed, employees of Symantec acting within the course and scope of their employment, are also directly attributable to Symantec under agency-principal and *respondeat superior* principles and render Symantec liable therefor. Symantec (through its employees appointed for the very purpose of representing Symantec's interests as a shareholder) and the other Officer/Director Defendants presided over Board of Directors meetings wherein the plan to take and convert Barton's Shares was considered and commenced and Symantec and the other Officer/Director Defendants ratified the ultimate taking and conversion of Barton's Shares by RPost, Ltd.

24. As a direct, proximate, and foreseeable result of the taking and conversion of Barton's Shares by RPost, Ltd. and the Officer/Director Defendants, and each of

them, Plaintiff has suffered general and special damages, including, but not limited to, damages from the loss of said property and/or from its use by said Defendants, damages for emotional and/or physical stress and distress from the conversion, the fair market/replacement value of said personal property in a sum not less than $20,000,000.00, pre-judgment interest, injunctive and other equitable relief and a restraining order. Based on the valuations of RPost, Ltd. which RPost, Ltd. has communicated to existing and/or prospective investors, Plaintiff Barton alleges that the value of Barton's Shares wrongfully taken and converted by RPost, Ltd. and the Officer/Director Defendants was, at the time of the conversion, at least $20,000,000.00. When and if necessary, Plaintiff will undertake its election of remedies at the lawfully permitted time at and/or after trial, all of which remedies are expressly reserved.

25. The conduct of RPost, Ltd. (by and through and ratified by the Officer/Director Defendants, who are and were authorized to act and make corporate decisions for RPost, Ltd.) and the Officer/Director Defendants (including, without limitation, Symantec, whose addition as a director was in place of Plaintiff and has continued thereafter to this date, and who nonetheless failed to halt the taking and conversion of Barton's Shares or notify Barton thereof and whose liability flows directly from the wrongful acts of its employees - Isenberg and Breed - whom Symantec installed on RPost, Ltd.'s Board of Directors and whose services were within the course and scope of said employment) was and is malicious, oppressive and fraudulent. Barton's Shares were taken and converted in violation of RPost's Bye-Laws, the terms and conditions of the Series E Convertible Preferred Stock Purchase Agreement (the "**Series E Agreement**") (which documents are in RPost, Ltd.'s possession, custody and control), the express and implied agreements between Barton and RPost, Ltd. and under governing law; were taken and converted without due process and notice to Barton; were taken and converted to further cause harm and distress to Barton and to retaliate against Barton for his inquiries and criticism of RPost, Ltd's management and directors; were taken and converted with the intent to fraudulently increase the value of the shares of,

and/or increase the percentage control over RPost, Ltd. by Khan, Tomkow and Symantec; were taken and converted to artificially increase the value of the shares of other shareholders and investors in RPost, Ltd. subsequent to the conversion to induce further investment in RPost, Ltd.; and were taken and converted through a civil conspiracy consisting of the preparation and circulation of fraudulent RPost, Ltd. corporate and financial records and submission of such forged documentation to Barton and to the Court to conceal said defendants' misconduct. Barton requests that punitive and exemplary damages be awarded against each and all of said defendants in an amount according to proof.

SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty, Against RPost, Ltd. And the Officer/Director Defendants and Does 1 through 50, inclusive)

26. Plaintiff refers to, realleges and incorporates by reference the allegations of Paragraphs 1 through 20 and 22-25 of this Second Amended Complaint as though fully set forth herein.

27. At all times relevant hereto, RPost, Ltd. and each of the Officer/Director Defendants owed Plaintiff a fiduciary duty including, without limitation, a duty of full, complete and fair disclosure of all material facts affecting Barton's Shares and a duty not to engage in the fraudulent concealment and wrongful acts alleged herein above. Khan and Tomkow's fiduciary duties to Plaintiff also derive from their status as controlling, majority shareholders. The wrongful acts of RPost, Ltd. and each of the Officer/Director Defendants give rise to this personal and direct breach of fiduciary duty claim against RPost, Ltd. and each of the Officer/Director Defendants as the wrongful acts - which resulted in the taking and conversion of Barton's Shares - are unique and specific to Barton and are acts which were intended to lead to the aggrandizement of RPost, Ltd. and of the Officer/Director Defendants..

28. Within the last four years from the filing of this action, Barton first discovered that RPost, Ltd. and the Officer/Director Defendants, and each of them,

intentionally breached their fiduciary duties to Barton by taking, cancelling and converting Barton's Shares and returning same to RPost, Ltd's treasury in violation of RPost, Ltd.'s Bye-Laws, the terms and conditions of the Series E Agreement (which documents are in RPost, Ltd.'s possession, custody and control), the express and implied agreements between Barton and RPost, Ltd. and under governing law. RPost, Ltd. and the Officer/Director Defendants undertook said breaches of fiduciary duty in secret, without due process and/or notice to Barton, and for myriad wrongful and improper purposes.

29. The wrongful acts of RPost, Ltd. and the Officer/Director Defendants as alleged hereinabove were not and are not within the standard of the business judgment rule, and fall outside of same, and breached fiduciary duties owed by the Officer/Director Defendants and RPost, Ltd. to Barton. The Officer/Director Defendants' wrongful acts as alleged hereinabove were further the product of an inherent conflict of interest as the Officer/Director Defendants undertook said acts for the improper purpose of concealing their misconduct, obtaining benefits personal to them and preserving the Officer/Director Defendants' positions at RPost, all at the expense of and with direct harm to Plaintiff.

30. As a direct, proximate and foreseeable result of the wrongful conduct of RPost, Ltd. the Officer/Director Defendants, and each of them, as alleged herein above, RPost has suffered general damages in a sum according to proof in excess of the jurisdictional minimum of this Court but alleged to be approximately $20,000,000.00, along with pre-judgment interest on the above referenced sums at the legal rate from the date of the wrongful acts of said Defendants through the date of entry of judgment.

31. The breaches of fiduciary duties by RPost, Ltd. and the Officer/Director Defendants as alleged hereinabove and incorporated herein were malicious and despicable and undertaken with fraud and oppression, such that exemplary and punitive damages should be awarded against them.

///

THIRD CAUSE OF ACTION

(Derivative Action (Breach of Fiduciary Duty), Against the Officer/Director Defendants and Does 1 through 50, inclusive)

32. Plaintiff refers to, realleges and incorporates by reference the allegations of Paragraphs 1 through 20 and 22-24 of this Second Amended Complaint as though fully set forth herein.

33. The Officer/Director Defendants, and each of them, and at all relevant times herein, owed all shareholders, including Plaintiff, and RPost, Ltd. a fiduciary duty.

34. In July 2009, Barton first discovered that the Officer/Director Defendants, and each of them, had failed to perform, and therefore breached, the fiduciary and related duties of officers and directors of RPost. The Officer/Director Defendants' breaches of fiduciary duties to RPost and its shareholders include, without limitation, the following:

a. Notwithstanding their fiduciary obligations to RPost, Ltd. and all shareholders, the Officer/Director Defendants caused RPost, Ltd. to take and convert Barton's Shares in violation of RPost, Ltd.'s Bye-Laws, the terms and conditions of the Series E Agreement (which documents are in RPost, Ltd.'s possession, custody and control), the express and implied agreements between Barton and RPost, Ltd. and under governing law. The Officer/Director Defendants undertook said wrongful acts in secret, without due process and/or notice to Barton, and for the wrongful and improper purposes of, among other things, retaliating against Barton for his inquiries and criticism of RPost, Ltd's management and directors; to fraudulently increase the value of the shares of and/or increase the control of Khan, Tomkow and Symantec over RPost, Ltd.; and to artificially increase the value of the shares of other shareholders and investors in RPost, Ltd. subsequent to the conversion (when, in fact, those shareholders will be exposed to significant loss of share value due to the expenditures the Company will be required to make to indemnify Barton for the wrongful conversion of his Shares). Moreover, as a result of their breaches of fiduciary duty, the Officer/Director Defendants have exposed RPost, Ltd. to substantial damages liability to other investors (current and incoming) for

which the Officer/Director Defendants should be personally responsible including, without limitation, securities violations for presenting false and/or misleading financial statements with respect to the outstanding shares of RPost, Ltd. and the value of RPost, Ltd.;

b. Notwithstanding their fiduciary obligations to RPost, Ltd. and all shareholders, Plaintiff is informed and believes and on that basis alleges that the Officer/Director Defendants, and each of them, have misrepresented to existing and prospective shareholders of RPost, Ltd. that Barton's Shares are no longer outstanding shares of RPost, Ltd., thereby misrepresenting both the number of outstanding shares of RPost, Ltd. and/or artificially inflating the value of the existing common shares of RPost and the value of the shares to be acquired by investors subsequent to the conversion of Barton's Shares by RPost, Ltd. and the Officer/Director Defendants (but subjecting those shareholders to significant loss of share value should RPost, Ltd. be ordered to indemnify Barton for the conversion and/or a constructive trust be imposed and Barton's Shares otherwise deemed valid and not cancelled and returned to RPost, Ltd.'s treasury). Moreover, as a result of their breaches of fiduciary duty, the Officer/Director Defendants have exposed RPost, Ltd. to substantial damages liability to other investors and Barton, for which the Officer/Director Defendants should be personally responsible;

c. Notwithstanding their fiduciary obligations to RPost, Ltd. and all shareholders, Plaintiff is informed and believes and on that basis alleges that the Officer/Director Defendants, and each of them, failed and refused each year to provide accurate (and, where required, audited) corporate financial records (pursuant to the Investor's Rights Agreement among other triggering agreement(s) and laws) which identified RPost's then current assets, income and liabilities and purported expenses of RPost and which reflected the cancelled and returned Barton Shares. Said conduct, Plaintiff is informed and believes, has resulted in the Officer/Director Defendants submitting financial information to shareholders and prospective investors not in conformance with generally accepted accounting principles, the Company's bye laws,

the Investor's Rights Agreement and/or governing law. For example, in May 2007, Officer/Director Defendant Kahn reported to the Los Angeles Business Journal (LABJ) that RPost enjoyed annual revenue of just short of $10,000,000.00; however, Plaintiff is informed and believes, and on that basis alleges, that RPost has never reported such actual revenue to its shareholders in any year and the Officer/Director Defendants, and RPost, Ltd.'s board, ratified Kahn's statements to the LABJ so that, in a traditional Ponzi scheme methodology, the Officer/Director Defendants could use the article to induce new investors into making investments into RPost;

d. In or about August 2006, Barton learned that Officer/Director Defendants Kahn and Tomkow had wrongfully closed the Series C Round and wrongfully converted the promissory notes (convertible into RPost shares) of the Series B investors by, among other things, failing to collect and undertake reasonable steps to collect on the Gulamali Funding Pledge (as defined below). In order to meet the funding requirement to convert the Series B Stock round at 50% of the Series C Stock valuation, the Officer/Director Defendants and RPost relied upon a funding pledge (the "**Gulamali Funding Pledge**") in the amount of $2,000,000.00 from The Hanover Trust of Bermuda, owned and operated by Ash Gulamali (collectively, "**Gulamali**"). Based upon that pledge, and despite the fact that no funds were ever received in fulfillment of Gulamali's $2,000,000.00 pledge (as was discovered by Plaintiff in August 2006 when Tomkow conceded in deposition that the pledged funds had not been paid), Defendants Kahn and Tomkow have thereafter wrongfully caused the Company to convert the Series B shareholders shares at a price which assumed the receipt of the $2,000,000.00 Gulamali pledge and never corrected the wrongful conversion when the Gulamali funds were not collected, which conduct benefitted Tomkow/Kahn and violated the rights of and caused damages to the Series B shareholders and subsequent shareholders in RPost, among others. Thereafter, the Officer/Director Defendants, ratifying the wrongful conduct of Khan and Tomkow, concealed from Barton and other shareholders (and prospective investors in subsequent share offerings, Plaintiff is informed and believes) that the

Officer/Director Defendants had failed to obtain the $2,000,000.00 (plus interest) due from Gulamali (and were not undertaking any commercially reasonable efforts to collect same) and had and have failed and refused to unwind/correct the wrongful conversion of the Series B shareholders shares, which conversion occurred at an artificially higher price per share. By converting the Series B notes to shares at the artificially higher per share price, and never collecting the Gulamali Funding Pledge, Kahn and Tomkow avoided the greater dilution of their shares that would have occurred had the Series C round not closed on time. Kahn and Tomkow knew that, if the Series C round did not timely close, the Series B notes would convert to shares at a much lower price per share, which would have substantially diluted the Founders' shares in an amount far greater than the dilution based on a timely Series C round closing. In 2006 and 2009, Khan under oath assured Barton that RPost, Ltd. was still attempting to collect on the Gulamali Funding Pledge (suggesting that the one element which could lead to the Series C closing be sustained would be achieved and further extending any possible timeline to commence any claim arising out of the failure to properly close the Series C round); however, Plaintiff is informed and believes, and on that basis alleges, that RPost, Ltd. has since removed the $2,000,000.00 note receivable due from Gulamali from RPost, Ltd.'s balance sheet and, in fact, is not making any commercially reasonable efforts to collect the sums due from Gulamali, all the while failing and refusing to adjust the share amounts of the Series B shareholders as a result of the improper Series C financing round closing and continuing to falsely represent to shareholders of RPost, Ltd. that Gulamali (Hanover) is a shareholder of RPost, Ltd. As the number and value of the Founders' shares is directly impacted by the disposition of the Series C round, Barton and other shareholders have a direct interest in RPost, Ltd. duly adjusting the Series B and Series C shares so as to reflect the non-receipt of the Gulamali receivable.

35. The wrongful acts of the Officer/Director Defendants as alleged hereinabove were not and are not within the standard of the business judgment rule, and fall outside of same, and breached fiduciary duties owed by the Officer/Director

Defendants to RPost, Ltd. and its shareholders. The Officer/Director Defendants' wrongful acts as alleged hereinabove were further the product of an inherent conflict of interest as the Officer/Director Defendants undertook said acts for the improper purpose of concealing their misconduct, obtaining benefits personal to them and/or preserving the Officer/Director Defendants' positions at RPost, all at the expense of and with direct harm to RPost, Ltd. and its shareholders.

36. Plaintiff notified the Officer/Director Defendants in writing of the ultimate facts that form the basis for this cause of action and/or is excused from doing so as same would be and/or would have been a futile exercise.

(a) In July 2009, Mr. Kahn stated under oath that RPost had unwound the transactions whereby Barton acquired Barton's Shares and Barton's Shares were thereby cancelled and returned to Rpost, Ltd.'s treasury; as the tortious act of conversion had already occurred, Rpost, Ltd. and the Officer/Director Defendants had actively concealed their myriad fraudulent and wrongful acts concerning Barton's Shares (as alleged in this Second Amended Complaint), and the Officer/Director Defendants had ratified the conversion (including, without limitation, the acceptance of RPost's identification in a July 2007 SEC filing that listed (for the first time) Symantec as a beneficial owner of at least 10% of RPost, Ltd.'s outstanding shares (which verified statement could only be accurate if Barton's Shares had been cancelled and converted by RPost, Ltd. and the Officer/Director Defendants), any further demand for the restoration of Barton's Shares was excused on the grounds of futility.

(b) The futility of a demand upon RPost and the Officer/Director Defendants is further demonstrated by the following, which Plaintiff is informed and believes and on that basis alleges:

(1) within four years of the filing of this action, Plaintiff discovered that:

(a) at RPost's claimed January 31, 2005 Board of Directors meeting and/or in the Board of Director meeting minutes of the same (at which meeting all of the Officer/Director (save Krechman) Defendants participated), RPost and all of the

Officer/Director Defendants (except Krechman) unanimously agreed to undertake steps against Barton (and do so in secret) to avoid a purported "liquidity event" (action which was claimed to be necessary albeit based upon a false set of assumed facts). Plaintiff is informed and believes, and on that basis alleges, that all of said Officer/Director Defendants (save Krechman who was not yet a director at that time, Plaintiff is informed and believes) authorized and empowered Khan, Tomkow and Watlington to implement a variety of schemes as Khan, Tomkow and Watlington saw fit to avoid the alleged "liquidity event" by secretly converting Barton's Shares;

(2) at RPost's claimed May 2, 2005 Board of Directors meeting and/or in the Board of Director meeting minutes of the same date (at which meeting all of the Officer/Director Defendants (save Krechman) participated), RPost and all of the Officer/Director Defendants (save Krechman who was not yet a director at that time, Plaintiff is informed and believes) unanimously affirmed and ratified Khan, Tomkow and Watlington's strategies to convert Barton's Shares which included, without limitation: (a) providing false documentation and false assumed facts to Bermuda counsel to purport to justify the conversion of Barton's Shares, and concealing same from Barton, (b) providing false financial records and documentation to RPost's auditor to create a false "non-payment" issue relative to certain of Barton's Shares; and (c) causing RPost to file a Complaint in Los Angeles Superior Court affirming Barton's Shares and their acquisition and Barton's ownership thereof as a ruse to conceal from Barton the actual and secret wrongful acts of RPost and the Officer/Director Defendants being undertaken.

(3) RPost and the Officer/Director Defendants, on a date which Khan would not identify under oath in deposition, secretly unwound the transactions whereby Barton acquired the Barton Shares and thereafter cancelled the Barton Shares and returned them to RPost's treasury. These actions were undertaken in secret, with the approval of each of the Officer/Director Defendants (by prior or subsequent unanimous votes and/or based on the actual and/or apparent authority granted to Khan, Tomkow and

Watlington and the ratification thereof) and were ratified by the Officer/Director Defendants in their acceptance, without objection and without any effort to stop or prevent same, of the benefits of the conversion of Barton's Shares through the above actions, among others.

The depth and the cumulative extent of the deception (and the unanimity among and ratification by) RPost and each of the Officer/Director Defendants, coupled with the four years of secrecy and the manifestation of corporate records, establishes that any demand by Plaintiff to unwind the conversion of Barton's Shares would have been futile and is excused under the law.

(c) Moreover, as Barton had notified RPost, Ltd. in August 2009 that an action based on the above wrongful conversion would be filed, the inaction by the Officer/Director Defendants thereafter to rectify the wrong, affirms that any further demand by Barton would have been futile. Further, as Khan continued to perpetrate the fraudulent scheme to justify the cancellation of Barton's Shares at the trial in the related case (in April 2010), through Khan's testimony (for himself and for RPost, Ltd.) and presenting fraudulent business records to justify same, and given that the Officer/Director Defendants had delegated to Khan the responsibility for managing the disposition of Barton's Shares, Barton was further excused from any demand upon the Officer/Director Defendants to rectify the breaches set forth above as said demand would have been futile. Further, based on the series of acts of the Officer/Director Defendants, and each of them, as alleged hereinabove, and the personal benefit to them by taking and converting Barton's Shares, the Officer/Director Defendants, and each of them, are not independent and disinterested and/or no reasonable basis exists for Plaintiff to conclude or expect that the wrongful acts of the Officer/Director Defendants were the product of a valid exercise of business judgment (which they were not) or would be rectified upon further demand. Further efforts by Plaintiff to secure action by the Board of Directors would also be futile as evidenced by, among other things, the Officer/Director Defendants' fraudulent concealment of the conversion of Barton's Shares from Barton

and their participation in the duplicitous and fraudulent acts alleged in Paragraph 19(1)-(8) above; the ratification by, for example, Symantec/Isenberg/Breed, Roston, Krechman, Watlington, Tomkow and Khan of the taking of Barton's Shares when RPost, Ltd. filed the July 2007 SEC documents under oath which omitted Barton as shareholder and replaced Barton with Symantec as a holder of at least 10% of RPost, Ltd.'s outstanding shares; Tomkow's representations under oath in July 2009 that he relies on Khan to handle all of Rpost, Ltd.'s business; and that the Officer/Director Defendants who have engaged in the wrongful acts above, encompass a majority of the board of RPost, Ltd. and voted for the wrongful acts alleged above. Plaintiff is informed and believes, and on that basis alleges that each of the Officer/Director Defendants also knowingly adopted and ratified the wrongful acts alleged hereinabove by, among other things, having actual and/or constructive knowledge of all of said wrongful acts and nonetheless concealing the conversion of Barton's Shares from Barton and, as recently as September 2010, continuing to ratify the contention of RPost that Barton allegedly was never the owner of the Barton Shares.

Plaintiff, as a shareholder of RPost. Ltd., is therefore compelled to bring this action for the benefit of RPost in order to protect the rights of shareholders of RPost including Plaintiff.

37. If Plaintiff is successful in this action, the relief and recovery will be of substantial benefit to all shareholders of RPost, including Plaintiff, and such action is necessary and proper to protect the interests of RPost and its shareholders. This cause of action is advanced pursuant to Corporations Code §800 (and governing law) and the allegations herein comply with the requirements thereof.

38. As a direct, proximate and foreseeable result of the wrongful conduct of the Officer/Director Defendants, and each of them, as alleged herein above, RPost, Ltd. has suffered general damages in a sum according to proof in excess of the jurisdictional minimum of this Court, which damages the Officer/Director Defendants should be adjudged to pay.

39. In addition to the afore-referenced damages, the Officer/Director Defendants, and each of them, are obligated to pay pre-judgment interest on the above referenced sums at the legal rate from the date of the wrongful acts of said Defendants through the date of entry of judgment.

40. The wrongful acts of the Officer/Director Defendants as alleged hereinabove and incorporated herein were malicious and despicable and undertaken with fraud and oppression, such that exemplary and punitive damages should be awarded against them.

FOURTH CAUSE OF ACTION

41-49. [Omitted Based on Court Ruling Dated November 4, 2010]

FIFTH CAUSE OF ACTION

(Declaratory Relief, Against Defendant RPost, Ltd. And Does 1 through 50, Inclusive)

50. Plaintiff refers to, realleges and incorporates by reference the allegations of Paragraphs 1 through 20 of this Second Amended Complaint as though fully set forth herein.

51. Plaintiff Barton is one of the primary founders of Defendant RPost. Barton is the registered owner of Barton's Shares, consisting of 6,016,500 shares of RPost, Ltd. Common Stock and was, and is, a shareholder at all relevant times and during the acts and omissions alleged hereinbelow.

52. An actual controversy exists in that Plaintiff contends, at a minimum, that RPost, Ltd. holds his Shares in trust and RPost, Ltd. has asserted that they were authorized to cancel and forfeit Barton's Shares. Plaintiff seeks a declaration (a) that RPost holds the Barton Shares in trust for Barton and that Barton's Shares are required to be delivered by RPost, Ltd. to Barton upon certain triggering events under governing agreements and laws; (b) that RPost is required, without demand, and has continuing and continuous duties to provide Barton with (1) annual audited financial statements/information and budgets of RPost, Ltd. under the Investor's Rights

Agreement and governing law; (2) reasonable advance notice of all shareholder meetings and that said meetings be held without requirement that all questions of the shareholders be submitted in advance; (3) copies of all prior and subsequent stock and option offerings and related financial documents; and (4) access to and copies of the Company's financial records. Barton is also informed and believes and on that basis alleges that as a shareholder he is entitled to prior notice of all meetings wherein the officers/directors/shareholders seek and/or sought to amend the By-laws and/or enter into contracts with officers and/or directors of the Company (and/or family members/relatives of same) and to vote thereupon and that any purported by-law amendments promulgated and/or contracts with officers/directors entered into without proper notice (as to the time/date of the meeting and the actual proposed amendment(s) and contracts having been provided to Barton and an opportunity for Barton to consider and vote thereon), are *ultra vires* and void. Plaintiff is informed and believes and on that basis alleges RPost disputes these contentions.

53. Plaintiff requests, therefore, that the Court adjudicate and declare the rights and responsibilities of Plaintiff and RPost, respectively, regarding the matters referenced above, and compel the production of said documents by RPost, Ltd.

SIXTH CAUSE OF ACTION

54-59. [Omitted Based on Court Ruling Dated November 4, 2010]

SEVENTH CAUSE OF ACTION

(Fraud, Against Defendant RPost, Ltd., and the Officer/Director Defendants, and Does 1 through 50, Inclusive)

60. Plaintiff refers to, realleges and incorporates by reference the allegations of paragraphs 1 through 20 of this Second Amended Complaint as though fully set forth herein.

61. In 2000, for consideration accepted by RPost, Ltd., Barton transferred all of his shareholder interests in RPost, Inc. to RPost, Ltd. In 2001, RPost, Ltd. and Barton completed two additional transactions whereby Barton (concurrently with Kahn and

Tomkow) acquired further shares in RPost, Ltd. (as described earlier in this First Amended Complaint) in exchange for consideration which RPost, Ltd. and its representatives acknowledged receipt of from Barton. Consistent therewith, in May 2004, RPost, Ltd., through its authorized representatives, Defendants Kahn and Tomkow, represented to Plaintiff, in writing, in the Series E Agreement at Paragraph 2.2(b), that all of the common shares issued by RPost, Ltd. were "fully paid and non-assessable." In addition, RPost, Ltd., by and through its authorized representatives, represented to Plaintiff, in writing in the Series E Agreement, that RPost, Inc. is a wholly owned subsidiary of RPost, Ltd. At the time that each of the aforementioned representations were made to Barton by RPost, he reasonably believed them to be true.

62. At all relevant times from 2000 through 2005, RPost, Ltd. confirmed in myriad writings that Barton owned at least 10% of the outstanding stock in RPost, Ltd. RPost further nonetheless confirmed Barton's RPost stock ownership within RPost's own Complaint filed in Case No. YC051416. In its Complaint in Case No. YC051416, RPost alleged, and thereby confirmed as fact its belief that, "As of July 24, 2000 Barton held 3,325,800 shares in RPost, Inc." (Complaint, p. 4:15-16) Further, that "The Founders exchanged their shares in RPost, Inc. for shares in RPost International Limited, and Barton received some 3,616,500 shares of RPost International Limited's Common Stock." (Complaint, p. 4:23-25) RPost also stated that in May, 2001 Barton was issued an additional 500,000 shares of common stock, and received an additional 1,900,000 shares of RPost International Limited common stock in August 2001, "...for a total of 6,016,500 shares. Today that represents 19% of the total number of issued and outstanding shares of RPost International Limited's Common Stock as converted." (Complaint, p. 5:12-16).

63. RPost, Ltd. and each of the Officer/Director Defendants at all times owed Barton a fiduciary duty to make full, complete and fair disclosures of all material facts affecting and/or concerning Barton's Shares and not to engage in the myriad, covert and wrongful acts alleged hereinabove including, without limitation, as alleged in Paragraph

19(1)-(8) above.

64. Despite their affirmative fiduciary obligations to Barton, Rpost, Ltd. and each of the Officer/Director Defendants fraudulently concealed from Barton, until 2009 and continuing thereafter through at least April 2010, that RPost, Ltd. and the Officer/Director Defendants had cancelled (and unwound the transactions regarding the issuance of) Barton's Shares, deemed Barton's Shares forfeited and returned Barton's Shares to treasury. The facts and the related conduct of said defendants so concealed were and are material and were concealed from Barton with the intent on the part of RPost, Ltd. and each of the Officer/Director Defendants to defraud Barton.

65. Notwithstanding that the instant action was filed within three years of the date of discovery of the fraudulent concealment (and of the last overt act by the conspiring defendants as alleged hereinabove and below) and of the actual taking and cancelling of Barton Shares and of Barton learning thereof, (1) RPost, Ltd. and the Officer/Director Defendants, and each of them, are nonetheless equitably estopped (and they have unclean hands barring any attempt) to rely on and assert any statute of limitations by virtue of (a) their breaches of fiduciary duties of full, complete and fair disclosure to Barton of all material facts concerning the Barton Shares and said defendants' fraudulent concealment thereof from Barton, and (b) the affirmative representations in the prior RPost, Ltd. Complaint, in RPost, Ltd's SEC filings under penalty of perjury (and signed by Khan) and in various RPost, Ltd. corporate records from 2000-2005; and (2) Barton's delayed discovery of the actual taking and cancellation of Barton's Shares, despite his efforts to acquire information from RPost, Ltd., renders the filing of the instant claim timely. Moreover, as the last overt act of the civil conspirants (RPost, Ltd. and the Officer/Director Defendants) was at least the cancellation and taking of Barton's Shares (which act Khan has testified occurred in 2007, but that fact and date of which was concealed from Barton by RPost, Ltd. and the Officer/Director Defendants and was not discovered until July 2009), Plaintiff's action herein is timely advanced. Moreover, for more than 8 years, Barton had understood,

based on the above transactions and representations, that RPost, Ltd. wholly-owned RPost, Inc., yet, again, RPost, Ltd. and the Officer/Director Defendants concealed the true facts (as now contended by RPost, Ltd. and the Officer/Director Defendants) from Barton regarding the viability of RPost, Ltd.'s acquisition of RPost, Inc.'s shares, ownership of RPost, Inc.'s assets and other related-party transactions (including transactions where Kahn and Tomkow caused RPost, Ltd. to assume purported debts of RPost, Inc. in 2004).

66. RPost, Ltd. and the Officer/Director Defendants, and each of them, engaged in the afore-referenced fraudulent concealment from Barton. RPost, Ltd. and the Officer/Director Defendants participated in board meetings, without disclosure thereof to Barton, wherein they planned and put in motion their plan to orchestrate and complete the cancellation, forfeiture and conversion of Barton's shares in RPost, Ltd. and to do so by, among other things, fabricating financial documents and providing false information and forged documentation to Bermuda counsel (and fraudulently concealing all of same from Barton until late 2009, February 2010 and April 2010). Consistent with their secret board and other meetings in furtherance of this conspiratorial enterprise, for example, Khan and Watlington coordinated and effectuated the fabrication of Directors resolutions; Khan prepared false financial statements and Khan and Watlington submitted false financial records to RPost, Ltd.'s purported auditors at Singer Lewak. These acts, among others, of Khan and Watlington were the product of a Board of Directors' approved course of action to secretly cause, among other things, Barton's Shares to be cancelled and forfeited and returned to RPost, Ltd.'s treasury. In 2005, Symantec's Breed was dispatched to placate Barton and assuage him that Symantec was going to keep a watchful eye on RPost, Ltd.'s Board of Directors' activities; all the while, RPost, Ltd. and the Officer/Director Defendants were implementing their concealed plan concerning Barton's Shares as described above. From 2008 through early 2010, RPost, Ltd., acting through Khan and the firm's counsel, concealed from Barton the corporate minutes, forged resolutions and other financial documents which

would collectively reveal the fraudulent enterprise engaged in by RPost, Ltd. and the Officer/Director Defendants. RPost, Ltd., Khan and Tomkow further engaged in secret acts designed to unwind the original acquisition by RPost, Ltd. of RPost, Inc. and its assets, to the detriment of Barton and other RPost, Ltd. shareholders and for their own aggrandizement, and without disclosure to Barton (who was a participant in the 2000 swap of his RPost, Inc. shares for RPost, Ltd. shares. Moreover, Officer/Director Defendants- Symantec/Isenberg/Breed, Roston, and Krechman - each thereafter learned of and participated in the fraudulent concealment of the true intent of RPost, Ltd., Kahn, Tomkow, and Watlington, and ratified and adopted said conduct to the detriment of Barton. Plaintiff is informed and believes, and on that basis alleges, that Symnatec/Isenberg/Breed participated in RPost Board of Director meetings from at least January 2005 (as alleged above) and thereafter (including without limitation in May 2005 and January 2006) and voted in favor of and/or ratified the acts taken by the Board of Directors and RPost and its Officers thereat and thereafter to effectuate the cancellation of (and unwinding of the transactions whereby Barton acquired) the Barton Shares and the return thereof to Rpost's treasury. Symantec/Isenberg/Breed's acceptance of and ratification of the fraudulent conduct is further evinced by Symantec's acceptance of its purported increased share ownership percentage in RPost (as reflected on Rpost's SEC filing in 2006) and Symantec/Isenberg/Breed's decision, in unanimity with that of RPost and the other Officer/Director Defendants, to conceal the above acts regarding Barton's Shares from Barton and to continue to fail to object to any of the conduct of RPost and the other Officer/Director Defendants regarding Barton's Shares.

67. Barton justifiably relied on (1) RPost, Ltd.'s corporate records (including, without limitation, the 2004 common stock capitalization table and the Series E Agreement and its exhibits), RPost, Ltd.'s Complaint filed with the Los Angeles Superior Court, RPost, Ltd.'s SEC filings through 2005, and (2) the non-disclosure by RPost, Ltd. and the Officer/Director Defendants of all material facts concerning Barton's Shares.

68. As a direct, proximate and foreseeable result of the fraudulent concealment by RPost, Ltd. and the Officer/Director Defendants, and each of them Barton has suffered general and special damages including loss of the Barton Shares, emotional and physical stress and distress and other related damages in the sum of at least $20,000,000.00, and pre-judgment interest thereon.

69. RPost, Ltd. and the Officer/Director Defendants, and each of them, acted in concert and conspired to engage in the fraudulent concealment and related wrongful acts alleged hereinabove and so conspired, aided and abetted each other as to further their own economic interests at the expense of the economic interests and rights of Barton, which they were duty bound to protect. Each of said co-conspirators are liable for the damages sustained by Barton as a result of the conspiratorial enterprise.

70. The wrongful acts of RPost, Ltd. and the Officer/Director Defendants as alleged hereinabove and incorporated herein were malicious and despicable and undertaken with fraud and oppression, such that exemplary and punitive damages should be awarded against them.

71. As an alternative remedy, Barton requests that the Court impose a constructive trust upon Barton's Shares held by Rpost, Ltd. RPost, Ltd., which has reacquired Barton's Shares through the fraudulent concealment and conduct alleged hereinabove, holds Barton's Shares as a constructive trustee.

EIGHTH CAUSE OF ACTION

(Violation of Business & Professions Code §17200, et seq., Against Defendant RPost, Ltd. And Does 1 through 50, Inclusive)

72. Plaintiff refers to, realleges and incorporates by reference the allegations of paragraphs 1 through 20, 22-25, 27-29, 33-25, 59-63 of this Second Amended Complaint as though fully set forth herein.

73. RPost, Ltd. has engaged in the following unfair, unlawful and/or deceptive and fraudulent business acts and/or practices including, without limitation, engaging in the acts alleged hereinabove in this Complaint. Barton has standing to sue under Section

17200, et seq. as he has sustained economic harm as a result of the unfair, unlawful and/or deceptive and fraudulent business practices of RPost, Ltd. In addition to the wrongful acts alleged hereinabove and incorporated herein, Plaintiff is informed and believes, and on that basis alleges, that RPost, Ltd. has:

a. engaged in an unfair, unlawful, fraudulent and deceptive conduct to deprive certain common shareholders of their lawful shares including, without limitation:

(1) cancelling, forfeiting and converting Barton's Shares and returning same to Rpost, Ltd.'s treasury in violation of the Bye-Laws, the Series E Agreement, the express and implied agreements between Barton and RPost, Ltd. and governing law and through various acts constituting breach of fiduciary duty and fraudulent concealment including financial statement fraud, corporate record fraud, abuse of process and false testimony;

(2) falsely representing to prospective investors and other shareholders in RPost, Ltd. that Barton's Shares were lawfully taken and returned to RPost, Ltd.'s treasury thereby reducing the outstanding shares of RPost, Ltd. and artificially increasing the value of the Officer/Director Defendants' shares and the shares of investors issued after the conversion of Barton's Shares;

(3) refusing to deliver to other RPost, Ltd. shareholders their shares upon demand;

(4) once Rpost, Ltd. determined in 2009 that the Gulamali Funding Pledge would not be paid, refusing to issue to the Series B shareholders the number of shares that are required to have been issued to them as a result of RPost, Ltd.'s failure to meet the financing benchmark stated in the Subordinated Convertible Debt Agreement; and, among other things,

(5) once Rpost, Ltd. determined in 2009 that the Gulamali Funding Pledge would not be paid, concealing and failing to fully disclose to investors in subsequent financing rounds (after finance round C) that RPost, Ltd. did not collect on the Gulamali Funding Pledge and that RPost, Ltd., at a minimum, owes its Series B

shareholders millions of RPost shares which are required to be issued to correct RPost, Ltd.'s failure to complete the Series B conversion at the required price.

74. The above-referenced acts and omissions by RPost, Ltd. constitute a pattern of unfair, unlawful, fraudulent and/or deceptive business practices as a result of which Barton has been injured in fact and suffered the loss and/or impairment of money and property, including, without limitation, his stock and the fair valuation thereof, among other damages. RPost, Ltd.'s aforementioned and alleged acts and omissions were and are designed, enacted, and repeatedly perpetrated to wrongfully deprive Plaintiff and other shareholders/investors of RPost, Ltd. of various civil and property rights.

75. Unless RPost, Ltd. is enjoined from violating the civil and property rights of the shareholders and prospective investors by, among other things, engaging in the acts alleged hereinabove in this Complaint and other statutes and common law, the shareholders and prospective investors will suffer such great and irreparable harm that no adequate remedy at law exists as pecuniary compensation will not afford adequate relief and will not deter RPost from continuing to engage in the unfair, unlawful and/or deceptive business acts and/or practices.

76. Plaintiff reserves the right to seek injunctive relief concerning any or all of the wrongful acts of RPost, Ltd. as alleged hereinabove. Plaintiff further seeks from RPost the disgorgement of all profits RPost has obtained as a result of the above-referenced unfair, unlawful, fraudulent and/or deceptive business practices, treble damages and attorneys' fees as provided under law.

WHEREFORE, Plaintiff pray for judgment on the Second Amended Complaint against the Defendants as follows:

ON THE FIRST, SECOND, THIRD AND SEVENTH CAUSES OF ACTION:

1. General damages in the sum of at least $20,000,000.00, plus special damages and other remedies as specified in the Second Amended Complaint and otherwise available under law;

2. Exemplary and punitive damages, according to proof

ON THE FIFTH CAUSE OF ACTION:

3. A declaration of the rights and responsibilities of the parties as set forth in the Second Amended Complaint hereinabove and otherwise at the time of trial of these claims;

ON THE EIGHTH CAUSE OF ACTION:

4. Injunctive and/or equitable relief and/or disgorgement of all profits RPost has obtained as a result of the above-referenced unfair, unlawful, fraudulent and/or deceptive business practices, treble damages and attorneys' fees and all such other relief as is available under law.

ON ALL CAUSES OF ACTION:

5. Costs and attorneys' fees as allowable by law (including, without limitation, the private attorney general statute) and/or contract; and

6. For such other and further relief as the Court deems just and proper and is available under law.

7. Plaintiff demands a jury trial on those claims permitted under law.

Dated: February 16, 2011 MCGARRIGLE, KENNEY & ZAMPIELLO, APC

By: _____
Patrick C. McGarrigle, Esq.
Attorneys for Plaintiff
Kenneth Barton

PROOF OF SERVICE

The undersigned declares as follows:

I, Vanessa Bravo, state that I am employed in Los Angeles County, California, in the office of a member of the bar of this court at whose direction the service described below was made. I am over the age of 18 and not a party to the within action. My business address is 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311.

I am readily familiar with McGarrigle, Kenney & Zampiello, APC's ordinary business practice of serving documents by:

Facsimile ("fax") Transmission: Under that practice, on the same day a proof of service of a document is executed, the document is faxed to each addressee at or about the time indicated on the proof of service.

Personal Service: Under that practice, on the same day a proof of service of a document is executed, the document is placed in an addressed envelope and handed to a messenger for delivery to the addressee.

XX U.S. Mail: Under that practice, on the same day a proof of service of a document is executed, the document is deposited with the U.S. Postal Service, postage prepaid, at 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311.

XX Electronic ("e-mail") Transmission: Under that practice, on the same day a proof of service of a document is executed, the document is e-mailed to each addressee at or about the time indicated on the proof of service.

In accordance with said ordinary business practice, on February 16, 2011, I served the foregoing **THIRD AMENDED COMPLAINT FOR: (1) CONVERSION; (2) BREACH OF FIDUCIARY DUTY; (3) DERIVATIVE ACTION (BREACH OF FIDUCIARY DUTY); (4) [OMITTED]; (5) DECLARATORY RELIEF; (6) [OMITTED]; (7) FRAUD; AND (8) VIOLATION OF BUSINESS PROFESSIONS CODE §17200** in the manner set forth above to each interested party listed below.

Henry Ben-Zvi, Esq.
BEN-ZVI & ASSOCIATES
3231 Ocean Park Boulevard, Suite 212
Santa Monica, California 90405

Michael L. Charlson, Esq.
J.Christopher Mitchell, Esq.
Hogan & Lovells US, LLP
525 University Avenue, 4th Floor
Palo Alto, California 94301

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

Executed on February 16, 2011, at Chatsworth, California.

Vanessa Bravo

Vanessa Bravo

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KENNETH BARTON, Plaintiff, vs. RPOST INTERNATIONAL LIMITED; RPOST, INC., Aka AVION MICROSERVICES; INC.; SYMANTEC CORPORATION; ZAFAR KHAN; TERRANCE TOMKOW; HENRI ISENBERG; CAROLE KRECHMAN; JAMES WATLINGTON;CHARLES BREED; ELLSWORTH ROSTON;and DOES 1 through 50, inclusive., Defendant.	**Case No.: YC061581** **STATEMENT OF DECISION** **CALIFORNIA RULES OF COURT, Rule 3.1590(a)** **TRIAL: March 1 - April 12, 2012** **SUBMITTED ON JUNE 19, 2012**

I. PROCEDURAL HISTORY

This case was filed on January 29, 2010, and after numerous motions and pre-trial proceedings, trial commenced on March 1, 2012. Both sides waived their right to a jury trial and the case was tried to the court between the dates of March 1, 2012 and April 12, 2012. After a closing argument briefing schedule, the matter was formally submitted on June 19, 2012.

The same parties were involved in prior litigation in case number YC051312 (consolidated with YC051416 and YC053346) which settled during the trial. In addition, the same parties have a new case pending in this court under case number YC065259, which was ordered related to this case pursuant to CRC Rule 3.300 on September 27, 2011.

II. STATEMENT OF THE CASE

At the height of the dot-com boom in the late 90s, defendant Dr. Terrance Tomkow, conceived a concept and developed a software product that was akin to certified mail for the burgeoning e-mail industry. Other entrepreneurs in the technology sector were excited about the idea and it appeared that the company would either be taken public or acquired by a larger company at great profit. In order to facilitate such an event, a corporate structure was created by Dr. Tomkow and plaintiff Kenneth Barton soon joined him in his efforts followed by defendant Zafar Khan. The three individuals are known as the founders of RPost, Inc. and RPost International Limited (hereinafter referred to as RPost)(See Exhibit 1).

Unfortunately, the dot-com bust soon followed, resulting in a lost opportunity at least in the short-term. The three founders of RPost were left with Dr. Tomkow's brainchild, limited capital and no apparent market. Now, these many years later, the RPost technology continues to be developed and the elusive pay-off appears no closer to fruition. What RPost does have is a history of several years of time-consuming, expensive and ongoing litigation as well as a series of private placement fundraising memoranda drafted by defendant Khan. These private placement memos have enabled RPost to continue to raise funds from investors who become preferred shareholders with the hope that RPost will become the next Facebook or Instagram.

While the current RPost principals continue to engage in aggressive fundraising, extolling the anticipated future successes of RPost, they have nonetheless adopted the position in this trial that the common shares of stock in RPost have no value. On the other hand, plaintiff seeks damages in excess of $14 million claiming that his common shares of stock in RPost, which he alleges have been unlawfully converted by defendants, have a substantial value. This conclusion

is based largely on what has been characterized as RPost's successful fundraising efforts with increasing prices charged for each new series of preferred shares offered to investors.

III. DEFENDANTS, RPOST INTERNATIONAL LIMITED, TERRANCE TOMKOW AND ZAFAR KHAN UNLAWFULLY CONVERTED PLAINTIFF'S SHARES OF STOCK.

A. Plaintiff's Claim Was Filed Within the Applicable Statute Of Limitations For Conversion.

The statute of limitations for a conversion cause of action is three years as set forth in Code of Civil Procedure Section 338. According to plaintiff Barton, the date of conversion of his shares of RPost common stock is either June 30, 2009 or July 7, 2009. (See Exhibit 66E , Kabani 554). Although it is true that plaintiff inquired as to the ownership of his shares of stock as far back as 2007 (see exhibits 85 and 86), Barton's shares of stock were not transferred back to the RPost treasury until either June or July of 2009. Mere suspicion of possible wrongdoing does not commence the running of the statute of limitations nor does defendants' belated claim that plaintiff was never a shareholder of RPost. *See Bennett v. The Hibernia Bank* (1956) 47 Cal.2d. 540, 561; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805; *Kee v. Becker* (1942) 54 Cal.App.2d 466.

The court is cognizant of attorney Robyn Crowther's letter to plaintiff's counsel dated January 30, 2007 and seen by plaintiff on February 7, 2007 which represents that plaintiff owns no shares of RPost (Exh. 308). As this lawsuit was filed on January 29, 2010, this case has been filed in a timely manner under either scenario.

Similarly, the court rejects defendants' argument that the plaintiff has split a cause of action as an earlier lawsuit between the parties involved a claim for the delivery of the stock certificates themselves which is a far different issue than that set forth in this litigation.

B. The Court Rejects the Assertion By Defendants That Plaintiff's Ownership Of Shares In RPost International Related To Whether He Held a JD Degree.

It is the court's conclusion that defendants RPost, Khan and Tomkow raise the issue of when Barton received his JD degree and where he received it from as a pretext for depriving plaintiff of his shares of RPost International. There are no documents to support the conclusion that Barton's JD degree was consideration for the issuance of said stock to him. He never acted as General Counsel for RPost nor did he prepare corporate resolutions or documents. In fact, there are many documents which directly contradict the testimony of Khan and Tomkow. (See Barton's nondisclosure agreements Exhibits 69 and 70; employment agreement Exhibit 71; RPost corporate resolutions Exhibits 78, 80 and 81; RPost corporate tax records Exhibit 65) all of which support the conclusion that Barton's JD degree was of no consequence in the issuance of RPost stock to him. Also, a JD degree without a license to practice law is of limited utility. His degree, actually received on March 3, 2001 (Exh. 92), at best, may have been helpful in marketing the company and was included in numerous private placement memoranda drafted by defendant Khan (see, for example, Exhibits 18 and 21). The court is not convinced that Barton made any misrepresentations as to his status of holding a JD degree at an earlier date. In any event, Tomkow's decision to include him as a founder with common stock interest in the new company had nothing to do with this status.

Although it appears that Barton never actually wrote a check in consideration for the issuance of stock to him, this likewise does not stand in the way of his claim for the conversion of his shares. None of the founders had paid for their initial stock issuances in this manner and the consideration for their shares was stated to be unreimbursed expenses and compensation. Much later, after plaintiff had ceased his day to day involvement with the company, Khan and Tomkow wrote checks to RPost to document the price paid in cash for their shares, when attempting to finally place the financial record-keeping of RPost in good order.

IV. THE EVIDENCE ALSO SUPPORTS THE CONCLUSION THAT PLAINTIFF HAS MET HIS BURDEN OF PROOF ON THE FRAUD, BREACH OF FIDUCIARY DUTY, AND BUSINESS AND PROFESSIONS CODE 17200 CAUSES OF ACTION.

In addition to that set forth above, the defendants also retroactively created and modified corporate resolutions to re-create the history supporting the result that they sought. Particularly egregious is Exhibit 79, prepared as if it had been executed on January 2, 2001 and including the signature of Kenneth Barton. In reality, plaintiff had executed the corporate resolution set forth as Exhibit 78, which included a page 3 confirming the issuance of 3,616,500 shares of RPost stock to him and Khan. It also defies credulity that the best evidence of the issuance of stock in RPost, that being the shareholder registry, has either been misplaced or destroyed casting further doubt on defendants' testimony that Barton's shares had been properly canceled and returned to the treasury in 2006.

V. PLAINTIFF IS ALSO ENTITLED TO DECLARATORY RELIEF REGARDING HIS OWNERSHIP OF SHARES IN RPOST INTERNATIONAL.

The court issues a declaration that plaintiff Barton was at all relevant times an owner of 6,016,500 common shares of RPost International and that he provided appropriate consideration for said shares of stock based on unreimbursed expenses and salary owed. Barton shall submit a check to the RPost International treasury in an amount equivalent to what Khan paid for the same number of shares so that the financial records of RPost International are properly balanced. The court further declares that defendant, RPost International, is prohibited from taking any action to encumber, forfeit and /or cancel Barton's shares without having obtained prior written approval from either the court, Barton or his duly authorized counsel. In addition, his shares are not subject to any amended bylaws, agreements, or other restrictions to which he has not personally, or through his counsel, provided written consent and approval.

Plaintiff has also requested additional relief in connection with this and the Business and Professions Code Section 17200 cause of action including the appointment of a receiver and other conditions, which would impose a substantial and unjustified burden on defendants. The court declines to include such remedies in the relief afforded to plaintiff in this case.

VI. IN REVIEWING THE TESTIMONY OF ALL OF THE WITNESSES, THE COURT IS DRAWN TO THE INESCAPABLE CONCLUSION THAT PLAINTIFF HAS MET HIS BURDEN OF PROOF ON ALL OF THE CAUSES OF ACTION.

The court did not find defendant Khan to be a credible witness and concludes that he knew at all relevant times the status of Barton's legal education. Indeed, Khan's genius lies in his ability to draft private placement memoranda designed to entice investors, which requires him to put the best possible light on all aspects of RPost's business. It could be argued that he overstated his own credentials as well as those of Barton in his ambitious attempts to continue to raise money for the benefit of the company. (See, for example, Exhibits 18 and 21). Tomkow was a reluctant participant in the business aspects of operating RPost and knowingly followed the lead of Khan concerning the determinations made regarding plaintiff Barton.

General Prior was one of the most impressive individuals this court has had the pleasure of listening to from the witness stand yet his testimony was of little assistance to the defendants' case. In fact, he seemed to forget that he indeed was a shareholder of RPost International and had to be reminded that he had written a check to confirm the issuance to him of shares in the company. (See Exhibit 366) His recollection that Barton had been introduced to him by another as holding a JD degree is of little consequence.

Jerry Silver testified that he recalled an initial meeting with Barton, where there was no mention of him as holding a JD or as being an attorney. He did, however, testify that when approached several years later regarding RPost by Barton and Khan, it was mentioned that Barton was an attorney. Ultimately, whether or not he recalls such a statement, Khan knew that Barton was not an attorney and it is unlikely he was represented to be one.

The testimony of Daniel Akiu was even more troubling and the court questions the wisdom of defendants calling him as a witness. He appeared biased against plaintiff in all aspects of his testimony and he alone testified that plaintiff had advised him that he attended law school at the University of Maryland and that he was corporate counsel for RPost. The court attaches little to no credibility to his testimony.

VII. THE PLAINTIFF IS ENTITLED TO DAMAGES FOR THE CONVERSION OF THE SHARES OF STOCK BY THE REISSUANCE TO HIM OF SAID SHARES.

The court had the opportunity to listen to the testimony of two experts, Mr. D'Almeida for the plaintiff and Mr. Henry for the defendants, as to the valuation of the RPost common stock. Although both men are extremely well qualified, Mr. Henry disputes the validity of the back- solve method utilized by Mr. D'Almeida but provided no reasonable alternative. It is difficult for the court to conclude that the value of the common shares of stock in RPost is zero in light of the 13 years that defendants have committed to the success of the company as well as Khan's ability to raise substantial funds to further RPost's long-term goals.

On the other hand, the court is also not persuaded that the utilization of the back-solve method is appropriate to determine the value of the common shares of stock. Although the court recognizes that the experts were retained for a particular purpose, their widely divergent opinions support the conclusion that ownership of shares in RPost remains a very speculative proposition, the value of which is almost impossible to determine. Plaintiff would like the court to be persuaded by other technology start-up success stories such a the recent purchase of Instagram by Facebook for a sum in excess of $1 billion. Defendants, meanwhile, emphasize the fact that no liquidation event, such as an initial public offering or buyout by a larger company, is on the horizon for RPost. The court cannot help but wonder, however, how the preferred shareholders would react had they listened to the testimony of Mr. Henry and defendant Khan in which they attempted to convince this Court that the shares of RPost presently have no value.

The court is concerned that if it chooses to assess a monetary value to the shares of stock, future events, which are totally based upon speculation, could result in an inequity for either plaintiff or defendants. Therefore, since the shares of stock still exist and a proper remedy for conversion includes the return of the converted property, that is what the court so rules. *See State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081.

Therefore, the defendants are ordered to restore to plaintiff 6,016,500 shares of RPost International common stock. If the defendants have made further transfers of their own stock to other entities since the resignation of Barton from RPost International, the same process must take place for his shares so that they retain the same benefit and potential value as the 6,016,500 shares previously owned by Khan.

The court is aware that Khan wrote checks to RPost International Limited in the amounts of $5,000.00 (Exh. 319), $3600 (Exh. 346) and $1900 (Exh. 341) for a total of $10,500.00 in additional consideration for his shares of common stock. Plaintiff should likewise pay to the RPost treasury the sum of $10,500.00 or accept an offset of his monetary damages award in said amount to confirm his ownership of 6,016,500 shares of RPost International or its successor entity or entities. (See defendants Exhibits 319, 340, 341, 342, 345, and 346).

The court is satisfied that both Barton and Khan had provided consideration for the issuance of the 6,016,500 shares of common stock by way of unreimbursed expenses and salary. (See e.g., exhibits 1, 2, 3, 5, 9, 58, 81). Nonetheless, in an effort to ensure that the books and records of Rpost would withstand scrutiny, the evidence supports the conclusion that Khan and Tomkow wrote personal checks to RPost as further consideration for their common shares of RPost stock. So too should Barton provide this additional consideration in exchange for clear title to his 6,016,500 shares.

Barton will have no role in the management of the company but must be given reasonable notice of meetings of its shareholders and major transactions. Certainly, the parties are encouraged to meet and confer to determine, on their own, a purchase price for Barton's shares of stock so that a potentially uncomfortable relationship going forward can be avoided.

VIII. ADDITIONAL DAMAGES ARE POTENTIALLY RECOVERABLE BY PLAINTIFF ON A CONVERSION CLAIM.

In a conversion cause of action, the plaintiff is also entitled to recover reasonable compensation for time and money spent by him in attempting to recover the converted property. Cal. Civil Code Section 3336. Additionally, plaintiff is entitled to emotional distress damages suffered as a result of defendant's conduct. *See Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 475. Reasonable compensation for time and money spent does not include attorney's fees and plaintiff has not proffered evidence to support an award for this category and no award is therefore made. *See Russell v. United Pac. Ins. Co.*(1963) 214 Cal.App.2d 78, 93.

On the issue of general damages for emotional distress, plaintiff has requested an award of $500,000.00 in his Post-Trial Closing Brief. It is obvious that he has suffered emotional distress, as he was involved with RPost from the beginning and was fully expecting to maintain his ownership share as they sought their financial reward. Rather, after returning to the company after his convalescence from a stroke, everything went downhill culminating in the other founding shareholders conspiring to deprive him of his common shares of stock. The Court awards the sum of $100,000 as emotional distress damages for plaintiff.

IX. THE PLAINTIFF HAS NOT MET HIS BURDEN OF PROOF TO IMPOSE LIABILITY AGAINST THE INDIVIDUALS CAROLE KRECHMAN AND ELLSWORTH ROSTON.

Although plaintiff has introduced evidence of these individual defendants' involvement as board members of RPost International, the court concludes that the plaintiff has not met his burden of proof as is required to impose liability on these individuals for participating in a conspiracy to convert his common shares of stock.

X.THE PLAINTIFF HAS PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE ACTIONS OF RPOST INTERNATIONAL LIMITED, TOMKOW AND KHAN WERE DONE WITH MALICE, OPPRESSION AND FRAUD, GIVING RISE TO A CLAIM FOR PUNITIVE DAMAGES.

It is the court's conclusion that ultimately Tomkow and Khan determined that Barton was making little or no contributions to the success of RPost International. Tomkow provided the idea and technical savvy and Khan proved to be a skilled fundraiser to keep the company afloat. What was Barton's role they wondered, and if indeed he was not even providing legal counsel, why should he continue as a shareholder of RPost International? The defendants may very well have a legitimate point as to plaintiff's actual contributions to RPost but he nonetheless was at all times a holder of 6,016,500 properly issued shares of common stock. The manner by which Khan and Tomkow attempted to separate him from that ownership gives rise to a proper claim for punitive damages.

XI. CONCLUSION.

Based on the court's ruling, plaintiff is awarded the return of his 6,016,500 shares of common stock of RPost International or its equivalent, general damages in the amount of $100,000, punitive damages in an amount to be determined and his costs of suit as the prevailing party. As referenced above, plaintiff must pay the sum of $10,500.00 as additional consideration for his 6,016,500 shares. At Barton's option, this may be accomplished by writing a check to RPost, or by an offset to the monetary damages awarded herein.

Dated : 8/13/12

Hon. Stuart M. Rice
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/03/12			DEPT. B
HONORABLE Stuart M. Rice	JUDGE	P. SCHULTZ	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	YC061581	Plaintiff Counsel	
	KENNETH BARTON VS RPOST INTERNATIONAL LIMITED, ET AL.	Defendant Counsel	NO APPEARANCES
	RELATED TO YC051312 & YC065259		

NATURE OF PROCEEDINGS:

COURT ORDER

The Court is in receipt of Defendants' Objection to Tentative Decision filed July 23, 2012 and Plaintiff's Response/Objection to the Court's Tentative Decision filed July 25, 2012 pursuant to California Rules of Court, Rule 3.1590(g).

After review of same, the Court's Tentative Decision is modified as set forth in the attached document and is now the Statement of Decision in Phase One of the trial. [California Rules of Court, Rule 3.1590(b)(c)]. Counsel are directed to page 8, lines 11-23, page 9, lines 11-12 and the conclusion on page 10.

The Court is mindful that Plaintiff did request the sum of $500,000.00 for emotional distress damages in his Post-Trial Opening Brief. The Court's comment to the contrary in the Tentative Decision was a reference to the Reply Brief. There is no change to the court's award of $100,000.00.

Plaintiff's request for consolidation with Case Number YC065259 and/or further hearing regarding the manner and method of share restoration will be addressed at the August 30, 2012 Further Status Conference.

Counsel for plaintiff is to prepare a Proposed

MINUTES ENTERED
08/03/12
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/03/12			DEPT. B
HONORABLE Stuart M. Rice	JUDGE	P. SCHULTZ	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	YC061581	Plaintiff Counsel	
	KENNETH BARTON VS RPOST INTERNATIONAL LIMITED, ET AL.		NO APPEARANCES
		Defendant Counsel	
	RELATED TO YC051312 & YC065259		

NATURE OF PROCEEDINGS:

Judgment, leaving a blank for the amount of punitive damages which will be determined in Phase Two of the trial. The parties are ordered to meet and confer regarding the wording of the Proposed Judgment. [California Rules of Court, Rule 3.1590(l)].

Clerk hereby gives notice.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order.
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Torrance, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 8/3/12

John A. Clarke, Executive Officer/Clerk

MINUTES ENTERED
08/03/12
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/03/12			DEPT. B
HONORABLE Stuart M. Rice	JUDGE	P. SCHULTZ	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	YC061581	Plaintiff Counsel	NO APPEARANCES
	KENNETH BARTON VS RPOST INTERNATIONAL LIMITED, ET AL.	Defendant Counsel	
	RELATED TO YC051312 & YC065259		

NATURE OF PROCEEDINGS:

By: _____
P. Schultz

MCGARRIGLE, KENNEY & ZAMPIELLO APC
9600 TOPANGA CANYON BOULEVARD, SUITE 200
CHATSWORTH, CA 91311

BEN-ZVI & ASSOCIATES
3231 OCEAN PARK BOULEVARD, SUITE 212
SANTA MONICA, CA 90405

MINUTES ENTERED
08/03/12
COUNTY CLERK

SUPERIOR COURT OF STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

KENNETH BARTON, Plaintiff, v. RPOST INTERNATIONAL LIMITED; ET AL. Defendants.	CASE NO.: YC061581 [Related to Case No. YC065259] [Assigned to Honorable Stuart M. Rice, Department "B"] **JUDGMENT AFTER COURT TRIAL** Complaint Filed: January 29, 2010

The Court, having completed all phases of the trial of the instant action, having considered all of the relevant testimony and admitted evidence and the argument of counsel, having received and considered all briefing (before, during and after trial), and for the reasons more fully stated in the Court's Ruling on Punitive Damages and Revisions to Statement of Decision dated June 18, 2013 and the Court's August 3, 2012 Statement of Decision, each incorporated herein, hereby rules and adjudges upon the

causes of action in Plaintiff's Third Amended Complaint[1] and enters judgment as follows:

1. Judgment is hereby entered IN FAVOR OF Plaintiff Kenneth Barton ("**Barton**") and AGAINST Defendants RPost International Limited, Zafar Khan and Terrance Tomkow, and each of them.

2. Plaintiff Barton is awarded and shall recover from Defendants RPost International Limited, Zafar Khan and Terrance Tomkow, jointly and severally, **(a)** compensatory damages (and restitution pursuant to Business and Professions Code Section 17200) in the net sum of $2,840,060.00 (share value award of $3,850,560.00 less an offset of $1,000,000.00 pursuant to the Court's approval of Defendants' RPost International Limited, Zafar Khan and Terrance Tomkow Motion under C.C.P. Section 877(a), and less a $10,500.00 credit), plus **(b)** $100,000.00 in emotional distress damages, and **(c)** pre-judgment interest on the damages in Paragraph 2(a), calculated in accordance with *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 290, from June 30, 2009 through the date of entry of Judgment in the sum of $880,021.91, for a total net damage and pre-judgment interest award against each of said Defendants RPost International Limited, Zafar Khan and Terrance Tomkow, jointly and severally, through the date of entry of judgment in the sum of **$3,820,081.91.**

3. In addition, and having proven by clear and convincing evidence that the actions of Defendant Zafar Khan were undertaken with malice, fraud and oppression, Plaintiff Barton is also awarded and shall recover from Defendant Zafar Khan punitive damages in the sum of $250,000.00.

4. In addition, and having proven by clear and convincing evidence that the actions of Defendant Terrance Tomkow were undertaken with malice, fraud and

[1] The Fourth and Sixth Causes of Action were omitted from Plaintiff's Third Amended Complaint in accordance with prior rulings on motions addressed to prior pleadings.

oppression, Plaintiff Barton is also awarded and shall recover from Defendant Terrance Tomkow punitive damages in the sum of $150,000.00.

5. Plaintiff Barton shall recover nothing from Defendants Carole Krechman and Ellsworth Roston; Though Defendants Krechman and Roston are prevailing parties, the Court determines that they shall not be and are not awarded costs (other than for their first appearance filing fees and motion filing fees) for the reasons stated by the Court at the August 30, 2013 hearing in this matter.

6. The Court determines and orders that Plaintiff Barton is the prevailing party in the litigation. Plaintiff Barton is, therefore, also awarded and shall recover from Defendants RPost International Limited, Zafar Khan and Terrance Tomkow, jointly and severally, his costs, per memorandum of costs and any post-judgment order(s) of this Court. Nothing herein shall preclude Plaintiff Barton from moving the Court for an award of attorneys' fees under law.

7. Both parties have assisted in the drafting of this judgment and approve same as to form and content, without the waiver of any of their rights.

Dated: August 30, 2013

Hon. Stuart M. Rice
Judge of the Superior Court

Filed 12/9/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH BARTON,

Plaintiff and Respondent,

v.

RPOST INTERNATIONAL LIMITED et al.,

Defendants and Appellants.

B251722

(Los Angeles County Super. Ct. No. YC061581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed as modified.

Ben-Zvi & Associates and Henry Ben-Zvi for Defendants and Appellants.

McGarrigle, Kenney & Zampiello, Patrick C. McGarrigle, Michael J. Kenney, for Plaintiff and Respondent.

Defendants and appellants RPost International Limited (RIL), Zafar Khan and Terrance Tomkow appeal from a judgment following a bench trial in favor of plaintiff and respondent Kenneth Barton in this action for conversion of stock. On appeal, defendants contend: (1) the statute of limitations began to run when Barton brought lawsuits for delivery of stock certificates or suspected the claims; (2) Barton improperly split his claims into multiple lawsuits; (3) the trial court should have applied Bermuda law and found defendants had no fiduciary duty to shareholders; (4) Barton's unfair competition claim should have been denied, because he was not a consumer or competitor of RIL; (5) there is no substantial evidence to support conversion, because Barton did not pay for his shares; (6) there is no evidence to support the finding of fraud; (7) the amount of compensatory damages is too speculative; (8) damages could not be awarded as restitution under Business and Professions Code section 17200; (9) there is no evidence of emotional distress to support noneconomic damages; (10) the amounts awarded for punitive damages were excessive; and (11) prejudgment interest should not have been awarded.

We conclude the trial court's finding of liability based on conversion is supported by substantial evidence. Barton provided consideration for his shares and discovered the conversion of his shares on July 7, 2009. Barton did not split his claims, because he did not have a viable claim for conversion when he filed lawsuits in 2005 and 2006. Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition. The trial court's award of compensatory damages is supported by substantial evidence and not unreasonable. The punitive damage awards are also supported by substantial evidence of reprehensible conduct and defendants' net worth. No abuse of discretion has been shown with respect to the award of prejudgment interest. However, we agree there is no substantial evidence of emotional distress to support noneconomic damages.

Barton appeals from the portion of the judgment in favor of respondents Carole Krechman and Ellsworth Roston. He contends the undisputed evidence shows Krechman

and Roston are equally liable for conversion of his shares of stock. We conclude there is no evidence Roston or Krechman are liable for conversion. We modify the judgment by deducting emotional distress damages, and as modified, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Corporate History and Prior Litigation

In 1999, Tomkow, Barton and Khan founded the Nevada corporation RPost, Inc. to develop and market technology that Tomkow developed for e-mail similar to certified mail. Barton's role was marketing, business development, and raising capital. In September 2000, the founders converted their loans to RPost into equity in the company. Barton was issued 289,500 shares of RPost stock in exchange for forgiveness of $33,258 in loans he had made to the company. The number of authorized shares was increased and the founders were issued additional shares to retain the same ownership percentages. They were also issued additional shares for services rendered and cancellation of loans to RPost, Inc. That same month, RPost was reorganized as Bermuda corporation RPost International Limited (RIL). RIL's directors adopted written resolutions allocating shares in the new corporation. The founders exchanged their common shares of RPost for common shares of RIL.

On January 2, 2001, RIL's directors cancelled the allotment of shares made in September 2000. The directors clarified the founders' allotment of shares of RIL in exchange for their shares of RPost as follows: 4,822,000 to Tomkow, 3,616,500 to Khan, and 3,616,500 to Barton. On May 30, 2001, RIL's directors adopted a resolution issuing an additional 500,000 shares of common stock to each of the founders at a price of $0.01 per share. $5,000 was deducted from the expenses and deferred compensation owed to Barton. On August 21, 2001, RIL's directors adopted a resolution allotting additional shares as follows, in exchange for valuable services rendered and cancellation of loans to the company: 2,500,000 shares to Tomkow in exchange for cancellation of a loan for

$25,000, 1,900,000 shares to Khan for cancellation of a loan for $16,089, and 1,900,000 to Barton for cancellation of a loan of $8,089. Barton believes his allocation was later corrected to reflect a value of $0.001 per share and payment of $1,900. Barton, Khan and Tomkow each earned salaries of $8,000 per month, plus expenses of $2,000 per month. They received as much of their salaries as the company could afford to pay and deferred the rest. The cost of Barton's shares was charged against Barton's accrued salary and unpaid expenses.

Barton suffered a stroke in September 2003. In May or June 2004, Symantec Corporation invested $1.1 million for preferred shares of RIL. On September 20, 2004, Barton's attorney wrote Khan and Tomkow. He raised several concerns and confirmed Barton's resignation from the RPost entities effective immediately. He requested delivery of Barton's share certificates and equity documentation within three days. He wrote additional letters with similar requests.

In June 2005, Khan, Tomkow and RIL responded to Barton's lawyer that RIL had not issued any common stock certificates to founders and no provision of the by-laws required the company to deliver share certificates for founders' shares. Roston became a RIL director in 2005.

On July 7, 2005, Barton filed an action against RIL, Kahn, Tomkow, and another individual, for breach of fiduciary duty and violation of the Labor Code. (*Barton v. RPost International Limited et al.* (Super. Ct. L.A. County, 2005, No. YC051312).) Barton alleged defendants had refused to deliver his stock certificates, failed to provide accurate corporate financial reports, failed to set aside reserves for legal defense, failed to pay deferred salary, and failed to reimburse him for reasonable expenses.

On July 21, 2005, RPost and RIL filed an action against Barton for specific performance, breach of contract, and declaratory relief. (*RPost, Inc., et al. v. Barton* (Super. Ct. L.A. County, 2005, No. YC051416).) The complaint explained the allocation of Barton's shares and alleged Barton held 6,016,500 shares of common stock which could not be transferred without notice to the company or without offering the company the opportunity to purchase the shares. At some point, the actions were consolidated.

RIL filed an answer to Barton's complaint. The individual defendants filed a demurrer. When Barton tried to file an amended complaint to address deficiencies raised in the demurrer, the court clerk refused to accept it, because RIL had filed an answer. The trial court sustained the demurrer without leave to amend and the action against the individual defendants was dismissed. Barton appealed.

At a meeting in January 2006, the RIL directors resolved to issue a call "to those shareholders that had not paid for their shares in accordance with Bye-law 10, that this call shall be for immediate payment and that notice of this call shall be delivered by Registered E-mail on January 31, 2005, and that all unpaid shares as of February 15, 2006 be liable to be forfeit in accordance with Bye-law 11." On January 31, 2006, RIL sent a lengthy e-mail to shareholders which included a notice that RIL was making a final call on all unpaid shares, payable by wire by February 15, 2006, or unpaid shares would be liable to be forfeited. Khan wrote three checks totaling $10,500 as additional consideration for his shares of common stock. Barton received the e-mail, but did not believe it applied to him, because he had paid for his shares.

Khan, Tomkow, and Roston attended a meeting of RIL directors on April 24, 2006. Khan recommended RIL revise the allocation of shares in the minutes from 2000 and 2001, but retain the original signatures, including Barton's signature. The RIL directors resolved to "correct" the mathematics of the share recapitalization adopted September 13, 2000, and strike clarifying resolutions from the minutes prepared January 2, 2001. This action deleted the third page of the January 2, 2001 minutes explaining the allocation of shares to the founders, but retained the signature page.

The directors also struck resolutions reflected in the minutes of February 1, 2001, and August 21, 2001, "that contain defects including errors and missing signatures." They added payment terms to the May 30, 2001 resolution. "It was RESOLVED that the Board of Directors accept the forfeiture and surrender of unpaid shares liable to be forfeited. [¶] It was FURTHER RESOLVED that management would provide a proposal on how to dispose of the shares for review by the Board of Directors."

On June 8, 2006, Barton filed a new complaint against RIL seeking specific performance and damages for failure to issue stock certificates. (*Barton v. RPost International Limited* (Super. Ct. L.A. County, 2006, No. YC053346.) The complaint alleged Barton is the registered owner of more than 6,000,000 shares. He had been requesting RIL issue and deliver stock certificates representing his shares since September 2004, which RIL refused to do. He sought specific performance ordering RIL to deliver stock certificates accurately reflecting the number of RIL shares he owned. He also sought damages of $5 million for failure to deliver his stock certificates upon written demand.

On August 22, 2006, RIL dismissed its complaint against Barton without prejudice. A directors' meeting was held on October 23, 2006, attended by Khan, Tomkow, Roston and others. The minutes reflect RIL's management hired Bermuda counsel to respond to Barton's request for share certificates. The Bermuda firm provided an opinion on October 2, 2006, that Barton had no title to the shares at issue, because extrinsic evidence showed his allotment was conditioned on having a degree to practice law. The directors accepted the legal opinion.

On November 22, 2006, RIL filed an answer to Barton's second lawsuit alleging 25 affirmative defenses. The thirteenth affirmative defense alleged Barton was not and never had been a shareholder of RIL and therefore lacked standing to assert the causes of action. On January 30, 2007, RIL's attorney Robin Crowther sent a letter to Barton's counsel stating, "RPost International's position in this lawsuit that Barton owns no shares and is not entitled to assert any of the rights of RPost International shareholders."

On February 5, 2007, Barton sent an e-mail to Roston and another RIL director, attaching Crowther's letter. He stated, "they now take the position that I am not a shareholder of RPost and, further, that the board of directors has accepted that position. [¶] Please confirm whether a board meeting was called to 'decide' such an issue and what each of your votes and positions were/are in connection with this issue."

On February 7, 2007, Barton's attorney sent a letter to Crowther, quoting Crowther's statement and noting the affirmative defense in RIL's answer that Barton

owns no shares. He requested supporting documents and accused RIL of attempting to steal Barton's shares.

In December 2007, this appellate court held the trial court should have accepted filing of Barton's amended complaint in his first action or granted him leave to amend. (*Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1219-1221.) We reversed the judgment of dismissal as to the individual defendants and remanded the case with instructions to grant Barton leave to file an amended complaint. Barton filed an amended complaint too late, however, and the trial court struck the amended complaint.

Krechman replaced Roston on RIL's board of directors in early 2008. Barton took Khan's deposition on July 7, 2009. Khan stated that RIL cancelled Barton's shares and returned them to RIL's treasury. He could not remember the date the event occurred. Barton was very angry and livid when he learned his shares had been cancelled. Documents at trial showed RIL gave a report to auditor Kabani & Company showing 6,024,508 shares were forfeited after June 30, 2008, and before June 30, 2009. Defendants claimed to have destroyed RIL's shareholder registries. It was stressful for Barton to learn RIL directors forged minutes omitting his allotment of shares.

Barton's actions were consolidated. The cause was set for trial on January 25, 2010, but apparently continued and commenced in April 2010. On May 4, 2010, the trial court granted a motion for directed verdict under Code of Civil Procedure section 631.8 as to the cause of action for delivery of stock certificates. The court found none of the contingent events had occurred which would require RIL to deliver stock certificates to the founders. RIL's failure to deliver share documents to Barton was not wrongful. The court found Barton's testimony credible and denied the motion as to the cause of action for unpaid wages. The parties settled the consolidated action in 2012.

The Instant Action

Barton filed the complaint in the instant case on January 29, 2010, prior to trial in his earlier lawsuits. He filed the operative third amended complaint on February 16,

2011, against several defendants, including Symantec Corporation, RIL, RPost, Khan, Tomkow, Krechman and Roston. The complaint alleged causes of action for conversion, breach of fiduciary duty, a derivative claim for breach of fiduciary duty, declaratory relief, fraud, and violation of Business and Professions Code section 17200.

Symantec settled Barton's derivative claim in the instant action. The trial court found the settlement was made in good faith. RIL sold its assets to RPost Communications Limited (RComm) in March 2011. Trial commenced in the instant action on March 1, 2012. The case was tried to the court over several days between March 1, 2012, and April 12, 2012. The parties presented documents supporting the facts above, as well as testimony from Barton, Khan, Tomkow, former RIL director Richard Pryor, individuals who had meetings with Barton early in the company's history, and financial experts. RComm employs approximately 21 people. Defendants' financial expert Kevin Henry concluded the value of Barton's common shares at the time of conversion was zero. Barton's financial expert Jaime d'Almeida concluded the value was $2.43 per share and the total value of Barton's shares at the time of conversion was $98,004,076.

The court issued a statement of decision on August 3, 2012, finding as follows. Barton's stock was converted on June 30, 2009, or July 7, 2009, when the shares were transferred back to the RIL treasury. The date of conversion is well within the three-year statute of limitations. Even if the statute of limitations began to run when Barton saw attorney Crowther's letter on February 7, 2007, the lawsuit was timely. Barton did not split his cause of action, because the earlier lawsuit involved a different issue concerning delivery of the stock certificates. Although Barton did not write a check in consideration for issuance of stock, none of the founders paid for their initial stock. Consideration for the shares was given in the form of unreimbursed expenses and compensation. After Barton no longer worked at the company, Khan and Tomkow wrote checks to RIL to document the price paid in cash for their shares and straighten out RIL's financial record-keeping.

Defendants retroactively created and modified corporate resolutions to revise the company's history to support the result they sought. Particularly egregious was the resolution prepared as if executed on January 2, 2001, including Barton's signature. In fact, Barton had executed a corporate resolution confirming issuance of 3,616,500 shares of RIL to Barton and Khan. The court did not believe the shareholder registry, which was the best evidence of the issuance of RIL stock, had been misplaced or destroyed. The failure to produce the shareholder registry cast further doubt on testimony that Barton's shares were properly canceled and returned to the treasury in 2006.

The court issued a declaration that Barton was at all relevant times an owner of 6,016,500 common shares of RIL and provided appropriate consideration for the shares of stock in the form of unreimbursed expenses and salary owed. The court ordered Barton to submit a check to RIL's treasury in an amount equivalent to Khan's payment for the same number of shares to balance RIL's financial records. RIL was prohibited from taking any action to encumber, forfeit or cancel Barton's shares without prior written approval from the court, Barton or his counsel. In addition, Barton's shares were not subject to amended bylaws, agreements, or other restrictions to which he had not personally or through counsel provided written consent. The court declined to order additional relief sought in connection with the declaratory relief and unfair competition claims, including appointment of a receiver, because it would impose a substantial and unjustified burden on defendants.

The court found Khan was not credible. He was aware of the status of Barton's legal education at all times. Defendants' financial expert had disputed the "back solve" valuation method, but provided no alternative. The court concluded the value of Barton's shares was not zero, because defendants had committed 13 years to the company's success and Khan successfully raised substantial funds to further the company's long-term goals. The court was not persuaded, however, that d'Almeida's valuation method was appropriate. "Although the court recognizes that the experts were retained for a particular purpose, their widely divergent opinions support the conclusion that ownership of shares in RPost remains a very speculative proposition, the value of which is almost

impossible to determine." The court noted there is no liquidation event upcoming. The court expressed concern that if a monetary value was assigned to the shares, future events could result in an inequity for either side. Therefore, since the shares of stock exist, the court ordered the return of the converted property. RIL was ordered to restore 6,016,500 shares of RIL common stock to Barton. If defendants had made further transfers of their stock to other entities since Barton's resignation, the same process must take place for Barton's shares so they retain the same benefit and potential value.

The court noted that Khan had written checks to RIL for a total of $10,500 as additional consideration for his shares of common stock. Barton was ordered to pay RIL's treasury $10,500 or accept an offset to his monetary damages award to confirm his ownership of 6,016,500 shares. The court was satisfied that Barton and Khan provided consideration for the issuance of 6,016,500 shares of common stock through unreimbursed expenses and salary. To ensure RIL's books and records would withstand scrutiny, since evidence showed Khan and Tomkow wrote personal checks as further consideration for their common shares, Barton was ordered to write a personal check as additional consideration in exchange for clear title to his shares.

Barton was entitled to reasonable compensation for time and money spent to recover the converted property, as well as damages for emotional distress suffered as a result of RIL's conduct. The court found Barton was involved in the company from the beginning and expected to maintain his ownership. After returning to the company following his convalescence from a stroke, the situation deteriorated, ending in the other founding shareholders conspiring to deprive him of his common shares of stock. The court awarded $100,000 in damages for emotional distress.

The court found Barton had not met his burden of proof to impose liability on Krechman and Roston for participating in a conspiracy to convert his common shares of stock.

After the trial court issued its statement of decision, further trial proceedings were held on the issue of punitive damages. Evidence of defendants' finances was presented. In March 2011, RIL had $1.26 million in its bank account. As of June 30, 2012, RIL had

assets of $328,000 and liabilities of $100,000. $850,000 had been transferred from RIL to other RPost entities to enable the other entities to take advantage of business opportunities. In the initial offering of preferred shares of RComm in 2011, the price was $5 per share. Later that year, the price was raised to $5.25 per share for preferred shares. In 2012, the price was raised to $5.75 per share. At RComm's October 2012 shareholder meeting, Khan advised shareholders $5 million had been raised. RComm intended to raise $18.2 million over two years to expand its business. RComm's revenues are not sufficient to meet its expenses, so it needs to raise funds from investors to continue to fund operations. RPost entities were pursuing several patent infringement actions against defendants including Amazon and Paypal.

Khan's net worth includes a home appraised for approximately $800,000, with net equity of $232,000. His personal bank account balance has a minimum of $68,000. He earns $132,000 per year, but his expenses are approximately the same amount. A promissory note exists from RIL to Khan in the amount of $225,893. He owns 6,000,000 common shares of RIL, 750,000 common shares of RComm, 250 common shares of RMail Limited, and 188,042 preferred shares of RComm. Khan obtained several shares through the cancellation of loans made to RIL. If Khan's preferred shares were valued at $5.75, the total value would be $1,081,241.50.

Tomkow owns a home valued at $800,000, with net equity of approximately $355,000. He also earns a salary of $132,000 per year. His expenses are slightly less than his net salary. He has a retirement account. As of January 1, 2011, RIL owed $208,884 on a promissory note to Tomkow. Tomkow owns 76,000 in preferred shares of RComm, as well as common shares of RIL, RMail Limited, and RComm. At $5.75 per share, the value of his preferred shares of RComm is $442,307.25.

Barton suggested an award of $2.8 million in punitive damages against Khan would be appropriate. He suggested an award of $2.2 million in punitive damages against Tomkow.

The court reconsidered the appropriate remedy in the case and appointed expert C. Paul Wazzan to determine the value of Barton's shares of RIL at the time of conversion.

Wazzan used the same Black-Scholes method that d'Almeida had used, but relied on more conservative assumptions. Using this method, Wazzan determined the enterprise value was between $33.8 million and $37.3 million. His assumptions of a one year time to liquidity and 50 percent discount for lack of marketability yielded an enterprise value of $33.8 million. Wazzan used an enterprise value of $33.8 million to determine Barton's common stock was worth $0.64 per share.

On June 18, 2013, the court issued a ruling on punitive damages and revised the statement of decision. The court noted that the evidence presented in the second phase of trial showed the assets and character of RIL had changed dramatically. Restoring Barton's shares would not provide the remedy the court had intended. The court needed a meaningful compensatory damages calculation to determine an appropriate punitive damages award.

The court adopted Wazzan's testimony that the shares of common stock had a value of $0.64 per share as of June 30, 2009. Barton's 6,016,500 shares had a monetary value of $3,850,560. The court modified the original statement of decision and determined Barton was entitled to a monetary judgment for the value of his converted shares against Tomkow, Khan and RIL in the amount of $3,850,560, less $10,500, for a net award of $3,840,060. The court was satisfied Wazzan properly chose and applied the "back solve" method in his analysis and made reasonable assumptions to determine the value of RIL common shares. The court modified the statement of decision to reflect RIL no longer needed to restore shares to Barton.

The court found Khan's course of conduct rose to a significant level of reprehensibility. Although his purported net worth is modest, he draws a six figure salary and attributes no value to his RIL holdings. The court awarded Barton punitive damages in the amount of $250,000 as against Khan. Tomkow's net worth is comparable to Khan, but his conduct was less egregious. Although complicit in the conversion of Barton's shares, he was focused on developing the business and deferred to Khan on financial matters. The court awarded punitive damages of $150,000 to Barton as against Tomkow.

On August 30, 2013, the court reduced the award of damages by the amount of the settlement paid by Symantec and awarded prejudgment interest of $880,021.91. The court entered judgment that day awarding the net sum of $2,840,060 in compensatory damages, $100,000 in emotional distress damages, and $880,021 in prejudgment interest, for a total of $3,820,081.91 as against RIL, Khan and Tomkow. In addition, Barton was awarded $250,000 in punitive damages against Khan and $150,000 against Tomkow. Barton recovered nothing from Krechman and Roston, but the court declined to award them their costs. RIL, Khan and Tomkow filed a timely notice of appeal. Barton also appealed.

DISCUSSION

Standard of Review

We review an appeal from a judgment following trial under the substantial evidence standard of review. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.) "'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Ibid.*) As long as there is substantial evidence, the appellate court must affirm, even if the reviewing justices personally would have ruled differently if they had presided over the proceedings below and even if other substantial evidence supports a different result. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Act of Conversion Triggering Statute of Limitations

Defendants contend their refusal to deliver stock certificates and denial of Barton's shareholder status in pleadings constituted conversion of Barton's shares, at which point the statute of limitations began to run. This is incorrect. Substantial evidence supports the trial court's finding that the shares were not converted until they were cancelled in 2009.

A cause of action for conversion requires "'"the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]" [Citation.]'" (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507.) "It is the uniform rule of law that shares of stock in a company are subject to an action in conversion. [Citations.]" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 122.)

"The essence of the tort of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner. The Restatement of the Law of Torts (Second) defines conversion as 'an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" (11 Fletcher Cyclopedia of the Law of Corporations (2014) §5114, p. 133, footnotes omitted.)

"To maintain an action of conversion, the plaintiff must have had title to, or a right in, the shares at the time of the conversion. There can be no conversion where the plaintiff did not in fact lose any of its control over, or rights in, its shares." (*Id.* at pp. 135-136.) "The plaintiff must show that the defendant wrongfully converted the shares and that the defendant's acts or conduct were such as to deprive the owner of the shares, either permanently and absolutely, or partially or temporarily." (*Id.* at pp. 136-137.)

"In general, the conversion dates from the time when the shareholder, being entitled to the immediate possession of the shares or of the certificate, makes a demand for it that is refused." (*Id.* at p. 138.) "An election to recover the shares themselves may bar the right to sue for their value as for a conversion, but merely seeking return of the shares as alternative relief does not." (*Id.* at pp. 140-141.)

"If a corporation wrongfully refuses to issue a proper share certificate when it has the power and is under an obligation to issue it, the corporation may be compelled to do so by a suit in equity for specific performance of its express or implied contract, at least where there is no adequate remedy at law, such as an action at law to recover for the breach. A shareholder seeking such relief must have performed the obligations that entitle the shareholder to the certificate or make tender of readiness to make such performance as the decree may require." (11 Fletcher Cyclopedia of the Law of Corporations, *supra*, §5165, pp. 265-266, footnotes omitted.)

"The shareholder may, instead of suing to compel the issuance and delivery of a certificate, have an action against the corporation for the damages sustained by reason of the failure or refusal to issue a certificate. Thus, . . . if the shareholder has title to the shares, the failure or refusal to deliver a certificate may be treated as a conversion of the shares, and the shareholder may maintain an action to recover damages." (*Id.* at pp. 268-269.)

In this case, the trial court found defendants converted Barton's shares when they cancelled and returned them to the treasury on June 30, 2009, or July 7, 2009. Cancelling the shares clearly interfered with Barton's ownership rights and constituted conversion. The documents RIL provided its auditors showed this action was taken between June 30, 2008, and June 30, 2009. Barton learned of RIL's action on July 7, 2009, through Khan's deposition testimony. There is substantial evidence to support the trial court's finding that RPost converted Barton's shares by cancelling them as of June 30, 2009, and that Barton first learned of the conversion on July 7, 2009. Barton filed his action well within the statute of limitations for conversion.

Defendant's contention that Barton's shares were converted when RIL refused to deliver share certificates is incorrect. Barton had to have the right to immediate possession of his share certificates in order to maintain a cause of action for conversion based on the failure to deliver certificates. The trial court in the prior case ruled that RIL was not required to issue certificates for Barton's shares. Barton did not have the right to possession of his share certificates. RIL's refusal to deliver share certificates was not wrongful, and therefore, it did not constitute conversion. If Barton had sued defendants for conversion based on their refusal to deliver share certificates, he would have lost.

Defendants contend their assertions that Barton was never a shareholder should have caused Barton to suspect he had a claim for conversion and started the statute of limitations. A simple claim of dominion or intention to interfere under a pretense of right, without more, does not constitute conversion. (*Kee v. Becker* (1942) 54 Cal.App.2d 466, 472.) Defendants statements did not affect Barton's dominion over his shares. The shareholder registry and RIL's accounting documents continued to reflect that Barton owned the shares allocated to him. Defendants' statements in legal proceedings were simply reflected numerous defenses that they asserted. If Barton had sued defendants for conversion based on their statements that he was never a shareholder, he would have lost. There is no evidence that defendants exercised dominion over Barton's stock until they cancelled the shares in 2009 and returned them to RIL's treasury. Barton was suspicious and accused RIL of attempting to steal his shares long before the act of conversion took place. He did not have a viable cause of action until RIL interfered with his dominion over the shares by cancelling them and transferring them back to the treasury.

Substantial evidence supports the trial court's finding that Barton's shares were converted when RPost cancelled and transferred them, which Barton learned about on July 7, 2009. RPost's contentions concerning the statute of limitations for breach of fiduciary duty, fraud, declaratory relief, and unfair competition are based on the same arguments and fail for the same reasons.

Claim Splitting

Defendants contend Barton improperly split his claims into successive lawsuits based on the same cause of action. We disagree.

"Under [the doctrine of res judicata], all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. '"Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.)

"'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant . . . . Even where there are multiple legal theories upon which recovery might be predicated, *one injury* gives rise to only one claim for relief.' [Citation.]" (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860.)

When Barton filed his complaints in 2005 and 2006 seeking the delivery of share certificates, no conversion had taken place. The trial court in the earlier action ruled RIL was not required to issue share certificates and the parties settled the matter without any finding of liability. The failure to deliver share certificates was not wrongful. A cause of action for conversion based on the failure to issue share certificates would not have been successful. It was not until RIL cancelled Barton's shares and transferred them back to RIL's treasury that the conversion occurred. The evidence showed Barton discovered RIL's conversion of his shares in 2009. Barton did not have a claim for conversion when he filed his earlier actions and did not split his claim.

Conversion

Defendants contend the trial court's finding of conversion is not supported by substantial evidence, because Barton did not pay for his shares. Defendants fail to demonstrate error.

The evidence showed Barton provided consideration for his allotments through unpaid expenses and salary owed to him. The resolutions state the allotments are made in exchange for shares of the previous company, cancellation of loans, and services rendered. Shares were allotted based on consideration received from Barton. The fact that the other founders paid additional sums several years later in an abundance of caution did not mean Barton did not provide consideration for his shares.

Since we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider defendants' additional contentions that liability was not supported by substantial evidence of breach of fiduciary duty, fraud, or unfair competition under Business and Professions Code section 17200.

Compensatory Damages

Defendants contend the amount of compensatory damages is too speculative. We disagree.

"'"'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where . . . it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits [citation] or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." ([Citation.])' [Citations.]" (*Asahi Kasei Pharma Corporation v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972-973.)

"'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' [Citation.] There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure . . . .' [Citation.]" (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 (*San Diego Metropolitan Transit Development*).)

In *San Diego Metropolitan Transit Development, supra*, 53 Cal.App.4th 918, "the jury had to determine damages based on two diametrically opposed expert opinions that varied not only in amounts but also in methodologies and factors considered. (*Id.* at pp. 924-925.) The damages the jury awarded fell between the contrasting figures presented by the experts. (*Id.* at p. 931.) In such circumstances, it is well established that '"[t]he trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence."' (*Id.* at p. 931.)" (*Maughan v. Correia* (2012) 210 Cal.App.4th 507, 522-523.)

In this case, defendants' expert Henry concluded the value of Barton's common shares at the time of conversion was zero, while Barton's expert d'Almeida concluded the value was $2.43 per share for a total value of $98,004,076. Court-appointed expert Wazzan, like d'Almeida, determined the value of Barton's shares using a variation of the Black-Scholes option pricing model which the parties referred to as the "back solve" formula. Black-Scholes is a standard economic formula used in financial derivatives to price options. In order to use the back solve formula to determine the value of Barton's shares, Wazzan explained that the variable for the anticipated positive liquidity event must be carefully controlled to account for the nature of the company as a "start-up" and avoid overvaluing the enterprise. Wazzan made it clear that a later liquidity date led to an unreasonably inflated equity value. Wazzan's use of the "back solve" formula to estimate the value of Barton's common stock was reasonable and not speculative. Under this approach, he determined the enterprise value was between $33.8 million and $37.3 million. Assuming an enterprise value of $33.8 million, Barton's common stock was worth $0.64 per share. The trial court's finding that Barton's common stock had value of $0.64 per share as of June 30, 2009, was supported by substantial evidence and not too speculative.

RPost also contends Barton's shares should have valued based on a conversion date in late 2004, early 2005, or no later than October 2006. We disagree. As discussed above, substantial evidence supported the trial court's finding that the act of conversion

took place in 2009. The court's calculation of the value of the converted property as of that date was correct.

Because we conclude the award of compensatory damages was fully supported by the evidence of conversion, we need not address defendants' contention that these damages could not be awarded as restitution under Business and Professions Code section 17200.

Emotional Distress Damages

Defendants contends there is no substantial evidence Barton suffered emotional harm to support an award of noneconomic damages for emotional distress. We agree.

"'Damages for emotional distress have been permitted only where there is some means for assuring the validity of the claim. [Citation.] The case law reveals a diversity of circumstances in which recovery for emotional distress may be had. They are loosely linked in the sense that in each it could be said that a particular form of mental suffering naturally ensued from the acts constituting the invasion of another kind of protected interest. "The commonest example . . . is probably where the plaintiff suffers personal injuries in addition to mental distress as a result of negligent or intentional misconduct by the defendant." [Citation.] Pain and suffering is the natural concomitant of a personal injury. [Citation.] "[I]n the case of many torts, such as assault, battery, false imprisonment, and defamation, mental suffering will frequently constitute the principal element of damages." [Citations.] *Molien* [*v. Kaiser Foundation Hospitals* (1980)] 27 Cal.3d 916, found sufficient assurance of the validity of a claim of emotional distress in the nature of the cause of action for negligent misdiagnosis, predicated as it was upon a false imputation of syphilis, which by statute constitutes slander per se, an intentional tort. [Citation.] In torts involving extreme and outrageous intentional invasions of mental and emotional tranquillity, the outrageous conduct affords the necessary assurance of the validity of the claim. [Citation.] Recovery also has been sanctioned for emotional distress which could be said naturally to ensue from an act which invaded an interest

protected by an established tort. (See, *Sloane v. Southern Cal. Ry. Co.* [(1896)] 111 Cal. 668 [humiliation from wrongful ejection from train]; *State Rubbish etc. Assoc. v. Siliznoff* [(1952)] 38 Cal.2d 330 [intentional infliction of emotional distress]; *Crisci v. Security Ins. Co.* [(1967)] 66 Cal.2d 425 [physical injuries and psychosis resulting from fall through opening]; see also *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337 [mental suffering occasioned by fear for safety of family caused by trespass]; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271 [discomfort and annoyance caused by nuisance]; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225 [annoyance ensuing from trespass].)' [Citation.]" (*Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 472.)

"[T]he limits imposed with respect to recovery for emotional distress caused by a defendant's negligence do not apply when distress is the result of a defendant's commission of the distinct torts of trespass, nuisance or conversion. Indeed, with respect to trespass, the law is clear that '. . . damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass.' (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905.) Thus the plaintiffs in *Armitage v. Decker* were allowed to recover for distress they suffered 'as a result of having their property line buried under large amounts of dirt, making it appear that one side of their property abuts a quarry, after having spent a long time looking for the best piece of property they could afford. The evidence also supported a conclusion that the [plaintiffs] suffered distress due to the spillage of dirt onto their property and the threat of interference with drainage on their property, as well as concern over appellant's operation of the bulldozer on the berm.' (*Id.* at pp. 905-906.)" (*Gonzales v. Personal Storage, Inc.*, *supra*, 56 Cal.App.4th at pp. 474-475.)

"[I]n the context of a conversion claim there is far less likelihood that allowing recovery for emotional distress damages will create liability which is out of proportion to the nature of the defendant's act. It follows that when a defendant is guilty of conversion, there is considerably less justification for imposing the limits on emotional distress

damages which exist in negligence cases[.]" (*Gonzales v. Personal Storage, Inc., supra*, 56 Cal.App.4th at p. 477.)

In this case, however, there is insufficient evidence Barton suffered emotional distress to support an award of damages. Barton testified that when he heard Khan's testimony at his deposition that the shares had been cancelled, he was very angry and livid. A year later, when he learned in court that his name had been forged on documents in order to unwind the transactions, it was very stressful. Standing alone, this evidence is insufficient to support an award of emotional distress damages. In most cases where there is only a financial loss, no emotional distress damages are recoverable. In respondent's brief on appeal, Barton claims additional evidence of emotional distress was presented to the court, but Barton fails to provide any citation to the record for additional evidence. Our own review of the record has not uncovered any additional evidence of emotional distress. The award of noneconomic damages was not supported by the slim testimony that Barton was livid about the cancellation of his shares and stressed by discovery during trial that minutes had been forged.

Punitive Damages

Defendants contend the awards of punitive damages were excessive, because reprehensibility was minimal and the amount was disproportionate to their net worth.

"An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]" (*Kelley v. Haag* (2006) 145 Cal.App.4th 910, 914.)

There is substantial evidence of the reprehensible nature of defendants' conduct. Barton had a serious health incident which forced him to work less. His co-founders showed indifference to his health when they engaged in their scheme to force him out of the company and deny his stock ownership. They took repeated actions to achieve their

goal, from fabricating minutes with his signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating. Barton, having suffered a stroke, was financially vulnerable and testified that he worried about paying his rent. Barton's harm resulted from Kahn and Tomkow's malice and deceit, not mere accident.

There was also substantial evidence of Kahn and Tomkow's net worth to support the amount of the award. Defendants have not presented all of the evidence of their net worth in their statement of facts on appeal. The award of $250,000 in punitive damages against Khan is supported by evidence that his preferred shares of RComm have a value of $5.75 per share, with a total value of $1,081,241.50. The price of the preferred shares was their value as of the time of trial. The award of $150,000 in punitive damages against Tomkow is similarly supported by the value of the preferred shares he owns in RComm, which was shown to be $442,307.25. In addition, both defendants have net equity in their homes and bank accounts.

Prejudgment Interest

RPost contends Barton was not entitled to prejudgment interest, because Barton's shares were not marketable and he did not suffer any loss. This is correct.

Civil Code section 3336 provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second--A fair compensation for the time and money properly expended in pursuit of the property."

In a successful action for conversion, the plaintiff can recover the market value of the converted property, plus interest from the date of conversion. (*Crofoot Lumber, Inc. v. Ford* (1961) 191 Cal.App.2d 238, 249.)

In addition, Civil Code section 3288 provides the trial court discretion to award interest: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

We have already concluded the value of the converted property was not overly speculative. The award of prejudgment interest based on the value of the property properly compensated Barton for the loss of his shares. Defendants have failed to show any abuse of discretion by the trial court in awarding prejudgment interest under the applicable statutes.

Barton's Appeal

In his appeal, Barton contends the undisputed evidence shows Roston and Krechman were equally liable for conversion. He has not set forth facts, however, demonstrating their liability. Barton's brief argues generalities, rather than providing citations to the record and authority to demonstrate that the trial court's rulings were wrong. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198.) "We are not required to search the record to ascertain whether it contains support for [plaintiff's] contentions." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) The evidence at trial does not support finding liability as to Roston or Krechman. Roston was an RIL director until early 2008. There is no evidence Roston participated in the act of conversion in 2009. Krechman became a RIL director in 2008, but there was no evidence that she was aware of or participated in the act of conversion in 2009. The conversion was shown from a document provided to auditors reflecting Barton's shares had been cancelled and Khan's deposition testimony that the act took place. There was

no evidence that Krechman was aware of the action, let alone had any meaningful participation in that action. The trial court properly found Roston and Krechman were not liable under the evidence presented.

DISPOSITION

The judgment is modified to reduce the amount of damages by deducting emotional distress damages of $100,000. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.

SUPERIOR COURT OF STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

KENNETH BARTON, Plaintiff, v. RPOST INTERNATIONAL LIMITED; ET AL. Defendants.	CASE NO.: YC061581 [Related to Case No. YC065259] [Assigned to Honorable Stuart M. Rice, Department "B"] **AMENDED JUDGMENT AFTER COURT TRIAL AND APPEAL** Complaint Filed: January 29, 2010 Trial Date: February 22, 2012

The Trial Court completed all phases of the trial of the instant action, having considered all of the relevant testimony and admitted evidence and the argument of counsel, having received and considered all briefing (before, during and after trial), and for the reasons more fully stated in the Court's August 3, 2012 Statement of Decision and the Court's Ruling on Punitive Damages and Revisions to Statement of Decision dated June 18, 2013, each incorporated herein, ruled and adjudged upon the causes of action in

Plaintiff's Third Amended Complaint[1] in favor of Plaintiff Kenneth Barton and against Defendants RPost International Limited[2], Zafar Khan and Terrance Tomkow and, thereupon entered Judgment as memorialized in its August 30, 2013 Judgment After Court Trial (the "**Original Judgment**") and in its February 5, 2014 Amended Judgment After Court Trial (collectively, the "**Judgment**").

Thereafter, the Court of Appeal of the State of California, Second Appellate District, Division Five, having considered the record on appeal as well as the arguments of counsel, and having received and considered all briefing submitted thereto, affirmed the Judgment with modifications as memorialized in its December 9, 2014 unpublished opinion. Defendants' Petition for Rehearing to the Court of Appeal was denied. The California Supreme Court, thereafter, denied the Petition for Review of Defendants and, on or about March 26, 2015, the Court of Appeal issued its remittitur.

Accordingly, and incorporating the Court of Appeal's modifications to this Court's Judgment, the Court hereby enters this "Amended Judgment After Court Trial and Appeal" as follows:

1. Judgment is hereby entered IN FAVOR OF Plaintiff Kenneth Barton (**"Barton"**) and AGAINST Defendants RPost International Limited (now known as Secure Messaging Systems (Bermuda)) (**"RIL"**), Zafar Khan and Terrance Tomkow, and each of them, jointly and severally.

2. Plaintiff Barton is awarded and shall recover from Defendants RIL, Zafar Khan and Terrance Tomkow, jointly and severally, **(a)** compensatory damages (and restitution pursuant to Business and Professions Code Section 17200) in the net sum of $2,840,060.00 (share value award of $3,850,560.00 less an offset of $1,000,000.00

---

[1] The Fourth and Sixth Causes of Action were omitted from Plaintiff's Third Amended Complaint in accordance with prior rulings on motions addressed to prior pleadings.

[2] Following the entry of Judgment, RPost International Limited changed its name to Secure Messaging Systems (Bermuda).

pursuant to the Court's approval of Defendants' RIL, Zafar Khan and Terrance Tomkow's Motion under C.C.P. Section 877(a), and less a $10,500.00 credit), plus **(b)** pre-judgment interest on the damages in Paragraph 2(a), calculated in accordance with *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 290, from June 30, 2009 through August 30, 2013 (the date of entry of the original Judgment) in the sum of $880,021.91, which damages total is **$3,720,081.91** ("**Compensatory Damages Award**"). Post-Judgment interest on the Compensatory Damages Award shall accrue from the Original Judgment date of August 30, 2013.

3. In addition, and having proven by clear and convincing evidence that the actions of Defendant Zafar Khan were undertaken with malice, fraud and oppression, Plaintiff Barton is also awarded and shall recover from Defendant Zafar Khan punitive damages in the sum of **$250,000.00** (the "**Khan Punitive Damages Award**"). Post-Judgment interest on the Khan Punitive Damages Award shall accrue from the Original Judgment date of August 30, 2013.

4. In addition, and having proven by clear and convincing evidence that the actions of Defendant Terrance Tomkow were undertaken with malice, fraud and oppression, Plaintiff Barton is also awarded and shall recover from Defendant Terrance Tomkow punitive damages in the sum of **$150,000.00** (the "**Tomkow Punitive Damages Award**"). Post-Judgment interest on the Tomkow Punitive Damages Award shall accrue from the Original Judgment date of August 30, 2013.

5. As memorialized in both the August 30, 2013 Judgment After Court Trial and in its February 5, 2014 Amended Judgment After Court Trial, Plaintiff Barton shall recover nothing from Defendants Carol Krechman and Ellsworth Roston. Pursuant to *C.C.P.* §904.1(a)(1), the judgment as to Krechman and Roston was final and no further findings are made here. Though Defendants Krechman and Roston are prevailing parties, the Court determines that they shall not be and are not awarded costs (other than for their first appearance filing fees, motion filing fees and costs for their respective depositions in

the total amount of $2,134.27) for the reasons stated by the Court at the August 30, 2013 and January 6, 2014 hearings on this matter.

6. RIL, Khan and Tomkow are awarded their costs on the Barton appeal in the amount of $138.62.

7. The Court determines and orders that Plaintiff Barton is the prevailing party in the litigation. Plaintiff Barton is, therefore, also awarded and shall recover from Defendants RIL, Zafar Khan and Terrance Tomkow, jointly and severally, his costs of $50,471.53 as memorialized in the Court's Ruling/Order On Defendants' Motion to Strike and/or Tax Costs filed February 25, 2014.

Dated: 7/21, 2015

Hon. Stuart M. Rice
Judge of the Superior Court

PROOF OF SERVICE

The undersigned declares as follows:

I, Vanessa Bravo, state that I am employed in Los Angeles County, California, in the office of a member of the bar of this court at whose direction the service described below was made. I am over the age of 18 and not a party to the within action. My business address is 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311.

I am readily familiar with McGarrigle, Kenney & Zampiello, APC's ordinary business practice of serving documents by:

XX Electronic ("e-mail") Transmission: Under that practice, on the same day a proof of service of a document is executed, the document is e-mailed to each addressee at or about the time indicated on the proof of service.

Personal Service: Under that practice, on the same day a proof of service of a document is executed, the document is placed in an addressed envelope and handed to a messenger for delivery to the addressee.

XX U.S. Mail: Under that practice, on the same day a proof of service of a document is executed, the document is deposited with the U.S. Postal Service, postage prepaid, at 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311.

In accordance with said ordinary business practice, on July 21, 2015, I served the foregoing **AMENDED JUDGMENT AFTER COURT TRIAL AND APPEAL** in the manner set forth above to each interested party listed below.

Henry Ben-Zvi, Esq.
BEN-ZVI & ASSOCIATES
3231 Ocean Park Boulevard, Suite 212
Santa Monica, California 90405

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

Executed on July 21, 2015, at Chatsworth, California.

Vanessa Bravo

Vanessa Bravo

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

IN RE: ZAFAR DAVID KHAN, Debtor, KENNETH BARTON, Plaintiff(s), vs. ZAFAR DAVID KHAN, Defendant.	Case No. 2:13-bk-19713-WB Adversary Case No: 2:13-AP-01752-WB **NOTICE OF MOTION AND MOTION OF CREDITOR KENNETH BARTON FOR SUMMARY JUDGMENT/ PARTIAL SUMMARY ADJUDICATION ON PLAINTIFF'S ADVERSARY COMPLAINT AND CAUSES OF ACTION FOR NON-DISCHARGEABILITY; MEMORANDUM OF POINTS AND AUTHORITIES** *[Separate Statement of Uncontroverted Facts and Conclusions of Law; Request for Judicial Notice and Exhibits Thereto; Declaration of Patrick C. McGarrigle; [Proposed] Judgment filed concurrently herewith]* Date: June 2, 2015 Time: 2:00 p.m. Courtroom: "1375"

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on June 2, 2015, at 2:00 p.m. in Courtroom "1375," and pursuant to *Federal Rules of Civil Procedures ("**FRCP**")*, Rules 56(a), et seq., as incorporated in to *Federal Rules of Bankruptcy Procedure ("**FRBP**")*, Rule 7056, and in accordance with Local Bankruptcy Rule (**"LBR"**) 7056-1, Creditor/Plaintiff Kenneth Barton ("**Creditor**" or "**Barton**") will and hereby does move for summary judgment/summary adjudication of Barton's operative Adversary Complaint and the three causes of action stated therein (the "**Complaint**") for determination of non-dischargeability of the claims of and debts owed to Barton by Debtor Zafar David Khan ("**Debtor**" or "**Khan**") pursuant to 11 *U.S.C.* Section 523(a)(2)(A), (a)(4) and (a)(6), *et seq*.

This Motion, made pursuant to *FRCP* Rule 56(a) et seq. and *FRBP* Rule 7056 and controlling case and statutory authorities, is well taken and should be granted, and judgment thereupon granted in favor of Barton on his Complaint (and the three causes of action stated therein) for non-dischargeability as there is no dispute of material fact, as a matter of law, that Barton's claims against Khan in the California State court action, Barton v. RPost International Limited; Zafar Khan, et al., LASC Case No. YC061581 (the "**State Court Action**"), and the debts of Khan owed to Barton set forth therein and arising therefrom, are and should be adjudged by this Court to be non-dischargeable within the meaning of Sections 523(a)(2)(A), (a)(4) and (a)(6).

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Patrick C. McGarrigle, Request for Judicial Notice and Exhibits Thereto and the Separate Statement of Uncontroverted Facts and Conclusions of Law, the pleadings of record filed in this action and in the State Court

///

///

///

///

Action, and on such oral and other documentary evidence and legal argument as may be presented before, during and after the hearing of this Motion.

Dated: April 21, 2015

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By _____

Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorneys for Plaintiff/Creditor Kenneth Barton

MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION.*

Plaintiff Kenneth Barton ("**Plaintiff**" or "**Barton**") prevailed on his claims of fraud, intentional breach of fiduciary duty and conversion against Debtor Khan and a California Trial Court entered Judgment thereon after a three-phased trial that spanned more than a year. Debtor's appeal therefrom and subsequent appellate petitions were unsuccessful and Barton's claims and the Judgment thereupon were affirmed and are final. Barton's Adversary Complaint here seeks this Court's determination that Barton's claims and the Judgment sustaining same, along with the debts arising therefrom, are non-dischargeable under 11 U.S.C. § 523(a)(2)(A), (4), and (6). Under governing law, the doctrine of collateral estoppel holds the State Court's determinations on the issues of Debtor's fraud, intentional breaches of fiduciary duty and conversion (along with the findings of willfulness and malice by Debtor) are binding against Debtor and preclude his re-litigation thereof in any purported defense against this Court's adjudication of Plaintiff's non-dischargeability claims. As Debtor has no defense to Barton's Complaint, summary judgment is proper and the claims of Barton and the debts owed to him by Debtor are rightly adjudged to be non-dischargeable.

II. *FACTUAL OVERVIEW.*

As the State Court found, Debtor engaged in fraud and intentional breach of fiduciary duty, falsifying and destroying corporate records all in an elaborate scheme to convert – essentially steal - Plaintiff Barton's 6,016,500 common shares in RPost International Limited ("**RPost**"). RJN, Ex. B (p. Barton 033-042). Barton prevailed on his fraud, intentional breach of fiduciary duty and conversion claims (among others) alleged in his Third Amended Complaint (RJN, Ex. A (p. Barton 002-013, 023-028)). Debtor was held to have done so willfully and maliciously with the deliberate intent to injure Barton and the State Court held that Barton's proof met the clear and convincing standard so as to support an award of punitive damages. RJN, Ex. B (p. Barton 042 (L:1-14); Ex. C (p. Barton 043-047). Judgment was entered for Barton and against Debtor.

RJN, Ex. D - E. The Court of Appeal affirmed the Judgment in December 2014 and Debtor's petitions for rehearing and review were later denied and the Remittitur issued. RJN, Exs. F-H.

Debtor filed a Chapter 13 Petition in mid-April 2013. Barton filed a three cause of action Adversary Complaint for Determination of Non-Dischargeability thereafter. The prosecution of the instant adversary action was stayed pending Debtor's appeal of the State Court Judgment. On March 31, 2015, the Court vacated the stay and the scheduling of the hearing on this Motion was stipulated to by counsel for the parties and accepted by the Court.

The governing statute in this regard, 11 U.S.C. §523, states in pertinent part:

"(a) A discharge under…this title does **not** discharge an individual debtor from any debt--

(2) for money, property, services…to the extent obtained by -

(A) false pretenses, a false representation, or actual fraud...;

(4) for fraud or defalcation while acting in a fiduciary capacity…;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;" (Emphasis added)

The issues which form the gravamen of Plaintiff's non-dischargeability Complaint in this matter[1] have each, collectively and individually, already been adjudicated in favor of Barton and against Debtor; said adjudication followed a lengthy bench trial before the Los Angeles Superior Court (which trial included the full participation of Khan (including his own live testimony) who was represented by counsel throughout those proceedings). That trial concluded with a Judgment in favor of Barton and against Khan (and others), including the imposition of punitive damages against Khan. (Request for Judicial Notice (**"RJN"**) Exhibits "B" – "E") That Judgment was affirmed as modified

1 Plaintiff's Adversary Complaint states causes of action for Non-Dischargeability based upon 11 U.S.C. §523(a)(2)(A) (money/property obtained by fraud / false representations), (a)(4) (fraud while acting in a fiduciary capacity) and (a)(6) (willful and malicious injury).

by the California Court of Appeal (RJN, Ex. "F"), the California Supreme Court denied review thereof (RJN, Ex. "G") and it has now become final (RJN, Ex. "H").2

Having already prevailed upon these issues vis-a-vis his state court claims and received a final Judgment in his favor, which Judgment fully adjudicates the issues which bear upon the non-dischargeability determination before this Court, the doctrine of collateral estoppel compels a finding of non-dischargeability and the entry of summary judgment in favor of Barton.

III. *SUMMARY JUDGMENT IS WARRANTED WHEN, LIKE HERE, THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.*

Summary judgment is appropriate when the movant can demonstrate that the pleadings, depositions, affidavits, and other evidence available to the court establish no genuine issue of material fact. *Fed. R. Civ. P.* 56(c) (made applicable to adversary proceedings by *Fed. R. Bankr. P.* 7056.) As stated in *Stevens v. Briles (In re Briles),* 228 B.R. 462 (S.D. Calif. 1998): "Essentially, the question of ruling on a motion for summary judgment is whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

---

2 On May 19, 2015, the State Court will hear a Motion by Plaintiff to modify the damage award against Debtor and others (vis-à-vis a limited reopening of the damages determination concerning the valuation of Barton's common shares in RPost and the enterprise value of RPost) based upon recently discovered evidence (obtained vis-à-vis a State Court granted Motion to Compel against Debtor's RPost companies in a pending fraudulent transfer action [LASC Case No. YC065259]) which Debtor had concealed from production in the action in which the Judgment was entered and then (expecting no one would uncover the contrary corporate records) provided testimony which, when juxtaposed to the recently ordered produced records (which RPost had given to the SEC), reveals Debtor's testimony to the State Court about RPost's enterprise value and Barton's share value to have been materially false. Determination of non-dischargeability here is and remains ripe since this Court's determination that Barton's Judgment establishing his fraud, breach of fiduciary duty and conversion claims (and the damages flowing therefrom) to be non-dischargeable is not circumscribed by the *amount* of damages (which nonetheless continue to accrue substantial interest for which Debtor will be liable until the damages are paid).

In opposing summary judgment, the non-moving party may not rely on conclusory allegations in his pleadings; rather, he must set forth sufficient evidence supporting a claimed factual dispute to require a fact finder to resolve the parties' differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving presents controverting evidence, the Court must then determine if the evidence is sufficient, considering the facts in the light of the applicable standard of proof, to permit a reasonable trier of fact to resolve the issue in the respondent's favor. *Anderson*, *supra*, 477 U.S. at 251. If the non-movant fails to make a showing on an element for which he bears the burden of proof, the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). A moving party is entitled to summary judgment where it has met its burden of proof and the opposing party has not or where "no rational trier of fact" would believe the opposing party's evidence. *Scott v. Harris* 550 U.S. 372, 378 (2007); *Estate of Tucker ex. rel. Tucker v. Interscope Records, Inc.* (9th Cir. 2008) 515 F.3d 1019, 1033. As set forth in myriad cases below, Bankruptcy Courts have frequently granted summary judgment for the plaintiff on non-dischargeability complaints where the issues litigated to judgment in an underlying state court proceeding are final and tie to the issues/elements for non-dischargeability determinations under § 523(a)(2), (4) and (6).

IV. *COLLATERAL ESTOPPEL PRECLUDES DEBTOR'S RE-LITIGATION OF THE ISSUES ADJUDICATED BY THE STATE COURT'S JUDGMENT AND REQUIRES ENTRY OF SUMMARY JUDGMENT IN BARTON'S FAVOR.*

The issue preclusive effect of an existing state court judgment may serve as the basis for granting summary judgment in a non-dischargeability proceeding. *Khaligh v. Hadaegh (In re Khaligh)* (9th Cir. BAP, 2006) 338 B.R. 817, 831-832. Under collateral estoppel principles, factual and/or legal issues adjudicated by a state court in pre-bankruptcy proceedings may be entitled to preclusive effect in a non-dischargeability proceeding in bankruptcy court. *Grogan v. Garner* (1991) 498 U.S. 285 (at fn. 11). Federal courts "...must give to a state court judgment the same preclusive effect as would

be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.* (1984) 465 U.S. 75, 81; *In re Nourbakhsh* (1995, 9th Cir) 67 F.3d 798, 800 (citing *Marrese v. Am. Academy of Orthopaedic Surgeons* (1985) 470 U.S. 373, 380; 28 U.S.C. §1738, the full faith and credit statute. In California, issue preclusion is applied when: (1) the issue decided in the prior proceeding is identical to the issue potentially being re-litigated in the subsequent proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) a final judgment on the merits was issued in the prior proceeding; and (5) the party against whom issue preclusion is sought was a party to the prior proceeding. *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, *cert. denied,* 500 U.S. 920 (1991). All such factors under *Lucido*[3] are met here and, as such, collateral estoppel is rightly available to be applied as a bar Debtor's re-litigation of the State Court claims. Consequently, Debtor has no defense to Barton's non-dischargeability Complaint or to this Court's determination that Barton's claims against Debtor and the debts owed by Debtor to Barton are non-dischargeable.

V. *APPLICATION OF COLLATERAL ESTOPPEL, BASED UPON THE STATE COURT JUDGMENT AND ISSUES DECIDED THEREIN, WARRANTS THE ENTRY OF SUMMARY JUDGMENT IN BARTON'S FAVOR.*

The Trial Court found in favor of Barton and his claims and issued Judgment against Debtor thereon including the imposition of punitive damages (resulting from

---

[3] Here, and tracking the *Lucido* elements: **(1)** the §523(a)(2)(A), (4), and (6) issues were all decided in the State Court Action against Debtor. The Trial Court found that Debtor had committed fraud, intentional breach of fiduciary duty and conversion concerning Barton's shares in RPost, found the evidence to be clear and convincing to support punitive damages and Debtor's conduct - including, without limitation, falsifying and forging corporate records and destroying documents – to be intentional; **(2)** and **(3)** as the Trial Court's statements of decision underscores, all of these issues (linked to §523(a)(2)(A), (a)(4), and (a)(b) determinations) were actually litigated below and were necessarily decided based on the pleading and claims adjudicated; **(4)** the Judgment against Debtor is final; and **(5)** Debtor was a party to the State Court Action. Hence, collateral estoppel is properly applied and applicable to this adversary action.

Barton having proven his claims (and the malice, oppression and fraud by Debtor) by clear and convincing evidence). RJN, Exs. "B" – "E." In adjudicating Barton's state court causes of action for Conversion, Intentional Breach of Fiduciary Duty and Fraud (among others), the Trial Court stated, "In reviewing the testimony of all of the witnesses, the court is drawn to the inescapable conclusion that plaintiff has met his burden of proof on all causes of action." (RJN, Ex. "B," p. 6:6-8). The Court of Appeal affirmed, the California Supreme Court denied review and the Remittitur issued. With the issues having already been litigated and finally determined against Debtor, this Court's application of collateral estoppel to determine Debtor's debts to Barton arising from the claims in the State Court action to be non-dischargeable is rightly exercised and summary judgment on the Complaint should be granted.

A. Barton's State Court Judgment Establishes Each Issue To Be Proved To Prevail On The Causes Of Action In His Adversary Complaint.

The product of Barton's State Court Judgment, the State Court's findings and the doctrine of collateral estoppel is that the entry of summary judgment on each of the causes of action within Barton's Adversary Complaint is well taken; as noted below, the issues proven by Barton to obtain his State Court Judgment are the same issues which establish the merit to each of Barton's three causes of action pending before this Court.

1. The First Cause Of Action For Non-Dischargeability Under Section 523(a)(2)(A) (Fraud) Is Proven By The State Court's Findings and Judgment And The Issues Decided Therein.

Under *Grogan* (at 281), the United States Supreme Court has held that a state court judgment for fraud is sufficient to establish non-dischargeability. The issues determined to support and sustain Barton's state court fraud claim against Khan have long been held sufficient to sustain a non-dischargeability judgment concerning such a claim and the debts arising therefrom under § 523(a)(2)(A). *Tobin v. Sans Souci Limited Partnership, (In re Tobin)*, 258B.R. 199,203 (9th Cir. BAP)(2001) (elements of fraud under § 523(a)(2)(A) " mirror the elements of common law fraud and match those for

actual fraud under California law..."). Here, the state court elements of fraud (misrepresentation, of a material fact, with knowledge of falsity, with intent to induce reliance, justifiable reliance, causation and damages. *California Civil Code §1710, et. seq., et al*), as against Khan have already been proven and affirmed. The establishment of these elements at the state court level equates to the establishment of fraud under Section 523(a)(2)(A): (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *Ghomeshi v. Sabban (In re Sabban),* 660 F.3d 1219, 1222 (9th Cir. 2010); *In re Weinberg*, 410 B.R. 19, 35 (9th Cir. BAP 2009); *Household Credit Servs., Inc. v. Ettell (In re Ettell)* (9th Cir. 1999) 188 F.3d 1141, 1144; *Leonard v. Guillory (In re Guillory)* (Cent. Dist. CA 2001) 285 B.R. 307.

Here, Barton received a Judgment against Debtor for, and based on specific findings of, fraud (among other things). RJN Exs. "B" – "E." The State Court noted (citing to Debtor's fabrication of corporate records, forgery of Barton's signature on said manufactured corporate records and Debtor's destruction of others) that, "...the defendants [including Khan] also retroactively created and modified corporate resolutions to re-create the history supporting the result they sought. Particularly egregious is Exhibit 79, prepared as if it had been executed on January 2, 2001 and including the signature of Kenneth Barton. In reality, plaintiff had executed the corporate resolutions set forth as exhibit 78, which included a page 3 confirming the issuance of 3,616,500 shares of RPost stock to [Barton] and Khan. It also defies credulity that the best evidence of the issuance of stock in RPost, that being the shareholder registry, has either been misplaced or destroyed casting further doubt on defendants' testimony that Barton's shares had been properly canceled and returned to the treasury in 2006." (RJN, Ex. "B" at p. 5:5-13) The Trial Court's specific recitation of Debtor's fraud and fraudulent scheme

to harm Barton, cited above among other examples in the Trial Court's statements of decision, is compelling.

Under the doctrine of collateral estoppel, and as the issues concerning Debtor's fraud having already been established by virtue of the State Court's findings and Judgment, Barton's summary judgment motion is well taken and a finding of non-dischargeability of the fraud judgment against Debtor and the debts arising therefrom should be entered.

2. The Second Cause For Non-Dischargeability Under Section 523(a)(4) (Fraud While Acting in a Fiduciary Capacity) Is Proven By The State Court's Findings And Judgment And The Issues Decided Therein.

Barton's Intentional Breach of Fiduciary Duty claim required that Barton prove that Debtor was acting in his capacity as a fiduciary when he committed his fraud. *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562. That Debtor owed a fiduciary duty to Barton (as an officer and director of the corporation in which Barton's shares were held) was supported by well-established California law (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d. 412; *James v. H.F. Ahmanson* (1969) 1 Cal. 3d 93, 110–113). Fraud by a fiduciary is a statutorily recognized ground for determining the claim and debt to be non-dischargeable. Section 523 (a)(4) prohibits discharge of any debt, "...for fraud or defalcation while acting in a fiduciary capacity..."

Here, the State Court's findings and Judgment adjudicated that, in committing fraud and intentionally converting Barton's stock, Debtor did so in his capacity as a fiduciary to Barton and intentionally breached his fiduciary duties to him. (RJN, Exs. "B" – "E"). The Honorable Stuart M. Rice held: "The evidence also supports the conclusion that Plaintiff has met his burden of proof ...on the breach of fiduciary...cause of action" (RJN, Ex. "B" at p. 5:1-3) and thereupon entered Judgment (RJN Exs. "B" – "E"). These State Court findings and Judgment trigger the appropriate application of the collateral estoppel doctrine such that Debtor's fraud as a fiduciary has been established pursuant to Section 523(a)(4). As such, Barton is entitled to a determination of non-dischargeability

as to Barton's claims against Debtor based on Debtor's intentional breach of fiduciary and the debts arising therefrom.

3. The Third Cause of Action For Non-Dischargeability Under Section 523(a)(6) (Willful and Malicious Injury) is Proven by the State Court's Findings And Judgment And The Issues Decided Therein.

Section 523(a)(6) excepts from discharge debts resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity." *Household Credit Servs., Inc. v. Ettell (In re Ettell)* 188 F.3d 1141, 1144 (9th Cir. 1999); *Leonard v. Guillory (In re Guillory)* 285 B.R. 307 (Cent. Dist. CA 2001).

The first step of the § 523(a)(6) inquiry is whether there was a "willful" injury, which is construed to entail a deliberate or intentional injury. *Kawaauhau v. Greiger,* 523 U.S. 57, 61-62 (1998). The "willful" requirement is met "...when it is shown that either the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct." *In re Jercich*, 238 F.3d 1202 (9th Cir. 2000) *cert. denied,* 533 U.S. 930 (2001) (emphasis in original). "The determination of subjective intent means that the 'willful' requirement is met." *In re Khaligh, Supra*, at 831. The "willful" element is clearly met here. Barton's State Court Judgment (inclusive of punitive damages against Debtor) includes the express finding that Barton, "...has proven by clear and convincing evidence that the actions of...Khan were done with malice, oppression and fraud, giving rise to a claim for punitive damages." (RJN, Ex. "B" at p. 10:1-4) Barton proved Debtor intentionally converted Barton's property through the fabrication of corporate records, forgery of Barton's signatures thereon and the destruction of other corporate records – all to fraudulently steal his 19% equity interest in RPost. As the State Court found, Debtor's course of conduct "rises to a significant degree of reprehensibility." (RJN, Ex. "C" at pg. Barton 0046:11) The State Court found that Debtor knew that Barton owned the shares in question, yet, without right or justification, intentionally acted to convert those shares, all

to the detriment and injury of Barton. (RJN at Exs. "C," "D" and "E") (findings which satisfy both the "willful" and "malicious" elements here). [4]

The second step of the inquiry is whether Debtor's conduct was "malicious." The relevant test for such conduct is: (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause." *In re Ormsby* (9th Cir. 2009) 591 F.3d 1199, 1207. Here, the State Court expressly found the conduct of Debtor to be malicious and oppressive; such findings are sufficient to show that the injury inflicted by Debtor upon Barton is malicious pursuant to §523(a)(6). *In re Jercich* at 1208-1209. The imposition of punitive damages against Debtor on all claims further reinforces the fact that Khan's actions were undertaken with the intent to harm Barton (RJN, Ex. "C"). *Cruz v. Homebase* (2000) 83 Cal.App 4th 160, 167.

Hence, having satisfied both prongs of "willful" and "malicious" test, Barton has demonstrated that summary judgment on his Third Cause of Action is warranted pursuant to §523(a)(6) and that the claims against and debts due from Debtor are rightly determined to be non-dischargeable as a matter of law.

VI. *CONCLUSION.*

Barton respectfully requests a determination and judgment of non-dischargeability on his claims against, and of the debts owed by, Debtor.

DATED: April 21, 2015

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By: _____

Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorneys for Plaintiff Kenneth Barton

---

4 In addition to the fraud and intentional breaches of fiduciary duty triggering non-dischargeability under Section 523(a)(6), Barton's conversion Judgment against Debtor triggers that relief as well: "The conversion of another's property without his knowledge or consent, done intentionally and without justification or excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6)." *In re Jercich, supra*, at 1208.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311

A true and correct copy of the foregoing document entitled (*specify*): **NOTICE OF MOTION AND MOTION OF CREDITOR KENNETH BARTON FOR SUMMARY JUDGMENT/ PARTIAL SUMMARY ADJUDICATION ON PLAINTIFF'S ADVERSARY COMPLAINT AND CAUSES OF ACTION FOR NON-DISCHARGEABILITY; MEMORANDUM OF POINTS AND AUTHORITIES** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 4/21/2015, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Trustee: rgonzalez@ecf.epiqsystems.com, dgomez@gonzalezplc.com
United States Trustee (LA): ustpregion16.la.ecf@usdoj.gov
Attorney for Debtor: Lew@Landaunet.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 4/21/2015, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 4/21/2015, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Via Federal Express:

Hon. Julia W. Brand
U.S. Bankruptcy Court, Roybal Federal Building
255 E. Temple Street, Suite 1382 / Courtroom 1375
Los Angeles, CA 90012-3332

☐ Service information continued on attached page

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

April 21, 2015	Vanessa Bravo	/s/ Vanessa Bravo
Date	*Printed Name*	*Signature*

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Lewis R. Landau (CA Bar No. 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888) 822-4340
Email: Lew@Landaunet.com

Attorney for Defendant and Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Zafar David Khan, Debtor.	Case No.: 2:13-bk-19713-WB Adv. No.: 2:13-ap-01752-WB Chapter 7 **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY ADJUDICATION; ALTERNATIVE REQUEST FOR CONTINUANCE THEREOF** Date: June 2, 2015 Time: 2:00 p.m. Place: Courtroom 1375; Judge Brand US Bankruptcy Court 255 E. Temple Street, 13th Floor Los Angeles, CA 90012
Kenneth Barton, Plaintiff, vs. Zafar David Khan, Defendant.	

Zafar David Khan, defendant in the above captioned adversary proceeding ("Khan" or "Defendant") herein opposes the motion filed by Kenneth Barton ("Barton") entitled "Notice of Motion and Motion of Creditor Kenneth Barton for Summary Judgment/Partial Summary Adjudication on Plaintiff's Adversary Complaint and Causes of Action for Non-Dischargeability" ("Motion") [ECF # 33] and alternatively requests a continuance thereof for the reasons stated herein. This opposition and alternative request for continuance is based on the following memorandum of points and authorities, Barton's Request for Judicial Notice ("RFJN") the separately filed Statement of Genuine Issues and Defendant's Request for Judicial Notice ("DRJN"). For all these reasons, Defendant requests that the Court deny the Motion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF ARGUMENTS

Barton's Motion asserts that the Los Angeles Superior Court's ("LASC") judgment in case number YC061581 establishes Barton's entitlement to a non-dischargeable judgment under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6) by application of issue preclusion. However, Barton fails to address the precise collateral estoppel issue presented in this case. The issue presented here is the preclusive effect of a trial court decision ***based on alternative grounds, after an appellate court has affirmed the decision on only one of the alternative grounds without considering the other grounds.***[1] In these circumstances, California law holds that only the claim considered on appeal is given collateral estoppel effect. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008). Thus, issue preclusive effect at most only attaches to the California Court of Appeals ("CCA") affirmance of the LASC's judgment for conversion.[2]

With the scope of permissible issue preclusive effect properly narrowed to only Barton's conversion claim, Barton cannot receive summary judgment on the current record:

1. ***First***, a conversion claim is not *per se* non-dischargeable under section 523(a)(6). *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001) ("Peklar"). Barton fails to properly raise and argue the non-dischargeability of his conversion claim other than in single sentence footnote on the last page of his brief. *See*, Motion at 10 foonote 4. Due process requires that the complex issue of collateral estoppel based non-dischargeability of Barton's conversion claim be raised and argued in an opening brief providing Defendant with an opportunity to respond thereto. Barton's Motion must therefore be denied or continued.

---

[1] Herein, the Court of Appeals decision expressly states, "Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition.***" *See*, Barton Request for Judicial Notice at 58 (emphasis added).

[2] Defendant will interchangeably use the terms "issue preclusion" and "collateral estoppel" as federal courts prefer the term "issue preclusion" while California courts continue to refer to collateral estoppel. *Compare*, Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078 n. 8 (9th Cir. 2007), *with*, Zevnik, 159 Cal. App. 4th at 82 n. 3.

2. ***Second***, after Barton filed his Motion, the Bankruptcy Appellate Panel ("BAP") published its decision in Plyam v. Precision Development, LLC (In re Plyam), - B.R. -, 2015 Bankr. LEXIS 1538 (9th Cir. BAP May 5, 2015) ("Plyam") (courtesy copy attached hereto as Exhibit 1). Plyam alters the landscape of Ninth Circuit law on the issue of the collateral estoppel effect of a California state court judgment that includes an award of punitive damages. The BAP expressly holds that, "to the extent that CC § 3294 findings are ... based on Despicable Malice or oppression or both, those findings ***prevent the use of issue preclusion as to § 523(a)(6) willfulness.***" Id. at *28 (emphasis added). Barton's Motion explicitly argues that malice and oppression support the request for § 523(a)(6) non-dischargeability. *See*, Motion at 10:7. To the extent Barton is relying on the LASC's award of punitive damages as supporting non-dischargeability, Barton must address the matter under the Plyam standard and Defendant must have an opportunity to respond to the new matter.

3. ***Third***, Barton's Motion omits citation to the seminal Ninth Circuit opinion addressing § 523(a)(4) non-dischargeability concerning the insufficiency of officer and director fiduciary status as establishing the trust relationship that is an essential element of the claim. *See*, Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125-1128 (9th Cir. 2003). Thus, summary judgment is indisputably unavailable for Barton's § 523(a)(4) claim.

4. ***Fourth***, although the issue may be resolved as of the June 2, 2015 hearing, Barton has moved the LASC to vacate the judgment in case number YC061581. *See*, DRJN at Exhibit 1. It is self-evident that if Barton succeeds in vacating the judgment, there is no judgment to be applied herein on the basis of any form of issue preclusion.

Based on the foregoing, Barton's Motion must be denied or continued until Barton duly addresses the issues in moving papers with due process of affording Defendant an opportunity to respond thereto. Absent a continuance, Barton's Motion should be denied based on the existence of genuine issues precluding summary judgment or summary adjudication of issues and Barton's failure to prove entitlement to judgement on the record before the Court.

///

///

II.

BARTON'S MOTION MUST BE DENIED BASED ON THE LIMITED ISSUE PRECLUSIVE EFFECT OF THE STATE COURT JUDGMENT

Barton relies on the issue preclusive effect of his state court judgment in requesting summary judgment herein. However, Barton's motion fails to address the fact that the CCA only considered and affirmed his conversion claim, without consideration of Barton's fraud, breach of fiduciary duty and unfair competition claims. The CCA's decision on only one of the alternative grounds for the judgment without deciding the other grounds limits the issue preclusive effect of the judgment under current California law adopting the Restatement of Judgments approach. Thus, only Barton's conversion claim is subject to review for issue preclusive effect herein.

The analysis of the issues presented herein is greatly facilitated by the BAP's recent Plyam decision because the case has many procedural and substantive similarities to the case at bar. *See*, Exhibit 1 hereto. In Plyam, following an 18 day trial, a jury entered a special verdict awarding $10,100,000 in general damages for breach of fiduciary duty and $200,000 in punitive damages. The state court judgment was appealed and affirmed. *See*, Precision Dev., LLC v. Plyam, 2013 WL 5801759 (Cal. Ct. App. 2013) (in regard to its review of the punitive damages award, the CCA found that "The jury believed that the Plyams' used Precision funds for their benefit, and their conduct was more than negligent or careless, and instead amounted to intentionally misleading the Bronfmans."). The Plyams then filed for relief under chapter 7. Precision sued for non-dischargeability under §§ 523(a)(4) and (a)(6) and Judge Bluebond denied summary judgment against Mrs. Plyam on the 523(a)(4) claim finding no fiduciary duty but granted summary judgment based on the issue preclusive effect of the LASC judgment on the 523(a)(4) and (a)(6) claim against Mr. Plyam. The Plyams appealed and the BAP reversed.

In the BAP's Plyam opinion, the BAP thoroughly reviewed the state of the law concerning issue preclusion in non-dischargeability cases within the context of summary judgment under §§ 523(a)(4) and (a)(6). The BAP summarized the law concerning issue preclusive effect of a prior state court judgment as follows:

> Summary judgment is appropriate where the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (applicable in adversary proceedings under Rule 7056). The bankruptcy court must view the evidence in the light most favorable to the non-moving party when determining whether genuine disputes of material fact exist and whether the movant is entitled to judgment as a matter of law.
>
> A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment as the basis for granting summary judgment. In so doing, the bankruptcy court must apply the forum state's law of issue preclusion. Thus, we apply California preclusion law.
>
> In California, application of issue preclusion requires that: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding. California further places an additional limitation on issue preclusion: courts may give preclusive effect to a judgment "only if application of preclusion furthers the public policies underlying the doctrine."
>
> The party asserting preclusion bears the burden of establishing the threshold requirements. This means providing "a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Ultimately, "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect."

See, Plyam, at *6 - *9 (citations omitted).

Herein, the state court judgment is likely final (assuming it is not vacated per Barton's pending motion) and the parties are identical. Thus, elements four and five are likely undisputed. The first three elements and the public policy limitation are, however, in dispute herein because identical issues have not been decided when a judgment affirming a single alternative ground to support a decision does not "necessarily decide" the issues not considered on appeal.

As mentioned at the outset, when a Superior Court relies on alternative grounds to support its judgment and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel effect. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008) ("Zevnik"), *see also*, Rest. 2d Judgments (1980) § 27, com. i, pp. 259-260. Here, that is precisely what happened when the CCA affirmed the LASC judgment. The CCA opinion states, "Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not

consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." *See*, Barton Request for Judicial Notice at 58, 74.

Zevnik explains the policy considerations supporting its holding as follows:

> The opportunity for review of a decision is an important procedural protection against a potentially erroneous determination and is a factor to consider in determining whether collateral estoppel applies. [citations] Appellate review provides a degree of assurance that the issue was correctly decided and enhances the reliability of the determination. When an appellate court declines to review a particular ground for a trial court decision, the reliability of that ground is not enhanced and is left in the same condition as if there had been no opportunity for review. The principal reason for an appellate court to decline to review alternative grounds for a trial court decision is judicial economy, which is a justification that we would not impugn. ***With regard to ensuring the reliability of a determination, however, an appellate court's failure to review an alternative ground on appeal has the same effect as the absence of an opportunity for review and, we believe, should result in no collateral estoppel as to that alternative ground.***
>
> Moreover, to accord collateral estoppel effect to alternative grounds relied on by the trial court after the appellate court affirmed on another ground and declined to review the alternative grounds would put pressure on appellate courts to review alternative grounds as a matter of course, in order to avoid the unintended consequence of establishing collateral estoppel on grounds that the appellate court did not review. This would dramatically increase the burden on appellate courts. Any benefit that might result from precluding the relitigation of issues in potential collateral litigation, which may or may not arise, would come at the cost of increasing the burden on the appellate court in the initial action. If an appellate court is aware of or anticipates collateral litigation and believes that to establish collateral estoppel on an alternative ground would be beneficial, the court may affirm the trial court judgment on more than one ground. (See Rest.2d Judgments, § 27, com. o, p. 263.)[5] The respondent on appeal may urge the court to do so. In our view, a blanket rule according collateral estoppel effect to each alternative and unreviewed ground for a trial court decision in these circumstances for the purpose of precluding relitigation of issues in collateral litigation is unnecessary and would be unwise.

Zevnik, 159 Cal. App. 4th at 85 (emphasis added).

The impact of the Zevnik limitation on collateral estoppel effect is that only Barton's conversion claim has the potential for issue preclusion herein. Once the CCA affirmed Barton's conversion judgment, the CCA expressly did "not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." However, Barton barely mentions his conversion claim in his brief as the conversion claim is only raised in single sentence footnote on the last page of his Motion. *See*, Motion at 10 fn. 4.

Once the state court judgment is limited to the potential issue preclusive effect of the conversion claim, Plyam addresses the further limitations on imposing collateral estoppel effect arising from an award of punitive damages. Plyam considered whether a creditor is entitled to a non-dischargeable judgment under § 523(a)(6) for willful and malicious conduct as a matter of law when a judgment imposes punitive damages under California Civil Code ("CC") § 3294. Based on the defined terms within CC § 3294, the BAP disagreed and reversed summary judgment. Importantly, the BAP held that findings under CC § 3294 are not issue preclusive as follows:

> On this record, we cannot ascertain the exact basis for the jury's findings. Because the punitive damages award may have been based only on a finding of Despicable Malice or oppression, issue preclusion was unavailable on the issue of § 523(a)(6) willfulness.
>
> To be clear, our holding does not eviscerate a bankruptcy court's ability or opportunity to apply issue preclusion to a state court jury's findings pursuant to CC § 3294. To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.
>
> But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness.

See, Plyam at *27- *28 (emphasis in original).

Herein, Barton has not addressed the foregoing issues in his moving papers. Barton merely assumes that the conversion affirmance by the CCA somehow imbues his entire judgment with collateral estoppel effect. Moreover, Barton understandably fails to address the Plyam standard as the case was published after Barton filed his Motion.

The motion must therefore be denied or continued so that Barton addresses Plyam in moving papers thereby explaining how the punitive damage award in this case satisfies the test under Plyam. At this point, Barton's Motion explicitly argues that malice and oppression support the request for § 523(a)(6) non-dischargeability. *See*, Motion at 10:7. But under Plyam, these findings do not support non-dischargeability. Defendant cannot fully respond to an argument that has not been developed in moving papers and is a crucial aspect of Barton's burden of proof and case in chief. For all these reasons, the Motion should be *denied*.

III.

BARTON HAS NOT CARRIED HIS BURDEN OF PROVING ENTITLEMENT TO SUMMARY JUDGMENT ON HIS § 523(a)(2)(A) FRAUD CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(2)(A) for actual fraud based on the alleged collateral estoppel effect of the LASC judgment. Barton's argument for a judgment under § 523(a)(2)(A) fails under Zevnik because the CCA did not consider Barton's fraud claim. Thus, the judgment loses collateral estoppel effect on Barton's fraud claim and cannot be used to establish a non-dischargeable judgment herein.

As mentioned above, the CCA opinion expressly states, "[b]ecause we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether defendants were additionally liable under theories of fraud***, breach of fiduciary duty and unfair competition." *See*, Barton RFJN at 58, 74 (emphasis added). Zevnik holds, "if a trial court relies on alternative grounds to support its decision and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel." Zevnik, 159 Cal. App. 4th at 79; *see also*, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club 140 Cal. App. 4th 1120, 1132 (Cal. Ct. App. 2006).[3] Because this Court must apply California issue preclusion law, it is clear that Barton cannot establish his fraud claim simply by reference to the state court judgment. As Barton offers no evidence other than the state court decision, judgment and appellate record, Barton's Motion must be denied.

Barton has failed to carry his burden of proving entitlement to summary judgment by application of issue preclusion. Barton's fraud claim does not carry collateral estoppel effect. The Motion must be denied based on a failure of proof.

---

[3] Subsequent California and Ninth Circuit precedents support the restatement approach citing the necessity of appellate review to applying issue preclusion. *See*, Murray v. Alaska Airlines, Inc., 50 Cal. 4th 860, 875-876 (2010), *and see*, Readylink Healthcare v. State Compensation Ins., 754 F. 3d 754, 762 (9th Cir. 2014) (citing Zevnik).

IV.

BARTON IS INDISPUTABLY NOT ENTITLED TO SUMMARY JUDGMENT ON HIS § 523(a)(4) FRAUD IN A FIDUCIARY CAPACITY CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(4) for fraud while acting in a fiduciary capacity based on the alleged collateral estoppel effect of the LASC judgment. Barton's argument for a judgment under § 523(a)(4) fails for two independent reasons. ***First***, as detailed above the CCA did not consider Barton's fiduciary duty claim. Thus, , under Zevnik the judgment does not carry issue preclusive effect on the breach of fiduciary duty claim. ***Second***, Barton utterly fails to carry his burden of establishing the trust relationship necessary for fiduciary fraud non-dischargeability under § 523(a)(4). Thus, Barton's Motion under § 523(a)(4) must be denied.

Barton cites California law in contending that Defendant's director and officer status creates the fiduciary relationship necessary for non-dischargeability under § 523(a)(4).[4] *See*, Motion at 8:13-17. However, Barton fails to cite the seminal Ninth Circuit opinion that unequivocally holds that the fiduciary status of directors and officers does not create the express or technical trust required to support non-dischargeability under § 523(a)(4). *See*, Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125-1128 (9th Cir. 2003) (relationship in California between a director on the one hand and the corporation and its shareholders on the other hand, strictly speaking, was one of agency and not trust and does not support application of § 523(a)(4) non-dischargeability) ("Cantrell"). Under Cantrell, Barton's claim fails as a matter of law.

Based on the foregoing, Barton's Motion requesting a non-dischargeable judgment under § 523(a)(4) based on the issue preclusive effect of the state court judgment must be denied. The judgment does not carry issue preclusive effect on Barton's claim for breach of fiduciary duty because the CCA expressly did not consider the claim. Moreover, Barton fails to address Cantrell, which unequivocally precludes his claim. As such, the Motion must be *denied*.

---

[4] Because Barton argues that California law applies, Defendant responds to the contention under California law. Defendant reserves the argument that other jurisdictional laws may be applicable to these matters.

V.

BARTON HAS NOT CARRIED HIS BURDEN OF PROVING ENTITLEMENT TO SUMMARY JUDGMENT ON HIS § 523(a)(6) CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(6) for a debt for willful and malicious injury based on the alleged collateral estoppel effect of the state court judgment. As explained herein in detail, no claim other than Barton's conversion claim carries any preclusive effect under Zevnik. Thus, Barton's conversion claim must be analyzed under both Peklar and Plyam to determine if the elements of a claim under § 523(a)(6) are established by issue preclusion. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035 (9th Cir. 2001), *see also*, Plyam v. Precision Development, LLC (In re Plyam), - B.R. -, 2015 Bankr. LEXIS 1538 (9th Cir. BAP May 5, 2015). Barton inexplicably fails to cite Peklar and Plyam was published after Barton filed his Motion. Thus, Barton's Motion does not support granting summary judgment on his § 523(a)(6) claim because the relevant authorities are omitted from Barton's moving papers.

In Peklar, the Ninth Circuit held as follows concerning non-dischargeability of a conversion claim:

> A judgment for conversion under California substantive law decides only that the defendant has engaged in the "wrongful exercise of dominion" over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused "willful and malicious injury" within the meaning of § 523(a)(6). A judgment for conversion under California law therefore does not, without more, establish that a debt arising out of that judgment is non-dischargeable under § 523(a)(6).

Peklar, 260 F.3d at 1039.

To the extent that Barton relies upon the state court's imposition of punitive damages to establish willfulness, Plyam delves into the state of mind requirement for § 523(a)(6) non-dischargeability based on willful and malicious injury:

///

///

///

> Under § 523(a)(6), the willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors "either a subjective intent to harm, or a subjective belief that harm is substantially certain." *In re Su*, 290 F.3d at 1144; see also *In re Jercich*, 238 F.3d at 1208. The injury must be deliberate or intentional, "not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). Thus, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64.

Plyam, at *10 (emphasis added).

The BAP then dissected whether the basis for finding despicable malice or oppression within Civil Code § 3294(c)(1) and (2) satisfies the § 523(a)(6) requirement that Defendant have "either a subjective intent to harm or a subjective belief that harm is substantially certain." The BAP found that it did not. The BAP's holding concerning the basis for despicable malice as not establishing § 523(a)(6) willfulness confirms the state of mind requirement for § 523(a)(6) non-dischargeability:

> In the context of CC § 3294, the term "willful" refers only to the deliberate conduct committed by a person in a despicable manner. The statute, thus, employs the dictionary definition of "willful." *See Geiger*, 523 U.S. at 61 n.3 (noting that Black's Law Dictionary defined "willful" as "voluntary" or "intentional"). ***There is no indication that "willful" refers to a subjective intent to injure or a subjective belief that injury is substantially certain to result.*** And, this interpretation makes practical sense; to read the statute otherwise would render the inclusion of Intentional Malice in CC § 3294 superfluous.

Plyam, at *25 – *26 (emphasis added).

Under this reasoning, Plyam now holds that a state court judgment containing an award of punitive damages based on the finding of "malice, oppression or fraud" does not establish § 523(a)(6) non-dischargeability as a matter of law. As such, Plyam now holds that a punitive damage award that includes malice or oppression as CC § 3294 findings cannot support non-dischargeability by issue preclusion:

> To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.

> But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness.

See, Plyam at page *28 (emphasis in original).

Herein, the state court judgment did not award punitive damages "**solely** based on a finding of Intentional Malice, fraud or both" as required by Plyam. Thus, Barton's Motion brought under § 523(a)(6) fails as a matter of law due to the unavailability of issue preclusion to establish the claim.

Although Barton's Motion is presently based on the collateral estoppel effect of the Superior Court's maliciousness and oppressiveness findings, Barton may attempt to argue that the judgment awarded punitive damages based on fraud as well. However, any such argument suffers from at least two hurdles. ***First***, under Zevnik, the CCA did not consider Barton's fraud claim and the fraud claim can carry no issue preclusive effect. ***Second***, just as the BAP in Plyam scrutinized the malice and oppressiveness findings under CC § 3294 to find that these terms do not establish willfulness under § 523(a)(6), any fraud finding suffers from an equal deficiency. Under CC § 3294(c)(3), fraud in support of an award of punitive damages can be based on "deceit." Deceit is defined in CC § 1710(2) as including negligent misrepresentations ***which do not require an intent to defraud***. *See*, Small v. Fritz Companies, Inc., 30 Cal. 4th 167 (2003). Thus, just as maliciousness and oppressiveness do not necessarily establish willfulness for purposes of § 523(a)(6), a fraud finding in connection with a conversion claim is equally deficient because the underlying tort is not necessarily an intentional tort. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001). Defendant reserves all arguments in this respect pending Barton's presentation of his case.

Finally, Barton must further address the fact that the CCA recognized a difference in culpability between defendants Tomkow and Khan. The Superior Court punitive damages ruling recognized that Tomkow's conduct was less "onerous" and the CCA opinion recognizes that Tomkow's "conduct was less egregious." See, RFJN 46, 68. Both decisions reference Tomkow as "complicit" in the conversion of Barton's shares. To the extent that Tomkow's liability arises

from his *complicity* in conversion, Tomkow is not the actor and his liability is being imputed. Judge Robles recently recognized that while fraud may be imputed under § 523(a)(2), a subjective state of mind cannot be imputed under the requirement for willful and malicious liability under § 523(a)(6). *See*, Mitehaus v. Ramey (In re Ramey), 508 B.R. 447, 455-456 (C.D. Cal. 2014), *modified*, 515 B.R. 777, *affirmed*, 2015 Bankr. LEXIS 578 (9th Cir. BAP 2015). Barton's Motion fails for this additional reason.

For all these reasons, Barton's Motion does not establish a claim for a non-dischargeable judgment under § 523(a)(6) based on the issue preclusive effective of the state court judgment. The Motion must therefore be denied.

VI.

IF NOT DENIED, THE MOTION SHOULD BE CONTINUED UNTIL BARTON DULY ADDRESSES FOUNDATIONAL ISSUES IN MOVING PAPERS

Due to the CCA's affirmance based solely on Barton's conversion claim, the only claim that could possibly be considered for issue preclusive effect herein is the conversion claim. However, Barton ignores Zevnik and barely identifies the conversion issue in his Motion, instead relegating the issue to a single sentence footnote on the last page of his brief. *See*, Motion at 10 footnote 4. The single sentence contains no analysis or argument as to how Barton's conversion claim is entitled to non-dischargeability in view of the Ninth Circuit's Peklar decision. Barton must also address Plyam which was published after Barton filed his Motion. Thus, Barton has not addressed crucial foundational issues in his moving papers.

The Court should not consider an argument not raised and developed in moving papers sufficiently to provide an opposing party with an opportunity to respond. *See*, Hill v. Opus Corp., 464 B.R. 361 fn. 34 (C.D. Cal. 2011) (in summary judgment context, "The court declines to consider arguments raised for the first time in reply, since the other party has no opportunity to respond."). It is well established that raising an issue in a footnote without argument or analysis is insufficient to raise the matter for purposes of review. *See*, International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733, 739 (9th Cir.1986) (declining to review an issue

raised in a footnote). Herein, the only claim that could possibly be considered for issue preclusive effect is Barton's conversion claim and Barton has inadequately addressed the issue in his Motion.

As a matter of due process, no summary judgment or summary adjudication of issues can be granted on this record. The Motion should either be denied or continued so that Barton addresses the issues presented by the subsequently decided Plyam decision and Defendant can respond thereto.

VII.

CONCLUSION

Wherefore, Defendant respectfully prays for an order of the Court denying Barton's Motion or continuing the Motion and for such other and further relief as the Court deems just and proper under the circumstances.

Date: May 12, 2015

Lewis R. Landau
Attorney-at-Law

By: */s/ Lewis R. Landau*
Lewis R. Landau
Attorneys for Defendant

EXHIBIT 1

Plyam v. Precision Dev., LLC (In re Plyam)

United States Bankruptcy Appellate Panel for the Ninth Circuit

January 22, 2015; May 5, 2015, Filed

BAP No. CC-14-1362-TaDPa

Reporter
2015 Bankr. LEXIS 1538

In re: YURI PLYAM and NATALIA PLYAM, Debtors.YURI PLYAM; NATALIA PLYAM, Appellants, v. PRECISION DEVELOPMENT, LLC

Prior History: [*1] Appeal from the United States Bankruptcy Court for the Central District of California. Bk. No. 2:13-bk-15020-BB, Adv. No. 2:13-ap-01558-BB. Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding.

Case Summary

Overview

HOLDINGS: [1]-The bankruptcy court erred in granting summary judgment to plaintiff on its *11 U.S.C.S. § 523(a)(6)* claim based on the issue preclusive effect of a state court judgment for breach of fiduciary duty, notwithstanding its award of punitive damages under Cal. Civ. Code § 3294 because the punitive damages award might have been based only on a finding of despicable malice or oppression; [2]-The bankruptcy court erred in granting summary judgment to plaintiff on its *§ 523(a)(4)* claim against one debtor based on the issue preclusive effect of the state court judgment because there was no indication that an express trust existed, and the court could not conclude that, as a matter of law, a technical trust existed.

Outcome

Judgment vacated and case remanded.

Counsel: Dennis P. Riley of Mesisca Riley & Kreitenberg, LLP argued for appellants Yuri Plyam and Natalia Plyam; Leo Daniel Plotkin of Levy, Small & Lallas argued for appellee Precision Development, LLC.

Judges: Before: TAYLOR, DUNN, and PAPPAS, Bankruptcy Judges.

Opinion by: TAYLOR

Opinion

TAYLOR, Bankruptcy Judge:

Debtors Yuri Plyam and Natalia Plyam appeal from the bankruptcy court's summary judgment excepting a state court judgment from discharge pursuant to *§ 523(a)(4)*[1] and *(a)(6)*, as to Yuri,[2] and pursuant to *§ 523(a)(6)*, as to Natalia.

The bankruptcy court granted summary judgment based on issue preclusion and the state court judgment's award of actual and punitive damages for breach of fiduciary duty. We determine that the bankruptcy court erred as the state court judgment did not include a finding equivalent to willfulness as required for *§ 523(a)(6)* nondischargeability, [*2] notwithstanding its

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, *11 U.S.C. §§ 101-1532*.

[2] We refer to the parties hereafter by their first names for sake of clarity; we intend no disrespect.

award of punitive damages under California Civil Code § 3294. The state court judgment also failed to establish the existence of an express or technical trust as required for § 523(a)(4) nondischargeability.

As a result, we VACATE the judgment and REMAND to the bankruptcy court for further proceedings consistent with this opinion.

BACKGROUND

In 2005, Yuri formed Precision Development, LLC, a Nevada limited liability company ("Precision"), for the purpose of developing residential real property in Southern California. Initially, he was its sole member and manager.

Precision obtained significant investment capital from Clare Bronfman and Sara Bronfman (jointly, the "Bronfmans"). According to the Bronfmans, they eventually invested approximately $26.3 million.

Between 2005 and 2007, Precision acquired numerous parcels of real property. Yuri's separate business entity oversaw their development; it did not go well. Precision's funds ran out in 2007 before it successfully completed development of or sold any of the properties.

Precision's operating agreement provided that it would hold title to all real property acquired with Precision funds. The Debtors, however, caused Precision to deed them three parcels of real [*3] property (the "Transferred Properties"). And once they acquired title, the Debtors alleged ownership of the Transferred Properties in loan documents and used the Transferred Properties as collateral for construction loans. The Debtors later also transferred a fourth property from Yuri's business entity to Precision and then from Precision to their family trust.

Eventually, the Bronfmans discovered Precision's dire state; few of its developments were close to completion. Indeed, some remained vacant land. The only projects with significant development were the Transferred Properties. And, the Debtors lost even the Transferred Properties to foreclosure by their construction lender.

The Bronfmans attempted to remedy the situation. They subsequently obtained control of Precision and caused it to sue the Debtors in California state court. The complaint alleged that the Debtors misused Precision funds and diverted its assets.

Following an 18-day trial, a jury entered a special verdict finding that "Yuri Plyam or Natasha [sic] Plyam" breached their fiduciary duties to Precision and that "Yuri or Natasha [sic] Plyam" acted with malice, oppression, or fraud. The jury awarded $10,100,000 in general [*4] damages and $200,000 in punitive damages (the "State Court Judgment"). The Debtors appealed to the California court of appeal, which affirmed the State Court Judgment. See *Precision Dev., LLC v. Plyam, 2013 Cal. App. Unpub. LEXIS 7749, 2013 WL 5801759 (Cal. Ct. App. Oct. 29, 2013)*. The State Court Judgment is now final.

The Debtors responded with a chapter 7 bankruptcy, and Precision then commenced an adversary proceeding seeking to except the State Court Judgment from discharge pursuant to § 523(a)(4) (for fraud or defalcation) and (a)(6).[3] It subsequently moved for summary judgment or, in the alternative, partial summary judgment. It based its motion solely on the State Court Judgment's alleged issue preclusive effect.

The Debtors opposed. They defended against the § 523(a)(4) claim by arguing that Natalia never owed a fiduciary duty to Precision and that Yuri was not a fiduciary during the time of the alleged [*5] acts of defalcation. On the § 523(a)(6) claim, they generally contested the sufficiency of evidence and argued, in particular, that triable issues of fact existed as to the justification or excuse for their actions in relation to the Transferred Properties and the later transfer of the fourth property to their family trust. The Debtors also argued that the State Court Judgment's punitive damages award did not

[3] In the adversary complaint, Precision also sought nondischargeability under § 523(a)(2)(A). As relevant to this appeal, it obtained summary judgment only as to the § 523(a)(4) and (a)(6) claims. The bankruptcy court dismissed with prejudice the § 523(a)(2)(A) claim against both of the Debtors, the § 523(a)(4) claim for defalcation against Natalia, and the § 523(a)(4) claim for embezzlement and/or larceny against both of the Debtors. No appeal was taken from those decisions.

satisfy the elements for § 523(a)(6) nondischargeability.

Following arguments at the hearing, the bankruptcy court relied on issue preclusion and granted summary judgment in part and denied it in part. It determined that Natalia did not owe a fiduciary duty; thus, it granted summary judgment against her only under § 523(a)(6). As to Yuri, it granted summary judgment on both the § 523(a)(4) and (a)(6) claims.

The bankruptcy court subsequently entered a judgment excepting the State Court Judgment, in the total amount of $10,497,843.24, from discharge. The Debtors timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err in granting summary judgment to Precision by giving issue preclusive effect to the State Court Judgment as to the § 523(a)(4) and (a)(6) nondischargeability [*6] claims?

STANDARDS OF REVIEW

We review de novo the bankruptcy court's decisions to grant summary judgment and to except a debt from discharge under § 523(a)(4) and (a)(6). See Boyajian v. New Falls Corp. (In re Boyajian), 564 F.3d 1088, 1090 (9th Cir. 2009); Black v. Bonnie Springs Family Ltd. P'ship (In re Black), 487 B.R. 202, 210 (9th Cir. BAP 2013); see also Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002) (nondischargeability presents mixed issues of law and fact and is reviewed de novo).

We also review de novo the bankruptcy court's determination that issue preclusion was available. In re Black, 487 B.R. at 210. If issue preclusion was available, we then review the bankruptcy court's application of issue preclusion for an abuse of discretion. Id. A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in inferences that may be drawn from the facts in the record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

DISCUSSION

Summary judgment is appropriate where the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (applicable in adversary proceedings under Rule 7056). The bankruptcy court must view the evidence in the light most favorable to the non-moving party when determining whether genuine disputes of material fact exist and whether the movant is entitled to judgment [*7] as a matter of law. See Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014). And, it must draw all justifiable inferences in favor of the non-moving party. See id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment as the basis for granting summary judgment. See Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831-32 (9th Cir. BAP 2006). In so doing, the bankruptcy court must apply the forum state's law of issue preclusion. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); see also 28 U.S.C. § 1738 (federal courts must give "full faith and credit" to state court judgments). Thus, we apply California preclusion law.

In California, application of issue preclusion requires that: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding. Lucido

v. Super. Ct., 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223 (1990). California further places an additional limitation on issue preclusion: courts may give preclusive effect to a judgment "only if application of preclusion furthers the public policies underlying the doctrine." In re Harmon, 250 F.3d at 1245 (citing Lucido, 51 Cal. 3d at 342-43); [*8] see also In re Khaligh, 338 B.R. at 824-25.

The party asserting preclusion bears the burden of establishing the threshold requirements. In re Harmon, 250 F.3d at 1245. This means providing "a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Ultimately, "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect." Id.

The Debtors do not challenge the bankruptcy court's determination that the State Court Judgment is final and against the Debtors. Consequently, we do not review this determination on appeal.

A. The bankruptcy court erred in granting summary judgment to Precision on its § 523(a)(6) claim based on the issue preclusive effect of the State Court Judgment.

1. Exceptional circumstances justify our review of the propriety of issue preclusion as to both Yuri and Natalia.

Yuri and Natalia filed a joint opening brief on appeal that requests de novo review of the availability of issue preclusion in connection with the § 523(a)(6) judgment, but named only Natalia when discussing this portion of the summary judgment. Precision, thus, argues that Yuri did not specifically challenge the § 523(a)(6) judgment against him and that he cannot obtain [*9] relief from that portion of the summary judgment on appeal. We acknowledge that a technical waiver exists. Nonetheless, based on the circumstances of this case and the nature of our ultimate conclusion, we determine that exceptional circumstances exist, and we exercise our discretion and extend review as to Yuri as well. See Mano-Y&M, Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998 (9th Cir. 2014) (appellate court may exercise discretion to consider waived issues based on exceptional circumstances).

Here, the Debtors share an attorney and filed a joint appellate brief, which squarely challenges the bankruptcy court's § 523(a)(6) determination. Our de novo review and resulting conclusion is based on a strictly legal point. While the Debtors do not argue this point directly as to Yuri in their opening brief, they do argue in their discussion of § 523(a)(4) that the State Court Judgment did not necessarily decide that Yuri acted with gross recklessness, a less culpable state of mind than that required for § 523(a)(6) willfulness. We, thus, determine that vacating the judgment solely as to Natalia would be manifestly unjust.

Section 523(a)(6) excepts from discharge debts arising from a debtor's "willful and malicious" injury to another person or to the property of another. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). The "willful" and "malicious" requirements [*10] are conjunctive and subject to separate analysis.[4] Id.; In re Su, 290 F.3d at 1146-47.

2. The State Court Judgment did not satisfy the element of willful injury as required for § 523(a)(6) nondischargeability.

Under § 523(a)(6), the willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors "either a subjective intent to harm, or a subjective belief that harm is substantially certain." In re Su, 290 F.3d at 1144; see also In re Jercich, 238 F.3d at 1208. The injury must be deliberate or intentional, "not merely a deliberate or intentional **act** that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (emphasis in original). Thus, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64.

---

[4] A "malicious" injury requires: "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). The Debtors do not challenge the bankruptcy court's application of issue preclusion as to § 523(a)(6) maliciousness. As a result, that issue is deemed waived. See ***Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009)***.

The terms "willful" and "malicious," first appearing in the Bankruptcy Act of 1898,[5] seemingly derive in some measure from the common law concepts of malice in fact and malice in law, respectively. [*11]

California, for example, defines malice in law as an "intent to do a wrongful act, established either by proof or presumption of law . . . from the intentional doing of the act without justification or excuse or mitigating circumstances." *In re V.V., 51 Cal. 4th 1020, 1028, 125 Cal. Rptr. 3d 421, 252 P.3d 979 (2011)* (citing *Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911)*; Cal. Penal Code §§ 7(4), 450(e); 1 Witkin & Epstein, Cal. Criminal Law § 11) (internal quotation marks omitted); see also *Tinker v. Colwell, 193 U.S. 473, 485-86, 24 S. Ct. 505, 48 L. Ed. 754 (1904)* ("Malice, in common acceptation, means ill will against a person, **but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse**." (emphasis added) (quoting Bromage v. Prosser, 4 Barn. & Cress. 247, 107 Eng. Rep. 1051 (K.B. 1825) (internal quotation marks omitted)), superseded by statute, Pub. L. No. 95-598, 92 Stat. 2549 (1978); *Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 53 (1867)* (same). Thus, malice in law squares cleanly with *§ 523(a)(6)* maliciousness.

In contrast, malice in fact is defined as "a **state of mind** arising from hatred or ill-will, evidencing a willingness to vex, annoy, or **injure another person**." *Davis v. Hearst, 160 Cal. at 160* (emphasis added); *In re V.V., 51 Cal. 4th at 1028* ("Malice in fact — defined as 'a wish to vex, annoy, or injure' . . . — consists of actual ill will or **intent to injure**.") (emphasis added).

This background, highlights two points critical to any *§ 523(a)(6)* willfulness determination. First, by holding that the requisite state of mind was an actual intent to injure [*12] (or substantial certainty regarding injury), the Supreme Court in Geiger effectively adopted a narrow construction and the most blameworthy state of mind included within the common understanding of malice in fact. As relevant here, under California law, the general definition of malice in fact encompasses less reprehensible states of mind.

Second, as the Supreme Court clarified in Geiger, recklessly inflicted injuries do not satisfy the *§ 523(a)(6)* willfulness requirement. See *523 U.S. at 61-62*. This necessarily includes all degrees of reckless conduct, whether arising from recklessness simple, heightened, or gross; conduct that is reckless merely requires an intent to act, rather than an intent to cause injury as required under Geiger. See H.R. Rep. 95-595, at 365 (1977) ("'Willful' means deliberate or intentional. To the extent that *Tinker v. Colwell, 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754 [1904]*, held that a looser standard is intended, and to the extent that other cases have relied on Tinker to apply a **'reckless disregard' standard, they are overruled**.") (emphasis added); *Restatement (Second) of Torts § 500 cmt. f* (1965). But see *Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1757, 185 L. Ed. 2d 922 (2013)* (holding that, for the purposes of *§ 523(a)(4)*, the state of mind for "defalcation" includes gross recklessness).

Here, the State Court Judgment provided two possible bases for the application of [*13] issue preclusion: the findings in the punitive damages award and the determination of breach of fiduciary duty under state law. Neither basis supported an application of issue preclusion on the issue of *§ 523(a)(6)* willfulness.

3. The punitive damages award was an insufficient basis for issue preclusion.[6]

The jury's punitive damages award against both of the Debtors was based on a disjunctive finding of malice, oppression, or fraud. The "malice, oppression or fraud" finding arises from California Civil Code § 3294 ("CC § 3294"), which provides for the recovery of punitive damages in non-contract breach civil cases. Each finding supplies an independent basis for a punitive damages award under CC § 3294. See *Coll. Hosp. Inc. v. Super. Ct., 8 Cal. 4th 704, 721, 34 Cal. Rptr. 2d 898, 882 P.2d 894 (1994)*.

---

[5] 30 Stat. 544, ch. II § 17(2) (1898) (repealed 1978).

[6] The Debtors make much of the fact that the jury finding was made in the alternative; that is, Yuri or Natalia. But, as the bankruptcy court noted, the punitive damages award was entered against both of the Debtors, which necessarily required a finding of malice, oppression, or fraud against each individual.

Civil Code § 3294 provides statutory definitions of these terms.[7] "Malice" is defined as either: (1) conduct that the defendant intends to cause injury to the plaintiff ("Intentional Malice"); or (2) despicable conduct carried on by the [*14] defendant with a willful and conscious disregard of the rights or safety of others ("Despicable Malice"). Cal. Civ. Code § 3294(c)(1).[8] "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Id. § 3294(c)(2). And, "fraud" refers to "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Id. § 3294(c)(3).

Only [*15] Intentional Malice, see *Brandstetter v. Derebery (In re Derebery), 324 B.R. 349, 356 (Bankr. C.D. Cal. 2005)*, and fraud expressly require an intent to cause injury. As a result, only those findings satisfy the *§ 523(a)(6)* willfulness requirement for the purposes of issue preclusion. Conversely, Despicable Malice and oppression, which arise from acts in conscious disregard of another's rights or safety, fail to satisfy the requisite state of mind for *§ 523(a)(6)* willfulness. As discussed in further detail below, conscious disregard is akin to recklessness.

a. A punitive damages award under California law can be based on acts in conscious disregard.

As defined by the California Supreme Court, a person acts with a conscious disregard of another's rights or safety when he is aware of the probable dangerous consequences of his conduct and he willfully and deliberately fails to avoid those consequences. *Taylor v. Super. Ct., 24 Cal. 3d 890, 895-96, 157 Cal. Rptr. 693, 598 P.2d 854 (1979)*; see also *Jud. Council of Cal. Civ. Jury Instruction (CACI) 3940, 3941*; Cal. Civ. Jury Instructions (BAJI) 14.71, 14.72.1.

The conscious disregard requirement found in CC § 3294 appears to track the Taylor decision. In Taylor, the California Supreme Court examined whether the act of driving while intoxicated constituted malice for the purposes of a CC § 3294 punitive damages award. Previously, some California [*16] courts held that reckless conduct did not establish malice as required for a punitive damages award. See *G.D. Searle & Co. v. Super. Ct., 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975)*; see also *Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 896, 99 Cal. Rptr. 706 (1972)*; *Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958)*. Contra *Nolin v. Nat'l Convenience Stores, Inc., 95 Cal. App. 3d 279, 285-88, 157 Cal. Rptr. 32 (1979)* (gross recklessness supported punitive damages award under CC § 3294). In an earlier case, the California Supreme Court, however, used the term "reckless misconduct" in dicta. See *Donnelly v. S. Pac. Co., 18 Cal. 2d 863, 869-70, 118 P.2d 465 (1941)*.

The Taylor court held that "a conscious disregard of the safety of others [could] constitute malice within the meaning of [CC § 3294]." *24 Cal. 3d at 895*. It also stated that to the extent Gombos v. Ashe was inconsistent with its holding, that case was disapproved. *Id. at 900*. Gombos previously held that drunk driving, while reckless, wrongful, and illegal, did not constitute malice within the meaning of CC § 3294. *158 Cal. App. 2d at 527*. The Taylor court never expressly excluded recklessness as a basis for an award of punitive damages; it thus kept the door open to punitive damages based on a state of mind other than actual intent to injure.

Within a year of the Taylor decision, CC § 3294 was amended to require conscious disregard with respect to Despicable Malice and oppression. In so amending the statute, the California legislature included the two types of malice that exist currently: Intentional Malice and Despicable Malice. Clearly, it [*17] did not intend to include two identical forms of malice in the statutory definition. Thus, conscious disregard begins to take shape as a state of mind less malicious than an intent to injure.

i. Conscious disregard is the equivalent of reckless conduct.

---

[7] Although enacted in 1872, CC § 3294 remained largely unaltered until amendment in 1980. Civil Code § 3294 was previously amended in 1901 (deemed unconstitutional and void in Lewis v. Dunne, 134 Cal. 291, 66 P. 478 (1901)) and 1905.

Prior to 1980, although the statute required a finding of malice, oppression, or fraud to recover punitive damages, it did not expressly define those categories. The 1980 amendment added the statutory definitions.

[8] In 1987, the California legislature amended CC § 3294 and added the "despicable" adjective to the type of conduct necessary for Despicable Malice and oppression. It also qualified Despicable Malice with the requirement that a defendant willfully and consciously disregard the rights or safety of another.

In the continuum of states of mind supporting a judgment based on tort, recklessness rests between negligence, requiring no intent, and intentional misconduct, requiring both a deliberate act and the desire to cause the consequences of the act. In *Donnelly v. S. Pac. Co., 18 Cal. 2d 863, 118 P.2d 465 (1941)*, the California Supreme Court considered whether existing law precluded a personal injury action based on negligence. It examined the contours of negligence and intentional torts and identified the existence of a third, intermediary category of tort law: "[a] tort having some of the characteristics of both negligence and willfulness occur[ed] when a person with **no intent to cause harm** intentionally perform[ed] an act so unreasonable and dangerous that he kn[ew], or should [have] know[n], it [was] highly probable that harm [would] result." *Id. at 869* (emphasis added). Noting the various terms employed by the courts to describe this category of tort, it adopted with approval the term "wanton and reckless misconduct." Id.

This type of [*18] tort, the California Supreme Court explained, "involve[d] no intention, as [did] willful misconduct, to do harm, and i[t] differ[ed] from negligence in that it . . . involve[d] an intention to perform an act that the actor [knew], or should [have] know[n], [would] very probably cause harm." Id. Importantly, it recognized that "wanton and reckless misconduct" was more closely akin to willful misconduct than to negligence and, "[t]hus, it justifie[d] an award of punitive damages." *Id. at 869-70*.

The Donnelly court's analysis on this point is dicta, but it is also consistent with the Restatement of Torts discussion of reckless conduct.[9] The Restatement explains that one type of recklessness involves the situation where a person knows, or has reason to know (based on an objective person standard),[10] of facts creating a high degree of risk of physical harm to another, and deliberately proceeds to act, or **fails to act**, in **conscious disregard** of, or indifference to, that risk. *Restatement (Second) of Torts § 500 cmt. a* (1965) (emphasis added).[11] The person must know (or have reason to know of) the facts creating an unreasonable risk. Id.

The critical difference between intentional and reckless misconduct is the necessary state of mind; for conduct to be reckless, the person must intend the reckless act but need not intend to cause the resulting harm. Id., cmt. f. To establish recklessness, it is sufficient that the person realizes (or should realize) the "strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless." Id. But, a strong probability is not equivalent to substantial certainty. See id. ("[A] strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results."); id. *§ 8A cmt. b*. Thus, "[a]s the probability that [*20] [injurious] consequences will follow decreases, and becomes less than substantial certainty, the [person's] conduct loses the character of intent, and becomes mere recklessness." Id. *§ 8A cmt. b*.

Comparing the explanations of reckless conduct provided by the *Donnelly* court and the Restatement of Torts with the definition of conscious disregard, it becomes clear that conscious disregard proceeds from reckless conduct. The common factor between conscious disregard and reckless conduct is the accompanying state of mind; both require solely an intent to act and the focus lies there, rather than on an intent to cause the consequences of the act as required by Geiger. Degrees of recklessness may exist; but, again, whether recklessness is heightened or gross, it is insufficient for a determination of *§ 523(a)(6)* willfulness.

In defining conscious disregard, the California Supreme Court in Taylor employed a description consistent with reckless conduct. As stated, acting with a conscious disregard within the meaning of CC § 3294 requires: (1) being aware of the probable dangerous consequences of one's own conduct; and (2) willfully and deliberately failing to avoid those consequences. *Taylor, 24 Cal. 3d at 895-96*.

First, to be aware of probable [*21] dangerous consequences, a person must first know or have reason to know of the facts

---

[9] We refer to the Restatement (Second) of Torts, in deference to the Supreme Court's discussion of the Restatement Second in Geiger and the Ninth Circuit's decisions in In [*19] re Jercich and In re Su. The Restatement (Third) of Torts: Liability for Phys. & Emot. Harm §§ 1 (Intent) (2010) and 2 (Recklessness) (2010) do not contain substantive differences that change our analysis.

[10] See Restatement (Second) of Torts § 12(1) (1965).

[11] The Restatement Second also points out a second type of reckless conduct: where the person knows (or has reason to know) of the facts but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. Restatement (Second) of Torts § 500 cmt. a (1965).

giving rise to a high degree of risk of harm to another. Knowledge of such facts is an essential element of recklessness. See *Restatement (Second) of Torts § 500 cmt. a*.

Second, whether consequences are "dangerous" relates to the character of a person's unreasonable conduct and the necessarily high degree of risk that serious harm will result from that conduct. See id., *cmts. a*, *c*.

Third, the probability factor of dangerous consequences also relates to reckless conduct. See id., *cmt. a*. Even a strong probability that consequences may result, however, is not equivalent to substantial certainty for the purposes of intent. See id., *cmt. f*; id. *§ 8A cmt. b*. In this context, probable means more likely than not, while substantial certainty requires near certainty.

Fourth, the terms "willfully" and "deliberately" mean only that the person failed, by design, to avoid the consequences of his wrongful act. His intent is focused on the act of being unsuccessful in preventing potential bad consequences, rather than on the actual consequences of his act. See id. *§ 500 cmt. b* ("Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself [*22] intended[.]").

The Supreme Court's decision in Bullock, although involving a different exception to discharge and federal common law rather than California state law, also strengthens the connection between conscious disregard and recklessness. There, the Supreme Court held that the term "defalcation," within the meaning of *§ 523(a)(4)*, included a state of mind involving gross recklessness with respect to improper fiduciary behavior. *133 S. Ct. at 1757*. In doing so, it concluded that "[w]here actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary '**consciously disregards**' (or is willfully blind to) 'a substantial and **unjustifiable risk**' that his conduct will turn out to violate a fiduciary duty." *Id. at 1759* (quoting *Model Penal Code § 2.02(2)(c)* (1985)) (emphasis added).

In sum, conscious disregard within the meaning of CC § 3294 is consistent with reckless conduct as discussed by California cases, the Restatement of Torts, and Bullock.

ii. California statutory authority and case law otherwise support that conscious disregard proceeds from reckless conduct.

A statutory analogue lends significant support to the determination that conscious disregard arises from reckless conduct. California law provides for enhanced [*23] remedies in cases of elder abuse. See Cal. Welf. & Inst. Code § 15657. In order to claim these enhanced statutory remedies, a defendant must be found guilty of **recklessness**, oppression, fraud, or malice in the commission of abuse. See id. For the purposes of an elder abuse act claim, recklessness is defined as "a 'deliberate disregard' of the 'high degree of probability' that an injury will occur." *Delaney v. Baker, 20 Cal. 4th 23, 31, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999)* (citing Cal. Civ. Jury Instructions (BAJI) 12.77, defining "recklessness" for intentional infliction of emotional distress; *Restatement (Second) of Torts § 500*)). Thus, recklessness "rises to the level of a conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it." *Id. at 31-32* (citing *Restatement (Second) of Torts § 500 cmt. g*).

The descriptions of recklessness for the purpose of an elder abuse claim and conscious disregard within the meaning of CC § 3294 are substantively similar. Indeed, the California Supreme Court has held that a plaintiff alleging an elder abuse claim must allege conduct "essentially equivalent" to conduct necessary to support a CC § 3294 punitive damages award. See *Covenant Care, Inc. v. Super. Ct., 32 Cal. 4th 771, 789, 11 Cal. Rptr. 3d 222, 86 P.3d 290 (2004)*. It, thus, implicitly recognized that an award of CC § 3294 punitive damages can be based on reckless conduct.

Moreover, various California courts have recognized the availability of CC [*24] § 3294 punitive damages for **nonintentional torts** when the offensive conduct is a conscious disregard of the rights or safety of others. See *Peterson v. Super. Ct., 31 Cal. 3d 147, 158, 181 Cal. Rptr. 784, 642 P.2d 1305 (1982)* ("Nonintentional torts may [] form the basis for punitive damages when the conduct constitutes conscious disregard of the rights or safety of others."); *Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1004, 25 Cal. Rptr. 2d 550, 863 P.2d 795 (1993)* ("[P]unitive damages sometimes may be assessed in unintentional tort actions under [CC §] 3294."). Nonintentional torts, including those predicated on reckless conduct, require only an intent to act. See, e.g., *Peterson, 31 Cal. 3d at 158-59* (Punitive damages

are available to punish "[n]onintentional conduct . . . when a party intentionally **performs an act** from which he knows, or should know, it is highly probable that harm will result.") (emphasis added).

iii. That "willful" is an additional requirement for Despicable Malice does not change the outcome of the analysis.

As stated, Despicable Malice is defined as despicable conduct done **willfully** and in conscious disregard of the rights or safety of another; oppression, notably, requires only a conscious disregard. Cal. Civ. Code § 3294(c)(1)-(2). The additional "willful" requirement in Despicable Malice, however, does not change the outcome of the analysis.

In the context of CC § 3294, the term "willful" refers only to the deliberate conduct committed [*25] by a person in a despicable manner. The statute, thus, employs the dictionary definition of "willful." See *Geiger, 523 U.S. at 61 n.3* (noting that Black's Law Dictionary defined "willful" as "voluntary" or "intentional"). There is no indication that "willful" refers to a subjective intent to injure or a subjective belief that injury is substantially certain to result. And, this interpretation makes practical sense; to read the statute otherwise would render the inclusion of Intentional Malice in CC § 3294 superfluous.

b. Determining that conscious disregard is insufficient to satisfy the *§ 523(a)(6)* willfulness requirement is consistent with existing precedent.

Construing conscious disregard as a form of reckless conduct is consistent with Geiger and its progeny, including the Ninth Circuit's decisions in In re Jercich and In re Su. As the Supreme Court recognized in Geiger, expanding *§ 523(a)(6)* to include reckless conduct "would obviate the need for *§ 523(a)(9)*, which specifically exempts 'debts for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.'" *Geiger, 523 U.S. at 62* (quoting *11 U.S.C. § 523(a)(9)*).

Yet, the availability of punitive damages for [*26] injuries caused while driving intoxicated was exactly the issue before the California Supreme Court in Taylor. It was this issue that caused the California Supreme Court to determine that conscious disregard could constitute malice. Not long after, the California legislature codified the inclusion of conscious disregard into CC § 3294.

We cannot reconcile the rationale supplied by the Supreme Court in Geiger in regards to *§ 523(a)(9)* with the factual circumstances giving rise to the conscious disregard standard in Taylor. Thus, consistent with *Geiger*, we must reject the attempt to give issue preclusive effect to findings based on conscious disregard in the context of *§ 523(a)(6)* willfulness. As recognized in Geiger, a determination to the contrary would render superfluous *§ 523(a)(9)* in nondischargeability proceedings.

c. Despicable conduct, as also required for Despicable Malice and oppression, is based on an objective person standard.

In addition to conscious disregard, both Despicable Malice and oppression require conduct that is despicable. Cal. Civ. Code § 3294(c)(1)-(2). Conduct is despicable when it is so vile, base, contemptible, miserable, wretched, or loathsome that ordinary decent people would look down upon and despise it. *Coll. Hosp. Inc., 8 Cal. 4th at 725* (describing despicable [*27] as circumstances that are "base," "vile," or "contemptible."); *Jud. Council of Cal. Civ. Jury Instruction (CACI) 3940, 3941*; Cal. Civ. Jury Instructions (BAJI) 14.71, 14.72.1.

Whether conduct is despicable is measured by an objective person standard. See *In re Dereberv, 324 B.R. at 356*. But, an objective, reasonable person standard is not allowed in the *§ 523(a)(6)* willfulness analysis. See *In re Su, 290 F.3d at 1145* ("By its very terms, the objective standard disregards the particular debtor's state of mind and considers whether an objective, reasonable person would have known that the actions in question were substantially certain to injure the creditor."). Thus, a punitive damages award based on Despicable Malice or oppression does not establish the subjective intent required for *§ 523(a)(6)* willfulness.

d. The disjunctive findings in the punitive damages award included Despicable Malice and oppression.

Here, the CC § 3294 findings in the punitive damages award were stated in the disjunctive: that Yuri and Natalia each acted with malice **or** oppression **or** fraud. On this record, we cannot ascertain the exact basis for the jury's findings. Because the punitive damages award may have been based only on a finding of Despicable Malice or oppression, issue preclusion was unavailable [*28] on the issue of § 523(a)(6) willfulness.

To be clear, our holding does not eviscerate a bankruptcy court's ability or opportunity to apply issue preclusion to a state court jury's findings pursuant to CC § 3294. To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.

But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness. Even then, however, those particular findings are not without value to a creditor seeking nondischargeability under § 523(a)(6). The creditor is still entitled to seek issue preclusion on other issues based on findings of Despicable Malice or oppression, including the maliciousness requirement of § 523(a)(6). Under those circumstances, the bankruptcy court need only try the singular issue of the debtor's intent for the purposes of § 523(a)(6) willfulness; that is, whether the debtor subjectively intended to cause injury or was substantially [*29] certain that injury would follow. It need not retry the entire state court case a second time.

4. The breach of fiduciary duty determination under California law was an insufficient basis for issue preclusion on the issue of § 523(a)(6) willfulness.

In California, the elements for a breach of fiduciary duty are the existence of a fiduciary relationship, breach of that fiduciary duty, and damages. *Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 820, 124 Cal. Rptr. 3d 256, 250 P.3d 1115 (2011)*. There is no particular scienter requirement, let alone a requirement of a subjective intent to injure. See *Correia-Sasser v. Rogone (In re Correia-Sasser), 2014 Bankr. LEXIS 3513, 2014 WL 4090837, at *8 (9th Cir. BAP Aug. 19, 2014)*. As a result, without more, a judgment for breach of fiduciary duty under California law cannot support a willfulness determination under § 523(a)(6).

B. The bankruptcy court erred in granting summary judgment to Precision on its § 523(a)(4) claim against Yuri based on the issue preclusive effect of the State Court Judgment.

Section 523(a)(4) excepts from discharge debts for fraud or defalcation while acting in a fiduciary capacity. Whether a debtor is a fiduciary for the purposes of § 523(a)(4) is a question of federal law. *Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996)*. The definition is construed narrowly, requiring that the fiduciary relationship arise from an express or technical trust that was imposed prior to the wrongdoing that caused the debt. *Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986)* ("The broad, general definition of fiduciary—a [*30] relationship involving confidence, trust and good faith—is inapplicable in the dischargeability context."); see also *Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997)*.

1. Express or technical trust

State law determines whether the requisite trust relationship exists. See *In re Lewis, 97 F.3d at 1185*; *Mele v. Mele (In re Mele), 501 B.R. 357, 365 (9th Cir. BAP 2013)*. The Debtors argue that here an express trust did not exist because the elements for a trust were not satisfied under California law. They maintain that, at best, the 2005 operating agreement required that Yuri hold the properties in trust for Precision; but, because Yuri was the sole member of Precision from 2005 to 2008, the duty to hold the properties in trust was effectively a duty to himself.

In response, Precision argues that the Debtors ignore Yuri's status as its manager, which independently established fiduciary duties owed to the company. In any event, it contends that, based on the 2008 amendment, the Bronfmans' membership interests in Precision were deemed issued as of the date of the 2005 operating agreement. And, it argues that pursuant to former California Corporations Code § 17153, a manager of a limited liability company is subject to the same fiduciary duties as a partner in a partnership; thus, by extension and pursuant to *Ragsdale*, a manager is a trustee of the limited

liability [*31] company.

Something that neither party addresses is that Precision is a Nevada limited liability company. Pursuant to the 2005 operating agreement, Precision was organized under the laws of Nevada. Former California Corporations Code § 17450(a),[12] in effect at the time of the underlying events and the state court action, established that: "[t]he laws of the state . . . under which a foreign limited liability company is organized shall govern its organization and **internal affairs** and the **liability and authority of its managers and members.**" Emphasis added.

The 2008 amendment to the Precision operating agreement states that: "[n]otwithstanding a conflict of [l]aws, the operating agreement may be enforced in the Courts of the State of California and or in the Courts of the State of New York, including the Federal District Courts of California and/or New York." Enforcing the operating agreement in a California or New York court, however, does not alter the law under which the agreement arose or by which it is governed. Thus, it appears that, for the purposes of *§ 523(a)(4)*, we look to Nevada law to determine whether an express or technical trust existed such that Yuri was a fiduciary to Precision.

a. An express trust did not exist [*32] .

Under Nevada law, an express trust requires that: (1) "[t]he settlor properly manifest[] an intention to create a trust; and [(2)] [t]here is trust property . . . ." *Nev. Rev. Stat. § 163.003*. There are various methods to create a trust, including a declaration by the owner of property that he or she holds the property as trustee or a transfer of property by the owner during his or her lifetime to another person as trustee. Id. *§ 163.002*. Nevada also permits the creation of a business trust. See *Nev. Rev. Stat. §§ 88A.010-88A.930* (2003). To create a business trust, a party must file with the Nevada secretary of state a certificate of trust. See id. *§ 88A.210* (2005).

Here, there is no indication that an express trust existed. Neither the 2005 operating agreement nor the 2008 amendment satisfied the requirements for an express trust. Nor is there anything else in the record that suggests the creation of an express trust during the time that Yuri was manager of Precision. Similarly, nothing in the record before us evidences the creation of a business trust. Thus, the next issue is whether a technical trust existed under Nevada law.

b. On this record, we cannot determine whether a technical trust existed.

Nevada law does not define a technical trust. In the absence of a definition [*33] under state law, we construe a technical trust as one imposed by law. See *In re Mele, 501 B.R. at 365*; see also *Teamsters Local 533 v. Schultz (In re Schultz), 46 B.R. 880, 885 (Bankr. D. Nev. 1985)* ("[A technical] trust . . . may arise by operation of a state statute which imposes trust-like obligations on those entering into certain kinds of contracts.").

Our review of the Nevada Revised Statutes ("NRS") reflects that a Nevada limited liability company does not necessarily involve a trust relationship between a manager or member and the limited liability company. One exception — *NRS § 86.391* — provides that "[a] member **holds as trustee** for the company specific property stated in the articles of organization or operating agreement as contributed by the member, but which was not so contributed." *Nev. Rev. Stat. § 86.391(2)* (emphasis added). And, *NRS § 86.311* establishes that "[r]eal and personal property owned or purchased by a company must be held and owned, and conveyance made, in the name of the company."

Unlike California, Nevada does not have a statute equating the fiduciary duties of a manager in a limited liability company context to those of a partner in a partnership. Therefore, duties under partnership law are irrelevant. Instead, Nevada law establishes that, in addition to a limited liability company's articles of organization, the operating [*34] agreement, if any,[13] is central to defining the contours of the fiduciary relationship. And, parties to an operating agreement have significant latitude in expanding or limiting fiduciary duties. See *Nev. Rev. Stat. § 86.286* (2013).

Here, the 2005 operating agreement does not expressly establish the existence or the non-existence of fiduciary duties owed to Precision by its manager. Nor does it provide that Yuri contributed any property to the company, the only manner in

---

[12] The new version, California Corporations Code § 17708.01, provides for the same.

[13] In Nevada, "[a] limited-liability company may, but is not required to, adopt an operating agreement." Nev. Rev. Stat. § 86.286.

which Nevada law expressly creates a fiduciary duty to a limited liability company. See *Nev. Rev. Stat. § 86.391(2)*. The operating agreement, however, provides that "[n]o real or other property of the LLC shall be deemed to be owned by any Member individually, but shall be owned by and title shall be vested solely in the LLC." While that provision and *NRS § 86.311* created duties owed to Precision, we cannot determine whether either appropriately relates to a technical trust, rather than to a constructive or resulting trust. The latter trusts, of course, are insufficient to support *§ 523(a)(4)* nondischargeability. See *Ragsdale, 780 F.2d at 796*.

Other documents and evidence may also exist that fill the lacuna here; for example, [*35] Precision's articles of organization, required to create a limited liability company under Nevada law. See *Nev. Rev. Stat. § 86.151(1)(a)* (2003). Such document may or may not establish that a trust relationship existed between Yuri and Precision. These determinations, however, must be made by the bankruptcy court, rather than the Panel, in the first instance.

On this record, we cannot conclude that, as a matter of law, a technical trust existed under Nevada law. The bankruptcy court, thus, abused its discretion in giving preclusive effect to the State Court Judgment on the issue of whether there existed a fiduciary relationship in relation to a technical trust for the purposes of *§ 523(a)(4)* nondischargeability.[14]

C. Judgment amount excepted from discharge

Finally, the Debtors argue that the bankruptcy court was required to conduct a separate inquiry into the measure of damages attributable to the specific tortious conduct at issue in the state court action. They contend that there were multiple breaches of fiduciary duty alleged and to the extent any of the breaches do not constitute a breach under federal law, any damages flowing [*36] from such breach are dischargeable. They also contend that only a damages judgment for fraud is subject to issue preclusion without further analysis by the bankruptcy court.

Based on our conclusions on both the *§ 523(a)(6)* and *(a)(4)* issues, we need not address this argument on appeal.

CONCLUSION

Given the unavailability of issue preclusion, the bankruptcy court erred in granting summary judgment in favor of Precision based on the preclusive effects of the State Court Judgment. Therefore, we VACATE the summary judgment and REMAND to the bankruptcy court for further proceedings consistent with this opinion.

---

[14] Given our conclusion, we do not address the other issues related to the *§ 523(a)(4)* nondischargeability judgment.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

22287 Mulholland Hwy., # 318
Calabasas, CA 91302

A true and correct copy of the foregoing document entitled (*specify*): _____

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY ADJUDICATION ALTERNATIVE REQUEST FOR CONTINUANCE THEREOF

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 05/12/2015, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Rosendo Gonzalez (TR) rgonzalez@ecf.epiqsystems.com, dgomez@gonzalezplc.com
Lewis R Landau on behalf of Defendant Zafar David Khan Lew@Landaunet.com
United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov
Philip A Zampiello on behalf of Plaintiff Kenneth Barton philipz@mkzlaw.com, PatrickM@mkzlaw.com;MichaelK@mkzl

☑ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 05/12/2015, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Judge Brand, US Bankruptcy Court, 255 E Temple Street, Suite 1382, Los Angeles, CA 90012

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

05/12/2015	Lewis R. Landau	/s/ Lewis R. Landau
Date	*Printed Name*	*Signature*

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

IN RE: ZAFAR DAVID KHAN, Debtor, KENNETH BARTON, Plaintiff(s), vs. ZAFAR DAVID KHAN, Defendant.	Case No. 2:13-bk-19713-WB Adversary Case No: 2:13-AP-01752-WB **REPLY OF CREDITOR KENNETH BARTON FOR SUMMARY JUDGMENT/ PARTIAL SUMMARY ADJUDICATION ON PLAINTIFF'S ADVERSARY COMPLAINT AND CAUSES OF ACTION FOR NON-DISCHARGEABILITY; MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 2, 2015 Time: 2:00 p.m. Courtroom: "1375"

0TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. SUPREME COURT: **Page(s)**

NINTH CIRCUIT:

DISTRICT COURT:

BANKRUPTCY COURTS:

TABLE OF AUTHORITIES (*Cont.*)

CALIFORNIA COURTS: **Page(s)**

FEDERAL STATUTES:

CALIFORNIA STATUTES:

SECONDARY SOURCES:

MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION*.

Plaintiff Barton's Summary Judgment Motion establishes that that claims against and obligations of Debtor Zafar Khan ("**Debtor**") are non-dischargeable as a matter of law. After a lengthy trial adjudicating claims for fraud, conversion and intentional breach of fiduciary duty, the Los Angeles Superior Court (LASC) expressly found that Barton proved each of those claims and had proven, by clear and convincing evidence, that Debtor's conduct was undertaken with fraud, malice *and* oppression. The LASC entered a detailed Statement of Decision, Ruling on Punitive Damages and Revised Statement of Decision (collectively, the "**SOD/RSOD**") and thereafter entered its Judgment sustaining all claims in favor of Barton. The LASC's now final[1] SOD/RSOD and Judgment meet all the requirements for, and trigger application of, collateral estoppel such that Barton's proven claims satisfy the elements of Barton's Section 523(a)(2)(A), (a)(4) and (a)(6) non-dischargeability claims before the Court. Summary disposition of Barton's claims should be granted as no genuine issues of material fact remain to be decided.

Debtor, faced with the daunting task of trying to re-characterize the LASC's SOD/RSOD and Judgment as something other than sufficiently firm and definite to be entitled to preclusive effect, has submitted an Opposition which substantively ignores the LASC's findings, under-quotes the Appellate Opinion and provides sweeping, conclusory characterizations to cases which are wholly inapposite to the case at bar. In short, none of Debtor's evidence-less assertions and distinguishable cases raise any triable issues on the record here.

First, as the LASC SOD/RSOD and Judgment are not based on "alternative grounds," Debtor's entire misconceived and insupportable assertion that somehow the Court of Appeal's affirmance nullified the Judgment on the fraud and intentional breach

---

1 Subsequent to the LASC's definitive action, the California Court of Appeal (CCA) affirmed the LASC Judgment *in toto*, save a reversal (inconsequential to these proceedings) of an emotional distress award. Judgment went final in late March 2015.

of fiduciary duty claims (where the Appellate Court addressed and upheld the conversion claim and declined to address *Debtor's* other contentions), is without logic or authority. The SOD/RSOD and Judgment are not based on "alternative grounds," so Debtor gets no mileage out from his inapposite citations. Further, even if (despite no evidence in the record) the SOD/RSOD and Judgment – which sustained entire causes of action (not a cause of action or motion on different sub-"grounds") – were somehow to be construed to be based on "alternative grounds," the 9th Circuit has held that the Appellate Court's affirmance of the Judgment overall includes the lower court's adjudication of claims which the Appellate Court's opinion ultimately did not have to reach. Hence, the inapt "alternative grounds" assertion, offered by Debtor to try and circumvent the LASC's controlling fraud and intentional breach of fiduciary duty findings, is untenable and summary disposition of the Section 523(a)(2)(A) and (a)(4) claims is warranted.

Second, while pinning his Opposition to the hope that the recent (not yet final) decision in *Plyam v. Precision Development, LLC (In Re Plyam)* (2015 Bankr. Lexis 1538 (9th Cir. BAP May 5, 2015) is somehow germane here in the context of the LASC's punitive damage findings, Debtor's hopes are misplaced. Other than quoting excerpts from *In Re Plyam*, Debtor fails to demonstrate that the case is on all fours with the matter at bar (which it is not). Where, as is the case here, the LASC expressly found that Debtor's nefarious acts (corporate records destruction, fabrication and forgery, etc.) were undertaken with fraud, malice *and* oppression (Motion, Ex. "B," p. 10/ "BARTON 0042"), the *In Re Plyam* Court reversed because the state court's jury finding was in the disjunctive (that the Debtor acted with malice, oppression *or* fraud) and, therefore, the punitive damages findings on that record were insufficient to satisfy the willfulness element under Section 523(a)(6) for purposes of summary judgment based on collateral estoppel. Yet, Debtor's Opposition fails to address this dispositive distinction between the unequivocal LASC findings and the equivocal findings of the jury in *In Re Plyam*.

Third, Debtor's remaining challenges to the SOD/RSOD and Judgment's collateral estoppel effect are meritless. For example, Debtor wholly ignores and does not

dispute that the Barton LASC fraud judgment satisfies the elements for non-dischargeability under Section 523(a)(2)(A). Instead, Debtor's lone plea to try and avoid (a)(2)(A) non-dischargeability is contingent on the meritless assertion that the LASC's SOD/RSOD and Judgment were on identified "alternative grounds" (no evidence exists as to the condition precedent to that argument) and, therefore, the Appellate Opinion upholding the Judgment effectively nullifies the fraud and intentional breach of fiduciary duty claims in the Judgment. Debtor's contorted and in apt "alternative grounds" theory (debunked above) is defied by logic and the law. Similarly, Debtor's assertion that the intentional breach of fiduciary duty judgment is somehow insufficient to support non-dischargeability under Section 523(a)(4), relying on the default judgment fact pattern in *In Re Cantrell* (9th Cir. 2003) 329 F.3d 1119, does not pass muster. Barton pled and proved *intentional* breach of fiduciary duty by Debtor which involved, using bankruptcy terms, the defalcation of Barton's Shares through fraud – corporate records destruction, fabrication and forgery and ultimately the sham cancellation of his shares and their return to treasury. Motion, Exs. "A" and "B". *In Re Cantrell* did not hold that Debtor's intentional fraudulent breaches of fiduciary duty as an officer/director over a shareholder's personal property (shares) do not fall within Section 523(a)(4). Similarly, Debtor's citation to *In Re Peklar* (9th Cir. 2001) 260 F.3d 1035, is of no moment; other than a generic cite that all conversion cases do not fall under Section 523(a)(6), Debtor does not overcome the LASC's SOD/RSOD and Judgment or the Appellate affirmance that Debtor intentionally converted Barton's Shares through fraud (corporate records destruction, fabrication and forgery) and Barton proved that the conversion was intentional and undertaken with fraud, malice *and* oppression.

Fourth, Debtor's last pleas are of no moment. First, Barton's pending motion in the State Court (to re-open the underlying matter and vacate the Judgment so that the Court can amend the Judgment to reflect a corrected damages award as a result of Debtor's concealment of an $130MM enterprise valuation memorandum and perjured testimony that no valuation had ever been undertaken by RIL) does not change the fact

that the fact of damage on account of Debtor's fraud, conversion and breach of fiduciary duty is sufficiently firm and definite to sustain a non-dischargeability judgment. Barton's claims are non-dischargeable and, in the event the State Court either denies the Motion or grants the Motion and increases the damages award, the fact of damage is already established as sufficient and firm, for purposes of collateral estoppel. Further, Debtor has no right to "reserve" any additional arguments simply because Debtor has advanced meritless assertions and which Barton is compelled to dispose of on reply.

II. BARTON IS ENTITLED TO SUMMARY DISPOSITION OF HIS NON-DISCHARGEABILITY CLAIM UNDER SECTION 523(a)(2)(A) BASED ON DEBTOR'S UNREBUTTED FRAUD.

At the Opposition, p. 8, Debtor's lone challenge to summary judgment on the 523(a)(2) claim (based on fraud) is not that the LASC did not enter a now final fraud judgment as articulated in the SOD/RSOD and Judgment against Debtor or that the LASC's findings are anything but sufficient to establish non-dischargeability under 523 (a)(2)(A). In fact, Debtor does not dispute or deny that the LASC's SOD/RSOD and Judgment established that Debtor committed fraud by, among other things, destroying, fabricating and forging corporate records all as part and parcel of his scheme with Debtor Tomkow to steal Barton's approximately 19% of the equity in RPost International Limited (RIL). Motion, Exs. "B and "C". Moreover, Debtor does not dispute – and cannot – that the fraud claims proven in the State Court Action and upon which Judgment was entered are concomitant with Congress' use of the word "fraud" in connection with non-dischargeability claims under Section 523(a)(2)(A). Barton's authorities on this issue are left untouched in the Opposition.

Instead, Debtor puts all its eggs in the specious basket that the Appellate Court's opinion (which catalogues the substantial evidence of Debtor's fraudulent conduct) somehow nullified the LASC fraud and intentional breach of fiduciary duty Judgment because the Opinion addresses the conversion and punitive damages claims and, since

liability was established, did not provide a discussion on the other claims upheld. Debtor's throw away, Hail Mary pass falls flat on any one of myriad grounds.

First, because the LASC's SOD/RSOD and Judgment were not entered on "alternative grounds," the entirety of Debtor's efforts to circumvent the preclusive effect of the LASC's issue preclusive findings are properly dismissed as meritless. Debtor's errors advancing this point are multi-faceted: (**1**) the LASC's SOD/RSOD and Judgment are not advanced on alternative grounds. Hence, the condition precedent to the inapt "rule" cited by Debtor (that the underlying decision is based on alternative grounds) is not satisfied, rending the entirety of Debtor's "alternative grounds" assertion unavailing; and (**2**) even assuming *arguendo* the LASC decisions were on "alternative grounds" (and they are not (as they sustain separate causes of action, not competing theories for one cause of action)), Debtor's reliance on the Appellate Opinion to try and prop up this legally unsupported position is misplaced as: (**a**) Debtor has quoted the Opinion out of context[2]: the CCA only declined to address *Debtor's remaining contentions* on appeal once it confirmed that the LASC Judgment was supported by substantial evidence (and did not suggest in any manner that the LASC's fraud and intentional breach of fiduciary duty claims were anything but intact); and (**b**) the Appellate Opinion expressly affirms

---

2 As the Court of Appeal stated: "Since we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider ***defendants'*** additional contentions that liability was not supported by substantial evidence of breach of fiduciary duty, fraud, or unfair competition under Business and Professions Code section 17200." (RJN, Ex. "F" at pg. 18 / "BARTON 0074," second paragraph from the top, emphasis added) What this reveals is that the Court of Appeal was not in any way (as Debtor suggests) diminishing the success of Barton's claims nor was it qualifying or limiting its affirmance of the trial court's decision. Rather, the Court of Appeal was dismissive of Debtor's additional arguments on appeal. That Debtor felt it necessary to hide this quote from the Court speaks volumes and demonstrates that Debtor also understands that it was his failed arguments that were cast aside by the Court of Appeal, not Barton's victory. Moreover, as if Debtor's misguided ploy to convince this Court that it somehow won by losing needed further debunking, the Court of Appeal stated that, save for the reduction of emotional distress damages, "...**the judgment is affirmed**." (RJN, Ex. "F", at pg. 25 / "BARTON 0081").

the Judgment and does not reverse the LASC on any cause of action (only removing emotional distress damages). Hence, there is no indication at all that the LASC's SOD/RSOD and Judgment are not upheld on the fraud and intentional breach of fiduciary duty causes of action; just the opposite, the decisions thereon are affirmed.

Second, the cases cited by Debtor are factually and legally inapposite. For example, the SOD/RSOD (and Judgment) sustained each of Barton's separate causes of action, determination which were not like the disqualification *motion* in, for example, Debtor's oft-cited case (Zevnik v. Superior Court (2008) 159 Cal.App.4th 76), which was denied on two alternative grounds (laches and on the merits).[3] In Zevnik, the law firm defending a malpractice action tried to use another trial court's denial of a third party's disqualification motion as collateral estoppel that the law firm did not commit malpractice. In reviewing the disqualification motion, the Court of Appeal relied on one of the alternative grounds (laches) to uphold the disqualification motion denial and expressly did not reach the merits of the disqualification motion. In other words, the Zevnik trial court had two grounds to sustain its lone holding that the law firm should not be disqualified; the Court of Appeal upheld that trial court's decision on the laches alternative ground, but did not reach the merits. Unlike here, there was no "Judgment" in

---

3 Like Debtor's errant citation to the inapposite Zevnik decision, Debtor's reliance on Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club (2006) 140 Cal.App.4th 1120, is unpersuasive. There, the Appellate Court did not affirm the entire judgment as occurred here (apart from a slight [and inconsequently for this proceeding] damages reduction). *Here, the Appellate Court affirmed the Judgment and reversed no cause of action.* Unlike Barton's separate and each successful causes of action sustained by the SOD/RSOD and Judgment, Newport involved alternative theories within a single cause of action, a distinction which Defendant does not address or account for. And, unlike Newport, the Appellate Court here noted specific findings which cross-over all the claims sustained by the Judgment: "[Defendants] took repeated actions to achieve their goal, from fabricating minutes with [Barton's] signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating." (RJN, Ex. "F" at pg. 22-23 / "BARTON 0078-0079") Those findings (in addition to the fact that the Judgment was affirmed *in toto*) unmask Debtor's "win by losing" gambit for the mirage it is.

Zevnik at issue. In sharp contrast, Judge Rice's SOD/RSOD and Judgment: (a) make no mention of "alternative grounds," but, instead, found that each cause of action on its own was proven. *Zevnik* does not purport to equate alternative grounds for granting a motion to a court adjudicating separate causes of action or that separate causes of action are deemed "alternative grounds" under the narrow (an inapt here) *Zevnik* decision. As the Opposition reflects no effort at all to substantively analyze the claimed issue presented but, instead, offers only sweeping conclusions untethered to any provisions of the SOD/RSOD/Judgment, the *Zevnik* decision and Debtor's assertions[4] simply have no bearing on the Court's disposition of this Motion, except to confirm that summary judgment is proper here.

Third, not surprisingly, even assuming the inapplicable "alternative grounds" concept had any application here (and it does not given the absence of any such "alternative grounds" noted in the SOD/RSOD or Judgment), the 9th Circuit has held that the Court of Appeal's affirmance, even if addressing just one of the matters at issue, bestows an affirmance on the entirety of the trial court's judgment. In *DiRuzza v. County of Tehama* (9th Cir. 2003) 323 F.3d 1147, 1153, which, following California Supreme Court precedent in *People v. Skidmore* (1865) 27 Cal. 287, concluded that "an appellate court's affirmance for any reason implicitly ratifies all reasoning given in the Court below." As the *Zevnik* Court noted (fn. 9), "*DiRuzza* stated that *Skidmore* was

---

4 Debtor's reliance on *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860 and *Readylink Healthcare, Inc. v. State Comp. Ins. Fund* (2014) 754 F.3d 754, bear no correlation to the LASC's SOD/RSOD and Judgment and the CCA's affirmance of its Judgment. *Murray* pertained to whether a final order following a federal administrative complaint with the Labor Department could be used for purposes of issue preclusion in a later state court proceeding on the same issue. *Id.* at 866. *Readylink* pertained to whether a state court finding on a preemption claim could be used as against an identical claim being brought in federal court. *Id.* at 761. In both cases, the courts decided *in favor of* issue preclusion because, like here, the issues at bar had already been fully and finally decided. In fact, the policy affirmed in *Readylink* underscores application of issue preclusion here: applying issue preclusion preserves the integrity of the judicial system by promoting judicial economy, and there is no reason for one court to tackle anew the same legal issues already resolved by another court. *Id.* at 762.

'controlling' on the question of the collateral estoppel effect of issues decided by the trial court after a reviewing court's affirmance on different grounds." While the *Zevnik* Court attempted to carve out an exception to *Skidmore* on the narrow factual grounds on the disqualification motion there (facts which are not at all on all fours with the State Court SOD/RSOD/Judgment here), the 9th Circuit has not accepted *Zevnik* and *DiRuzza* continues to guide the federal courts on the issue (even assuming arguendo the State Court SOD/RSOD/Judgment could ever be construed as an underlying judgment on "alternative grounds," which Debtor has not demonstrated with any cogent argument and authority).[5] As the Federal District Court confirmed in *Flying J, Inc. v. Pistacchio* (E.D. Cal. March 31, 2008) 2008 WL 906396, concluded, "Therefore, we reiterate the understanding of California law we stated in *Markoff v. New York Life Insurance Co.*, 530 F.2d 841, 842 (9th Cir.1976) ...: '**[The California position] is that even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.**'"

In short, Debtor cannot avoid summary disposition on the errant theory that the LASC's SOD/RSOD and Judgment were based on "alternative grounds" (when they are

---

5 As the *DiRuzza* Court noted, citing *Skidmore*: "The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with that judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words 'judgment affirmed,' as they occur in the published report of the case. (17 Cal. 261).... The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. **But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression.** *Skidmore* at 292-293." *DiRuzza* at 1154-55.

not), and, even if such a construction could be placed on the SOD/RSOD and Judgment (and it cannot), 9th Circuit law rejects Debtor's inapt theory in any case.6

III. AS IT IS UNREBUTTED THAT DEBTOR, AS A FIDUCIARY (WITH CONTROL OVER BARTON'S SHARES), DESTROYED, FABRICATED AND FORGED CORPORATE RECORDS AND THEN CANCELLED BARTON'S SHARES, BARTON'S PROVEN INTENTIONAL BREACH OF FIDUCIARY DUTY CLAIM SATISFIES SECTION 523(a)(4).

Debtor's two challenges to summary disposition under 523(a)(4) each fail.

First, for the reasons expressed above, Debtor's reliance on the *Zevnik* case and the specious plea that the LASC's SOD/RSOD and Judgment (finding Debtor to have intentionally breached his fiduciary duties to Barton) is somehow not sufficiently firm and definite because the Appellate Court, while affirming the Judgment, did not discuss this particular cause of action, is misplaced and does not avoid summary disposition. Barton's analysis of this red herring is set forth above and incorporated herein.

Second, Debtor's reliance on *In Re Cantrell* is also of no aid to the Opposition and the decision is factually inapposite at the very least and does nothing to Debtor's attempt to limit the scope of the Debtor's fiduciary duties regarding the control and disposition of Barton's shares in RIL. Critically different from *In Re Cantrell*, here, Debtor owed – as a matter of California Supreme Court precedent (as an officer and director) – a fiduciary

---

6 Putting aside Debtor's erroneous assertion that the Appellate affirmance of the Judgment only permits preclusive effect of the State Court's conversion findings, Debtor's citation to *In Re Peklar*, *infra*, affirms the rule that the LASC's final judgment is entitled to preclusive effect. "A state court judgment is given the same preclusive effect by a federal court as it would be given by a court of the state in which the judgment is rendered.28 U.S.C. Section 1738; *Marrese v. Am. Acad. Of Orthopedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). Under California preclusion law, collateral estoppel effect is given to a judgment that 'actually and necessarily' decides the issue in question. [citation omitted]." *In Re Peklar*, at 1039. Debtor has failed to rebut that the LASC necessarily decided the fraud, intentional breach of fiduciary duty and conversion claims as well as determined the propriety of punitive damages. Collateral estoppel is properly applied here.

duty with respect to the handling and disposition of Barton's shares (his personal property); yet, Debtor makes no effort to discuss the authorities in the motion. Moreover, for purposes of Section 523(a)(4), Debtor's conduct concerning Barton's personal property – his shares (entrusted to and under the control of the Debtor as an officer/director) – is fundamentally different from conduct by an officer over general "corporate assets" which the creditor has no personal property interest in at all. Particularly distinguished from the default, generic fiduciary duty claim in *In Re Cantrell* (stemming only from a default judgment), here, the Debtor destroyed corporate records concerning Barton, fabricated corporate minutes and used Barton's signatures to commit forgery to convert Barton's shares and then, in fact, controlled Barton's personal property by cancelling the shares and taking possession in the corporate treasury. Such conduct is clear defalcation of the creditor's personal property by a fiduciary charged with responsibility thereover. In sharp contrast, in *In Re Cantrell*, (a) the only "rule" was that the corporation's officers are more like agents, not trustees, over the *corporation's assets* (which assets the shareholder has not personal property interest), and (b) did not, as was the case here, involve a proven case of intentional breach of fiduciary duty of the debtor concerning the creditor's personal property assets. Debtor's attempts to cast the *In Re Cantrell* decision as a broad-brush, bright-line rule - that the fiduciary element required for 523 (a)(4) issue preclusion can never be established as to a corporate officer - is unsustainable and not the holding of that case; instead, In Re Cantrell is limited to the narrow default judgment facts there and not, as is the case, here, a well-developed record of the Debtor's intentional/fraudulent breaches of fiduciary duty in the taking of Barton's personal property (RIL shares).

Further, as a default judgment case, the *In Re Cantrell* Court was required to dig through a complaint (only) to try and ascertain the nature of the breach of fiduciary duty claim there. When examining the potential for issue preclusion arising from a corporate officer's breach of fiduciary duty, that Court found that, because the judgment in question was arising from a default judgment, it was necessary to look through to the underlying

complaint to determine whether it contained allegations necessary to establish a fiduciary relationship for purposes of issue preclusion under Section 523(a)(4), or whether it merely alleged a breach of fiduciary duty claim. *Id* at 1128. The same cannot be said for the matter at bar. First, at the state court level here, the judgment came after a lengthy trial, lasting three phases over nine months; it was not a default judgment. So unlike the generic allegations of appropriation of corporate assets in *In Re Cantrell* (*Id.* at 1122), here there were specific findings of the unlawful conversion by Debtor of Barton's personal property (his shares) and the trail of forgery and fraud undertaken by Debtor to execute that conversion is indisputably established.

Debtor's challenge to summary disposition of the non-dischargeability claim under Section 523(a)(4) is unavailing. Barton has proven that the LASC's finding of intentional breach of fiduciary duty in the taking of Barton's shares (his personal property) through forgery, fabrication and destruction of corporate records constitutes defalcation by a fiduciary under Section 523(a)(4). Barton's motion is well taken.

IV. BARTON HAS ESTABLISHED THAT SUMMARY DISPOSITION OF HIS NON-DISCHARGEABILITY CLAIM PURSUANT TO SECTION 523(a)(6) IS RIGHTLY GRANTED.

Debtor's efforts to avoid summary disposition of the non-dischargeability claim (third cause of action) under Section 523(a)(6) are also unavailing.

Debtor asserts a series of challenges: (a) the *Zevnik* "alternative grounds" assertion – disposed of above and incorporated herein; (b) that two decisions – *Peklar* and *Plyam* – somehow preclude issue preclusion on the conversion claim and/or derived from the punitive damages findings (both assertions addressed and readily distinguished below); (c) that, as a spin-off of the (erroneous *Zevnik* assertion), the "fraud" component of punitive damages (where both the LASC and the Appellate Court affirmed the finding that Debtor's conduct was undertaken with fraud, oppression and malice) is not entitled to preclusive effect because the fraud cause of action was not specifically discussed (though the entire Judgment was affirmed) – a plea with no authority, discussion or logic

behind it; and (d) even though the LASC entered Judgment for fraud, conversion and intentional breach of fiduciary duty and found, by clear and convincing evidence, that both Khan and Tomkow's conduct was undertaken through fraud, malice and oppression, somehow Tomkow should be entitled to a trial because the Court awarded a little less punitive damages than it did against Khan. Having sustained the punitive damages award against both Debtors, whatever modicum of differential in reprehensibility between Khan and Tomkow's conduct is of no legal consequence since both were adjudged to have committed all the wrongs alleged in Barton's claims and to have done so with fraud, malice and oppression. Tomkow gets no reprieve here because he was a little less reprehensible than his cohort.

First, for the reasons expressed above, the *Zevnik* assertion is complete canard and has no impact on the preclusive effect of the LASC's SOD/RSOD and Judgment. Barton's analysis above is incorporated herein.

Second, Debtor's clinging to *Peklar* and *Pylam* provides no support for the Opposition.

(1) Debtor's Opposition overlooks the LASC's express findings satisfying the willful and malicious elements for non-dischargeability under Section 523(a)(6). For example, the record submitted with the Motion is dispositive to uphold a Section 523(a)(6) adjudication. The State Court held that Barton proved that Debtor converted Barton's shares in RPost International Limited (RIL) and did so with fraud, malice and oppression so as to justify the imposition of punitive damages. Motion, Ex. "B," p. 10/"BARTON 0042". The State Court specifically found that Debtor destroyed corporate records, and then fabricated and forged other corporate records as part of a scheme to convert Barton's Shares (Motion, Ex. "B," p. 5/"BARTON 0037"). The State Court found that this conduct, among other misconduct by Debtor, sustained all of the causes of action *by clear and convincing evidence* including, without limitation, the claims for conversion, fraud and intentional breach of fiduciary duty. Motion, Ex. "B," p. 6/"BARTON 0038". Moreover, Judge Rice specifically found that Debtor's

actions - were undertaken with fraud, malice and oppression and was particularly reprehensible. Motion, Ex. "B," p. 10/"BARTON 0042."

Clearly strained to find any basis to oppose the Motion, Debtor errantly puts all his eggs in the *In Re Plyam* (9th Cir. BAP 2015) 2015 WL 2124780, basket. Unfortunately, Debtor's conclusory mis-statements concerning *Plyam* and decision not to make any effort to juxtapose the State Court's express findings here with the patently distinguishable issues there are readily discerned by even a cursory review of the decision. Debtor's failure of reconciliation is not surprising given the State Court's express findings which amply sustain a willful and malicious determination under Section 523(a)(6). The LASC held that Barton ". . .has proven by clear and convincing evidence that the actions of.. .[Debtor] were done with malice, oppression and fraud, giving rise to a claim for punitive damages." (RJN, Ex. "B" at p. 10:1-4). This express finding on all elements in support of punitive damages renders *Plyam* and the purported *Plyam* "rule" coined by Debtor simply not controlling on the record here; and

(2) Debtor's generic offering that the Debtor's conversion of another's property is not always nondischargeable under Section 523(a)(6) (or (a)(4) is of no moment. Debtor cites *In Re Peklar* (9th Cir. 2001) 260 F.3d 1035, with no analysis. He then suggests the summary judgment hearing should be continued because Plaintiff did not, in advance, comment on Debtor's inapt and patently distinguishable case cite. Of course, no continuance is required or necessary. On its face, and anything but similar to the intentional conversion of Barton's Shares by Debtor here, *In Re Peklar* does nothing to avoid summary disposition. In *In Re Peklar*, the debtor, a lessee, was alleged to have removed furniture from leased premises purportedly in derogation of the lessor's rights under a lease. The only evidence of the debtor's wrongful act related to the issue of willful and malicious was that the debtor-lessee claimed that she removed the furniture on the advice of her counsel, and the debtor filed a declaration to the effect. *In Re Peklar*, at 1038-1039. Moreover, no punitive damages were at issue or awarded in *In Re Peklar*. Here, however, the State Court specifically found that the taking of Barton's

Shares by Debtor (**a**) the product of Debtor's fabrication and forgery of RIL corporate minutes, (**b**) involved the destruction of other corporate records, and (**c**) was proven by clear and convincing evidence to have been done with fraud, malice and oppression. Motion, Ex. "B," p. 5 and 10/"BARTON 0033 AND 0042". Debtor's malfeasance below was determined to be intentional (fraudulent), malicious and oppressive (Id.), not negligent or merely reckless. Unlike Ms. Peklar, Debtor has presented none and can present none – in light of the State Court's explicit findings – that Debtor's conversion of Barton's Shares was anything but willful and malicious.

It is settled that intentional conversion of another's property has long been confirmed and held to satisfy the non-dischargeability standards under Section 523(a)(6) (and its predecessor statutes). *In Re Jercich* (9th Cir. 2001) 238 F.3d 1202, 1207; *McIntyre v. Kavanaugh* (1916) 242 U.S. 138, 37 S.Ct. 38 (Supreme Court affirms conversion of corporate shares "willful and malicious" to except from discharge); *In Re Bailey* (9th Cir. 1999) 197 F. 3d 997 (though upholding discharge on the narrow facts there, 9th Circuit confirms that: "The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6)."). *Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini)* (9th Cir. 1986) 780 F.2d 1440; *Transamerica Comm. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551 (9th Cir.1991). The LASC found that Debtor's malfeasance was "willful" through at least two showings: (a) Debtor knew Barton was a shareholder and his constructs to the contrary were rejected, and (b) Debtor acted fraudulently in converting the shares, which fraudulent conduct is, by definition, intentional and willful. "Willful" is satisfied by intentional malice or fraud, as noted in *Plyam*. Moreover, even if the State Court had not (though it did) expressly find Debtor's conduct to be malicious, this Court can readily conclude that the nature of the intentional/willful conduct by Debtor was malicious. In *Littleton*, the Ninth Circuit explained its holding in *Cecchini* as meaning that in the case of a conversion—referring to a conversion that is both intentional and

"willful"—"malice may be inferred from the nature of the wrongful act." *Littleton* at 554. Here, the State Court held that (a) that, to convert Barton's Shares, Debtor did so by destroying, fabricating and forging corporate records to manufacture the sham that Barton was never a shareholder; and (b) the deliberate conduct constituting the conversion was undertaken by Debtor with "fraud, malice and oppression," thereby satisfying both the "willful" and "malicious" components of Section 523(a)(6).

Debtor's closing assertions do not change the result here. Barton's pending state court motion to re-open the damages determination to the Debtor's fraudulent withholding of a valuation memorandum is of no moment, as the collateral estoppel applies to the fact of damage sustained, even when a case is remanded for further damages determination. "[W]here the decision to be carried over was adequately deliberated and firm, ...the parties were fully heard, ...the court supported its decision with a reasoned opinion, ...[and] the decision was subject to appeal or was in fact reviewed on appeal...support[s] the conclusion that the decision is final for the purpose of preclusion." *Restatement 2nd of Judgments*, Sec. 13, cmt. g; *Follo v. Morency* (USDC (Mass.) 2014) 507 B.R. 421, 427.[7]

Further, no basis for any continuance or reservation of further argument by Debtor is warranted. Having offered untenable authorities and argument, the Debtor does not get the last word on those matters.

DATED: May 19, 2015

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By: _____

Patrick C. McGarrigle, Esq.
Attorneys for Plaintiff Kenneth Barton

---

7 State Court judgment, affirmed on common law fraud, was accorded preclusive effect on issues, notwithstanding remand on punitive damages: "The decision of the trial court was not tentative and the only possible consequence of the Vermont Supreme Court's decision to remand the action affects the damages to be awarded to Follo—there is no potential impact upon the substantive conclusions reached regarding the issue of common-law fraud. Consequently, for the purposes of collateral estoppel, there exists a valid final judgment." *Id.*

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311

A true and correct copy of the foregoing document entitled (*specify*): **REPLY OF CREDITOR KENNETH BARTON FOR SUMMARY JUDGMENT/ PARTIAL SUMMARY ADJUDICATION ON PLAINTIFF'S ADVERSARY COMPLAINT AND CAUSES OF ACTION FOR NON-DISCHARGEABILITY; MEMORANDUM OF POINTS AND AUTHORITIES** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 5/19/2015, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Trustee: rgonzalez@ecf.epiqsystems.com, dgomez@gonzalezplc.com
United States Trustee (LA): ustpregion16.la.ecf@usdoj.gov
Attorney for Debtor: Lew@Landaunet.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 5/19/2015, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 5/19/2015, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Via Federal Express:

Hon. Julia W. Brand
U.S. Bankruptcy Court, Roybal Federal Building
255 E. Temple Street, Suite 1382 / Courtroom 1375
Los Angeles, CA 90012-3332

☐ Service information continued on attached page

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

May 19, 2015	Vanessa Bravo	/s/ Vanessa Bravo
Date	*Printed Name*	*Signature*

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT CHANGES MADE BY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:

ZAFAR DAVID KHAN,

Debtor,

KENNETH BARTON,

Plaintiff(s),

v.

ZAFAR DAVID KHAN,

Defendant.

Case No. 2:13-bk-19713-WB

Adversary Case No:2:13-ap-01752-WB

~~[PROPOSED]~~ ORDER ON PLAINTIFF KENNETH BARTON'S MOTION FOR SUMMARY JUDGMENT AGAINST DEBTOR ZAFAR DAVID KHAN

Date: ~~June 2, 2015~~ ***June 16, 2015***
Time: 2:00 p.m.
Courtroom: "1375"

The Court, having reviewed and considered Plaintiff Kenneth Barton's (**"Plaintiff"**) Motion for Summary Judgment / Partial Summary Adjudication on his Adversary Complaint for Non-Dischargeability (the **"Complaint"**), Plaintiff's Separate Statement Of Uncontroverted Facts And Conclusions Of Law and related filings and admissible evidence (**"Motion"**), the Opposition papers of Debtor Zafar David Khan

("**Debtor Khan**"), Plaintiff's Reply papers, and having heard and considered the arguments of counsel for Plaintiff and Debtor, and based as well on the reasons set forth by the Court on the record at the hearing on the Motion, the Court orders, adjudges and decrees as follows:

1. Plaintiff's Motion is GRANTED IN PART and DENIED IN PART.
2. The Court determines and finds that:
   a. Plaintiff has satisfied all requirements for, is entitled to and the Court hereby GRANTS Plaintiff's Motion for Summary Judgment against Debtor Khan on Plaintiff's First Cause of Action in his Complaint for Determination of Non-Dischargeability under 11 U.S.C. §§523(a)(2)(A);
   b. Plaintiff has not satisfied the requirements for and the Court hereby DENIES Plaintiff's Motion for Summary Judgment against Debtor Khan on Plaintiff's Second Cause of Action in his Complaint for Determination of Non-Dischargeability under 11 U.S.C. §§523(a)(4); and
   c. Plaintiff has satisfied all requirements for, is entitled to and the Court hereby GRANTS Plaintiff's Motion for Summary Judgment against Debtor Khan on Plaintiff's Third Cause of Action in his Complaint for Determination of Non-Dischargeability under 11 U.S.C. §§523(a)(6).

###

Date: March 7, 2016

Julia W. Brand
United States Bankruptcy Judge

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT CHANGES MADE BY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:

ZAFAR DAVID KHAN,

Debtor,

KENNETH BARTON,

Plaintiff(s),

v.

ZAFAR DAVID KHAN,

Defendant.

Case No. 2:13-bk-19713-WB

Adversary Case No:2:13-ap-01752-WB

[AMENDED ~~PROPOSED~~] JUDGMENT IN FAVOR OF PLAINTIFF KENNETH BARTON FOLLOWING SUMMARY JUDGMENT ON BARTON'S NON-DISCHARGEABILITY ADVERSARY COMPLAINT AGAINST DEBTOR ZAFAR DAVID KHAN

Date: ~~June 2, 2015~~ ***June 16, 2015***
Time: 2:00 p.m.
Courtroom: "1375"

The Court, having granted in part and denied in part, Plaintiff Kenneth Barton's (**"Plaintiff"**) Motion for Summary Judgment / Partial Summary Adjudication on his Adversary Complaint for Non-Dischargeability (the **"Complaint"**) against Debtor Zafar David Khan (**"Debtor Khan"**), the Court orders, adjudges and decrees as follows:

1. Judgment is hereby entered IN FAVOR of Plaintiff Barton and AGAINST Defendant Zafar David Khan on the Complaint, as Plaintiff Barton proved his First and Third Causes of Action in the Complaint, under 11 U.S.C. § 523(a)(2)(A) and 523(a)(6), and, therefore, as determined by the Los Angeles Court in the case of *Barton v. RPost International Limited, et al.*, LASC Case No. YC061581 (the "**State Court Action**"), (a) the general and punitive damages, respectively, awarded in favor of Plaintiff Barton and against Defendant Zafar David Khan in the sum of $3,720,081.91 (jointly and severally with others as specified therein) and $250,000.00, respectively, for a total of **$3,970,081.91** (the "**Money Judgment**"), (b) all post-judgment interest on the Money Judgment from and after August 30, 2013 (the date of the original Judgment in the State Court Action), and (c) the costs of suit awarded to Barton in the State Court Action, are non-dischargeable; and

2. Plaintiff Barton's Second Cause of Action in his Complaint against Defendant Zafar David Khan under 11 U.S.C. § 523(a)(4) is dismissed.

###

Date: March 7, 2016

Julia W. Brand
United States Bankruptcy Judge

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address

Lewis R. Landau (CA Bar No. 143391)
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888) 822-4340
Email: Lew@Landaunet.com

FOR COURT USE ONLY

☐ *Individual appearing without attorney*
☒ *Attorney for:* Defendant Zafar David Khan

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re:

Zafar David Khan,

Debtor.

Kennth Barton,

Plaintiff,

vs.

Zafar David Khan,

Defendant.

~~Debtor(s).~~

CASE NO.: 2:13-bk-19713WB; AP 2:13-ap-01752WB

CHAPTER: 7

NOTICE OF MOTION FOR:

CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS

(***Specify name of Motion***)

DATE: 04/19/2016
TIME: 2:00 p.m.
COURTROOM: 1375
PLACE: US Bankruptcy Court; Judge Brand
255 E. Temple Street; 13th Floor
Los Angeles, CA 90012

1. TO (*specify name*): Plaintiff

2. NOTICE IS HEREBY GIVEN that on the following date and time and in the indicated courtroom, Movant in the above-captioned matter will move this court for an Order granting the relief sought as set forth in the Motion and accompanying supporting documents served and filed herewith. Said Motion is based upon the grounds set forth in the attached Motion and accompanying documents.

3. **Your rights may be affected**. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)

4. **Deadline for Opposition Papers:** This Motion is being heard on regular notice pursuant to LBR 9013-1. If you wish to oppose this Motion, you must file a written response with the court and serve a copy of it upon the Movant or Movant's attorney at the address set forth above no less than fourteen (14) days prior to the above hearing date. If you fail to file a written response to this Motion within such time period, the court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

5. **Hearing Date Obtained Pursuant to Judge's Self-Calendaring Procedure:** The undersigned hereby verifies that the above hearing date and time were available for this type of Motion according to the judge's self-calendaring procedures.

Date: 03/29/2016

Lewis R. Landau, Attorney-at-Law
Printed name of law firm

/s/ Lewis R. Landau
Signature

Lewis R. Landau
Printed name of attorney

Lewis R. Landau (CA Bar No. 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888) 822-4340
Email: Lew@Landaunet.com

Attorney for Defendant and Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Zafar David Khan, Debtor.	Case No.: 2:13-bk-19713-WB Adv. No.: 2:13-ap-01752-WB Chapter 7 **MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS**
Kenneth Barton, Plaintiff, vs. Zafar David Khan, Defendant.	Date: April 19, 2016 Time: 2:00 p.m. Place: Courtroom 1375; Judge Brand US Bankruptcy Court 255 E. Temple Street, 13th Floor Los Angeles, CA 90012

Zafar David Khan, debtor and defendant in the above captioned adversary proceeding ("Debtor" or "Defendant") herein moves for an order pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 8006(f) certifying the Debtor's appeal of the March 7, 2016 judgment [ECF # 53] ("Judgment") in this adversary proceeding for direct appeal to the Ninth Circuit Court of Appeals. Debtor has appealed the Judgment and a true and correct copy of the Notice of Appeal attaching the Judgment is attached hereto as Exhibit 1. Debtor's motion is set forth in the following memorandum of points and authorities as supported by the attached Declaration of Lewis R. Landau and exhibits hereto.

///

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE JUDGMENT SHOULD BE CERTIFIED FOR DIRECT APPEAL FOR ALL THE REASONS SET FORTH IN 28 U.S.C. § 158(d)(2)(A)

On March 7, 2016 the Court entered its Judgment after granting Kenneth Barton's ("Plaintiff" or "Barton") motion for summary judgment based on the collateral estoppel effect of Barton's Los Angeles Superior Court ("LASC") judgment. Debtor's primary argument in opposition to summary judgment based on collateral estoppel was that the California Court of Appeal affirmed Barton's Superior Court judgment on only one of several claims, and did not review the alternative bases for the judgment which included Barton's fraud claim. *See*, Exhibit 2 hereto [summary judgment opposition brief]. The basis for Debtor's argument was the California Court of Appeal's Zevnik decision and related cases that follow the modern rule for collateral estoppel effect under the *Restatement (Second) of Judgments*. Under the modern approach, "only the grounds relied on by the appellate court can establish collateral estoppel." *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79, 88, 70 Cal. Rptr. 3d 817, 819, 826 (Cal Ct. App. 2008) ("Zevnik").

This Court understandably rejected application of the Zevnik rule based on a Ninth Circuit decision predating Zevnik and that applied the 1865 California Supreme Court's Skidmore case. *See*, DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003) ("DiRuzza"), *see also*, People v. Skidmore, 27 Cal. 287 (1865) ("Skidmore"). According to DiRuzza, Skidmore held that preclusive effect can be given to all grounds upon which the lower court's judgment was based, unless that holding is reversed on appeal. Under applicable principles of *stare decisis*, this Court held that it was bound to follow *DiRuzza*. *See*, June 16, 2015 transcript at 6:10-15, attached hereto as Exhibit 3 (in relevant part).

A recent appellate law newsletter article recognizes the conflict that has developed in the law of collateral estoppel based on Zevnik and DiRuzza. *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) ("Shatz

Article") [courtesy copy attached as Exhibit 4]. Shatz summarizes the conflict in preclusion law as follows:

> The conflict between the *DiRuzza* analysis on the one hand, and the *Butcher/Newport* analysis on the other, creates an anomaly: A federal district judge, bound by 9th Circuit precedent, must follow *DiRuzza's* construction of California law and apply the traditional rule. But a California Superior Court judge facing the exact same preclusion question would most likely follow *Butcher, Newport, and Zevnik* - the most recent Court of Appeal decisions on point. Of course, a Superior Court judge (especially those sitting outside of the 2nd District and Orange County) could adopt *DiRuzza's* reasoning that the old Supreme Court precedent governs and therefore follow the traditional view. That, however, is unlikely. Most trial judges are more inclined to follow the most recent pronouncements adopting the modern view. And, those judges sitting in the 2nd District and Orange County probably would not want to pick a fight with their local Court of Appeal. That's not to say that a zealous advocate couldn't (or shouldn't) argue that the traditional view is the right view. Indeed, the *DiRuzza* court noted that it would apply *Skidmore* until it received "definitive indication" that *Skidmore* "no longer represents the law of California." Arguably, *Newport* and *Zevnick* supply that "indication," although the contrary argument would be that only the California Supreme Court can resolve the conflict. Thus, practitioners who find themselves on the losing side of the issue would have solid grounds to pursue a petition for review to the California Supreme Court.

Id., Exhibit 4 hereto at internal page 2.

The conflict summarized in the Shatz Article has been recognized in a recent Bankruptcy Court opinion case as well. *See*, In re Aberle, 533 B.R. 311, 317 (Bankr. N.D. Cal. 2015) (the subject collateral estoppel issue, "has generated a very interesting debate among California courts").

Debtor's appeal of the Judgment thus centers on the issue of the preclusive effect of an issue determined at trial that is neither relied upon, nor disturbed, by a reviewing appellate court. This narrow question should be certified to the Ninth Circuit Court of Appeals for direct review based on the reasons set forth in 28 U.S.C. § 158(d)(2)(A). The Ninth Circuit may then certify the question to the California Supreme Court and resolve the conflict that has developed between federal and state law on the same issue.

FRBP 8006 contains the procedure for requesting certification for direct review. FRBP 8006(f) states:

> (f) Certification by the Court on Request.
> (1) How Requested. A request by a party for certification that a circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)–(iii) applies—or a request by a majority of the appellants and a majority of the appellees—must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.
> (2) Service and Contents. The request must be served on all parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1), and it must include the following:
> (A) the facts necessary to understand the question presented;
> (B) the question itself;
> (C) the relief sought;
> (D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)–(iii) applies; and
> (E) a copy of the judgment, order, or decree and any related opinion or memorandum.

FRBP 8006(f).

In compliance with the requirements of FRBP 8006(f), Debtor addresses each subsection as follows:

(A) the facts necessary to understand the question presented;

The facts necessary to understand the question presented are set forth above. Although recognizing the Zevnik rule, the Court followed the Ninth Circuit's DiRuzza case under principles of *stare decisis*. Consequently, the only court in a position to resolve this important issue of law is the Ninth Circuit Court of Appeals.

(B) the question itself;

The question presented is whether, under California law, only the grounds relied on by the appellate court establish collateral estoppel effect.

(C) the relief sought;

Debtor seeks direct review in the Ninth Circuit Court of Appeals because the Ninth Circuit is the only Court in a position to change the holding of the DiRuzza to reflect the current state of California law.

(D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)–(iii) applies;

Direct appeal is authorized under 28 U.S.C. § 158(d) as follows:

> (d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.
> (2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
> (i) ***the judgment***, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or ***involves a matter of public importance***;
> (ii) ***the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions***; or
> (iii) ***an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken***;
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.
> (B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—
> (i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or
> (ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);
> then the bankruptcy court, the district court, or the bankruptcy appellate panel ***shall make the certification*** described in subparagraph (A).

28 U.S.C. § 158(d) (emphasis added).

Herein, each of the circumstances described in 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) exist and each such circumstance supports certification for direct appeal as follows:

> *(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;*

The Judgment involves a question of law that involves a matter of public importance. The California Supreme Court has identified three public policies underlying the doctrine of collateral estoppel: "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *See*, Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 919-920 (9th Cir. 2001). Preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation are thus matters of public importance.

The conflict between state and federal law on the issue presented herein thus creates a circumstance whereby California law and the *Restatement (Second) of Judgments* have developed to reflect current public policy. However, courts in the Ninth Circuit remain bound to follow DiRuzza and its reliance on the 150 year old Skidmore case. The rules of federal and state comity require that federal courts give prior state judgments the same preclusive effect as the courts of the state court that rendered the judgment. 28 U.S.C. § 1738 (2012). Thus, the question presented herein is a matter of public importance supporting direct review because until the conflict between state and federal law is reconciled, the judicial process will lack comity on a common question of California law.

For these reasons, the question presented on appeal involves a matter of public importance.

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions;

The Judgment involves a question of law requiring resolution of conflicting decisions. This conflict is proven by the very title of the Shatz Article: "Preclusion Rules Cause Conflict." *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) [Exhibit 4 hereto]. There is no legitimate dispute that the Judgment involves a question of law requiring resolution of conflicting decisions. Thus, the second factor supports direct review.

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

An immediate appeal to the Ninth Circuit herein will materially advance the progress of the case in which the appeal is taken. Whether the pending appeal is adjudicated by the Bankruptcy Appellate or United States District Court, either such court should engage in the same *stare decisis* analysis as this Court and follow DiRuzza. Thus, advancing the appeal to the Ninth Circuit will materially advance the progress of the appeal because the Ninth Circuit is the only court in a position to address the conflict in federal and state law arising under DiRuzza.

///

///

(E) a copy of the judgment, order, or decree and any related opinion or memorandum.

A copy of the Court's March 7, 2016 Judgment is attached to the Debtor's Notice of Appeal attached hereto as Exhibit 1. The excerpt of the Court's June 16, 2015 transcript confirming the Court's reliance on DiRuzza is attached hereto as Exhibit 3.

II.

CONCLUSION

Wherefore, Debtor respectfully prays for an order of the Court pursuant to FRBP 8006(f) certifying the Debtor's appeal of the Judgment for direct appeal to the Ninth Circuit Court of Appeals. Debtor requests such other and further relief as the Court deems just and proper under the circumstances.

Date: March 29, 2016

Lewis R. Landau
Attorney-at-Law

By:*/s/ Lewis R. Landau*
Lewis R. Landau
Attorneys for Debtor Defendant

DECLARATION OF LEWIS R. LANDAU

I, Lewis R. Landau, do hereby declare:

1. I am an attorney of record for Zafar David Khan ("Debtor") in adversary proceeding number 2:13-ap-01752-WB. I have personal knowledge the facts set forth herein.

2. Attached to my declaration as Exhibit 1 is a true and correct copy of the Debtor's Notice of Appeal timely filed to appeal the Barton March 7, 2016 judgment in the above captioned adversary proceeding. The appeal is presently pending with the Bankruptcy Appellate Panel.

3. Attached to my declaration as Exhibit 2 is a true and correct copy of the Debtor's opposition to Barton's motion for summary judgment without exhibits thereto.

4. Attached to my declaration as Exhibit 3 is a true and correct excerpt of the official transcript of the Court's June 16, 2015 hearing at which a ruling was issued.

5. Attached to my declaration as Exhibit 4 is a true and correct copy of the article Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) that I downloaded from the internet at the internet address reflected thereon.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 29th day of March, 2016 at Los Angeles, California.

/s/ Lewis R. Landau
Lewis R. Landau

EXHIBIT 1

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address	FOR COURT USE ONLY
Lewis R. Landau (SBN 143391) Attorney at Law 22287 Mulholland Hwy., #318 Calabasas, CA 91302 Voice & Fax: (888)822-4340 Email: Lew@Landaunet.com ☐ *Individual appearing without attorney* ☒ *Attorney for:* Appellant	

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re: Zafar David Khan, Debtor(s).	CASE NO.:2:13-bk-19713-WB ADVERSARY NO.: 2:13-ap-01752-WB (*if applicable*) CHAPTER: 7
Kenneth Barton, Plaintiff(s) (*if applicable*). vs. Zafar David Khan, Defendant(s) (*if applicable*).	**NOTICE OF APPEAL AND STATEMENT OF ELECTION**

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s): Zafar David Khan

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

☐ Plaintiff
☒ Defendant
☐ Other (*describe*):

For appeals in a bankruptcy case and not in an adversary proceeding.

☐ Debtor
☐ Creditor
☐ Trustee
☐ Other (*describe*):

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from:
   March 7, 2016 Judgment determining non-dischargeability of debt attached hereto.

2. The date the judgment, order, or decree was entered: 03/07/2016

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (*attach additional pages if necessary*):

1. Party: Plaintiff Kenneth Barton

   Attorney:

   Patrick C. McGarrigle
   McGarrigle, Kenney & Zampiello, APC
   9600 Topanga Canyon Boulevard, Suite 200
   Chatsworth, California 91311
   (818)998-330

2. Party: Defendant Zafar David Khan

   Attorney:

   Lewis R. Landau (SBN 143391)
   Attorney at Law
   22287 Mulholland Hwy., #318
   Calabasas, CA 91302
   Voice & Fax: (888)822-4340
   Email: Lew@Landaunet.com

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

☐ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

/s/ Lewis R. Landau Date: 03/21/2016
Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT CHANGES MADE BY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:

ZAFAR DAVID KHAN,

Debtor,

KENNETH BARTON,

Plaintiff(s),

v.

ZAFAR DAVID KHAN,

Defendant.

Case No. 2:13-bk-19713-WB

Adversary Case No:2:13-ap-01752-WB

[AMENDED ~~PROPOSED~~] JUDGMENT IN FAVOR OF PLAINTIFF KENNETH BARTON FOLLOWING SUMMARY JUDGMENT ON BARTON'S NON-DISCHARGEABILITY ADVERSARY COMPLAINT AGAINST DEBTOR ZAFAR DAVID KHAN

Date: ~~June 2, 2015~~ ***June 16, 2015***
Time: 2:00 p.m.
Courtroom: "1375"

The Court, having granted in part and denied in part, Plaintiff Kenneth Barton's (**"Plaintiff"**) Motion for Summary Judgment / Partial Summary Adjudication on his Adversary Complaint for Non-Dischargeability (the "**Complaint**") against Debtor Zafar David Khan (**"Debtor Khan"**), the Court orders, adjudges and decrees as follows:

1. Judgment is hereby entered IN FAVOR of Plaintiff Barton and AGAINST Defendant Zafar David Khan on the Complaint, as Plaintiff Barton proved his First and Third Causes of Action in the Complaint, under 11 U.S.C. § 523(a)(2)(A) and 523(a)(6), and, therefore, as determined by the Los Angeles Court in the case of *Barton v. RPost International Limited, et al.*, LASC Case No. YC061581 (the "**State Court Action**"), (a) the general and punitive damages, respectively, awarded in favor of Plaintiff Barton and against Defendant Zafar David Khan in the sum of $3,720,081.91 (jointly and severally with others as specified therein) and $250,000.00, respectively, for a total of **$3,970,081.91** (the **"Money Judgment"**), (b) all post-judgment interest on the Money Judgment from and after August 30, 2013 (the date of the original Judgment in the State Court Action), and (c) the costs of suit awarded to Barton in the State Court Action, are non-dischargeable; and

2. Plaintiff Barton's Second Cause of Action in his Complaint against Defendant Zafar David Khan under 11 U.S.C. § 523(a)(4) is dismissed.

###

Date: March 7, 2016

Julia W. Brand
United States Bankruptcy Judge

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

22287 Mulholland Hwy., #318
Calabasas, CA 91302

A true and correct copy of the foregoing document entitled: **NOTICE OF APPEAL AND STATEMENT OF ELECTION** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 03/21/2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Rosendo Gonzalez (TR) rgonzalez@ecf.epiqsystems.com, itran@gonzalezplc.com
Lewis R Landau on behalf of Defendant Zafar David Khan Lew@Landaunet.com
United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov
Philip A Zampiello on behalf of Plaintiff Kenneth Barton
philipz@mkzlaw.com, PatrickM@mkzlaw.com;MichaelK@mkzlaw.com;VanessaB@mkzlaw.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

3/21/2016	Lewis R. Landau	/s/ Lewis R. Landau
Date	*Printed Name*	*Signature*

EXHIBIT 2

Lewis R. Landau (CA Bar No. 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888) 822-4340
Email: Lew@Landaunet.com

Attorney for Defendant and Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Zafar David Khan, Debtor.	Case No.: 2:13-bk-19713-WB Adv. No.: 2:13-ap-01752-WB Chapter 7 **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY ADJUDICATION; ALTERNATIVE REQUEST FOR CONTINUANCE THEREOF** Date: June 2, 2015 Time: 2:00 p.m. Place: Courtroom 1375; Judge Brand US Bankruptcy Court 255 E. Temple Street, 13th Floor Los Angeles, CA 90012
Kenneth Barton, Plaintiff, vs. Zafar David Khan, Defendant.	

Zafar David Khan, defendant in the above captioned adversary proceeding ("Khan" or "Defendant") herein opposes the motion filed by Kenneth Barton ("Barton") entitled "Notice of Motion and Motion of Creditor Kenneth Barton for Summary Judgment/Partial Summary Adjudication on Plaintiff's Adversary Complaint and Causes of Action for Non-Dischargeability" ("Motion") [ECF # 33] and alternatively requests a continuance thereof for the reasons stated herein. This opposition and alternative request for continuance is based on the following memorandum of points and authorities, Barton's Request for Judicial Notice ("RFJN") the separately filed Statement of Genuine Issues and Defendant's Request for Judicial Notice ("DRJN"). For all these reasons, Defendant requests that the Court deny the Motion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF ARGUMENTS

Barton's Motion asserts that the Los Angeles Superior Court's ("LASC") judgment in case number YC061581 establishes Barton's entitlement to a non-dischargeable judgment under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6) by application of issue preclusion. However, Barton fails to address the precise collateral estoppel issue presented in this case. The issue presented here is the preclusive effect of a trial court decision ***based on alternative grounds, after an appellate court has affirmed the decision on only one of the alternative grounds without considering the other grounds***.[1] In these circumstances, California law holds that only the claim considered on appeal is given collateral estoppel effect. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008). Thus, issue preclusive effect at most only attaches to the California Court of Appeals ("CCA") affirmance of the LASC's judgment for conversion.[2]

With the scope of permissible issue preclusive effect properly narrowed to only Barton's conversion claim, Barton cannot receive summary judgment on the current record:

1. ***First***, a conversion claim is not *per se* non-dischargeable under section 523(a)(6). *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001) ("Peklar"). Barton fails to properly raise and argue the non-dischargeability of his conversion claim other than in single sentence footnote on the last page of his brief. *See*, Motion at 10 foonote 4. Due process requires that the complex issue of collateral estoppel based non-dischargeability of Barton's conversion claim be raised and argued in an opening brief providing Defendant with an opportunity to respond thereto. Barton's Motion must therefore be denied or continued.

---

[1] Herein, the Court of Appeals decision expressly states, "Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition.***" *See*, Barton Request for Judicial Notice at 58 (emphasis added).

[2] Defendant will interchangeably use the terms "issue preclusion" and "collateral estoppel" as federal courts prefer the term "issue preclusion" while California courts continue to refer to collateral estoppel. *Compare*, Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078 n. 8 (9th Cir. 2007), *with*, Zevnik, 159 Cal. App. 4th at 82 n. 3.

2. ***Second***, after Barton filed his Motion, the Bankruptcy Appellate Panel ("BAP") published its decision in Plyam v. Precision Development, LLC (In re Plyam), - B.R. -, 2015 Bankr. LEXIS 1538 (9th Cir. BAP May 5, 2015) ("Plyam") (courtesy copy attached hereto as Exhibit 1). Plyam alters the landscape of Ninth Circuit law on the issue of the collateral estoppel effect of a California state court judgment that includes an award of punitive damages. The BAP expressly holds that, "to the extent that CC § 3294 findings are ... based on Despicable Malice or oppression or both, those findings ***prevent the use of issue preclusion as to § 523(a)(6) willfulness.***" Id. at *28 (emphasis added). Barton's Motion explicitly argues that malice and oppression support the request for § 523(a)(6) non-dischargeability. *See*, Motion at 10:7. To the extent Barton is relying on the LASC's award of punitive damages as supporting non-dischargeability, Barton must address the matter under the Plyam standard and Defendant must have an opportunity to respond to the new matter.

3. ***Third***, Barton's Motion omits citation to the seminal Ninth Circuit opinion addressing § 523(a)(4) non-dischargeability concerning the insufficiency of officer and director fiduciary status as establishing the trust relationship that is an essential element of the claim. *See*, Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125-1128 (9th Cir. 2003). Thus, summary judgment is indisputably unavailable for Barton's § 523(a)(4) claim.

4. ***Fourth***, although the issue may be resolved as of the June 2, 2015 hearing, Barton has moved the LASC to vacate the judgment in case number YC061581. *See*, DRJN at Exhibit 1. It is self-evident that if Barton succeeds in vacating the judgment, there is no judgment to be applied herein on the basis of any form of issue preclusion.

Based on the foregoing, Barton's Motion must be denied or continued until Barton duly addresses the issues in moving papers with due process of affording Defendant an opportunity to respond thereto. Absent a continuance, Barton's Motion should be denied based on the existence of genuine issues precluding summary judgment or summary adjudication of issues and Barton's failure to prove entitlement to judgement on the record before the Court.

///

///

II.

BARTON'S MOTION MUST BE DENIED BASED ON THE LIMITED ISSUE PRECLUSIVE EFFECT OF THE STATE COURT JUDGMENT

Barton relies on the issue preclusive effect of his state court judgment in requesting summary judgment herein. However, Barton's motion fails to address the fact that the CCA only considered and affirmed his conversion claim, without consideration of Barton's fraud, breach of fiduciary duty and unfair competition claims. The CCA's decision on only one of the alternative grounds for the judgment without deciding the other grounds limits the issue preclusive effect of the judgment under current California law adopting the Restatement of Judgments approach. Thus, only Barton's conversion claim is subject to review for issue preclusive effect herein.

The analysis of the issues presented herein is greatly facilitated by the BAP's recent Plyam decision because the case has many procedural and substantive similarities to the case at bar. *See*, Exhibit 1 hereto. In Plyam, following an 18 day trial, a jury entered a special verdict awarding $10,100,000 in general damages for breach of fiduciary duty and $200,000 in punitive damages. The state court judgment was appealed and affirmed. *See*, Precision Dev., LLC v. Plyam, 2013 WL 5801759 (Cal. Ct. App. 2013) (in regard to its review of the punitive damages award, the CCA found that "The jury believed that the Plyams' used Precision funds for their benefit, and their conduct was more than negligent or careless, and instead amounted to intentionally misleading the Bronfmans."). The Plyams then filed for relief under chapter 7. Precision sued for non-dischargeability under §§ 523(a)(4) and (a)(6) and Judge Bluebond denied summary judgment against Mrs. Plyam on the 523(a)(4) claim finding no fiduciary duty but granted summary judgment based on the issue preclusive effect of the LASC judgment on the 523(a)(4) and (a)(6) claim against Mr. Plyam. The Plyams appealed and the BAP reversed.

In the BAP's Plyam opinion, the BAP thoroughly reviewed the state of the law concerning issue preclusion in non-dischargeability cases within the context of summary judgment under §§ 523(a)(4) and (a)(6). The BAP summarized the law concerning issue preclusive effect of a prior state court judgment as follows:

> Summary judgment is appropriate where the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (applicable in adversary proceedings under Rule 7056). The bankruptcy court must view the evidence in the light most favorable to the non-moving party when determining whether genuine disputes of material fact exist and whether the movant is entitled to judgment as a matter of law.
>
> A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment as the basis for granting summary judgment. In so doing, the bankruptcy court must apply the forum state's law of issue preclusion. Thus, we apply California preclusion law.
>
> In California, application of issue preclusion requires that: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding. California further places an additional limitation on issue preclusion: courts may give preclusive effect to a judgment "only if application of preclusion furthers the public policies underlying the doctrine."
>
> The party asserting preclusion bears the burden of establishing the threshold requirements. This means providing "a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Ultimately, "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect."

See, Plyam, at *6 - *9 (citations omitted).

Herein, the state court judgment is likely final (assuming it is not vacated per Barton's pending motion) and the parties are identical. Thus, elements four and five are likely undisputed. The first three elements and the public policy limitation are, however, in dispute herein because identical issues have not been decided when a judgment affirming a single alternative ground to support a decision does not "necessarily decide" the issues not considered on appeal.

As mentioned at the outset, when a Superior Court relies on alternative grounds to support its judgment and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel effect. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008) ("Zevnik"), *see also*, Rest. 2d Judgments (1980) § 27, com. i, pp. 259-260. Here, that is precisely what happened when the CCA affirmed the LASC judgment. The CCA opinion states, "Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not

consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." *See*, Barton Request for Judicial Notice at 58, 74.

Zevnik explains the policy considerations supporting its holding as follows:

> The opportunity for review of a decision is an important procedural protection against a potentially erroneous determination and is a factor to consider in determining whether collateral estoppel applies. [citations] Appellate review provides a degree of assurance that the issue was correctly decided and enhances the reliability of the determination. When an appellate court declines to review a particular ground for a trial court decision, the reliability of that ground is not enhanced and is left in the same condition as if there had been no opportunity for review. The principal reason for an appellate court to decline to review alternative grounds for a trial court decision is judicial economy, which is a justification that we would not impugn. ***With regard to ensuring the reliability of a determination, however, an appellate court's failure to review an alternative ground on appeal has the same effect as the absence of an opportunity for review and, we believe, should result in no collateral estoppel as to that alternative ground.***
>
> Moreover, to accord collateral estoppel effect to alternative grounds relied on by the trial court after the appellate court affirmed on another ground and declined to review the alternative grounds would put pressure on appellate courts to review alternative grounds as a matter of course, in order to avoid the unintended consequence of establishing collateral estoppel on grounds that the appellate court did not review. This would dramatically increase the burden on appellate courts. Any benefit that might result from precluding the relitigation of issues in potential collateral litigation, which may or may not arise, would come at the cost of increasing the burden on the appellate court in the initial action. If an appellate court is aware of or anticipates collateral litigation and believes that to establish collateral estoppel on an alternative ground would be beneficial, the court may affirm the trial court judgment on more than one ground. (See Rest.2d Judgments, § 27, com. o, p. 263.)[5] The respondent on appeal may urge the court to do so. In our view, a blanket rule according collateral estoppel effect to each alternative and unreviewed ground for a trial court decision in these circumstances for the purpose of precluding relitigation of issues in collateral litigation is unnecessary and would be unwise.

Zevnik, 159 Cal. App. 4th at 85 (emphasis added).

The impact of the Zevnik limitation on collateral estoppel effect is that only Barton's conversion claim has the potential for issue preclusion herein. Once the CCA affirmed Barton's conversion judgment, the CCA expressly did "not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." However, Barton barely mentions his conversion claim in his brief as the conversion claim is only raised in single sentence footnote on the last page of his Motion. *See*, Motion at 10 fn. 4.

Once the state court judgment is limited to the potential issue preclusive effect of the conversion claim, Plyam addresses the further limitations on imposing collateral estoppel effect arising from an award of punitive damages. Plyam considered whether a creditor is entitled to a non-dischargeable judgment under § 523(a)(6) for willful and malicious conduct as a matter of law when a judgment imposes punitive damages under California Civil Code ("CC") § 3294. Based on the defined terms within CC § 3294, the BAP disagreed and reversed summary judgment. Importantly, the BAP held that findings under CC § 3294 are not issue preclusive as follows:

> On this record, we cannot ascertain the exact basis for the jury's findings. Because the punitive damages award may have been based only on a finding of Despicable Malice or oppression, issue preclusion was unavailable on the issue of § 523(a)(6) willfulness.
>
> To be clear, our holding does not eviscerate a bankruptcy court's ability or opportunity to apply issue preclusion to a state court jury's findings pursuant to CC § 3294. To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.
>
> But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness.

See, Plyam at *27- *28 (emphasis in original).

Herein, Barton has not addressed the foregoing issues in his moving papers. Barton merely assumes that the conversion affirmance by the CCA somehow imbues his entire judgment with collateral estoppel effect. Moreover, Barton understandably fails to address the Plyam standard as the case was published after Barton filed his Motion.

The motion must therefore be denied or continued so that Barton addresses Plyam in moving papers thereby explaining how the punitive damage award in this case satisfies the test under Plyam. At this point, Barton's Motion explicitly argues that malice and oppression support the request for § 523(a)(6) non-dischargeability. *See*, Motion at 10:7. But under Plyam, these findings do not support non-dischargeability. Defendant cannot fully respond to an argument that has not been developed in moving papers and is a crucial aspect of Barton's burden of proof and case in chief. For all these reasons, the Motion should be *denied*.

III.

BARTON HAS NOT CARRIED HIS BURDEN OF PROVING ENTITLEMENT TO SUMMARY JUDGMENT ON HIS § 523(a)(2)(A) FRAUD CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(2)(A) for actual fraud based on the alleged collateral estoppel effect of the LASC judgment. Barton's argument for a judgment under § 523(a)(2)(A) fails under Zevnik because the CCA did not consider Barton's fraud claim. Thus, the judgment loses collateral estoppel effect on Barton's fraud claim and cannot be used to establish a non-dischargeable judgment herein.

As mentioned above, the CCA opinion expressly states, "[b]ecause we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether defendants were additionally liable under theories of fraud***, breach of fiduciary duty and unfair competition." *See*, Barton RFJN at 58, 74 (emphasis added). Zevnik holds, "if a trial court relies on alternative grounds to support its decision and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel." Zevnik, 159 Cal. App. 4th at 79; *see also*, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club 140 Cal. App. 4th 1120, 1132 (Cal. Ct. App. 2006).[3] Because this Court must apply California issue preclusion law, it is clear that Barton cannot establish his fraud claim simply by reference to the state court judgment. As Barton offers no evidence other than the state court decision, judgment and appellate record, Barton's Motion must be denied.

Barton has failed to carry his burden of proving entitlement to summary judgment by application of issue preclusion. Barton's fraud claim does not carry collateral estoppel effect. The Motion must be denied based on a failure of proof.

---

[3] Subsequent California and Ninth Circuit precedents support the restatement approach citing the necessity of appellate review to applying issue preclusion. *See*, Murray v. Alaska Airlines, Inc., 50 Cal. 4th 860, 875-876 (2010), *and see*, Readylink Healthcare v. State Compensation Ins., 754 F. 3d 754, 762 (9th Cir. 2014) (citing Zevnik).

IV.

BARTON IS INDISPUTABLY NOT ENTITLED TO SUMMARY JUDGMENT ON HIS § 523(a)(4) FRAUD IN A FIDUCIARY CAPACITY CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(4) for fraud while acting in a fiduciary capacity based on the alleged collateral estoppel effect of the LASC judgment. Barton's argument for a judgment under § 523(a)(4) fails for two independent reasons. ***First***, as detailed above the CCA did not consider Barton's fiduciary duty claim. Thus, , under Zevnik the judgment does not carry issue preclusive effect on the breach of fiduciary duty claim. ***Second***, Barton utterly fails to carry his burden of establishing the trust relationship necessary for fiduciary fraud non-dischargeability under § 523(a)(4). Thus, Barton's Motion under § 523(a)(4) must be denied.

Barton cites California law in contending that Defendant's director and officer status creates the fiduciary relationship necessary for non-dischargeability under § 523(a)(4).[4] *See*, Motion at 8:13-17. However, Barton fails to cite the seminal Ninth Circuit opinion that unequivocally holds that the fiduciary status of directors and officers does not create the express or technical trust required to support non-dischargeability under § 523(a)(4). *See*, Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125-1128 (9th Cir. 2003) (relationship in California between a director on the one hand and the corporation and its shareholders on the other hand, strictly speaking, was one of agency and not trust and does not support application of § 523(a)(4) non-dischargeability) ("Cantrell"). Under Cantrell, Barton's claim fails as a matter of law.

Based on the foregoing, Barton's Motion requesting a non-dischargeable judgment under § 523(a)(4) based on the issue preclusive effect of the state court judgment must be denied. The judgment does not carry issue preclusive effect on Barton's claim for breach of fiduciary duty because the CCA expressly did not consider the claim. Moreover, Barton fails to address Cantrell, which unequivocally precludes his claim. As such, the Motion must be *denied*.

---

[4] Because Barton argues that California law applies, Defendant responds to the contention under California law. Defendant reserves the argument that other jurisdictional laws may be applicable to these matters.

V.

BARTON HAS NOT CARRIED HIS BURDEN OF PROVING ENTITLEMENT TO SUMMARY JUDGMENT ON HIS § 523(a)(6) CLAIM

Barton argues that he is entitled to a non-dischargeable judgment under § 523(a)(6) for a debt for willful and malicious injury based on the alleged collateral estoppel effect of the state court judgment. As explained herein in detail, no claim other than Barton's conversion claim carries any preclusive effect under Zevnik. Thus, Barton's conversion claim must be analyzed under both Peklar and Plyam to determine if the elements of a claim under § 523(a)(6) are established by issue preclusion. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035 (9th Cir. 2001), *see also*, Plyam v. Precision Development, LLC (In re Plyam), - B.R. -, 2015 Bankr. LEXIS 1538 (9th Cir. BAP May 5, 2015). Barton inexplicably fails to cite Peklar and Plyam was published after Barton filed his Motion. Thus, Barton's Motion does not support granting summary judgment on his § 523(a)(6) claim because the relevant authorities are omitted from Barton's moving papers.

In Peklar, the Ninth Circuit held as follows concerning non-dischargeability of a conversion claim:

> A judgment for conversion under California substantive law decides only that the defendant has engaged in the "wrongful exercise of dominion" over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused "willful and malicious injury" within the meaning of § 523(a)(6). A judgment for conversion under California law therefore does not, without more, establish that a debt arising out of that judgment is non-dischargeable under § 523(a)(6).

Peklar, 260 F.3d at 1039.

To the extent that Barton relies upon the state court's imposition of punitive damages to establish willfulness, Plyam delves into the state of mind requirement for § 523(a)(6) non-dischargeability based on willful and malicious injury:

///

///

///

> Under § 523(a)(6), the willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors "either a subjective intent to harm, or a subjective belief that harm is substantially certain." *In re Su*, 290 F.3d at 1144; see also *In re Jercich*, 238 F.3d at 1208. The injury must be deliberate or intentional, "not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). Thus, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64.

Plyam, at *10 (emphasis added).

The BAP then dissected whether the basis for finding despicable malice or oppression within Civil Code § 3294(c)(1) and (2) satisfies the § 523(a)(6) requirement that Defendant have "either a subjective intent to harm or a subjective belief that harm is substantially certain." The BAP found that it did not. The BAP's holding concerning the basis for despicable malice as not establishing § 523(a)(6) willfulness confirms the state of mind requirement for § 523(a)(6) non-dischargeability:

> In the context of CC § 3294, the term "willful" refers only to the deliberate conduct committed by a person in a despicable manner. The statute, thus, employs the dictionary definition of "willful." *See Geiger*, 523 U.S. at 61 n.3 (noting that Black's Law Dictionary defined "willful" as "voluntary" or "intentional"). ***There is no indication that "willful" refers to a subjective intent to injure or a subjective belief that injury is substantially certain to result***. And, this interpretation makes practical sense; to read the statute otherwise would render the inclusion of Intentional Malice in CC § 3294 superfluous.

Plyam, at *25 – *26 (emphasis added).

Under this reasoning, Plyam now holds that a state court judgment containing an award of punitive damages based on the finding of "malice, oppression or fraud" does not establish § 523(a)(6) non-dischargeability as a matter of law. As such, Plyam now holds that a punitive damage award that includes malice or oppression as CC § 3294 findings cannot support non-dischargeability by issue preclusion:

> To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.

> But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness.

See, Plyam at page *28 (emphasis in original).

Herein, the state court judgment did not award punitive damages "**solely** based on a finding of Intentional Malice, fraud or both" as required by Plyam. Thus, Barton's Motion brought under § 523(a)(6) fails as a matter of law due to the unavailability of issue preclusion to establish the claim.

Although Barton's Motion is presently based on the collateral estoppel effect of the Superior Court's maliciousness and oppressiveness findings, Barton may attempt to argue that the judgment awarded punitive damages based on fraud as well. However, any such argument suffers from at least two hurdles. ***First***, under Zevnik, the CCA did not consider Barton's fraud claim and the fraud claim can carry no issue preclusive effect. ***Second***, just as the BAP in Plyam scrutinized the malice and oppressiveness findings under CC § 3294 to find that these terms do not establish willfulness under § 523(a)(6), any fraud finding suffers from an equal deficiency. Under CC § 3294(c)(3), fraud in support of an award of punitive damages can be based on "deceit." Deceit is defined in CC § 1710(2) as including negligent misrepresentations ***which do not require an intent to defraud***. *See*, Small v. Fritz Companies, Inc., 30 Cal. 4th 167 (2003). Thus, just as maliciousness and oppressiveness do not necessarily establish willfulness for purposes of § 523(a)(6), a fraud finding in connection with a conversion claim is equally deficient because the underlying tort is not necessarily an intentional tort. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001). Defendant reserves all arguments in this respect pending Barton's presentation of his case.

Finally, Barton must further address the fact that the CCA recognized a difference in culpability between defendants Tomkow and Khan. The Superior Court punitive damages ruling recognized that Tomkow's conduct was less "onerous" and the CCA opinion recognizes that Tomkow's "conduct was less egregious." See, RFJN 46, 68. Both decisions reference Tomkow as "complicit" in the conversion of Barton's shares. To the extent that Tomkow's liability arises

from his *complicity* in conversion, Tomkow is not the actor and his liability is being imputed. Judge Robles recently recognized that while fraud may be imputed under § 523(a)(2), a subjective state of mind cannot be imputed under the requirement for willful and malicious liability under § 523(a)(6). *See*, Mitehaus v. Ramey (In re Ramey), 508 B.R. 447, 455-456 (C.D. Cal. 2014), *modified*, 515 B.R. 777, *affirmed*, 2015 Bankr. LEXIS 578 (9th Cir. BAP 2015). Barton's Motion fails for this additional reason.

For all these reasons, Barton's Motion does not establish a claim for a non-dischargeable judgment under § 523(a)(6) based on the issue preclusive effective of the state court judgment. The Motion must therefore be denied.

VI.

IF NOT DENIED, THE MOTION SHOULD BE CONTINUED UNTIL BARTON DULY ADDRESSES FOUNDATIONAL ISSUES IN MOVING PAPERS

Due to the CCA's affirmance based solely on Barton's conversion claim, the only claim that could possibly be considered for issue preclusive effect herein is the conversion claim. However, Barton ignores Zevnik and barely identifies the conversion issue in his Motion, instead relegating the issue to a single sentence footnote on the last page of his brief. *See*, Motion at 10 footnote 4. The single sentence contains no analysis or argument as to how Barton's conversion claim is entitled to non-dischargeability in view of the Ninth Circuit's Peklar decision. Barton must also address Plyam which was published after Barton filed his Motion. Thus, Barton has not addressed crucial foundational issues in his moving papers.

The Court should not consider an argument not raised and developed in moving papers sufficiently to provide an opposing party with an opportunity to respond. *See*, Hill v. Opus Corp., 464 B.R. 361 fn. 34 (C.D. Cal. 2011) (in summary judgment context, "The court declines to consider arguments raised for the first time in reply, since the other party has no opportunity to respond."). It is well established that raising an issue in a footnote without argument or analysis is insufficient to raise the matter for purposes of review. *See*, International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733, 739 (9th Cir.1986) (declining to review an issue

raised in a footnote). Herein, the only claim that could possibly be considered for issue preclusive effect is Barton's conversion claim and Barton has inadequately addressed the issue in his Motion.

As a matter of due process, no summary judgment or summary adjudication of issues can be granted on this record. The Motion should either be denied or continued so that Barton addresses the issues presented by the subsequently decided Plyam decision and Defendant can respond thereto.

VII.

CONCLUSION

Wherefore, Defendant respectfully prays for an order of the Court denying Barton's Motion or continuing the Motion and for such other and further relief as the Court deems just and proper under the circumstances.

Date: May 12, 2015

Lewis R. Landau
Attorney-at-Law

By:*/s/ Lewis R. Landau*
Lewis R. Landau
Attorneys for Defendant

EXHIBIT 3

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES

--oOo--

In Re:	Case No. 2:13-bk-19712-WB
TERRANCE ALEXANDER TOMKOW	Chapter 7
Debtor,	Los Angeles, California June 16, 2015 Tuesday, 10:00 A.M.
BARTON, Plaintiff, v. TOMKOW, Defendant.	Adv. No. 2:13-ap-01751-WB
In Re: ZAFAR DAVID KHAN, Debtor,	Case No. 2:13-bk-19713-WB
BURKE, *et al.*, Plaintiffs, v. KHAN, *et al.*, Defendants.	Adv. No. 2:13-ap-01773-WB

STATUS CONFERENCE RE: MOTION TO ABATE OR STAY PROCEEDINGS

Proceedings produced by electronic sound recording; transcript produced by transcription service.

LOS ANGELES, CALIFORNIA, TUESDAY, JUNE 16, 2015

10:05 A.M.

--oOo--

THE COURT: Good morning, Your Honor.

ATTORNEYS: Good morning, Your Honor.

THE COURT: Please be seated. All right. So we're here on many matters related to the Terrance Alexander Tomkow bankruptcy cases. I think we're going to start with the Barton adversary proceeding.

MR. MCGARRIGLE: Good morning, Your Honor. Patrick McGarrigle for Mr. Barton.

MR. LANDAU: Good morning, Your Honor. Lewis Landau for the debtors.

THE COURT: All right. Good morning. All right. And just so I'm clear on my record and on the audio recording. This is matters -- let's see, what the matters are. Matters #7.00 and #8.00 in the Terrance Tomkow and then matters #3.00 and #4.00 in the Zafar Khan case today. All right.

So we had argument a couple weeks ago regarding the motion for summary judgment which is basically an identical motion in both cases. I recognize that Mr. Tomkow and Mr. Khan play different roles, but basically it's a motion for summary judgment based on issue preclusion, based on the state court judgment.

I think I left what I need at my own desk. Oh, we're going to take like a two-second recess because I forgot to bring something out with me.

(Off the record.)

THE COURT: All right. So we're back. I told you it would be quick. So the first issue, of course, was raised by Mr. Landau was whether the same judgment has issued preclusive effect based on the ruling by the Court of Appeals in the state court. We had argument on that and I'm going to follow the Ninth Circuit case, which is the *Deruzzi* (phonetic) case which I think I have to file because it's a Ninth Circuit case, and it provides that California law is that there's issue preclusive effect for the whole judgment, even though the state court, Court of Appeals only came down on one issue.

So -- and the cases that Mr. Landau cited are two Court of Appeal cases, but not any cases from -- California Court of Appeal cases, not any cases from California Supreme Court. And I think that as a Bankruptcy Court we're still bound by the Ninth Circuit's analysis on this. And so I think that the entire judgment to extent it satisfies the other requirements for issue preclusion can have issue preclusive effect.

I considered the arguments that the parties made and we read all the pleadings and case law on this and I'm

going to grant summary judgment on the claim under 523(a)(2)(A) based on fraud, based on the state court judgment of fraud. I find that all of the requirements for issue preclusion with respect to that claim have been met. Identical issues were litigated, the issues were actually litigated. The issues weren't necessarily decided and the prior decision was final on the merits and it's against the same party or privity exists.

I also take a step back and look at the policy considerations and determine even based on that that issue preclusion should apply with respect to this claim and the state court found fraud by both parties, Dr. Khan and Doctor -- Mr. Khan and Dr. Tomkow and so -- but their -- action on both of their parts. So I think that there's issue preclusive effect there with respect to a 523(a)(2) claim, so I think it's appropriate to enter summary judgment on that basis.

I'm going to deny summary judgment on the 523(a)(4) claim because I don't believe that it has -- that the conduct that is alleged is a type of conduct that creates a fiduciary relationship for purposes of 523(a)(4). It's different than under state law. Mr. McGarrigle, all you gave me was this basic kind of generic state law, fiduciary duty argument and that doesn't satisfy 523(a)(4), so I'm denying summary judgment on that basis.

EXHIBIT 4

manatt

Appellate Law

Volume V, Issue 8
This article was originally published in the December 3. 2009 issue of the Los Angeles and San Francisco Daily Journals.

Preclusion Rules Causes Conflict

Dec 08, 2009 | Authors: Benjamin G. Shatz | Lara M. Krieger

Assume that a California Superior Court relies on two different and independent reasons to reach a judgment. Then, the Court of Appeal affirms the judgment based on one of these reasons, but never bothers to mention the alternative ground. Can the ground that was ignored on appeal still have preclusive effect? Surprisingly, the answer probably depends on whether the preclusion question arises in state or federal court - even though California substantive preclusion rules are supposed to govern this issue regardless of the forum.

Preclusion rules are substantive, so this is not an instance where there is a difference in procedural law between the state and federal courts. Instead, the same set of California preclusion rules governs both in the state and federal courts. *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985, 1007 (9th Cir. 2007) So there shouldn't be conflicting results between the state and federal courts, right? Wrong.

Three California Court of Appeal decisions squarely on point hold that if the reviewing court affirms on only one ground of the many relied on by the trial court, only that single ground has preclusive effect.

First, in *Butcher v. Truck Insurance Exchange*, 77 Cal. App. 4th 1442, 1455-56 (2000), Division Four of the 2nd District Court of Appeal surveyed the issue nationwide, and found that there are two schools of thought. One line of cases gives preclusive effect only to the rationale adopted by the appellate court (the "modern" view), and the other gives preclusive effect to all the grounds relied on by the trial court regardless of whether the appellate court relied on those grounds (the "traditional" view). After extensively analyzing California precedent following the traditional view. *Butcher* reasoned that the traditional view "has not withstood the test of time, and it would be unwise to follow a rule that looks only to the judgments, without taking account of the reasons for those judgments as stated in the appellate courts' opinions." *Butcher* therefore held that "if a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established." Second, three years ago, Division Three of the 4th District confronted this same issue and followed *Butcher*. In *Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club*, 140 Cal. App. 4th 1120, 1130-32 (2006), the Court of Appeal thoroughly reviewed California precedent and the policies underlying both lines of precedent. And like *Butcher*, *Newport* rejected the traditional rule. *Newport* noted that its conclusion is echoed by the Restatement (Second) of Judgments, Section 27, comment "o," which addresses the collateral estoppel (i.e., issue preclusion) effect of an appellate judgment. The Restatement's comment provides that "[if] the appellate court upholds one of [the trial court's] determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination."

Third, just last year in *Zevnik v. Superior Court*, 159 Cal.App.4th 76, 79 (2008), the issue arose again. Division Three of the 2nd District agreed with *Newport* and *Butcher*, holding that "if a trial court relies on alternative grounds to support its decision and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel."

Thus, it would seem that California law is settled in favor of the modern view: *Zevnick*, *Butcher*, and *Newport* are recent and thoughtfully reasoned Court of Appeal opinions, and their holdings are bolstered by the Restatement. Yet, the 9th Circuit Court of Appeals, which should be applying California substantive law on the issue, has reached precisely the opposite result.

In *DiRuzza v. County of Tehama*, 323 F.3d 1147, 1156 (9th Cir. 2003), the court held that a California appellate judgment is conclusive as to all grounds relied on by the trial court, even those not considered by the reviewing court. *DiRuzza* acknowledged *Butcher* and its adoption of the modern view. But *DiRuzza* didn't stop at Butcher and dug deep into the recesses of California law to find a 1865 California Supreme Court opinion adopting the traditional view: *People v. Skidmore*, 27 Cal. 287 (1865). *DiRuzza* reasoned that this California Supreme Court opinion trumps any contrary Court of Appeal decision - including *Butcher*. *DiRuzza* also relied on an earlier 9th Circuit opinion that had concluded that the "California position" "'is that even if the appellate court refrains from

considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.'" (quoting *Markoff v. New York Life Ins. Co.*, 430 F.2d 841, 842 (9th Cir. 1976)).

In *Newport*, the California Court of Appeal recognized *DiRuzza's* concern that the California Supreme Court has never overruled its 1865 precedent - but *Newport* refused to slavishly adhere to stare decisis principles, and instead concluded that the '"authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it.'" (quoting *Sei Fujii v. State of California*, 38 Cal. 2d 718, 729 (1952)). *Newport* concluded that "[w]e believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second." In support of its conclusion, *Newport* first noted that the California Supreme Court has already approved the Restatement (Second) of Judgments Section 27 and its comments, and next reasoned that the traditional rule violates this State Constitution's requirement that courts "set forth decisions in writing 'with reasons stated.'"

But, what *Newport* arguably did was ignore the Supreme Court precedent of *Skidmore* in derogation of stare decisis. Supreme Court opinions, if not qualified or disapproved, are supposed to be binding on all inferior courts, regardless of how old they are. *Lawrence Tractor Co. v. Carlisle Ins. Co.*, 202 Cal. App. 3d 949, 954 (1988); *Mehr v. Superior Court*, 139 Cal. App. 3d 1044, 1049 n.3 (1983); *see also Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353-54 (2007)

At least one California court has noticed the conflict between *DiRuzza* and *Butcher* - but refused to take a position. *Pitts v. City of Sacramento*, 138 Cal. App. 4th 853, 858 n.7 (2006) (3rd District notes, but does not reach, the issue). And the 2008 *Zevnik* decision avoided contradicting *Skidmore* by narrowly construing the hoary Supreme Court precedent to apply only to res judicata (claim preclusion) rather than collateral estoppel (issue preclusion).

The conflict between the *DiRuzza* analysis on the one hand, and the *Butcher/Newport* analysis on the other, creates an anomaly: A federal district judge, bound by 9th Circuit precedent, must follow *DiRuzza's* construction of California law and apply the traditional rule. But a California Superior Court judge facing the exact same preclusion question would most likely follow *Butcher, Newport*, and *Zevnik* - the most recent Court of Appeal decisions on point. Of course, a Superior Court judge (especially those sitting outside of the 2nd District and Orange County) could adopt *DiRuzza's* reasoning that the old Supreme Court precedent governs and therefore follow the traditional view. That, however, is unlikely. Most trial judges are more inclined to follow the most recent pronouncements adopting the modern view. And, those judges sitting in the 2nd District and Orange County probably would not want to pick a fight with their local Court of Appeal. That's not to say that a zealous advocate couldn't (or shouldn't) argue that the traditional view is the right view. Indeed, the *DiRuzza* court noted that it would apply *Skidmore* until it received "definitive indication" that *Skidmore* "no longer represents the law of California." Arguably, *Newport* and *Zevnick* supply that "indication," although the contrary argument would be that only the California Supreme Court can resolve the conflict. Thus, practitioners who find themselves on the losing side of the issue would have solid grounds to pursue a petition for review to the California Supreme Court.

Benjamin G. Shatz is a certified specialist in appellate law in the Appellate Practice Group of Manatt, Phelps & Phillips in Los Angeles. He is currently the Chair of the Los Angeles County Bar Appellate Courts Committee. **Lara M. Krieger**, formerly a Manatt associate, is now an associate at Greines, Martin, Stein & Richland in Los Angeles.

For additional information on this issue, contact:

Benjamin G. Shatz Mr. Shatz is a member of Manatt's Appellate Practice Group. He has briefed hundreds of civil appeals, writs and petitions to the U.S. Supreme Court, U.S. Courts of Appeals, California Supreme Court and California Courts of Appeal, covering areas of law including entertainment, copyright, trademark, employment, land use, banking, insurance, product liability, professional liability, wrongful death, punitive damages, class actions, anti-SLAPP and unfair competition.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

23975 Park Sorrento, Suite 200
Calabasas, CA 91302

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION FOR** (*specify name of motion*) CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 03/29/2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) 03/29/2016, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Judge Brand; US Bankruptcy Court, 255 E. Temple Street, Suite 1382, Los Angeles, CA 90012

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

03/29/2016	Lewis R. Landau	/s/ Lewis R. Landau
Date	*Printed Name*	*Signature*

In re: Khan; AP 2:13-ap-1752 WB	CHAPTER: 7
Debtor(s).	CASE NUMBER: 2:13-bk-19713 WB

ADDITIONAL SERVICE INFORMATION (if needed):

NEF Service List (category I):

Rosendo Gonzalez (TR)
rgonzalez@ecf.epiqsystems.com, itran@gonzalezplc.com

Lewis R Landau on behalf of Defendant Zafar David Khan
Lew@Landaunet.com

United States Trustee (LA)
ustpregion16.la.ecf@usdoj.gov

Philip A Zampiello on behalf of Plaintiff Kenneth Barton
philipz@mkzlaw.com, PatrickM@mkzlaw.com;MichaelK@mkzlaw.com;VanessaB@mkzlaw.com

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: ZAFAR DAVID KHAN, Debtor, --- KENNETH BARTON, Plaintiff(s), v. ZAFAR DAVID KHAN, Defendant.	Case No. 2:13-bk-19713-WB Adversary Case No:2:13-ap-01752-WB **PLAINTIFF KENNETH BARTON'S OPPOSITION TO DEFENDANT ZAFAR KHAN'S MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS** **Date: April 19, 2016** **Time: 2:00 p.m.** **Place: Courtroom 1375; Judge Brand** **US Bankruptcy Court** **255 E. Temple Street; 13th Floor** **Los Angeles, CA 90012**

Creditor/Adversary Plaintiff Kenneth Barton ("**Barton**") hereby presents his Opposition Memorandum to Debtor/ Defendant Zafar Khan's Motion For Certification Of Appeal For Direct Review In the 9th Circuit Court Of Appeals ("**Motion**").

MEMORANDUM OF POINTS AND AUTHORITIES

I. DEBTOR'S CERTIFICATION MOTION IS WITHOUT MERIT AND SHOULD BE DENIED.

On March 7, 2016, the Court entered its Order granting Plaintiff Kenneth Barton's motion for summary judgment ("**MSJ**") under 11 U.S.C. Section 523(a)(2)(A) and (a)(6). In opposing the MSJ, Debtor Zafar Khan ("**Khan**") did not (and does not here) deny that he fully litigated **(a)** all causes of action and proceedings in the Los Angeles Superior Court that led to a judgment in Barton's favor on all causes of action against Debtor including for fraud (collectively, the "**Fraud Judgment**"), and **(b)** his appeal therefrom. The California Court of Appeal (McGarrigle Decl., Ex. B) affirmed the Fraud Judgment (save the reversal of an emotional distress damages award [not pertinent here]), and chose not to engage in a discussion of all of the affirmed causes of action. Ruling on Barton's summary judgment motion, and responding to Debtor's attempts to parse the Court of Appeal's Opinion, this Court cited *DiRuzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003) in support of its conclusion that, pursuant to the California Supreme Court's decision in *People v. Skidmore*, 27 Cal. 287 (1865), the Court of Appeal's affirmance of the Fraud Judgment applies to all of the causes of action determined by the Superior Court in Barton's favor against Khan.

On March 7, 2016, this Court also entered Judgment against the Debtor (the "**NDJ**") establishing the non-dischargeability of Barton's Fraud Judgment against Khan. Largely repeating the rationale for this Motion as was advanced at the MSJ hearing, Debtor has filed the instant motion seeking certification of the NDJ for direct appeal to the 9th Circuit (as a condition to requesting that the 9th Circuit pose a question to the California Supreme Court regarding application of collateral estoppel). Debtor asserts that: **(a)** the Court of Appeal's decision affirming the Fraud Judgment did not effectively affirm all causes of action because the Opinion did not expressly discuss in detail all causes of action adjudicated against Debtor in the Superior Court; **(b)** (and

notwithstanding that the instant Motion is bereft of any legal and factual analysis) the Superior Court's Fraud Judgment was based on "alternative grounds"; and **(c)** (i) if the Superior Court's Fraud Judgment was based on "alternative grounds," and (ii) if (Debtor asserts) the Court of Appeal's Opinion did not discuss all "alternative grounds" in affirming the Fraud Judgment, then, (iii) there is an alleged, potential conflict in the California Supreme Court's 150 year+ rule of law (on the one hand) and what Debtor asserts (on the other hand) is a purported "modern approach" (which Debtor argues limits the effect of collateral estoppel such that a trial court's rulings on "alternative grounds" that are not specifically addressed in the appellate opinion are not entitled to preclusive effect). However, and for any number of reasons, the Motion is legally and factually untenable and should be denied.

First, Debtor's manufacturing of a purported "conflict in the law," that would require the 9th Circuit to directly review the NDJ and pose an inquiry to the California Supreme Court, is without support. The 9th Circuit reviewed the issue of collateral estoppel stemming from appellate review of state court judgments and confirmed thirteen years ago that, based on the Supreme Court's determination in Skidmore, an appellate affirmance of a judgment is just that, an affirmance of the *entire* judgment. This Court, like the DiRuzza Court, adhered to principles of *stare decisis* and entered summary judgment in Barton's favor by adhering to controlling law and according full effect to the Fraud Judgment and the Court of Appeal's Opinion affirmance. Following Skidmore, and rejecting the inapt (and, as one California Appellate Court[1] has concluded are,

---

1 Attached to the McGarrigle Declaration as Exhibit "A" is an unpublished California Court of Appeal decision, Gonzalez v. Beyer Pongratz & Rosen, California Court of Appeal, Case No. C065197 (2010 WL 4849920) specifically addressing Zevnik and an appellants similar attempt to breathe life into causes of action which were not specifically addressed in an appellate decision that fully affirmed the trial court's judgment. While not citable for precedential value, the Gonzalez decision is properly considered by this Court under 9th Circuit precedent. Daniel v. Ford Motor Co. 806 F.3d 1217 (9th Cir. 2015) ("Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law.).

"frivolous") assertions regarding the scope of Zevnik v. Superior Court, 159 Cal.App.4th 76 (2008)and its ilk) is precisely what this Court was required to do. As the 9th Circuit has made clear, when deciding state law issues, the decision of the state's highest court must be followed; whether there is a purported conflict in intermediate court decisions is only an issue *if* the state's highest court has not previously issued the law of the state. Lewis v. Telephone Employees Credit Union 87 F.3d 1537 (9th Cir. 1996) ("When interpreting state law, federal courts are bound by decisions of the state's highest court. '*In the absence* of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.").

Hence, and ***second***, Debtor's Motion is also properly denied because the Motion fails – as a matter of proof and legal authority – to establish that the Superior Court's Fraud Judgment was based, not on the several separately stated causes of action adjudicated in Barton's favor but, on the nebulous, undefined "alternative grounds" phraseology. Barton proved and succeeded on all *causes of action* – not "alternative grounds" – against the Debtor and Debtor cites nothing in the record for this (or any reviewing court to conclude otherwise). Further, the Motion reflects no attempt (and Debtor cannot correct the failure of proof and argument on Reply) to define under controlling law what the "alternative grounds" language from Zevnik and its handful of predecessors is intended to refer to and how (if at all) that phraseology somehow means "cause of action" (which is something altogether different). It is axiomatic that causes of action stand alone. Motions, like the disqualification motion in Zevnik, may be decided on "alternative grounds." Yet, Debtor has chosen not to present an argument or authority to satisfy the condition precedent to further examination of balance of the Motion, to wit, to demonstrate that causes of action (separately proven and adjudicated) are "alternative grounds" under California law and as contemplated in the Zevnik, et al. decisions. The absence of such a discussion in the Motion is not surprising because there is no logic or reasoning behind it (except an attempt to effectively convert the Court of Appeal's full

affirmance on the causes of action in Barton's favor and against Khan into an "affirmed in part, (impliedly) reversed in part" opinion). Such reasoning was soundly rejected by the *Gonzalez* Court:

> "Gonzalez disagrees, arguing his seventh and eight causes of action survived issuance of the remittitur. He appears to believe that this court's unqualified affirmance of the judgment in favor of the law firm on all causes of action was transformed into a reversal of the judgment on the two causes of action not explicitly addressed in this court's decision affirming the judgment. Not so. The trial court entered judgment against Gonzalez on all causes of action. This court affirmed. The fact that the decision affirming the judgment did not explicitly discuss two causes of action does not transform its unqualified affirmance of the judgment into the reversal of the judgment as to those causes of action."

While *Gonzalez* is not precedential, as the 9th Circuit in *Davis* confirmed four months ago, the unpublished decision can be considered as a relevant reflection of California law on the subject. Juxtaposing *DiRuzza* and *Skidmore* (and simply considering the unpublished decision (and comments on the absence of merit to Debtor's very argument here) in *Gonzalez*), on the one hand, to *Zevnik*, the Restatement and a local attorney's short practice article reveals (a) this Court's Judgment rightly adhered to the law, (b) there is no "conflict in the law" or other ground warranting certification or the query to the California Supreme Court, (c) the premise of the Motion is untenable as Debtor has (despite the issue being raised at the MSJ hearing) chosen not to address the substantive threshold issue that the Fraud Judgment on all causes of action is not akin to a "motion" decided on "alternative grounds," and (d) the policy reasons *for* applying collateral estoppel – an issue also unaddressed and undeveloped in the Motion – were rightly followed by this Court and are improvidently challenged here. In short, Debtor's attempt to have another opportunity to relitigate his fraud and related intentional malfeasance and misconduct runs directly afoul to California's reasoning for the doctrine in the first place.

As the California Supreme Court in *Murray v. Alaska Airlines* (2010) 50 Cal.4th 860, 877 instructed (in a decision which advised the 9th Circuit that collateral estoppel

applied to administrative findings where the plaintiff did not pursue an appeal past the administrative remedies): "Last, "[e]ven assuming all the threshold requirements are satisfied ... [w]e have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." (Lucido v. Superior Court (1990) 51 Cal.3d 335, 342–343, 272 Cal.Rptr. 767, 795 P.2d 1223.) ***We find that the public policies underlying the doctrine of collateral estoppel will best be served by applying the doctrine to the particular factual setting of this case. Those policies include conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation.*** (Allen v. McCurry (1980) 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308; Montana v. United States (1979) 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210; Sims, supra, 32 Cal.3d at pp. 488–489, 186 Cal.Rptr. 77, 651 P.2d 321; Syufy Enterprises v. City of Oakland (2002) 104 Cal.App.4th 869, 878, 128 Cal.Rptr.2d 808.)." (Emphasis Added). Debtor's efforts here – an ongoing unwillingness to accept now at least three courts' determinations that he committed fraud – is precisely why the collateral estoppel doctrine exists: to end litigation on decided matters. The Fraud Judgment is based on causes of action which were affirmed[2], not alternative grounds, and

---

2 As the Court of Appeal stated: "Since we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider ***defendants'*** additional contentions that liability was not supported by substantial evidence of breach of fiduciary duty, fraud, or unfair competition under Business and Professions Code section 17200." (Ex. B at pg. 18 (internal), p. 00022), second paragraph from the top, emphasis added) What this reveals is that the Court of Appeal was not in any way (as Debtor suggests) diminishing the success of Barton's claims nor was it qualifying or limiting its affirmance of the trial court's decision. Rather, the Court of Appeal was dismissive of Debtor's additional arguments on appeal. That Debtor felt it necessary to hide this quote from the Court speaks volumes and demonstrates that Debtor also understands that it was his failed arguments that were cast aside by the Court of Appeal, not Barton's victory. Moreover, as if Debtor's misguided ploy to convince this Court that it somehow won by losing needed further debunking, the Court of Appeal stated that, save for the reduction of emotional distress damages, "...**the judgment is affirmed.**" (Ex. B at Opinion p. 25 (internal) (p. 00029).

Debtor has failed to demonstrate otherwise previously or in this Motion, which is properly denied.

Third, Debtor's reliance on Zevnik and a non-determinative comment (in *dicta*) by a Bankruptcy Court in In Re Aberle, 533 B.R. 311 (Bankr. N.D. Cal. 2015)3 to prop up a (non-existent) "modern approach" or "modern view" – when those cases are factually inapt and Debtor has not established the threshold question is proven (that causes of action are "alternative grounds") – is unpersuasive and misplaced.[4] In Zevnik, the law firm defending a malpractice action tried to use another trial court's denial of a third party's disqualification motion as collateral estoppel that the law firm did not commit malpractice. In reviewing the disqualification motion, the Court of Appeal relied on one of the alternative grounds (laches) to uphold the disqualification motion denial and expressly did not reach the merits of the disqualification motion. In other words, the Zevnik trial court had two grounds to sustain its lone holding that the law firm should not

---

3 Other than indicating that there was an interesting discussion going on concerning Zevnik and DiRuzza was occurring, on the facts and law, Aberle is not relevant to this Motion or the underlying issues.

4 Like Debtor's errant citation to the inapposite Zevnik decision, Debtor's reliance on an article's reference to the decision in Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club (2006) 140 Cal.App.4th 1120, does not move the needle. There, the Appellate Court did not affirm the entire judgment as occurred here. *Here, the Appellate Court affirmed the Judgment and reversed no cause of action.* Unlike Barton's separate and each successful causes of action sustained by LASC, Newport involved alternative theories *within* a single cause of action, a distinction which Debtor did not previously and has not since addressed. And, unlike Newport, the Appellate Court here noted specific findings which cross-over all the claims sustained by the Judgment: "[Defendants] took repeated actions to achieve their goal, from fabricating minutes with [Barton's] signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating." (Ex. B at pg. 22-23 (internal) p. 0026-27). Those findings (in addition to the fact that the Judgment was affirmed *in toto*) unmask Debtor's untenable implied "reversal by appellate affirmance" theory. Barton can only hope that, in light of the Gonzalez decision and the policy of conserving judicial resources, Debtor will have withdrawn this Motion shortly after receipt of this Opposition and, thereafter, file a notice of withdrawal of the appeal.

be disqualified; the Court of Appeal upheld that trial court's decision on the laches alternative ground, but did not reach the merits. Unlike here, there was no "Judgment" in *Zevnik* at issue.

As the *Zevnik* Court confirmed (fn. 9), "*DiRuzza* stated that *Skidmore* was 'controlling' on the question of the collateral estoppel effect of issues decided by the trial court after a reviewing court's affirmance on different grounds." While the *Zevnik* Court attempted to carve out an exception to *Skidmore* on the narrow factual grounds on the disqualification motion there (facts which are not at all on all fours with the State Court Fraud Judgment here), the 9th Circuit has not accepted *Zevnik* and *DiRuzza* continues to guide the federal courts on the issue (even assuming arguendo the State Court Fraud Judgment could ever be construed as an underlying judgment on "alternative grounds," which Debtor has not demonstrated with any cogent argument and authority).[5] As the Federal District Court confirmed in *Flying J, Inc. v. Pistacchio* (E.D. Cal. March 31, 2008) 2008 WL 906396, "Therefore, we reiterate the understanding of California law we stated in *Markoff v. New York Life Insurance Co.*, 530 F.2d 841, 842 (9th Cir.1976) ...: '**[The California position] is that even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.**'" (Emphasis Added).

---

5 As the *DiRuzza* Court noted, citing *Skidmore*: "The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with that judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words 'judgment affirmed,' as they occur in the published report of the case. (17 Cal. 261).... The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. **But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression.** *Skidmore* at 292-293." *DiRuzza* at 1154-55.

The point here is that all of Debtor's efforts to convert a non-conflict in the law into a contrived "conflict in the law" to then attempt to certify the Judgment for appeal to the 9th Circuit to then delay the process through a question and answer process with the California Supreme Court, are contrary to the law and without legal support. Neither *Zevnik*, the Restatement nor the lawyer's article are on a par with or demonstrate any conflict with *DiRuzza*, *Skidmore*, et al. The Motion is rightly denied.

Fourth, and finally, neither FRBP 8006(f) or 28 U.S.C. Section 158(d)(2) apply here. With respect to FRBP 8006(f)(2)(A)-(D), Debtor has failed to meet its burden: under subsection (A), Debtor has failed to present any facts and law that the state court's Fraud Judgment on all causes of action somehow constitutes the undefined "alternative grounds" concept at issue in *Zevnik*, et al. Debtor's presentation presupposes a conclusion that Debtor has not presented the facts and law to substantiate and, as such, subsection (A) has not been satisfied; with respect to subsection (B), the statement of the question is incomplete, at best, and overlooks the key threshold question – which Debtor has not addressed factually or legally. Hence, the Motion is defective in this regard; and with respect to subsection (C), the statement is not sustainable – the "current law" is *Skidmore*, *DiRuzza* and several other decisions following same and cited above. The "current law" is not *Zevnik* (as the *Gonzalez* Court confirms) and *Zevnik* is neither factually or legally on all fours with the instant action.

With respect to subsection (D), which looks at satisfaction of the requirements of Section 158(d)(2)(A)(i)-(iii), Debtor is also unable to meet the criteria: with respect to subsection (d)(2)(A)(i), Debtor suggests without much discussion that the Motion is based on an alleged "matter of public importance," which effectively concedes that the remaining grounds in subsection (i) ["the judgment …involves a question of law as to which there is no controlling decision…."]. However, Debtor's mere conclusions (Motion, p. 5:22-28) are devoid of any facts and parroting the public policies supporting collateral estoppel does not buttress the Motion here. Rather, the integrity of the judicial system, promotion of judicial economy and protection of litigants from harassment each

strongly compel the denial of the Motion and Debtor's withdrawal/dismissal of the appeal without any further delay or expense. Barton has been deprived of the remedies of the Fraud Judgment as a result of Debtor and Debtor's partner, Tomkow, et al. by being forced to litigate in these bankruptcy proceedings, which Khan and Tomkow are financing through their corporation's assets. With three courts having affirmed Debtor's fraud and the Fraud Judgment's propriety, the integrity of the judicial system and judicial economy would best be served by Debtor ending the on-going litigation on matters that have already been fully litigated and decided. Permitting Debtor, who engaged in myriad acts of fraud, to keep burdening the courts and an aggrieved victim thereof, is not in furtherance of any public policy; with respect to subsection (d)(2)(A)(ii), as discussed infra, there are no "conflicting decisions" or questions of law that are not already decided. There is no Federal decision in conflict. There is no California decision – that is, and this is key, factually on all fours with the case at bar – that is in conflict (and the *Gonzalez* decision reflects the legal untenability of the very premise of the Motion). Debtor cannot satisfy this prong either; and, with respect to subsection (d)(2)(A)(iii), based on the controlling law and the insight also provided to the Debtor's team in the *Gonzalez* decision, the Debtor's withdrawal of this Motion and the appeal are the only remaining prudent steps that respect the decisions of now several courts on these issues.

While Barton would prefer Debtor not proceed with the appellate measures which needlessly increase legal expenses and burden the judicial system, because certifying the Judgment for the 9th Circuit is an infrequently permitted course and Debtor cannot meet and has not met the requirements here, the Motion is properly denied.

DATED: April 5, 2016

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By: _____

Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311

A true and correct copy of the foregoing document entitled (*specify*): **PLAINTIFF KENNETH BARTON'S OPPOSITION TO DEFENDANT ZAFAR KHAN'S MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 4/5/2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Trustee: rgonzalez@ecf.epiqsystems.com, itran@gonzalezplc.com
United States Trustee (LA): ustpregion16.la.ecf@usdoj.gov
Attorney for Debtor: Lew@Landaunet.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 4/5/2016, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Via U.S. Postal Service, Priority Mail:

Hon. Julia W. Brand
U.S. Bankruptcy Court, Roybal Federal Building
255 E. Temple Street,
Suite 1382 / Courtroom 1375
Los Angeles, CA 90012-3332

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 4/5/2016, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

April 5, 2016	Vanessa Bravo	/s/ Vanessa Bravo
Date	*Printed Name*	*Signature*

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:

ZAFAR DAVID KHAN,

Debtor,

KENNETH BARTON,

Plaintiff(s),

v.

ZAFAR DAVID KHAN,

Defendant.

Case No. 2:13-bk-19713-WB

Adversary Case No:2:13-ap-01752-WB

DECLARATION OF PATRICK C. MCGARRIGLE IN SUPPORT OF PLAINTIFF KENNETH BARTON'S OPPOSITION TO DEFENDANT ZAFAR KHAN'S MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS

Date: **April 19, 2016**
Time: **2:00 p.m.**
Place: **Courtroom 1375; Judge Brand**
US Bankruptcy Court
255 E. Temple Street; 13th Floor
Los Angeles, CA 90012

DECLARATION OF PATRICK C. MCGARRIGLE

I, Patrick C. McGarrigle, declare:

1. I am an attorney, duly licensed to practice before this Court, and the principal McGarrigle, Kenney & Zampiello, APC, counsel for Creditor/Plaintiff Kenneth Barton (**"Barton"**).

2. Attached hereto as Exhibit "A" and incorporated fully herein is a true and correct copy of the unpublished California Court of Appeal decision in the case of *Gonzalez v. Beyer Pongratz and Rosen*, California Court of Appeal, Case No. C065197 (2010 WL 4849920).

3. Attached hereto as Exhibit "B" and incorporated fully herein is a true and correct copy of the California Court of Appeal Opinion (and modification) filed December 9, 2014 in Appellate Case No. B251722, in the case of *Kenneth Barton v. RPost International Limited; Zafar Khan, Terrance Tomkow, et al.* (LASC Case No. YC061581).

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

Executed this 5th day of April, 2016 at Chatsworth, California.

Patrick C. McGarrigle

EXHIBIT A

KeyCite Red Flag - Severe Negative Treatment
Unpublished/noncitable November 30, 2010

2010 WL 4849920
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Third District, California.

Daniel E. GONZALEZ, Plaintiff and Appellant,
v.
BEYER, PONGRATZ & ROSEN et al., Defendants and Respondents.

No. C065197.
|
(Super.Ct.No. 03AS00288).
|
Nov. 30, 2010.

Attorneys and Law Firms

Robert R. Schaldach, Attorney at Law, Sacramento, CA, for Plaintiff and Appellant.

Karen M. Goodman, Goodman & Associates, Sacramento, CA, for Defendants and Respondents.

Opinion

SCOTLAND, Acting P.J. *

*1 Daniel Gonzalez filed a legal malpractice suit against the law firm of Beyer, Pongratz & Rosen, and attorneys Etan Rosen and Erik Child, to whom we shall refer collectively as the "law firm." The trial court entered summary judgment in favor of the law firm.

Gonzalez appealed, and this court affirmed the judgment. (*Gonzalez v. Beyer, Pongratz & Rosen* (Feb. 20, 2009, C052538) [nonpub. opn.], at p. 17.) After Gonzalez unsuccessfully attempted to file an untimely petition for rehearing, he sought review in the California Supreme Court, which denied his petition.

The remittitur issued to the trial court certifying that this court's decision had become final. Gonzalez then filed a petition for writ of mandate in the California Supreme Court, seeking to vacate the decision of this court. The petition was denied.

Undeterred by his lack of success on appeal, Gonzalez returned to the trial court and filed a motion to set aside the judgment. The trial court denied the motion and warned Gonzalez that "any future attempt to re-litigate this matter may result in a monetary sanction ."

Gonzalez appeals from the trial court's denial of his motion to set aside the judgment this court affirmed on appeal. The law firm moves to dismiss the appeal and asks us to impose sanctions against Gonzalez for bringing a frivolous appeal.

We conclude Gonzalez's latest appeal must be dismissed because it is from a nonappealable order. We further conclude the appeal is frivolous; consequently, we shall impose monetary sanctions against Gonzalez in the amount of $6,840, payable to the law firm.

BACKGROUND

The underlying legal malpractice lawsuit was brought in 2003. Gonzalez asserted 10 causes of action alleging that the law firm negligently handled five legal matters.

In 2006, the trial court entered summary judgment in favor of the law firm. Gonzalez appealed. [1] In February 2009, this court affirmed the judgment. The written decision affirming the judgment did not specifically address the trial court's rulings on Gonzalez's seventh and eighth causes of action involving one of the underlying legal matters, *Gonzalez v. Board of Dental Examiners* (accusation No.1998–48). Gonzalez's appellate briefs did not address those rulings under separate headings. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830–1831, fn. 4 [an appellant must present each point separately in its opening brief under an appropriate heading, showing the nature of the question to be presented and the point to be made; failure to do so may be deemed a forfeiture of the argument].)

A petition for rehearing would have been the appropriate vehicle for Gonzalez to raise the issue that this court's decision did not address the trial court's ruling on the seventh and

eighth causes of action and that the forfeiture rule should not apply to his failure to contest these rulings by setting forth argument and authority under separate headings, as required by the California Rules of Court.

*2 Gonzalez failed to file a timely petition for rehearing, and this court declined to permit him to file an untimely petition for rehearing.

Gonzalez then petitioned the California Supreme Court for review, asserting that this court's decision did not resolve his seventh and eighth causes of action. His petition for review was denied.

Thus, a remittitur was issued to the trial court certifying that the decision of this court, affirming the judgment, was final.

Gonzalez then filed a petition for writ of mandate in the California Supreme Court, seeking to vacate this court's decision affirming the judgment. The Supreme Court denied the petition.

In February 2010, Gonzalez returned to the trial court and filed, in propria persona, a motion to set aside the judgment. In denying the motion, the trial court stated: "I don't have jurisdiction to do anything that you're asking me to do.... I'm not able to overrule the Court of Appeal." The trial court also commented that Gonzalez was "tilting at windmills" by "trying to relitigate this case that the Court of Appeal has decided in total." The trial court further admonished Gonzalez that "any future attempt to re-litigate this matter may result in a monetary sanction."

Despite the trial court's warning that a further attempt to overturn the judgment might result in a monetary sanction, Gonzalez appealed from the denial of his motion to set aside the judgment.

The law firm moved to dismiss the appeal on the grounds that the order denying Gonzalez's motion to vacate the judgment is not an appealable order and that the appeal is entirely frivolous. The law firm also asked this court to sanction Gonzalez for pursuing a frivolous appeal.

Attorney Robert R. Schaldach then substituted into the case as Gonzalez's appellate counsel. This court notified Gonzalez that we were considering imposing sanctions for filing a frivolous appeal from a nonappealable order, gave him the opportunity to file written opposition, and set the matter for oral argument. (See Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Opposition was filed by Gonzalez personally, and two oppositions were filed by Attorney Schaldach. Oral argument was held on October 22, 2010.

DISCUSSION

I

"An order denying a motion to vacate an appealable judgment is generally not appealable if such appeal raises only matters that could be reviewed on appeal from the judgment itself." (*Rooney v.. Vermont Inv. Corp.* (1973) 10 Cal.3d 351, 358.) "If the prior judgment or order was appealable, and the grounds on which vacation is sought existed before entry of judgment, the correctness of the judgment should be reviewed on an appeal from the judgment itself. To permit an appeal from the order refusing to vacate would give the aggrieved party two appeals from the same decision or, if the party failed to take a timely appeal from the judgment, an unwarranted extension of time starting from the subsequent order." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 197, pp. 273–274; *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1576; see also *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.)

*3 Here, the prior judgment was appealable and the correctness of that judgment was reviewed on appeal. This court affirmed the judgment in its entirety. The grounds upon which Gonzalez sought to have the judgment vacated existed prior to the entry of judgment. The fact that, when affirming the judgment, this court did not address his seventh and eighth causes of action, does not detract from the fact that Gonzalez's motion to vacate the judgment was simply an attempt to relitigate the merits of the previous grant of summary judgment as to these causes of action.

Because Gonzalez's motion to vacate the judgment was merely an attempt to relitigate matters that had already been resolved against him both in the trial court and on appeal, the order denying this motion is not an appealable order. (*Rooney v. Vermont Inv. Corp., supra,* 10 Cal.3d at pp. 358–359; 9 Witkin, *supra,* at pp. 273–274.) Consequently, we must dismiss this appeal.

Gonzalez disagrees, arguing his seventh and eight causes of action survived issuance of the remittitur. He appears

to believe that this court's unqualified affirmance of the judgment in favor of the law firm on *all causes of action* was transformed into a reversal of the judgment on the two causes of action not explicitly addressed in this court's decision affirming the judgment. Not so. The trial court entered judgment against Gonzalez on *all causes of action.* This court affirmed. The fact that the decision affirming the judgment did not explicitly discuss two causes of action does not transform its unqualified affirmance of the judgment into the reversal of the judgment as to those causes of action.

Entirely inapposite are the cases upon which Gonzalez relies, *Zevnik v. Superior Court (Rayonier, Inc.)* (2008) 159 Cal.App.4th 76 (hereafter *Zevnik*), *Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120 (hereafter *Newport Beach*), and *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442 (hereafter *Butcher*). They involve the doctrine of collateral estoppel and hold that, where a trial court decision is based on alternative grounds, each being sufficient to support the decision, and an appellate court affirms the decision on only one of the alternative grounds without deciding the other grounds, only the ground upon which the appellate court relied has preclusive effect in subsequent proceedings. (*Zevnik, supra* 159 Cal.App.4th at pp. 83–84; *Newport Beach, supra,* 140 Cal.App.4th at p. 1132; *Butcher, supra,* 77 Cal.App.4th at p. 1460.)

For example, in *Zevnik,* a legal malpractice suit brought by Rayonier and Southern Wood (collectively Rayonier) against their attorneys (collectively Zevnik) arose from Zevnik's concurrent representation of Rayonier and certain other plaintiffs (ITT and ITT Fluid) in an underlying insurance coverage litigation. In the underlying litigation, the trial court denied Rayonier's motion to disqualify Zevnik as counsel for ITT and ITT Fluid on two alternative grounds: (1) Rayonier failed to establish a basis for disqualification; and (2) the motion was barred by the doctrine of laches. (*Zevnik, supra,* 159 Cal.App.4th at p. 80.) The Court of Appeal "affirmed the denial of the motion to disqualify based on laches alone and expressly declined to reach the parties' contentions concerning other grounds asserted by the trial court in support of its ruling." (*Ibid.*) Thereafter, in the legal malpractice action, Zevnik attempted to use this prior ruling as a shield, arguing that "facts determined by the trial court in the order denying the motion to disqualify counsel in the insurance coverage action were conclusively established, and that those facts precluded any finding that [Zevnik] had breached a duty owed to [Rayonier and Southern Wood] and defeated each of the counts alleged in [the legal malpractice action]." (*Id.* at p. 81.) The trial court disagreed, ruling that only the ground relied on by the Court of Appeal in its decision, i.e., laches, had collateral estoppel effect. (*Ibid.*) The Court of Appeal agreed, reasoning that "after review by an appellate court, the final decision and the issues 'necessarily decided' for purposes of collateral estoppel encompass only the grounds relied on by the appellate court." (*Id.* at p. 84; see also *Newport Beach, supra,* 140 Cal.App.4th at p. 1132; *Butcher, supra,* 77 Cal.App.4th at p. 1460.)

*4 Any reasonable attorney would recognize *Zevnik, Newport Beach,* and *Butcher* do **not** stand for the proposition that, if a Court of Appeal decision affirms a summary judgment entered in defendant's favor but does not explicitly discuss two of the causes of action, the decision of the Court of Appeal makes, as Gonzalez puts it, those two cases of action "loose at large for purposes of adjudication." And no reasonable attorney would conclude that *Zevnik, Newport Beach,* or *Butcher* make appealable the order of the trial court denying Gonzalez's motion to vacate the judgment after it had been affirmed by the Court of Appeal, the Supreme Court had denied a petition for review, and the remittitur had issued.

II

For the reasons stated above, we conclude Gonzalez's appeal is frivolous because "any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 650.)

Gonzalez claims that his appeal is not frivolous because, when the trial court denied his motion to vacate the judgment, it "recommended" that he "return to the appellate court to address this matter." On the contrary, the trial court told Gonzalez: "You're a very intelligent person. But these documents that you have[,] trying to relitigate this case that the Court of Appeal has decided in total, you're tilting at windmills.... You lost the case." The court further admonished him that "any future attempt to re-litigate this matter may result in a monetary sanction." The reference to returning to the Court of Appeal came during Gonzalez's argument that the trial court had jurisdiction to reinstate his seventh and eighth causes of action. The trial court responded: "No jurisdiction. Okay. The Court of Appeal, if you want to go back to them and see if they'll hear it again, they may have that power, but I don't have it." No reasonable attorney, indeed no reasonable person, would view this statement by

the trial court as a recommendation to appeal the denial of the motion to vacate the judgment. The court's other statements explained precisely why the denial of the motion to vacate was not appealable—the motion was an attempt to relitigate matters already resolved against Gonzalez and affirmed on appeal.

Sanctions for pursuing a frivolous appeal are appropriate even though Gonzalez filed the appeal in propria persona. (See *Kabbe v.. Miller* (1990) 226 Cal.App.3d 93, 98; *Leslie v. Bd. of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121.)

In determining the amount of monetary sanctions to be imposed, we consider the amount of the law firm's attorney fees on appeal, the degree of objective frivolousness of the appeal, and the need for discouragement of like conduct in the future. (See *In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 519; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 33–34.)

The degree of objective frivolousness is obvious, as we have explained. And the need to discourage like conduct in the future is evident from Gonzalez's disregard of the trial court's warning that any further attempt by him to relitigate the case might subject him to sanctions. The law firm has produced evidence that one of its attorneys "spent 37.5 hours researching and preparing this motion for dismissal and reviewing the numerous documents in this more than 7 year old case," and billed this time at a rate of $175 per hour, "which is a large discount from her standard hourly rate." A second attorney "spent 1.5 hours reviewing the appeal documents, performing legal research and drafting [the] motion," and billed this time at a rate of $185 per hour, "which is a large discount from [her] standard hourly rate." Added together, this is equals $6,840 in attorney fees for responding to Gonzalez's frivolous appeal.

***5** In light of (1) the law firm's need to document the journeys this case has taken through the trial court, the Court of Appeal, the Supreme Court, and back to the trial court, in order to show the frivolous nature of this appeal, (2) the degree of obvious frivolousness of the appeal, and (3) the need to discourage like conduct in the future, we conclude that the requested amount of sanctions, $6,840, is warranted.

DISPOSITION

Sanctions in the amount of $6,840—to be paid to respondent law firm no later than 30 days after this decision is final—are imposed against appellant Daniel E. Gonzalez for pursuing a frivolous appeal from a nonappealable order. The appeal is dismissed.

We concur: NICHOLSON and BUTZ, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2010 WL 4849920

Footnotes

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 We take judicial notice of the record on appeal and of this court's decision in *Gonzalez v. Beyer, Pongratz & Rosen* (Feb. 20, 2009, C052538) [nonpub. opn.].

End of Document

EXHIBIT B

Filed 12/9/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH BARTON,

Plaintiff and Respondent,

v.

RPOST INTERNATIONAL LIMITED et al.,

Defendants and Appellants.

B251722

(Los Angeles County Super. Ct. No. YC061581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed as modified.

Ben-Zvi & Associates and Henry Ben-Zvi for Defendants and Appellants.

McGarrigle, Kenney & Zampiello, Patrick C. McGarrigle, Michael J. Kenney, for Plaintiff and Respondent.

Defendants and appellants RPost International Limited (RIL), Zafar Khan and Terrance Tomkow appeal from a judgment following a bench trial in favor of plaintiff and respondent Kenneth Barton in this action for conversion of stock. On appeal, defendants contend: (1) the statute of limitations began to run when Barton brought lawsuits for delivery of stock certificates or suspected the claims; (2) Barton improperly split his claims into multiple lawsuits; (3) the trial court should have applied Bermuda law and found defendants had no fiduciary duty to shareholders; (4) Barton's unfair competition claim should have been denied, because he was not a consumer or competitor of RIL; (5) there is no substantial evidence to support conversion, because Barton did not pay for his shares; (6) there is no evidence to support the finding of fraud; (7) the amount of compensatory damages is too speculative; (8) damages could not be awarded as restitution under Business and Professions Code section 17200; (9) there is no evidence of emotional distress to support noneconomic damages; (10) the amounts awarded for punitive damages were excessive; and (11) prejudgment interest should not have been awarded.

We conclude the trial court's finding of liability based on conversion is supported by substantial evidence. Barton provided consideration for his shares and discovered the conversion of his shares on July 7, 2009. Barton did not split his claims, because he did not have a viable claim for conversion when he filed lawsuits in 2005 and 2006. Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition. The trial court's award of compensatory damages is supported by substantial evidence and not unreasonable. The punitive damage awards are also supported by substantial evidence of reprehensible conduct and defendants' net worth. No abuse of discretion has been shown with respect to the award of prejudgment interest. However, we agree there is no substantial evidence of emotional distress to support noneconomic damages.

Barton appeals from the portion of the judgment in favor of respondents Carole Krechman and Ellsworth Roston. He contends the undisputed evidence shows Krechman

and Roston are equally liable for conversion of his shares of stock. We conclude there is no evidence Roston or Krechman are liable for conversion. We modify the judgment by deducting emotional distress damages, and as modified, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Corporate History and Prior Litigation

In 1999, Tomkow, Barton and Khan founded the Nevada corporation RPost, Inc. to develop and market technology that Tomkow developed for e-mail similar to certified mail. Barton's role was marketing, business development, and raising capital. In September 2000, the founders converted their loans to RPost into equity in the company. Barton was issued 289,500 shares of RPost stock in exchange for forgiveness of $33,258 in loans he had made to the company. The number of authorized shares was increased and the founders were issued additional shares to retain the same ownership percentages. They were also issued additional shares for services rendered and cancellation of loans to RPost, Inc. That same month, RPost was reorganized as Bermuda corporation RPost International Limited (RIL). RIL's directors adopted written resolutions allocating shares in the new corporation. The founders exchanged their common shares of RPost for common shares of RIL.

On January 2, 2001, RIL's directors cancelled the allotment of shares made in September 2000. The directors clarified the founders' allotment of shares of RIL in exchange for their shares of RPost as follows: 4,822,000 to Tomkow, 3,616,500 to Khan, and 3,616,500 to Barton. On May 30, 2001, RIL's directors adopted a resolution issuing an additional 500,000 shares of common stock to each of the founders at a price of $0.01 per share. $5,000 was deducted from the expenses and deferred compensation owed to Barton. On August 21, 2001, RIL's directors adopted a resolution allotting additional shares as follows, in exchange for valuable services rendered and cancellation of loans to the company: 2,500,000 shares to Tomkow in exchange for cancellation of a loan for

$25,000, 1,900,000 shares to Khan for cancellation of a loan for $16,089, and 1,900,000 to Barton for cancellation of a loan of $8,089. Barton believes his allocation was later corrected to reflect a value of $0.001 per share and payment of $1,900. Barton, Khan and Tomkow each earned salaries of $8,000 per month, plus expenses of $2,000 per month. They received as much of their salaries as the company could afford to pay and deferred the rest. The cost of Barton's shares was charged against Barton's accrued salary and unpaid expenses.

Barton suffered a stroke in September 2003. In May or June 2004, Symantec Corporation invested $1.1 million for preferred shares of RIL. On September 20, 2004, Barton's attorney wrote Khan and Tomkow. He raised several concerns and confirmed Barton's resignation from the RPost entities effective immediately. He requested delivery of Barton's share certificates and equity documentation within three days. He wrote additional letters with similar requests.

In June 2005, Khan, Tomkow and RIL responded to Barton's lawyer that RIL had not issued any common stock certificates to founders and no provision of the by-laws required the company to deliver share certificates for founders' shares. Roston became a RIL director in 2005.

On July 7, 2005, Barton filed an action against RIL, Kahn, Tomkow, and another individual, for breach of fiduciary duty and violation of the Labor Code. (*Barton v. RPost International Limited et al.* (Super. Ct. L.A. County, 2005, No. YC051312).) Barton alleged defendants had refused to deliver his stock certificates, failed to provide accurate corporate financial reports, failed to set aside reserves for legal defense, failed to pay deferred salary, and failed to reimburse him for reasonable expenses.

On July 21, 2005, RPost and RIL filed an action against Barton for specific performance, breach of contract, and declaratory relief. (*RPost, Inc., et al. v. Barton* (Super. Ct. L.A. County, 2005, No. YC051416).) The complaint explained the allocation of Barton's shares and alleged Barton held 6,016,500 shares of common stock which could not be transferred without notice to the company or without offering the company the opportunity to purchase the shares. At some point, the actions were consolidated.

RIL filed an answer to Barton's complaint. The individual defendants filed a demurrer. When Barton tried to file an amended complaint to address deficiencies raised in the demurrer, the court clerk refused to accept it, because RIL had filed an answer. The trial court sustained the demurrer without leave to amend and the action against the individual defendants was dismissed. Barton appealed.

At a meeting in January 2006, the RIL directors resolved to issue a call "to those shareholders that had not paid for their shares in accordance with Bye-law 10, that this call shall be for immediate payment and that notice of this call shall be delivered by Registered E-mail on January 31, 2005, and that all unpaid shares as of February 15, 2006 be liable to be forfeit in accordance with Bye-law 11." On January 31, 2006, RIL sent a lengthy e-mail to shareholders which included a notice that RIL was making a final call on all unpaid shares, payable by wire by February 15, 2006, or unpaid shares would be liable to be forfeited. Khan wrote three checks totaling $10,500 as additional consideration for his shares of common stock. Barton received the e-mail, but did not believe it applied to him, because he had paid for his shares.

Khan, Tomkow, and Roston attended a meeting of RIL directors on April 24, 2006. Khan recommended RIL revise the allocation of shares in the minutes from 2000 and 2001, but retain the original signatures, including Barton's signature. The RIL directors resolved to "correct" the mathematics of the share recapitalization adopted September 13, 2000, and strike clarifying resolutions from the minutes prepared January 2, 2001. This action deleted the third page of the January 2, 2001 minutes explaining the allocation of shares to the founders, but retained the signature page.

The directors also struck resolutions reflected in the minutes of February 1, 2001, and August 21, 2001, "that contain defects including errors and missing signatures." They added payment terms to the May 30, 2001 resolution. "It was RESOLVED that the Board of Directors accept the forfeiture and surrender of unpaid shares liable to be forfeited. [¶] It was FURTHER RESOLVED that management would provide a proposal on how to dispose of the shares for review by the Board of Directors."

On June 8, 2006, Barton filed a new complaint against RIL seeking specific performance and damages for failure to issue stock certificates. (*Barton v. RPost International Limited* (Super. Ct. L.A. County, 2006, No. YC053346.) The complaint alleged Barton is the registered owner of more than 6,000,000 shares. He had been requesting RIL issue and deliver stock certificates representing his shares since September 2004, which RIL refused to do. He sought specific performance ordering RIL to deliver stock certificates accurately reflecting the number of RIL shares he owned. He also sought damages of $5 million for failure to deliver his stock certificates upon written demand.

On August 22, 2006, RIL dismissed its complaint against Barton without prejudice. A directors' meeting was held on October 23, 2006, attended by Khan, Tomkow, Roston and others. The minutes reflect RIL's management hired Bermuda counsel to respond to Barton's request for share certificates. The Bermuda firm provided an opinion on October 2, 2006, that Barton had no title to the shares at issue, because extrinsic evidence showed his allotment was conditioned on having a degree to practice law. The directors accepted the legal opinion.

On November 22, 2006, RIL filed an answer to Barton's second lawsuit alleging 25 affirmative defenses. The thirteenth affirmative defense alleged Barton was not and never had been a shareholder of RIL and therefore lacked standing to assert the causes of action. On January 30, 2007, RIL's attorney Robin Crowther sent a letter to Barton's counsel stating, "RPost International's position in this lawsuit that Barton owns no shares and is not entitled to assert any of the rights of RPost International shareholders."

On February 5, 2007, Barton sent an e-mail to Roston and another RIL director, attaching Crowther's letter. He stated, "they now take the position that I am not a shareholder of RPost and, further, that the board of directors has accepted that position. [¶] Please confirm whether a board meeting was called to 'decide' such an issue and what each of your votes and positions were/are in connection with this issue."

On February 7, 2007, Barton's attorney sent a letter to Crowther, quoting Crowther's statement and noting the affirmative defense in RIL's answer that Barton

owns no shares. He requested supporting documents and accused RIL of attempting to steal Barton's shares.

In December 2007, this appellate court held the trial court should have accepted filing of Barton's amended complaint in his first action or granted him leave to amend. (*Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1219-1221.) We reversed the judgment of dismissal as to the individual defendants and remanded the case with instructions to grant Barton leave to file an amended complaint. Barton filed an amended complaint too late, however, and the trial court struck the amended complaint.

Krechman replaced Roston on RIL's board of directors in early 2008. Barton took Khan's deposition on July 7, 2009. Khan stated that RIL cancelled Barton's shares and returned them to RIL's treasury. He could not remember the date the event occurred. Barton was very angry and livid when he learned his shares had been cancelled. Documents at trial showed RIL gave a report to auditor Kabani & Company showing 6,024,508 shares were forfeited after June 30, 2008, and before June 30, 2009. Defendants claimed to have destroyed RIL's shareholder registries. It was stressful for Barton to learn RIL directors forged minutes omitting his allotment of shares.

Barton's actions were consolidated. The cause was set for trial on January 25, 2010, but apparently continued and commenced in April 2010. On May 4, 2010, the trial court granted a motion for directed verdict under Code of Civil Procedure section 631.8 as to the cause of action for delivery of stock certificates. The court found none of the contingent events had occurred which would require RIL to deliver stock certificates to the founders. RIL's failure to deliver share documents to Barton was not wrongful. The court found Barton's testimony credible and denied the motion as to the cause of action for unpaid wages. The parties settled the consolidated action in 2012.

The Instant Action

Barton filed the complaint in the instant case on January 29, 2010, prior to trial in his earlier lawsuits. He filed the operative third amended complaint on February 16,

2011, against several defendants, including Symantec Corporation, RIL, RPost, Khan, Tomkow, Krechman and Roston. The complaint alleged causes of action for conversion, breach of fiduciary duty, a derivative claim for breach of fiduciary duty, declaratory relief, fraud, and violation of Business and Professions Code section 17200.

Symantec settled Barton's derivative claim in the instant action. The trial court found the settlement was made in good faith. RIL sold its assets to RPost Communications Limited (RComm) in March 2011. Trial commenced in the instant action on March 1, 2012. The case was tried to the court over several days between March 1, 2012, and April 12, 2012. The parties presented documents supporting the facts above, as well as testimony from Barton, Khan, Tomkow, former RIL director Richard Pryor, individuals who had meetings with Barton early in the company's history, and financial experts. RComm employs approximately 21 people. Defendants' financial expert Kevin Henry concluded the value of Barton's common shares at the time of conversion was zero. Barton's financial expert Jaime d'Almeida concluded the value was $2.43 per share and the total value of Barton's shares at the time of conversion was $98,004,076.

The court issued a statement of decision on August 3, 2012, finding as follows. Barton's stock was converted on June 30, 2009, or July 7, 2009, when the shares were transferred back to the RIL treasury. The date of conversion is well within the three-year statute of limitations. Even if the statute of limitations began to run when Barton saw attorney Crowther's letter on February 7, 2007, the lawsuit was timely. Barton did not split his cause of action, because the earlier lawsuit involved a different issue concerning delivery of the stock certificates. Although Barton did not write a check in consideration for issuance of stock, none of the founders paid for their initial stock. Consideration for the shares was given in the form of unreimbursed expenses and compensation. After Barton no longer worked at the company, Khan and Tomkow wrote checks to RIL to document the price paid in cash for their shares and straighten out RIL's financial record-keeping.

Defendants retroactively created and modified corporate resolutions to revise the company's history to support the result they sought. Particularly egregious was the resolution prepared as if executed on January 2, 2001, including Barton's signature. In fact, Barton had executed a corporate resolution confirming issuance of 3,616,500 shares of RIL to Barton and Khan. The court did not believe the shareholder registry, which was the best evidence of the issuance of RIL stock, had been misplaced or destroyed. The failure to produce the shareholder registry cast further doubt on testimony that Barton's shares were properly canceled and returned to the treasury in 2006.

The court issued a declaration that Barton was at all relevant times an owner of 6,016,500 common shares of RIL and provided appropriate consideration for the shares of stock in the form of unreimbursed expenses and salary owed. The court ordered Barton to submit a check to RIL's treasury in an amount equivalent to Khan's payment for the same number of shares to balance RIL's financial records. RIL was prohibited from taking any action to encumber, forfeit or cancel Barton's shares without prior written approval from the court, Barton or his counsel. In addition, Barton's shares were not subject to amended bylaws, agreements, or other restrictions to which he had not personally or through counsel provided written consent. The court declined to order additional relief sought in connection with the declaratory relief and unfair competition claims, including appointment of a receiver, because it would impose a substantial and unjustified burden on defendants.

The court found Khan was not credible. He was aware of the status of Barton's legal education at all times. Defendants' financial expert had disputed the "back solve" valuation method, but provided no alternative. The court concluded the value of Barton's shares was not zero, because defendants had committed 13 years to the company's success and Khan successfully raised substantial funds to further the company's long-term goals. The court was not persuaded, however, that d'Almeida's valuation method was appropriate. "Although the court recognizes that the experts were retained for a particular purpose, their widely divergent opinions support the conclusion that ownership of shares in RPost remains a very speculative proposition, the value of which is almost

impossible to determine." The court noted there is no liquidation event upcoming. The court expressed concern that if a monetary value was assigned to the shares, future events could result in an inequity for either side. Therefore, since the shares of stock exist, the court ordered the return of the converted property. RIL was ordered to restore 6,016,500 shares of RIL common stock to Barton. If defendants had made further transfers of their stock to other entities since Barton's resignation, the same process must take place for Barton's shares so they retain the same benefit and potential value.

The court noted that Khan had written checks to RIL for a total of $10,500 as additional consideration for his shares of common stock. Barton was ordered to pay RIL's treasury $10,500 or accept an offset to his monetary damages award to confirm his ownership of 6,016,500 shares. The court was satisfied that Barton and Khan provided consideration for the issuance of 6,016,500 shares of common stock through unreimbursed expenses and salary. To ensure RIL's books and records would withstand scrutiny, since evidence showed Khan and Tomkow wrote personal checks as further consideration for their common shares, Barton was ordered to write a personal check as additional consideration in exchange for clear title to his shares.

Barton was entitled to reasonable compensation for time and money spent to recover the converted property, as well as damages for emotional distress suffered as a result of RIL's conduct. The court found Barton was involved in the company from the beginning and expected to maintain his ownership. After returning to the company following his convalescence from a stroke, the situation deteriorated, ending in the other founding shareholders conspiring to deprive him of his common shares of stock. The court awarded $100,000 in damages for emotional distress.

The court found Barton had not met his burden of proof to impose liability on Krechman and Roston for participating in a conspiracy to convert his common shares of stock.

After the trial court issued its statement of decision, further trial proceedings were held on the issue of punitive damages. Evidence of defendants' finances was presented. In March 2011, RIL had $1.26 million in its bank account. As of June 30, 2012, RIL had

assets of $328,000 and liabilities of $100,000. $850,000 had been transferred from RIL to other RPost entities to enable the other entities to take advantage of business opportunities. In the initial offering of preferred shares of RComm in 2011, the price was $5 per share. Later that year, the price was raised to $5.25 per share for preferred shares. In 2012, the price was raised to $5.75 per share. At RComm's October 2012 shareholder meeting, Khan advised shareholders $5 million had been raised. RComm intended to raise $18.2 million over two years to expand its business. RComm's revenues are not sufficient to meet its expenses, so it needs to raise funds from investors to continue to fund operations. RPost entities were pursuing several patent infringement actions against defendants including Amazon and Paypal.

Khan's net worth includes a home appraised for approximately $800,000, with net equity of $232,000. His personal bank account balance has a minimum of $68,000. He earns $132,000 per year, but his expenses are approximately the same amount. A promissory note exists from RIL to Khan in the amount of $225,893. He owns 6,000,000 common shares of RIL, 750,000 common shares of RComm, 250 common shares of RMail Limited, and 188,042 preferred shares of RComm. Khan obtained several shares through the cancellation of loans made to RIL. If Khan's preferred shares were valued at $5.75, the total value would be $1,081,241.50.

Tomkow owns a home valued at $800,000, with net equity of approximately $355,000. He also earns a salary of $132,000 per year. His expenses are slightly less than his net salary. He has a retirement account. As of January 1, 2011, RIL owed $208,884 on a promissory note to Tomkow. Tomkow owns 76,000 in preferred shares of RComm, as well as common shares of RIL, RMail Limited, and RComm. At $5.75 per share, the value of his preferred shares of RComm is $442,307.25.

Barton suggested an award of $2.8 million in punitive damages against Khan would be appropriate. He suggested an award of $2.2 million in punitive damages against Tomkow.

The court reconsidered the appropriate remedy in the case and appointed expert C. Paul Wazzan to determine the value of Barton's shares of RIL at the time of conversion.

Wazzan used the same Black-Scholes method that d'Almeida had used, but relied on more conservative assumptions. Using this method, Wazzan determined the enterprise value was between $33.8 million and $37.3 million. His assumptions of a one year time to liquidity and 50 percent discount for lack of marketability yielded an enterprise value of $33.8 million. Wazzan used an enterprise value of $33.8 million to determine Barton's common stock was worth $0.64 per share.

On June 18, 2013, the court issued a ruling on punitive damages and revised the statement of decision. The court noted that the evidence presented in the second phase of trial showed the assets and character of RIL had changed dramatically. Restoring Barton's shares would not provide the remedy the court had intended. The court needed a meaningful compensatory damages calculation to determine an appropriate punitive damages award.

The court adopted Wazzan's testimony that the shares of common stock had a value of $0.64 per share as of June 30, 2009. Barton's 6,016,500 shares had a monetary value of $3,850,560. The court modified the original statement of decision and determined Barton was entitled to a monetary judgment for the value of his converted shares against Tomkow, Khan and RIL in the amount of $3,850,560, less $10,500, for a net award of $3,840,060. The court was satisfied Wazzan properly chose and applied the "back solve" method in his analysis and made reasonable assumptions to determine the value of RIL common shares. The court modified the statement of decision to reflect RIL no longer needed to restore shares to Barton.

The court found Khan's course of conduct rose to a significant level of reprehensibility. Although his purported net worth is modest, he draws a six figure salary and attributes no value to his RIL holdings. The court awarded Barton punitive damages in the amount of $250,000 as against Khan. Tomkow's net worth is comparable to Khan, but his conduct was less egregious. Although complicit in the conversion of Barton's shares, he was focused on developing the business and deferred to Khan on financial matters. The court awarded punitive damages of $150,000 to Barton as against Tomkow.

On August 30, 2013, the court reduced the award of damages by the amount of the settlement paid by Symantec and awarded prejudgment interest of $880,021.91. The court entered judgment that day awarding the net sum of $2,840,060 in compensatory damages, $100,000 in emotional distress damages, and $880,021 in prejudgment interest, for a total of $3,820,081.91 as against RIL, Khan and Tomkow. In addition, Barton was awarded $250,000 in punitive damages against Khan and $150,000 against Tomkow. Barton recovered nothing from Krechman and Roston, but the court declined to award them their costs. RIL, Khan and Tomkow filed a timely notice of appeal. Barton also appealed.

DISCUSSION

Standard of Review

We review an appeal from a judgment following trial under the substantial evidence standard of review. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.) "'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Ibid.*) As long as there is substantial evidence, the appellate court must affirm, even if the reviewing justices personally would have ruled differently if they had presided over the proceedings below and even if other substantial evidence supports a different result. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Act of Conversion Triggering Statute of Limitations

Defendants contend their refusal to deliver stock certificates and denial of Barton's shareholder status in pleadings constituted conversion of Barton's shares, at which point the statute of limitations began to run. This is incorrect. Substantial evidence supports the trial court's finding that the shares were not converted until they were cancelled in 2009.

A cause of action for conversion requires "'"the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]" [Citation.]'" (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507.) "It is the uniform rule of law that shares of stock in a company are subject to an action in conversion. [Citations.]" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 122.)

"The essence of the tort of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner. The Restatement of the Law of Torts (Second) defines conversion as 'an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" (11 Fletcher Cyclopedia of the Law of Corporations (2014) §5114, p. 133, footnotes omitted.)

"To maintain an action of conversion, the plaintiff must have had title to, or a right in, the shares at the time of the conversion. There can be no conversion where the plaintiff did not in fact lose any of its control over, or rights in, its shares." (*Id.* at pp. 135-136.) "The plaintiff must show that the defendant wrongfully converted the shares and that the defendant's acts or conduct were such as to deprive the owner of the shares, either permanently and absolutely, or partially or temporarily." (*Id.* at pp. 136-137.)

"In general, the conversion dates from the time when the shareholder, being entitled to the immediate possession of the shares or of the certificate, makes a demand for it that is refused." (*Id.* at p. 138.) "An election to recover the shares themselves may bar the right to sue for their value as for a conversion, but merely seeking return of the shares as alternative relief does not." (*Id.* at pp. 140-141.)

"If a corporation wrongfully refuses to issue a proper share certificate when it has the power and is under an obligation to issue it, the corporation may be compelled to do so by a suit in equity for specific performance of its express or implied contract, at least where there is no adequate remedy at law, such as an action at law to recover for the breach. A shareholder seeking such relief must have performed the obligations that entitle the shareholder to the certificate or make tender of readiness to make such performance as the decree may require." (11 Fletcher Cyclopedia of the Law of Corporations, *supra*, §5165, pp. 265-266, footnotes omitted.)

"The shareholder may, instead of suing to compel the issuance and delivery of a certificate, have an action against the corporation for the damages sustained by reason of the failure or refusal to issue a certificate. Thus, . . . if the shareholder has title to the shares, the failure or refusal to deliver a certificate may be treated as a conversion of the shares, and the shareholder may maintain an action to recover damages." (*Id.* at pp. 268-269.)

In this case, the trial court found defendants converted Barton's shares when they cancelled and returned them to the treasury on June 30, 2009, or July 7, 2009. Cancelling the shares clearly interfered with Barton's ownership rights and constituted conversion. The documents RIL provided its auditors showed this action was taken between June 30, 2008, and June 30, 2009. Barton learned of RIL's action on July 7, 2009, through Khan's deposition testimony. There is substantial evidence to support the trial court's finding that RPost converted Barton's shares by cancelling them as of June 30, 2009, and that Barton first learned of the conversion on July 7, 2009. Barton filed his action well within the statute of limitations for conversion.

Defendant's contention that Barton's shares were converted when RIL refused to deliver share certificates is incorrect. Barton had to have the right to immediate possession of his share certificates in order to maintain a cause of action for conversion based on the failure to deliver certificates. The trial court in the prior case ruled that RIL was not required to issue certificates for Barton's shares. Barton did not have the right to possession of his share certificates. RIL's refusal to deliver share certificates was not wrongful, and therefore, it did not constitute conversion. If Barton had sued defendants for conversion based on their refusal to deliver share certificates, he would have lost.

Defendants contend their assertions that Barton was never a shareholder should have caused Barton to suspect he had a claim for conversion and started the statute of limitations. A simple claim of dominion or intention to interfere under a pretense of right, without more, does not constitute conversion. (*Kee v. Becker* (1942) 54 Cal.App.2d 466, 472.) Defendants statements did not affect Barton's dominion over his shares. The shareholder registry and RIL's accounting documents continued to reflect that Barton owned the shares allocated to him. Defendants' statements in legal proceedings were simply reflected numerous defenses that they asserted. If Barton had sued defendants for conversion based on their statements that he was never a shareholder, he would have lost. There is no evidence that defendants exercised dominion over Barton's stock until they cancelled the shares in 2009 and returned them to RIL's treasury. Barton was suspicious and accused RIL of attempting to steal his shares long before the act of conversion took place. He did not have a viable cause of action until RIL interfered with his dominion over the shares by cancelling them and transferring them back to the treasury.

Substantial evidence supports the trial court's finding that Barton's shares were converted when RPost cancelled and transferred them, which Barton learned about on July 7, 2009. RPost's contentions concerning the statute of limitations for breach of fiduciary duty, fraud, declaratory relief, and unfair competition are based on the same arguments and fail for the same reasons.

Claim Splitting

Defendants contend Barton improperly split his claims into successive lawsuits based on the same cause of action. We disagree.

"Under [the doctrine of res judicata], all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. '"Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.)

"'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant . . . . Even where there are multiple legal theories upon which recovery might be predicated, *one injury* gives rise to only one claim for relief.' [Citation.]" (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860.)

When Barton filed his complaints in 2005 and 2006 seeking the delivery of share certificates, no conversion had taken place. The trial court in the earlier action ruled RIL was not required to issue share certificates and the parties settled the matter without any finding of liability. The failure to deliver share certificates was not wrongful. A cause of action for conversion based on the failure to issue share certificates would not have been successful. It was not until RIL cancelled Barton's shares and transferred them back to RIL's treasury that the conversion occurred. The evidence showed Barton discovered RIL's conversion of his shares in 2009. Barton did not have a claim for conversion when he filed his earlier actions and did not split his claim.

Conversion

Defendants contend the trial court's finding of conversion is not supported by substantial evidence, because Barton did not pay for his shares. Defendants fail to demonstrate error.

The evidence showed Barton provided consideration for his allotments through unpaid expenses and salary owed to him. The resolutions state the allotments are made in exchange for shares of the previous company, cancellation of loans, and services rendered. Shares were allotted based on consideration received from Barton. The fact that the other founders paid additional sums several years later in an abundance of caution did not mean Barton did not provide consideration for his shares.

Since we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider defendants' additional contentions that liability was not supported by substantial evidence of breach of fiduciary duty, fraud, or unfair competition under Business and Professions Code section 17200.

Compensatory Damages

Defendants contend the amount of compensatory damages is too speculative. We disagree.

"'"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where . . . it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits [citation] or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." ([Citation.])' [Citations.]" (*Asahi Kasei Pharma Corporation v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972-973.)

"'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' [Citation.] There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure . . . .' [Citation.]" (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 (*San Diego Metropolitan Transit Development*).)

In *San Diego Metropolitan Transit Development, supra*, 53 Cal.App.4th 918, "the jury had to determine damages based on two diametrically opposed expert opinions that varied not only in amounts but also in methodologies and factors considered. (*Id.* at pp. 924-925.) The damages the jury awarded fell between the contrasting figures presented by the experts. (*Id.* at p. 931.) In such circumstances, it is well established that '"[t]he trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence."' (*Id.* at p. 931.)" (*Maughan v. Correia* (2012) 210 Cal.App.4th 507, 522-523.)

In this case, defendants' expert Henry concluded the value of Barton's common shares at the time of conversion was zero, while Barton's expert d'Almeida concluded the value was $2.43 per share for a total value of $98,004,076. Court-appointed expert Wazzan, like d'Almeida, determined the value of Barton's shares using a variation of the Black-Scholes option pricing model which the parties referred to as the "back solve" formula. Black-Scholes is a standard economic formula used in financial derivatives to price options. In order to use the back solve formula to determine the value of Barton's shares, Wazzan explained that the variable for the anticipated positive liquidity event must be carefully controlled to account for the nature of the company as a "start-up" and avoid overvaluing the enterprise. Wazzan made it clear that a later liquidity date led to an unreasonably inflated equity value. Wazzan's use of the "back solve" formula to estimate the value of Barton's common stock was reasonable and not speculative. Under this approach, he determined the enterprise value was between $33.8 million and $37.3 million. Assuming an enterprise value of $33.8 million, Barton's common stock was worth $0.64 per share. The trial court's finding that Barton's common stock had value of $0.64 per share as of June 30, 2009, was supported by substantial evidence and not too speculative.

RPost also contends Barton's shares should have valued based on a conversion date in late 2004, early 2005, or no later than October 2006. We disagree. As discussed above, substantial evidence supported the trial court's finding that the act of conversion

took place in 2009. The court's calculation of the value of the converted property as of that date was correct.

Because we conclude the award of compensatory damages was fully supported by the evidence of conversion, we need not address defendants' contention that these damages could not be awarded as restitution under Business and Professions Code section 17200.

Emotional Distress Damages

Defendants contends there is no substantial evidence Barton suffered emotional harm to support an award of noneconomic damages for emotional distress. We agree.

"'Damages for emotional distress have been permitted only where there is some means for assuring the validity of the claim. [Citation.] The case law reveals a diversity of circumstances in which recovery for emotional distress may be had. They are loosely linked in the sense that in each it could be said that a particular form of mental suffering naturally ensued from the acts constituting the invasion of another kind of protected interest. "The commonest example . . . is probably where the plaintiff suffers personal injuries in addition to mental distress as a result of negligent or intentional misconduct by the defendant." [Citation.] Pain and suffering is the natural concomitant of a personal injury. [Citation.] "[I]n the case of many torts, such as assault, battery, false imprisonment, and defamation, mental suffering will frequently constitute the principal element of damages." [Citations.] *Molien* [*v. Kaiser Foundation Hospitals* (1980)] 27 Cal.3d 916, found sufficient assurance of the validity of a claim of emotional distress in the nature of the cause of action for negligent misdiagnosis, predicated as it was upon a false imputation of syphilis, which by statute constitutes slander per se, an intentional tort. [Citation.] In torts involving extreme and outrageous intentional invasions of mental and emotional tranquillity, the outrageous conduct affords the necessary assurance of the validity of the claim. [Citation.] Recovery also has been sanctioned for emotional distress which could be said naturally to ensue from an act which invaded an interest

protected by an established tort. (See, *Sloane v. Southern Cal. Ry. Co.* [(1896)] 111 Cal. 668 [humiliation from wrongful ejection from train]; *State Rubbish etc. Assoc. v. Siliznoff* [(1952)] 38 Cal.2d 330 [intentional infliction of emotional distress]; *Crisci v. Security Ins. Co.* [(1967)] 66 Cal.2d 425 [physical injuries and psychosis resulting from fall through opening]; see also *Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337 [mental suffering occasioned by fear for safety of family caused by trespass]; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271 [discomfort and annoyance caused by nuisance]; *Herzog v. Grosso* (1953) 41 Cal.2d 219, 225 [annoyance ensuing from trespass].)' [Citation.]" (*Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 472.)

"[T]he limits imposed with respect to recovery for emotional distress caused by a defendant's negligence do not apply when distress is the result of a defendant's commission of the distinct torts of trespass, nuisance or conversion. Indeed, with respect to trespass, the law is clear that '. . . damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass.' (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905.) Thus the plaintiffs in *Armitage v. Decker* were allowed to recover for distress they suffered 'as a result of having their property line buried under large amounts of dirt, making it appear that one side of their property abuts a quarry, after having spent a long time looking for the best piece of property they could afford. The evidence also supported a conclusion that the [plaintiffs] suffered distress due to the spillage of dirt onto their property and the threat of interference with drainage on their property, as well as concern over appellant's operation of the bulldozer on the berm.' (*Id.* at pp. 905-906.)" (*Gonzales v. Personal Storage, Inc.*, *supra*, 56 Cal.App.4th at pp. 474-475.)

"[I]n the context of a conversion claim there is far less likelihood that allowing recovery for emotional distress damages will create liability which is out of proportion to the nature of the defendant's act. It follows that when a defendant is guilty of conversion, there is considerably less justification for imposing the limits on emotional distress

damages which exist in negligence cases[.]" (*Gonzales v. Personal Storage, Inc., supra*, 56 Cal.App.4th at p. 477.)

In this case, however, there is insufficient evidence Barton suffered emotional distress to support an award of damages. Barton testified that when he heard Khan's testimony at his deposition that the shares had been cancelled, he was very angry and livid. A year later, when he learned in court that his name had been forged on documents in order to unwind the transactions, it was very stressful. Standing alone, this evidence is insufficient to support an award of emotional distress damages. In most cases where there is only a financial loss, no emotional distress damages are recoverable. In respondent's brief on appeal, Barton claims additional evidence of emotional distress was presented to the court, but Barton fails to provide any citation to the record for additional evidence. Our own review of the record has not uncovered any additional evidence of emotional distress. The award of noneconomic damages was not supported by the slim testimony that Barton was livid about the cancellation of his shares and stressed by discovery during trial that minutes had been forged.

Punitive Damages

Defendants contend the awards of punitive damages were excessive, because reprehensibility was minimal and the amount was disproportionate to their net worth.

"An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]" (*Kelley v. Haag* (2006) 145 Cal.App.4th 910, 914.)

There is substantial evidence of the reprehensible nature of defendants' conduct. Barton had a serious health incident which forced him to work less. His co-founders showed indifference to his health when they engaged in their scheme to force him out of the company and deny his stock ownership. They took repeated actions to achieve their

goal, from fabricating minutes with his signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating. Barton, having suffered a stroke, was financially vulnerable and testified that he worried about paying his rent. Barton's harm resulted from Kahn and Tomkow's malice and deceit, not mere accident.

There was also substantial evidence of Kahn and Tomkow's net worth to support the amount of the award. Defendants have not presented all of the evidence of their net worth in their statement of facts on appeal. The award of $250,000 in punitive damages against Khan is supported by evidence that his preferred shares of RComm have a value of $5.75 per share, with a total value of $1,081,241.50. The price of the preferred shares was their value as of the time of trial. The award of $150,000 in punitive damages against Tomkow is similarly supported by the value of the preferred shares he owns in RComm, which was shown to be $442,307.25. In addition, both defendants have net equity in their homes and bank accounts.

Prejudgment Interest

RPost contends Barton was not entitled to prejudgment interest, because Barton's shares were not marketable and he did not suffer any loss. This is correct.

Civil Code section 3336 provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second--A fair compensation for the time and money properly expended in pursuit of the property."

In a successful action for conversion, the plaintiff can recover the market value of the converted property, plus interest from the date of conversion. (*Crofoot Lumber, Inc. v. Ford* (1961) 191 Cal.App.2d 238, 249.)

In addition, Civil Code section 3288 provides the trial court discretion to award interest: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

We have already concluded the value of the converted property was not overly speculative. The award of prejudgment interest based on the value of the property properly compensated Barton for the loss of his shares. Defendants have failed to show any abuse of discretion by the trial court in awarding prejudgment interest under the applicable statutes.

Barton's Appeal

In his appeal, Barton contends the undisputed evidence shows Roston and Krechman were equally liable for conversion. He has not set forth facts, however, demonstrating their liability. Barton's brief argues generalities, rather than providing citations to the record and authority to demonstrate that the trial court's rulings were wrong. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198.) "We are not required to search the record to ascertain whether it contains support for [plaintiff's] contentions." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) The evidence at trial does not support finding liability as to Roston or Krechman. Roston was an RIL director until early 2008. There is no evidence Roston participated in the act of conversion in 2009. Krechman became a RIL director in 2008, but there was no evidence that she was aware of or participated in the act of conversion in 2009. The conversion was shown from a document provided to auditors reflecting Barton's shares had been cancelled and Khan's deposition testimony that the act took place. There was

no evidence that Krechman was aware of the action, let alone had any meaningful participation in that action. The trial court properly found Roston and Krechman were not liable under the evidence presented.

DISPOSITION

The judgment is modified to reduce the amount of damages by deducting emotional distress damages of $100,000. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.

Filed 12/24/14 Barton v. RPost International CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH BARTON, Plaintiff and Respondent, v. RPOST INTERNATIONAL LIMITED et al., Defendants and Appellants.	B251722 (Los Angeles County Super. Ct. No. YC061581) **ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

It is ordered that the opinion filed herein on December 9, 2014, be modified in the following particulars:

On page 19, the first sentence of the second paragraph reads: "In this case, defendants' expert Henry concluded the value of Barton's common shares at the time of conversion was zero, while Barton's expert d'Almeida concluded the value was $2.43 per share for a total value of $98,004,076." The sentence should be replaced with "In this case, defendants' expert Henry concluded the value of Barton's common shares at the time of conversion was zero, while Barton's expert d'Almeida concluded the value was $2.43 per share for a total value of $14,649,600."

On page 23, under the heading "Prejudgment Interest," the second sentence of the first paragraph should be changed from "This is correct" to "This is not correct."

There is no change in judgment.

TURNER, P. J.

KRIEGLER, J.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, California 91311

A true and correct copy of the foregoing document entitled (*specify*): **DECLARATION OF PATRICK C. MCGARRIGLE IN SUPPORT OF PLAINTIFF KENNETH BARTON'S OPPOSITION TO DEFENDANT ZAFAR KHAN'S MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 4/5/2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Trustee: rgonzalez@ecf.epiqsystems.com, itran@gonzalezplc.com
United States Trustee (LA): ustpregion16.la.ecf@usdoj.gov
Attorney for Debtor: Lew@Landaunet.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 4/5/2016, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Via U.S. Postal Service, Priority Mail:

Hon. Julia W. Brand
U.S. Bankruptcy Court, Roybal Federal Building
255 E. Temple Street,
Suite 1382 / Courtroom 1375
Los Angeles, CA 90012-3332

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 4/5/2016, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

April 5, 2016	Vanessa Bravo	/s/ Vanessa Bravo
Date	*Printed Name*	*Signature*

Lewis R. Landau (CA Bar No. 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888) 822-4340
Email: Lew@Landaunet.com

Attorney for Defendant and Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Zafar David Khan, Debtor. Kenneth Barton, Plaintiff, vs. Zafar David Khan, Defendant.	Case No.: 2:13-bk-19713-WB Adv. No.: 2:13-ap-01752-WB Chapter 7 **REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS** Date: April 19, 2016 Time: 2:00 p.m. Place: Courtroom 1375; Judge Brand US Bankruptcy Court 255 E. Temple Street, 13th Floor Los Angeles, CA 90012

Zafar David Khan, debtor and defendant in the above captioned adversary proceeding ("Debtor" or "Defendant") herein replies to the opposition filed by Kenneth Barton ("Barton" or "Plaintiff") to Debtor's motion for an order pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 8006(f) certifying the Debtor's appeal of the March 7, 2016 judgment [ECF # 53] ("Judgment") in this adversary proceeding for direct appeal to the Ninth Circuit Court of Appeals.

///

///

///

///

MEMORANDUM OF POINTS AND AUTHORITIES

I.

BARTON'S OPPOSITION FAILS TO REBUT DEBTOR'S CLEAR SHOWING UNDER ALL CIRCUMSTANCES LISTED IN 28 U.S.C. § 158(d)(2) SUPPORTING CERTIFICATION FOR DIRECT APPEAL

Debtor has shown cause under 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) supporting direct review of this Court's order and judgment granting Barton a non-dischargeable judgment by application of collateral estoppel. Debtor has clearly shown that a genuine conflict exists in the application of California collateral estoppel law among California state courts and Ninth Circuit federal courts that should be applying the same rule of California preclusion law. This issue is a matter of important public policy and an immediate appeal from the judgment will materially advance the progress of the proceeding in which the appeal is taken. Although any one of the disjunctively listed causes under 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) will support certification for direct review, herein all three bases support certification in this case. Consequently, under 28 U.S.C. § 158(d)(2)(B)(ii) the Court "***shall***" make the certification for direct review and the Debtor requests that the Court do so.

Barton claims that the Debtor has "manufactured" a purported conflict in the law. *See*, Opposition 3:12. The Court need look no further than the Shatz Article to find that a third party specialist in the field of appellate law confirms that a genuine conflict exists in the application of California collateral estoppel law among California state and Ninth Circuit federal courts. *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) ("Shatz Article") [courtesy copy attached to Debtor's Motion as Exhibit 4]. Barton understandably ignores the Shatz Article in his opposition brief because the Shatz Article renders Barton's "manufactured conflict" argument entirely meritless.

///

///

///

///

The transcript of the Court's June 16, 2015 ruling [Motion Exhibit 3] indisputably confirms that the Court applied California preclusion law as interpreted by the Ninth Circuit's DiRuzza decision when it granted Barton's motion for summary judgment. *See*, DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003) ("DiRuzza"). As explained in the Shatz Article, the DiRuzza case creates the conflict in the law of preclusion because it relies on the 150 year old California Supreme Court's Skidmore decision that does not take into account subsequent changes to the *Restatement (Second) of Judgments* and the development of a "modern view" that limits the collateral estoppel effect of claims not considered on appeal. *See*, People v. Skidmore, 27 Cal. 287 (1865) ("Skidmore"). The question of law requiring resolution of conflicting decisions is ripe and merits direct review under 28 U.S.C. § 158(d)(2)(A)(ii) (judgment requiring resolution of conflicting decisions merits direct review).

Because the conflict in the application of California collateral estoppel law is undeniable, Barton re-frames his argument by claiming that the California Court of Appeal ("CCA") affirmed the entirety of the Los Angeles Superior Court ("LASC") judgment and therefor all claims subsumed within LASC decision are imbued with collateral estoppel effect. Barton's sole authority for this argument is the Gonzalez case that Barton states is similar to the issues herein. *See*, Gonzalez v. Beyer Pongratz & Rosen, 2010 WL 4849920 (Cal. Ct. App. 2010) ("Gonzalez"). Barton argues that Gonzalez stands for the proposition that it is frivolous to attempt to "breathe life into causes of action which were not specifically addressed in an appellate decision that fully affirmed the trial court's ruling." *See*, Opposition 3:21 and fn. 1, 5:3-16. However, the most cursory reading of Gonzalez immediately reveals that it is ***not a collateral estoppel case***. Gonzalez involves a remitted case that returned to the same trial court after an appellate affirmance. On return, the plaintiff attempted to relitigate a claim not addressed on appeal. The trial court rejected the attempt at relitigation and the CCA sanctioned the plaintiff for a frivolous appeal when it asserted that the "inapposite" Zevnik case supported the attempt at relitigation. The Gonzalez case has nothing to do with collateral estoppel law and Barton's assertion that Gonzalez supports his position herein is as frivolous as the plaintiff's assertion of the Zevnik decision in that case.

Barton's attempt at re-framing the issue fails. Herein, there is no dispute that the CCA only considered Barton's conversion claim on appeal and affirmed the LASC judgment on that basis. The CCA opinion could not be more explicit:

> Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether the defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition.***"

McGarrigle Decl. [ECF # 71-1] at 6 (emphasis added).

Thus, the CCA decision expressly states that the appellate court did "not consider whether the defendants were additionally liable under theories of fraud." Yet, this Court granted summary judgment to Barton on his fraud claims based on the collateral estoppel effect of the LASC judgment. The lack of appellate review is at the heart of the *Restatement (Second) of Judgments* modern view, and recent California appellate court decisions, that deny collateral estoppel effect to the unreviewed claims. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 70 Cal. Rptr. 3d 817, 823 (Cal Ct. App. 2008) ("In our view, after review by an appellate court, the final decision and the issues "necessarily decided" for purposes of collateral estoppel encompass only the grounds relied on by the appellate court."); *see also*, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club, 140 Cal. App.4th 1120, 45 Cal.Rptr.3d 207 (Cal. Ct. App. 2006) *and* Butcher v. Truck Ins. Exchange, 77 Cal.App.4th 1442, 92 Cal. Rptr.2d 521 (Cal. Ct. App. 2000). If the CCA were to consider the same collateral estoppel question posed to this Court, the CCA would not grant collateral estoppel effect to the claims not considered on appeal.

The only way to efficiently reconcile the conflict between the development of California preclusion law in California courts and the DiRuzza decision which purports to reflect California law for federal courts is to expedite direct review by the Ninth Circuit. The Ninth Circuit can certify the issue to the California Supreme Court and is the only court legally entitled to make the request. *See*, California Rules of Court 8.548. If Debtor must proceed through the typical appellate process of review by the District Court or the Bankruptcy Appellate Panel, there is no reason to believe that these courts will not follow the same *stare decisis* path followed by this

Court and affirm based on DiRuzza. If so, that process will add an additional year to the appellate timeline and incur the unnecessary expense of an additional round of briefing. Direct review is thus clearly appropriate under the circumstances to materially advance the progress of the proceeding in which the appeal is taken.

Based on the foregoing, all circumstances listed in 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) support certification for direct review. Under 28 U.S.C. § 158(d)(2)(B)(ii) the Court shall make the certification for direct review. Debtor requests that the Court grant the motion.

II.

CONCLUSION

Wherefore, Debtor respectfully prays for an order of the Court pursuant to FRBP 8006(f) certifying the Debtor's appeal of the Judgment for direct appeal to the Ninth Circuit Court of Appeals. Debtor requests such other and further relief as the Court deems just and proper under the circumstances.

Date: April 12, 2016

Lewis R. Landau
Attorney-at-Law

By:*/s/ Lewis R. Landau*
Lewis R. Landau
Attorneys for Debtor, Defendant

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

22287 Mulholland Hwy., # 318
Calabasas, CA 91302

A true and correct copy of the foregoing document entitled (*specify*): REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 04/12/2016, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☑ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 04/12/2016, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Judge Brand, US Bankruptcy Court, 255 E. Temple Street, Suite 1382, Los Angeles, CA 90012

☐ Service information continued on attached page

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

04/12/2016	Lewis R. Landau	/s/ Lewis R. Landau
Date	*Printed Name*	*Signature*

ADDITIONAL SERVICE INFORMATION (if needed):

NEF Service List (category I):

Rosendo Gonzalez (TR)
rgonzalez@ecf.epiqsystems.com, itran@gonzalezplc.com

Lewis R Landau on behalf of Defendant Zafar David Khan
Lew@Landaunet.com

United States Trustee (LA)
ustpregion16.la.ecf@usdoj.gov

Philip A Zampiello on behalf of Plaintiff Kenneth Barton
philipz@mkzlaw.com, PatrickM@mkzlaw.com;MichaelK@mkzlaw.com;VanessaB@mkzlaw.com

PATRICK C. MCGARRIGLE, ESQ., SBN 149008
MICHAEL J. KENNEY, ESQ., SBN 192775
PHILIP A. ZAMPIELLO, ESQ., SBN 198723
McGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
PH: (818) 998-3300 FAX: (818) 998-3344

Attorneys for Creditor/Adversary Plaintiff
Kenneth Barton

UNITED STATES BANKRUPTCY COURT CHANGES MADE BY COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE:

ZAFAR DAVID KHAN,

Debtor,

KENNETH BARTON,

Plaintiff(s),

v.

ZAFAR DAVID KHAN,

Defendant.

Case No. 2:13-bk-19713-WB

Adversary Case No:2:13-ap-01752-WB

~~[PROPOSED]~~ ORDER DENYING DEFENDANT ZAFAR DAVID KHAN'S MOTION FOR CERTIFICATION OF APPEAL FOR DIRECT REVIEW IN COURT OF APPEALS

Date: **April 19, 2016**
Time: **2:00 p.m.**
Place: **Courtroom 1375; Judge Brand**
US Bankruptcy Court
255 E. Temple Street; 13th Floor
Los Angeles, CA 90012

The Motion of Debtor/ Defendant Zafar David Khan ("**Defendant**" or "**Movant**") For Certification Of Appeal For Direct Review In the 9th Circuit Court Of Appeals ("**Motion**") came ~~for~~ ***on*** regularly for hearing before this Court on April 19, 2016 at 2:00 p.m. Lewis Landau, Esq. appeared on behalf of Defendant/Movant. Patrick C.

McGarrigle, Esq. appeared on behalf of Creditor/Adversary Plaintiff Kenneth Barton ("**Barton**"). The Court, having read and considered Defendant's Motion, Barton's Opposition, Defendant's Reply papers, and the arguments of counsel for Plaintiff and Defendant, and based as well on the reasons set forth by the Court on the record at the hearing on the Motion, the Court orders, adjudges and decrees as follows:

1. Defendant Khan's Motion is DENIED.

###

Date: April 27, 2016

Julia W. Brand
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re
Zafar David Khan,

Debtor.

Zafar David Khan,

Appellant,

vs.

Kenneth Barton,

Appellee.

BAP No. CC-16-1076
Bk No. 2:13-bk-19713 WB
Adv. No. 2:13-ap-01752 WB

APPELLANT'S OPENING BRIEF ON APPEAL

Lewis R. Landau (SBN 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888)822-4340
Email: Lew@ Landaunet.com

Attorney for Appellant,
Zafar David Khan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

Pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 8014, Zafar David Khan ("Appellant," "Debtor" or "Khan") submits this Opening Brief in support of Appellant's appeal of the Bankruptcy Court's March 7, 2016 Order Granting Summary Judgment and Judgment thereon (collectively "Judgment") [AER 9:257, 10:260][1] and April 27, 2016 Order Denying Motion for Certification for Direct Review ("Order") [AER 16:418]. For all the reasons set forth herein, the Judgment and Order should be *reversed.*

Statement of Basis of Appellate Jurisdiction

This appeal seeks review of the Judgment and Order entered by the United States Bankruptcy Court for the Central District of California. The Bankruptcy Court had jurisdiction over the subject non-dischargeability complaint pursuant 28 U.S.C. §§ 1334(b) and 157(b)(2)(I). This Court has jurisdiction to consider the appeals of the Judgment and Order pursuant to 28 U.S.C. §§ 158(a) and (b) as all parties have consented to this Court's jurisdiction.

Appellant timely sought review of the March 7, 2016 Judgment by filing his notice of appeal on March 21, 2016. AER 1:4; 11:263. Likewise, Appellant timely sought review of the Order by filing his amended notice of appeal of the April 27, 2016 Order on May 10, 2016. AER 1:5; 17:421.

The Judgment and Order are final orders subject to appeal. The Judgment fully disposed of all causes of action and the entire complaint. The Order finally disposed of the motion to certify the appeal for direct review. Consequently, the Judgment and Order are properly before this Court for review.

For all the reasons set forth herein, the Judgment and Order should be *reversed* and the proceeding remanded.

///

///

[1] Record references refer to Appellant's Appendix of Experts of Record on Appeal ("AER") by "Exhibit:Page".

Statement of Issue Presented and Applicable Standard of Appellate Review

Appellant presents the following issues on appeal:

1. Did the Bankruptcy Court err in granting Kenneth Barton's ("Barton" or "Appellee") motion for summary judgment under 11 U.S.C. § 523(a)(2)(A) or (a)(6) by granting issue preclusive effect to the fraud claim within Barton's Los Angeles Superior Court judgment ("LASC Judgment") after the California Court of Appeal ("CCA") expressly declined consideration of Barton's fraud claim on appeal?

2. Did the Bankruptcy Court err in entering the Judgment under 11 U.S.C. § 523(a)(2)(A) or (a)(6) in favor of Barton and against Appellant on the basis of the issue preclusive effect of Barton's LASC Judgment?

3. Did the Bankruptcy Court err in denying Debtor's motion to certify the within appeal for direct review in the Ninth Circuit Court of Appeals?

The proceedings below granted summary judgment in favor of Barton and resulted in entry of the Judgment based on the issue preclusive effect of Barton's LASC Judgment. The BAP reviews summary judgment orders *de novo*. *See*, Plyam v. Precision Development, LLC (In re Plyam), 530 B.R. 456, 461-462 (9th Cir. BAP 2015) ("Plyam"). The BAP also reviews *de novo* the Bankruptcy Court's determination that issue preclusion was available. Id.

If issue preclusion was available, the BAP then reviews the Bankruptcy Court's application of issue preclusion for an abuse of discretion. A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Id.

Regarding the Bankruptcy Court's denial of certification for direct review, the Bankruptcy Court was interpreting and applying the procedural rule of 28 U.S.C. § 158(d)(2)(A). The Bankruptcy Court's interpretation of the Code and

Rules is reviewed *de novo*. *See*, Kir Temecula v. LPM Corp. (In re LPM Corp.), 300 F.3d 1134, 1136 (9th Cir. 2002).

For all the reasons set forth herein, the Judgment and Order should be *reversed*.

Statement of the Case

The Bankruptcy Court procedural history relevant to the entry of the Judgment and Order is as follows:

1. On April 14, 2013 Debtor filed a voluntary petition under chapter 13 of the Bankruptcy Code. The chapter 13 case was converted to chapter 7 on December 26, 2013. This Court previously reviewed and affirmed the Bankruptcy Court's conversion order. *See*, Khan v. Barton (In re Khan), 523 B.R. 175 (9th Cir. BAP 2014). The BAP's affirmance of the conversion order is pending appeal to the Ninth Circuit Court of Appeals.

2. On July 25, 2013 Barton filed his complaint for determination of dischargeability of debt asserting a cause of action under each of 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6). AER 2:7. Barton's complaint incorporated his pending Los Angeles Superior Court action against Debtor bearing case number YC061581. At the time that Barton filed his complaint, the LASC had filed its Statement of Decision [AER 2:20] and Ruling on Punitive Damages and Revisions to Statement of Decision [AER 2:30], but judgment had not yet been entered.

3. On April 21, 2015 Barton moved for summary judgment ("MSJ") [AER 4:38] after the LASC had entered its February 5, 2014 Amended Judgment After Court Trial ("LASC Judgment") [AER 4:121] and the December 9, 2014 California Court of Appeal decision affirming the LASC Judgment ("Decision") [AER 4:126]. Barton's MSJ was based entirely on the issue preclusive effect of the LASC Judgment and Decision.

4. On May 12, 2015 Debtor opposed Barton's MSJ. AER 5:168. Debtor challenged the issue preclusive effect of the LASC Judgment's fraud determination

on the grounds that the CCA Decision expressly states, "Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider whether the defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." AER 5:171. Under current California precedent adopting the *Restatement (Second) of Judgments* approach, a claim not considered on appeal is "not necessary" to the determination and carries no collateral estoppel effect. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008).[2]

5. On May 19, 2015 Barton replied in support of his motion. AER 8:235.

6. On June 16, 2015 the Bankruptcy Court granted Barton's MSJ. AER 19:431-434. The Bankruptcy Court's decision was based on a 2003 Ninth Circuit case relying on outdated California precedent to conclude that a claim not considered on appeal does carry preclusive effect. *See*, DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003) ("DiRuzza").

7. On March 7, 2016 the Bankruptcy Court entered its Order and Judgment. AER 9:255, 10:258.

8. On March 21, 2016 Debtor timely filed his Notice of Appeal. AER 1:5; 17:420.

9. On March 29, 2016 Debtor moved to certify his appeal for direct review in the Ninth Circuit Court of Appeals. AER 12:268. On April 5, 2016 Barton opposed Debtor's motion for certification for direct review. AER 14:360. On April 12, 2016 Debtor replied to Barton's opposition. AER 15:410.

10. On April 19, 2016 the Bankruptcy Court denied Debtor's motion for certification for direct review. AER 19:486.

---

[2] Appellant will refer to the terms "issue preclusion" and "collateral estoppel" in this brief. Federal courts prefer the term "issue preclusion" while California courts continue to refer to "collateral estoppel." *Compare*, Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078 n. 8 (9th Cir. 2007), *with*, Zevnik, 159 Cal. App. 4th at 82 n. 3. As this case involves federal court application of California collateral estoppel law, both terms have application in this matter.

11. On April 27, 2016 the Bankruptcy Court entered its Order denying Debtor's motion for certification. AER 16:418.

12. On May 10, 2016 Debtor timely amended his Notice of Appeal to include review of the Order. AER 17:421.

For all the reasons set forth herein, the Judgment and Order should be *reversed*.

Statement of Facts Relevant to Issues on Review

Because the Court decided an earlier appeal in this case involving the same parties, the background facts set forth in the Court's published opinion are incorporated herein by reference. *See*, Khan v. Barton (In re Khan), 523 B.R. 175, 178-179 (9th Cir. BAP 2014). As relevant to the issue preclusion and collateral estoppel issues presented herein, Debtor incorporates by reference the background facts set forth in the CCA's December 9, 2014 Decision affirming the LASC Judgment. AER 4:126.

The crucial facts directly relevant to the determination of the legal issues presented in this appeal concern the findings within the LASC Judgment and the limited scope of the CCA's review in its Decision affirming the LASC Judgment.

Starting with the LASC Judgment, in its original August 8, 2012 Statement of Decision, the LASC found RPost International Limited ("RIL"), Debtor and related debtor Terrance Alexander Tomkow liable for conversion, fraud, breach of fiduciary duty and unfair business practices concerning the cancellation of Barton's shares in RIL. AER 4:98-107. The LASC granted Barton punitive damages finding Debtor engaged in "malice, oppression and fraud." AER 4:107, 112, 118. The LASC also granted Barton $100,000 in damages on his emotional distress claim. AER 4:106.

On appeal, the CCA limited its review to the conversion claim, emotional distress and punitive damage awards. The CCA reversed the award of damages for emotional distress. AER 4:145-147. The CCA affirmed the judgment for

conversion on the grounds that the cancellation of Barton's shares interfered with his property rights sufficiently to constitute an act of conversion. AER 4:140. The CCA affirmed the award of punitive damages, but only on the grounds that Debtor acted with "malice and deceit." AER 4:148. The CCA Decision notably omits reference to the fraud finding that supported the LASC Judgment granting punitive damages.

In regard to its review of Barton's fraud, breach of fiduciary duty and unfair business practices claims, the CCA Decision states:

> Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, ***we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition.***

AER 4:126 (emphasis added).

The CCA repeated this limited scope of review on page 18 of its Decision. AER 4:143.

The CCA's decision to decline review of the fraud and other claims in Barton's Judgment eliminates collateral estoppel effect thereof under current California law. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008). In fact, Zevnik is a decision of the CCA's Second District, the same appellate District that issued the Decision. Consequently, the CCA Second District's own precedent set forth in Zevnik creates the limited collateral estoppel effect to its Decision herein.

The Bankruptcy Court was required to apply California collateral estoppel law when determining the issue preclusive effect of the LASC Judgment and CCA Decision in Barton's non-dischargeability action. The Bankruptcy Court erred in giving the fraud claim within the LASC Judgment issue preclusive effect when that claim was not reviewed on appeal.

For all the reasons set forth herein, the Judgment and Order should be *reversed*.

Argument

The relatively narrow and primary issue in this appeal is whether the LASC's fraud determination in the LASC Judgment, which was expressly *not reviewed* by the CCA in its Decision, nevertheless carries collateral estoppel effect supporting entry of the Bankruptcy Court's Judgment. California collateral estoppel law has changed over the past 15 years and now follows the modern approach as stated in Zevnik and the *Restatement (Second) of Judgments* § 27, comment o ("*Restatement*"). Under the *Restatement* approach, a claim not considered on appeal does not carry preclusive effect. Thus, the Bankruptcy Court erred in entering its Judgment under §§ 523(a)(2)(A) or (a)(6) based on the issue preclusive effect of the fraud claim in the LASC Judgment. Without the issue preclusive effect of the fraud claim, the LASC Judgment and CCA Decision do not establish claims under §§ 523(a)(2)(A) or (a)(6) by issue preclusion. This issue is reviewed *de novo* and the Court should reverse the Judgment and remand the matter for further proceedings.

The Bankruptcy Court followed the Ninth Circuit's DiRuzza case in holding that Barton's fraud claim carries preclusive effect notwithstanding the lack of appellate review. The holding of DiRuzza conflicts with the development of California law adopting the *Restatement* approach. To the extent this Court also finds itself bound by DiRuzza, the conflict in state and federal law that has developed concerning application of California law justifies direct review by the Ninth Circuit as the Ninth Circuit is the only court in a position to certify the question to the California Supreme Court and resolve the conflict. The Bankruptcy Court therefore erred in refusing to certify this appeal for direct review. This issue is also reviewed *de novo*.

For all the reasons set forth herein, the Judgment and Order should be *reversed*.

///

1. Current California Law Denies Collateral Estoppel Effect For Barton's Fraud Judgment Because it was Not Considered and Not Reviewed by the California Court of Appeal.

The Bankruptcy Court erred in granting issue preclusive effect to the fraud claim within Barton's LASC Judgment because California courts would not grant collateral estoppel effect to a claim not reviewed on appeal. Since the Bankruptcy Court was required to apply current California law on the issue, the Judgment must be reversed and the matter remanded.

The Court's Plyam decision sets forth the analytical framework for *de novo* review of a bankruptcy court's summary judgment based on issue preclusion. Plyam states:

> A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment as the basis for granting summary judgment. *See Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 831-32 (9th Cir. BAP 2006). In so doing, the bankruptcy court must apply the forum state's law of issue preclusion. *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001); see also 28 U.S.C. § 1738 (federal courts must give "full faith and credit" to state court judgments). Thus, we apply California preclusion law.
>
> In California, application of issue preclusion requires that: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding. *Lucido v. Super. Ct.*, 51 Cal.3d 335, 341, 272 Cal.Rptr. 767, 795 P.2d 1223 (1990). California further places an additional limitation on issue preclusion: courts may give preclusive effect to a judgment "only if application of preclusion furthers the public policies underlying the doctrine." *In re Harmon*, 250 F.3d at 1245 (*citing Lucido*, 51 Cal.3d at 342-43, 272 Cal.Rptr. 767, 795 P.2d 1223); *see also In re Khaligh*, 338 B.R. at 824-25.
>
> The party asserting preclusion bears the burden of establishing the threshold requirements. *In re Harmon*, 250 F.3d at 1245. This means providing "a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *Kelly v. Okoye*

> *(In re Kelly)*, 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Ultimately, "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect." Id.

Plyam, 581 B.R. at 462.

Unlike Plyam, this case rests on the question of whether the LASC Judgment for fraud retains collateral estoppel effect when the CCA Decision expressly did not consider that claim on appeal. Because the CCA did not consider Barton's fraud claim under appellate review, the limited scope of review eliminates collateral estoppel effect for the fraud claim. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008). Zevnik is the latest of three California Court of Appeal decisions focusing on the issue of the preclusive effect of a trial court decision resting on alternate grounds after an appellate court affirms on only one of the grounds without considering the alternate grounds:

> The issue presented here is the preclusive effect of a trial court decision based on alternative grounds, each of which was sufficient to support the decision, after an appellate court has affirmed the decision on only one of the alternative grounds without deciding the other grounds. The first Restatement of Judgments and the Restatement Second of Judgments both express the view that only the ground relied on by the appellate court is collateral estoppel in these circumstances. (*Rest., Judgments*, § 69, com. b, p. 316; *Rest.2d Judgments*, § 27, com. o, p. 263.) Recent California opinions have adopted this rule. (*Newport Beach*, supra, 140 Cal.App.4th at p. 1132, 45 Cal.Rptr.3d 207; *Butcher*, supra, 77 Cal.App.4th at p. 1460, 92 Cal. Rptr.2d 521.)

Zevnik, 159 Cal. App. 4th at 84; *citing*, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club, 140 Cal. App. 4th 1120, 1132 (Cal. Ct. App. 2006) ("Newport"); Butcher v. Truck Ins. Exchange, 77 Cal. App. 4th 1442, 92 Cal. Rptr. 2d 521 (Cal. Ct. App. 2000) ("Butcher").

///

//

///

Zevnik, agreeing with Newport and Butcher, holds that:

> In our view, after review by an appellate court, the final decision and the issues "necessarily decided" for purposes of collateral estoppel encompass only the grounds relied on by the appellate court. Apart from the reasons cited above, we find support for this conclusion in consideration of the important role of appellate review in ensuring the reliability of a determination.

Zevnik, 159 Cal. App. 4th at 85.

Consequently, when the CCA affirmed Barton's LASC Judgment solely on the conversion claim, without considering the fraud and other claims, only the conversion claim carries collateral estoppel effect because that was the only claim "necessarily decided" for purposes of collateral estoppel. Zevnik further explains that granting collateral estoppel effect to an unreviewed claim is inconsistent with the public policies underlying the doctrine because it effectively eliminates appellate review for that claim. Zevnik, 159 Cal. App. 4th at 85.

The Bankruptcy Court herein refused to apply the rule set forth in the Zevnik, Newport and Butcher line of cases due to the Ninth Circuit's DiRuzza decision. *See*, DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003). AER 18:432. The Bankruptcy Court decided that it was bound to follow DiRuzza as a matter of *stare decisis* notwithstanding Zevnik, Newport and Butcher.

In DiRuzza, the Ninth Circuit addressed whether "the collateral estoppel effect of the issues decided by a trial court survive after a reviewing court's affirmance on different grounds?" Id. at 1153. The Ninth Circuit held in pertinent part:

> California case law addressing this question is sparse. The earliest of the relevant cases, a California Supreme Court case decided in 1865, supports the conclusion that an appellate court's affirmance for any reason implicitly ratifies all reasoning given in the court below. To be sure, a nebulous exception to the rule and a recent California appellate decision cut against timeworn precedent and may counsel in favor of more selective application of collateral estoppel principles. In the end, however, we conclude that the 1865 decision is controlling. The principles enunciated in that opinion have been questioned by a

> lower appellate court, but we find no opinions from the highest California court undermining the authority of its early holding.
>
> The venerable nineteenth-century case to which we refer is *People v. Skidmore*, 27 Cal. 287 (Cal. 1865). In the initial stages of Skidmore's procedural history, the parties stipulated that a referee would 'try all the issues of law and fact ... and ... report a judgment thereon.' *Id.* at 289. In the resulting report, the referee found 'from the facts ... stated [in the pleadings]' that the plaintiff should not be permitted to recover.

Id., at 292.

In Skidmore, judgment was entered on the referee's report and plaintiff took the case to the California Supreme Court. The Supreme Court affirmed the judgment, but relied upon the procedural issue of misjoinder in reaching its decision. The case eventually returned to the California Supreme Court for a determination whether the plaintiff having corrected the misjoinder, could again bring suit. The court held that regardless of its previous reliance on misjoinder as the basis for its decision, the referee's report and resulting judgment, which reached the merits of the case, had been affirmed by the judgment accompanying the previous opinion. Accordingly, the plaintiff could not bring suit again, as the merits of the case had already been determined. Id.

Zevnik explains that Skidmore does not control the collateral estoppel analysis because it is a case involving res judicata whereby a subsequent action is barred, not collateral estoppel wherein an un-reviewed issue on appeal is given preclusive effect. Zevnik states:

> Thus, *Skidmore*, supra, 27 Cal. 287, held that a trial court judgment on the merits precluded a later claim on the same cause of action despite the fact that the judgment was affirmed on appeal based on only a procedural defect. *Skidmore* involved only res judicata, or claim preclusion. *Skidmore* did not discuss the requirements for collateral estoppel or conclude that the issues decided by the trial court were collateral estoppel. In particular, *Skidmore* did not decide whether issues presented in the second action were actually litigated or

> necessarily decided in the first action. For these reasons and because *Skidmore* offered no compelling rationale applicable to collateral estoppel, we decline to extend the rule from *Skidmore* to collateral estoppel and express no opinion on its continuing validity.

Zevnik, 159 Cal. App. 4th at 88.

At the time that the Ninth Circuit decided DiRuzza in 2003, the only case supporting the *Restatement's* modern approach was Butcher decided in 2000. DiRuzza acknowledges that there may be further development in California law on the subject:

> *Butcher* appears to be the only published California appellate opinion clearly supporting a departure from the general California rule that an affirmance of a judgment blesses all the grounds voiced in the trial court. *Butcher* advances plausible arguments against the general California rule, but it comes from an intermediate appellate court which failed to acknowledge that the California Supreme Court, in *Skidmore*, had addressed the subject. ***Until we receive a definitive indication that Skidmore no longer represents the law of California, we will adhere to that case's precepts.*** Therefore, we reiterate the understanding of California law we stated in *Markoff v. New York Life Insurance Co.*, 530 F.2d 841, 842 (9th Cir.1976) (discussed supra in footnotes 4 and 5): "[The California position] is that even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect."

DiRuzza, 323 F.3d at 1156 (emphasis added).

There are now three (3) CCA opinions adopting the modern *Restatement* approach, including the very court that rendered the CCA Decision herein. DiRuzza is no longer binding authority on the subject because the grounds upon which the 150-year old Skidmore decision have vanished. As stated in Newport:

> We find no justification for being bound by *Skidmore*. As Justice Holmes argued in a similar context: 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was

> laid down have vanished long since, and the rule simply persists from blind imitation of the past.' ....
>
> We believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second of Judgments, section 27.
>
> We therefore adopt the modern/Restatement Second rule and, agreeing with *Butcher*, hold that 'if a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established.' (*Butcher, supra*, 77 Cal. App. 4th at p. 1460.)

Newport, 140 Cal. App. 4th at 1130-1132.

The Ninth Circuit recognized that a federal court may refuse to follow a California Supreme Court case such as Skidmore on the question presented herein if the court believes that the California Supreme Court would now follow the Zevnik rule:

> This Court does not overlook that in some situations a federal court, in a diversity suit, may refuse to follow a state supreme court decision. It is not necessary that a case be expressly overruled in order to lose its persuasive force. *Cf. Mason v. American Emery Wheelworks*, 1 Cir., 1957, 241 F.2d 906. The law is in part an evolutionary process of judicial reasoning. If convinced that the California Supreme Court would no longer follow the case, then, under the *Erie Bendit Railroad Co. v. Tompkins* decision ..., this Court should apply the same standards which it believes the highest court of this State would use.

Torrance National Bank v. The Aetna Casualty & Surety Company, 251 F.2d 666, 669 n.5 (9th Cir.1958).

Herein, the Court should adopt the rule set forth in Zevnik, Newport and Butcher and reverse the Bankruptcy Court's summary judgment for non-dischargeability under § 523(a)(2) for fraud based on the limited issue preclusive effect of the LASC Judgment. The CCA's refusal to consider the fraud claim on appeal while nevertheless affirming the LASC Judgment renders it "not necessary" to the LASC Judgment. Alternately, public policy does not support giving the fraud claim issue preclusive effect because the lack of appellate consideration effectively

eliminates appellate review for that claim. Under either the "necessarily decided" or public policy test, Barton's fraud claim does not meet the requirements for issue preclusive effect under Lucido v. Super. Ct., 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223 (1990).

For all the reasons set forth herein, the Judgment must be *reversed.*

2. The LASC Judgment and CCA Decision do Not Establish a Non-Dischargeable Conversion Claim Under § 523(a)(6) by Issue Preclusion.

As explained hereinabove, no claim other than Barton's conversion claim carries any preclusive effect under Zevnik because the CCA Decision solely affirmed on the grounds of Barton's conversion claim. Thus, Barton's conversion claim must be analyzed under applicable Ninth Circuit precedents to determine if the elements of a claim under § 523(a)(6) are established by issue preclusion. Those precedents are the Ninth Circuit's Peklar decision and this Court's Plyam decision. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035 (9th Cir. 2001), *and see*, Plyam v. Precision Development, LLC (In re Plyam), 530 B.R. 456 (9th Cir. BAP 2015). Under these precedents, the Bankruptcy Court erred in granting summary judgment and entering the Judgment.

In Peklar, the Ninth Circuit held as follows concerning non-dischargeability of a conversion claim:

> A judgment for conversion under California substantive law decides only that the defendant has engaged in the "wrongful exercise of dominion" over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused "willful and malicious injury" within the meaning of § 523(a)(6). A judgment for conversion under California law therefore does not, without more, establish that a debt arising out of that judgment is non-dischargeable under § 523(a)(6).

Peklar, 260 F.3d at 1039.

///

To the extent that Barton relies upon the state court's imposition of punitive damages to establish willfulness, Plyam delves into the state of mind requirement for § 523(a)(6) non-dischargeability based on willful and malicious injury:

> Under § 523(a)(6), the willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors "either a subjective intent to harm, or a subjective belief that harm is substantially certain." *In re Su*, 290 F.3d at 1144; see also *In re Jercich*, 238 F.3d at 1208. The injury must be deliberate or intentional, "not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). Thus, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64.

Plyam, at 465.

The BAP then thoroughly analyzed whether a finding of "despicable malice or oppression" within the punitive damages provisions of Civil Code § 3294(c)(1) and (2) established the willful and malicious injury requirement of § 523(a)(6) by issue preclusion. The BAP held the finding was insufficient to establish the claim by preclusion. The BAP's holding concerning the basis for despicable malice as not establishing § 523(a)(6) willfulness confirms the specific intent to injure state of mind requirement for § 523(a)(6) non-dischargeability:

> In the context of CC § 3294, the term "willful" refers only to the deliberate conduct committed by a person in a despicable manner. The statute, thus, employs the dictionary definition of "willful." *See Geiger*, 523 U.S. at 61 n.3 (noting that Black's Law Dictionary defined "willful" as "voluntary" or "intentional"). ***There is no indication that "willful" refers to a subjective intent to injure or a subjective belief that injury is substantially certain to result.*** And, this interpretation makes practical sense; to read the statute otherwise would render the inclusion of Intentional Malice in CC § 3294 superfluous.

Plyam, at 469 (emphasis added).

Under this reasoning, Plyam now holds that a state court judgment containing an award of punitive damages based on the finding of "malice, oppression or fraud"

does not establish § 523(a)(6) non-dischargeability as a matter of law because the disjunctive finding does not necessarily establish an intent to injure state of mind. As such, Plyam directs that a punitive damage award that includes "malice or oppression" as CC § 3294 findings cannot support non-dischargeability by issue preclusion unless the "maliciousness" is designated as "intentional":

> To the extent the findings are **clearly** and **solely** based on a finding of Intentional Malice, fraud, or both, such findings are sufficient to meet the willfulness requirement of § 523(a)(6). And, of course, a state court judgment based on an intentional tort may independently satisfy the § 523(a)(6) willfulness requirement.
>
> But, to the extent that CC § 3294 findings are stated in the disjunctive or based on Despicable Malice or oppression or both, those findings prevent the use of issue preclusion as to § 523(a)(6) willfulness.

See, Plyam at 470 (emphasis in original).

Herein, the LASC Judgment awarded punitive damages based on a finding of "malice, oppression and fraud." AER 4:107, 112, 118. The Bankruptcy Court based its grant of summary judgment under § 523(a)(6) on the fact that LASC Judgment's punitive damages findings were stated in the conjunctive, versus the disjunctive, as set forth in Plyam. AER 18:434. The crux of the Bankruptcy Court's decision was that the fraud finding establishes the willfulness and malice requirement of § 523(a)(6). The Bankruptcy Court stated:

> So I think the fraud finding itself can satisfy the willfulness requirement and also the malice requirement under the Bankruptcy Code for a finding of liability under 523(a)(6). And so on that basis, I'm going to grant summary judgment under 523(a)(6), so that is my ruling on that.

AER 18:434.

The flaw in the Bankruptcy Court's ruling is that the CCA did not carry the LASC Judgment's conjunctive findings forward into its Decision. The CCA Decision affirmed the award of punitive damages based solely on the finding of there being substantial evidence of "malice and deceit" with no reference to fraud.

AER 4:148. The CCA's Decision to limit its affirmance of punitive damages solely to "malice and deceit" is therefore consistent with the CCA's overall refusal to consider Barton's fraud claim on appellate review.

Under Zevnik, Newport and Butcher, the CCA did not consider Barton's fraud claim and the fraud claim therefore carries no issue preclusive effect for either Barton's fraud claim under § 523(a)(2)(A) or Barton's willful and malicious injury claim under § 523(a)(6).

Per Plyam, a willful and malicious injury claim under § 523(a)(6) can be established by issue preclusion "based on a finding of Intentional Malice, fraud or both." Herein, the "malice" finding suffers from the same missing modifier as in Plyam: the malice finding is not stated as being "intentional." Consequently, the CCA's malice finding does not support the § 523(a)(6) claim.

The remaining finding in support of punitive damages that requires analysis for issue preclusion is the "deceit" finding. Just as the BAP in Plyam scrutinized the malice and oppressiveness findings under CC § 3294 to find that these terms do not establish willfulness under § 523(a)(6), the deceit finding suffers from an equal deficiency. Under CC § 3294(c)(3), fraud in support of an award of punitive damages can be based on "deceit." Deceit is defined in CC § 1710(2) includes negligent misrepresentations ***which do not require an intent to defraud***. *See*, Small v. Fritz Companies, Inc., 30 Cal. 4th 167, 132 Cal. Rptr. 2d 490, 494 (2003). Thus, just as maliciousness and oppressiveness do not necessarily establish willfulness for purposes of § 523(a)(6) because those finding do not necessarily establish willful intent to injure, a deceit finding suffers from the same flaw. In this case, the conversion claim is equally deficient because the underlying tort is not necessarily an intentional tort and the intent to harm state of mind is not necessarily established to impose punitive damages. *See*, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001). Thus, the Bankruptcy Court erred in granting Barton summary judgment under § 523(a)(6).

The Bankruptcy Court's reliance on a "fraud" finding to establish willful and malicious intent under § 523(a)(6) was in error. The CCA Decision did not review that claim and the claim therefore carried no collateral estoppel effect under Zevnik. Moreover, a mere finding of "deceit" to support punitive damages does not establish the intentional conduct necessary to support a claim under § 523(a)(6) and Plyam.

For all these reasons, the Judgment should be *reversed.*

3. The Bankruptcy Court Erred in Denying Certification for Direct Appellate Review.

The Bankruptcy Court found itself constrained to follow the DiRuzza case under principles of *stare decisis* notwithstanding the DiRuzza case's failure to acknowledge the subsequent development in California collateral estoppel law contained in Zevnik and Newport. To efficiently address the conflict that has developed between California state and federal law, Debtor moved to certify this appeal under FRBP 8006(f) for direct review before the Ninth Circuit. The Bankruptcy Court erred in denying Debtor's motion for direct review.

There is no legitimate question that a conflict has developed in application of the law of California collateral estoppel between the Zevnik and DiRuzza cases. *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) ("Shatz Article") [AER 12:332]. The Shatz Article summarizes the conflict in preclusion law as follows:

> The conflict between the *DiRuzza* analysis on the one hand, and the *Butcher/Newport* analysis on the other, creates an anomaly: A federal district judge, bound by 9th Circuit precedent, must follow *DiRuzza's* construction of California law and apply the traditional rule. But a California Superior Court judge facing the exact same preclusion question would most likely follow *Butcher, Newport, and Zevnik* - the most recent Court of Appeal decisions on point. Of course, a Superior Court judge (especially those sitting outside of the 2nd District and Orange County) could adopt *DiRuzza's* reasoning that the old Supreme

> Court precedent governs and therefore follow the traditional view. That, however, is unlikely. Most trial judges are more inclined to follow the most recent pronouncements adopting the modern view. And, those judges sitting in the 2nd District and Orange County probably would not want to pick a fight with their local Court of Appeal. That's not to say that a zealous advocate couldn't (or shouldn't) argue that the traditional view is the right view. Indeed, the *DiRuzza* court noted that it would apply *Skidmore* until it received "definitive indication" that *Skidmore* "no longer represents the law of California." Arguably, *Newport* and *Zevnick* supply that "indication," although the contrary argument would be that only the California Supreme Court can resolve the conflict. Thus, practitioners who find themselves on the losing side of the issue would have solid grounds to pursue a petition for review to the California Supreme Court.

AER 12:332-333.

The conflict summarized in the Shatz Article has been recognized in a recent Bankruptcy Court opinion case as well. *See*, In re Aberle, 533 B.R. 311, 317 (Bankr. N.D. Cal. 2015) (the subject collateral estoppel issue, "has generated a very interesting debate among California courts").

Debtor's appeal of the Judgment thus centers on whether the Zevnik, Newport, Butcher and *Restatement* rule applies to limit the collateral estoppel effect of an un-reviewed claim or whether DiRuzza and the 150-year old Skidmore decision require the opposite result. This narrow question should have been certified to the Ninth Circuit Court of Appeals for direct review for the reasons set forth in 28 U.S.C. § 158(d)(2)(A). To the extent it deemed necessary, the Ninth Circuit could then certify the question to the California Supreme Court and resolve the conflict that has developed between federal and state law on the same issue.

FRBP 8006 contains the procedure for requesting certification for direct review. Among procedural requirements, the rule requires that the request specify the reasons why direct appeal should be allowed, including which circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)–(iii) applies. If any of these circumstances exist, the certification for direct review is *mandatory*.

Direct appeal is authorized under 28 U.S.C. § 158(d) as follows:

> (d)(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.
> (B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—
> ....
> (ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);
> then the bankruptcy court, the district court, or the bankruptcy appellate panel ***shall make the certification*** described in subparagraph (A).

28 U.S.C. § 158(d) (emphasis added).

Herein, each of the circumstances described in 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) exist and each such circumstance, independently, supports certification for direct appeal. The Bankruptcy Court erred in denying the motion because a bankruptcy court "shall make the certification" when any one of three circumstances in 28 U.S.C. § 158(d)(2)(A)(i), (ii) and (iii) exist. The Bankruptcy Court denied the motion because the Court believed that "the law is clear" based on DiRuzza and Skidmore. AER 19:489. But the Bankruptcy Court's analysis utterly ignores the impact of Zevnik, Newport, Butcher and the *Restatement Second.*

There is no legitimate question that the CCA Second District would not give collateral estoppel effect to the fraud finding based on its own decision in Zevnik.

Under 28 U.S.C. § 158(d)(2)(A)(i), the Judgment involves a question of law that involves a matter of public importance. The California Supreme Court has identified three public policies underlying the doctrine of collateral estoppel: "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *See*, Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 919-920 (9th Cir. 2001). Preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation are thus matters of public importance.

The conflict between state and federal law on the issue presented herein thus creates a circumstance whereby California law and the *Restatement (Second) of Judgments* have developed to reflect current public policy. However, courts in the Ninth Circuit continue to follow DiRuzza and its reliance on the 150-year-old Skidmore decision. The rules of federal and state comity require that federal courts give prior state judgments the same preclusive effect as the courts of the state court that rendered the judgment. 28 U.S.C. § 1738 (2012). Thus, the question presented herein is a matter of public importance supporting direct review because until the conflict between state and federal law is reconciled, the judicial process will lack comity on a common question of California law.

Under 28 U.S.C. § 158(d)(2)(A)(ii), the Judgment involves a question of law requiring resolution of conflicting decisions. This conflict is proven by the very title of the Shatz Article: "Preclusion Rules Cause Conflict." *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015). AER 12:332. There is no legitimate dispute that the Judgment involves a question of law requiring resolution of conflicting decisions. Thus, the second independent factor supports direct review.

Under 28 U.S.C. § 158(d)(2)(A)(iii), an immediate appeal to the Ninth Circuit herein would have materially advanced the progress of this case, assuming the BAP also follows DiRuzza and Skidmore. This Court may engage in the same *stare decisis* analysis as the Bankruptcy Court and follow DiRuzza. Thus, advancing the appeal to the Ninth Circuit would materially advance the progress of the appeal because the Ninth Circuit is the only court in a position to address the conflict in federal and state law arising under DiRuzza by certifying the question to the California Supreme Court.

For all these reasons, the Bankruptcy Court erred in denying certification for direct review and the Order should be *reversed*.

Conclusion

For all these reasons, Appellant prays for an order of this Court *reversing* the Order and Judgment and remanding the matter for further proceedings.

Dated: June 6, 2016

Lewis R. Landau
Attorney-at-Law

By: */s/ Lewis R. Landau*
Lewis R. Landau
Attorney for Appellant

CERTIFICATION REQUIRED BY BAP RULE 8010(a)-1(b)

BAP No. CC-16-1076

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal [list the names of all such parties and identify their connections and interest]:

1. Terrance Alexander Tomkow;
2. Zafar David Khan;
3. Kenneth Barton.

Dated: June 6, 2016

/s/ Lewis R. Landau
Lewis R. Landau

CERTIFICATION REQUIRED BY BAP RULE 8010(a)-1(c)

BAP No. CC-16-1076

The undersigned certifies that the following are known related cases and appeals [list the name, court and status of all related cases and appeals]:

Concurrently pending: BAP No. CC-16-1075

Previously pending: BAP Nos. CC-14-1020; CC-14-1021
CC-14-1041; CC-14-1060
CC-14-1061; CC-14-1062

Dated: June 6, 2016

/s/ Lewis R. Landau
Lewis R. Landau

CERTIFICATION REQUIRED BY FRBP 8015(a)(7)(C)

The undersigned certifies that the foregoing brief complies with the type-volume (a)(7)(C). According to the word count of the word-processing system used to prepare the brief, the brief contains 7,342 words.

Dated: June 6, 2016

/s/ Lewis R. Landau
Lewis R. Landau

DECLARATION OF SERVICE

I, Lewis R. Landau, the undersigned, do declare:

1. I am a citizen of the United States, over the age of eighteen (18) years and not a party to the within action.

2. On the 6th day of June, 2016, I served the following documents: **APPELLANT'S OPENING BRIEF ON APPEAL** on the interested parties in this matter in the following manner:

3. **Service by Notice of Electronic Filing.** I declare that I served a true copy of the within document by causing a notice of electronic filing to be sent to the following parties:

Mr. Lewis R. Landau, Attorney
Patrick C McGarrigle

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 6TH DAY OF JUNE, 2016, AT LOS ANGELES, CALIFORNIA.

/s/ Lewis R. Landau
Lewis R. Landau

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re Zafar David Khan, Appellant.	BAP Nos. CC-16-1076 Bk Nos. 2:13-bk-19713-WB Adv. Nos. 2:13-ap-01752-WB
Zafar David Khan, Appellant, vs. Kenneth Barton, Appellee.	**APPELLEE KENNETH BARTON'S RESPONSIVE BRIEF ON APPEAL**

Patrick C. McGarrigle, Esq. (SBN 149008)
Michael J. Kenney, Esq. (SBN 192775)
MCGARRIGLE KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
T: (818) 998-3300
F: (818) 998-3344
Email: patrickm@mkzlaw.com

Attorney for Appellee
Kenneth Barton

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

California Court of Appeals Cases:

California Statutes:

Appellee Kenneth Barton ("**Appellee**" or "**Barton**") presents his Responsive Brief to the Opening Brief filed by Appellant/Appellant Zafar Khan ("**Appellant,**" "**Khan**" or "**Debtor**") in support of Appellant's appeal of the Bankruptcy Court's (1) Order Granting Summary Judgment and its Non-Dischargeability Judgment thereon (collectively "**Judgment**"), both entered on March 7, 2016 [AER 9:257, 10:260][1] and (2) April 27, 2016 Order Denying Debtor's Motion for Certification for Direct Review ("**Cert. Denial Order**") [AER 16:418].

MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION.*

Appellant Khan's appeal here is not well taken and the Bankruptcy Court's Judgment and Cert. Denial Order are properly affirmed.

Here, the Bankruptcy Court granted Appellee's Motion for Summary Judgment on his non-dischargeability complaint causes of action under Sections 523(a)(2)(A) and (a)(6). The Bankruptcy Court had the benefit, *inter alia*, the underlying decisions of the Los Angeles Superior Court and its Judgment and the Opinion of the California Court of Appeal, 2nd District (the "**COA**") to conclude as a matter of law that Appellee had met the burdens for summary disposition of the non-dischargeability claims under the two above provisions. Appellant had been adjudged to have committed fraud and conversion against Barton and to have engaged in (by clear and convincing evidence) acts constituting fraud, malice *and* oppression that resulted in the imposition of punitive damages against Appellant. Under the controlling law presented in the Summary Judgment Motion and based on the undisputed record, Barton's Summary Judgment Motion was rightly granted.

Unable to challenge the record of the Superior Court and the COA's Opinion, Appellant was relegated to offering the assertion that the COA's Opinion affirming the Judgment was on "alternative grounds" and that, therefore and despite the express Opinion affirming the Judgment, the COA somehow only affirmed part of the Judgment

and the balance was effectively reversed or nullified. Appellant did not and could not reconcile his "alternative grounds" rhetoric, on the one hand, with the State Court Judgment that held for Barton on causes of action for fraud, conversion, etc., on the other hand. Instead, from whole cloth, Appellant attempted to re-write the COA Opinion as effectively holding the State Court Fraud Judgment "affirmed in part, reversed in part" because the Court of Appeal chose not to provide a detailed discussion of all the reasons for its affirmance of the Judgment. Then, from that untenable premise hinged to a string of inapt authorities and a bankruptcy lawyer blog, Appellant asserted that (a) a purported new "*modern approach*" to the doctrine of collateral estoppel somehow precluded the Bankruptcy Court from following 9th Circuit precedent and California Supreme Court law, and (b) if the COA Opinion were construed under Appellant's contrived new approach, the COA Opinion did not affirm the fraud cause of action and the "fraud, malice and oppression" finding does not satisfy Section 523(a)(6). The Bankruptcy Court was not persuaded and Appellee's Summary Judgment Motion and Non-Dischargeability Judgment were entered.

Undeterred, Appellant then doubled-down on the untenable challenge to the Bankruptcy Court's Judgment by asserting that – despite no factual and legal similarity to the case at bar (and no attempt to reconcile the absence of any such similarities) – Appellant's interpretation of the COA's Opinion and his (albeit inapt) authorities warranted that a question be certified for ultimate presentation to the California Supreme Court. Debtor did not cite the Bankruptcy Court to (and has not addressed on appeal) the California Court of Appeal decision (unpublished) rejecting the very type of unsustainable parsing upon which the instant appeal is premised. *Gonzalez v. Beyer Pongratz & Rosen*, California Court of Appeal, Case No. C065197 (2010 WL 4849920) [AER 364][1]. In fact, the *Gonzalez* decision underscores the absence of any merit to the

---

1 While not citable for precedential value, the *Gonzalez* decision is properly considered by this Court under 9th Circuit precedent. *Daniel v. Ford Motor Co.* 806 F.3d 1217 (9th Cir. 2015) ("Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from

instant appeal; there, the Court specifically rejected the same theory that has propped up Appellant's instant appeal:

> "Gonzalez disagrees, arguing his seventh and eight causes of action survived issuance of the remittitur. He appears to believe that this court's unqualified affirmance of the judgment in favor of the law firm on all causes of action was transformed into a reversal of the judgment on the two causes of action not explicitly addressed in this court's decision affirming the judgment. Not so. The trial court entered judgment against Gonzalez on all causes of action. This court affirmed. The fact that the decision affirming the judgment did not explicitly discuss two causes of action does not transform its unqualified affirmance of the judgment into the reversal of the judgment as to those causes of action."

Gonzalez, p. 3; AER at 377-378. The Bankruptcy Court denied Appellant's certification motion as the California Courts do not support the inapt logic offered by Appellant here and Appellant did not satisfy the grounds for certification of any question to the California Supreme Court.

Appellant's Brief merely presents the same long-since-defeated arguments and inapt cases, whilst continuing to fail to address the controlling law, final decisions and undisputed evidence and, in contravention of his duties on appeal, declining to address the Appellee's arguments and authorities regarding Appellant's attempts to challenge the collateral estoppel effect of the COA Opinion and the lack of any basis for certification. Appellant cannot wait until his Reply Brief to first address the myriad grounds raised by Appellee below that support the Bankruptcy Court's Orders and Judgment and this Honorable Court's affirmance thereof. Accordingly, the Bankruptcy Court's Order granting summary judgment, the Judgment and the Cert. Denial Order should be affirmed.

---

considering such decisions as a possible reflection of California law.").

II. ***SUMMARY OF UNDISPUTED FACTS.***

Appellant's selective Statement of Facts omits several undisputed facts which only serve to underscore the ample support in the record for the Bankruptcy Court's Order granting summary judgment, the entry of the Non-Dischargeability Judgment and the Cert. Denial Order. For example,

1. On or about August 3, 2012, the LASC issued its Statement of Decision (**"SOD"**) in the State Court Matter, finding that Barton had "...met his burden of proof on all of the causes of action." (AER 103; BARTON 0038:6-8)

2. The LASC further stated in its SOD that "[Barton] has proven by clear and convincing evidence that the actions of RPost International Limited, Tomkow and Khan were done with Malice, Oppression and Fraud, giving rise to a claim for punitive damages." (AER 107; BARTON 0042:1-4)

3. On or about June 18, 2013, the LASC issued its Ruling on Punitive Damages and Revisions to Statement of Decision and, in assessing punitive damages against Mr. Khan, found that "Mr. Khan's course of conduct in this case rises to a significant degree of reprehensibility." (AER 112; BARTON 0046:1-4)

4. On or about August 30, 2013, the LASC issued its Judgment After Court Trial, further memorializing that Barton proved, "...by clear and convincing evidence that the actions of [Khan] were undertaken with malice, fraud and oppression..." (AER 118; BARTON 0051:19-20) Those findings were further memorialized in the LASC "Amended Judgment After Court Trial." (AER 122; BARTON 0054:19-20)

5. The LASC further stated in its Judgment After Court Trial that Barton proved, "...by clear and convincing evidence that the actions of [Tomkow] were undertaken with malice, fraud and oppression..." (AER 118-119; BARTON 0051:23-0052:1) Those findings were further memorialized in the LASC "Amended Judgment After Court Trial." (AER 122-123; BARTON 0054:23-0055:1)

6. On or about December 9, 2014, the Court of Appeal of the State of California, Second Appellate District, Division 5, affirmed the findings of the LASC in all material respects stating that, **"There is substantial evidence of the reprehensible nature of [Khan and Tomkow's] conduct." "They took repeated actions to [force Barton out of the company and deny his stock ownership], from fabricating minutes with his signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating." "Barton's harm resulted from Khan and Tomkow's malice and deceit, not mere accident."** (AER 147-148; BARTON 0078-0079) (Emphasis Added)

Notably, neither before the Bankruptcy Court below (either in connection with the Summary Judgment Motion or Debtor's Certification Motion) nor in this appeal has Appellant cited anything in the Superior Court record where Barton succeeded on his fraud and conversion causes of action (or on his intentional breach of fiduciary duty or Business & Professions Code Section 17200 claims, for that matter) on "alternative grounds."

III. ***THE BANKRUPTCY COURT'S SUMMARY JUDGMENT ORDER AND NON-DISCHARGEABILITY JUDGMENT ARE RIGHTLY AFFIRMED.***

Debtor's appeal here hinges on one legally and factually untenable premise: that despite controlling law and commons sense, somehow the COA's Opinion affirming the Fraud Judgment in the State Court Action can be rewritten so as to be considered a "reversal" because its Opinion did not contain a detailed discussion regarding *all* the causes of action upon which Barton prevailed in the Trial Court. Debtor's Section 523(a)(2)(a) and 523(a)(6) challenges, respectively, are not that the Bankruptcy Court erred in applying controlling law regarding those particular claims, but that the

Bankruptcy Court somehow misapplied *DiRuzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003) and controlling California law to the COA Opinion and State Court Fraud Judgment. Appellant's proffered logic was (and is) that, because COA's Opinion of "Judgment affirmed[2]" should really mean "Judgment affirmed in part, reversed in part," the Bankruptcy Court could not rely on collateral estoppel from the COA Opinion and State Court's Fraud Judgment to grant summary judgment on Barton's 523(a)(2)(A) and (a)(6) claims. The Bankruptcy Court properly rejected Debtor's factually and legally unsustainable twisting of the COA Opinion and controlling law and properly held that the COA's unqualified affirmance of the Fraud Judgment compelled the granting of summary judgment under the above-referenced Code sections. Because Appellant's Brief simply re-hashes the assertions advanced below to try and pigeon-hole an inapt theory (that the Court of Appeal's decision was somehow based on "alternative grounds" notwithstanding the Trial Court's judgment was entered on all causes of action, not "alternative grounds") as a premise to his Section 523 challenges, Barton will address the challenge to the COA's Opinion and State Court Judgment first.

A. Under California Law, The Court of Appeal's Affirmance Of The State Court Judgment In Barton's Favor Affirms The *Entire* Judgment; As Such, Appellant's Parsing Of The Appellate Opinion Is Improper And No Basis For The Instant Appeal.

Appellant devotes the lion's share of his brief to advancing the specious plea that there is a purported "modern view" of collateral estoppel and the effect of an appellate court's affirmance of a judgment where the appellate court chooses not to engage in a detailed discussion as to why each of the successful causes of action which are the subject of the underlying judgment are affirmed. Appellant's premise, however, is nothing more than rhetorical wishful thinking. Not only is the AOB untethered to any authority but it is presented without any discussion – ***zero*** – **(1)** as to how the purported "alternative

---

2 With no effect on the issues before the Bankruptcy Court, the COA did reverse the Trial Court's award of emotional distress damages, but in all other respects the Judgment was

grounds" rationale (offered in the handful of decisions cited by Appellant) applies in any way to the affirmance of a Judgment that covers myriad causes of action or even applies to the Trial Court's Judgment on all causes of action (which did not involve "alternative grounds"); and **(2)** of Barton's analysis presented to the Bankruptcy Court below (including one California appellate decision) which flatly rejected the very same non-sensical premise that has propped up this appeal (and Debtor's needless certification motion in the Bankruptcy Court).

Ruling on Barton's summary judgment motion, and responding to Appellant's attempts to parse the Court of Appeal's Opinion, the Bankruptcy Court properly relied on 9th Circuit precedent, *DiRuzza* (citing *People v. Skidmore*, 27 Cal. 287 (1865)), holding that the COA's Opinion affirming the Fraud Judgment applied to all of the causes of action determined in the State Court Fraud Judgment against Debtor. None of the rationales offered in the appeal support deviating from 9th Circuit precedent or controlling California law.

First, the 9th Circuit reviewed the issue of collateral estoppel stemming from appellate review of state court judgments and confirmed thirteen years ago that, based on the Supreme Court's determination in *Skidmore*, an appellate affirmance of a judgment is just that, an affirmance of the *entire* judgment. The Bankruptcy Court, like the *DiRuzza* Court, adhered to principles of *stare decisis* and entered summary judgment in Barton's favor by adhering to controlling law and according full effect to the Fraud Judgment and the COA's unqualified affirmance. Following *Skidmore*, and rejecting the inapt (and, as the California Appellate Court in *Gonzales* has concluded are, "frivolous") assertions regarding the scope of *Zevnik v. Superior Court*, 159 Cal.App.4th 76 (2008) (and its related decisions) is precisely what the Bankruptcy Court was required to do. As the 9th Circuit has made clear, when deciding state law issues, the decision of the state's highest court must be followed; whether there is a purported conflict in intermediate court decisions is only an issue ***if*** the state's highest court has not previously issued the law of

---

affirmed.

the state. Lewis v. Telephone Employees Credit Union 87 F.3d 1537 (9th Cir. 1996) ("When interpreting state law, federal courts are bound by decisions of the state's highest court. '*In the absence* of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance."). As there is no "absence of such a decision," Appellant's attempt to inject the already factually and legally inapt Zevnik decision and its progeny as grounds to re-write the COA's Opinion is at odds with Lewis, among other precedent. As is evident throughout the brief, Appellant couches his challenges to the Section 523(a)(2)(A) and (a)(6) summary judgment order by asserting that Zevnik and related decisions undermine the collateral estoppel effect of the COA's Opinion; however, as that premise is without support on the law or the facts, then, too, the challenges to the summary judgment order on the two subject causes of action ruled in Barton's favor also fail.

Hence, and ***second***, Appellant failed below and again on appeal to demonstrate that the State Court Fraud Judgment and the COA's Opinion were based on "alternative grounds. Such failure is not a surprise since the Superior Court's Fraud Judgment was based on the several separately stated causes of action adjudicated in Barton's favor and not on the nebulous, undefined "alternative grounds" phraseology which Appellant does not even attempt to apply to the Fraud Judgment or to the COA's Opinion. Undeniably, Barton proved and succeeded on all *causes of action* – not "alternative grounds" – against the Appellant and Appellant cited nothing before the Bankruptcy Court and nothing in the record here for this Court to conclude otherwise. Further, AOB reflects no attempt to define under controlling law what the "alternative grounds" language from Zevnik and its handful of predecessors is intended to refer to and how (if at all) that phraseology somehow is meant to apply to "causes of action" (which are something altogether different). It is axiomatic that causes of action stand alone. Motions, like the disqualification motion in Zevnik, may be decided on "alternative grounds." Yet, Appellant has chosen not to present an argument or authority to satisfy the condition

precedent to demonstrate that causes of action (separately proven and adjudicated) are "alternative grounds" under California law and as contemplated in the Zevnik, et al. decisions.

Third, the entire premise of the appeal – that because the COA's Opinion contains a detailed discussion of some but not all of the causes of action and damages, the Opinion (despite its clear language) is somehow not an unqualified affirmance of the entire Judgment but an "affirmed in part, reversed in part" ruling – has been previously rejected by a California appellate court. Appellant was provided with the authority – Gonzalez – in connection with the certification motion below, but it is particularly telling that, in his brief, Appellant fails to address this decision which (as the quoted exception in Section I above confirms) rejects the Debtor's attempt here to parse the collateral estoppel effect of the COA's Opinion of affirmance.

Fourth, the policy of collateral estoppel also warranted the Bankruptcy Court's entry of summary judgment and the Non-Dischargeability Judgment. As the California Supreme Court in Murray v. Alaska Airlines (2010) 50 Cal.4th 860, 877 instructed (in a decision which advised the 9th Circuit that collateral estoppel applied to administrative findings where the plaintiff did not pursue an appeal past the administrative remedies): "Last, "[e]ven assuming all the threshold requirements are satisfied ... [w]e have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." (Lucido v. Superior Court (1990) 51 Cal.3d 335, 342–343, 272 Cal.Rptr. 767, 795 P.2d 1223.) ***We find that the public policies underlying the doctrine of collateral estoppel will best be served by applying the doctrine to the particular factual setting of this case. Those policies include conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation***. (Allen v. McCurry (1980) 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308; Montana v. United States (1979) 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210;

People v. Sims, (1982) 32 Cal.3d 468; *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878, 128 Cal.Rptr.2d 808.)." (Emphasis Added). Appellant's efforts here – an ongoing ***un***willingness to accept now at least three courts' determinations that he committed fraud[3] – is precisely why the collateral estoppel doctrine exists: to end litigation on decided matters. The Fraud Judgment is based on causes of action which were affirmed[4], was not based on (unidentified by Appellant) "alternative grounds" in the Trial Court or on appeal, and Appellant has failed to demonstrate otherwise. Appellant was accorded the opportunity to fully litigate its appeal from the Fraud Judgment and, hence, there is no due process or other purported right of Appellant that has been abridged. The doctrine of collateral estoppel is furthered by an affirmance of the Bankruptcy Court's summary judgment order and Judgment and the Cert. Denial Order.

Moreover, there is no policy reason to support Appellant's misadventure to attempt to re-write 9th Circuit and California law and certainly no reason given this particular Appellant. Juxtaposing *DiRuzza* and *Skidmore* (and simply considering the unpublished decision (and comments on the absence of merit to Appellant's very argument here) in

---

3 As this Honorable Court is aware, the Bankruptcy Court previously converted Debtor's Chapter 13 case to Chapter 7 for, among other reasons, Debtor's interference with the State Court proceedings. That decision and related orders were affirmed by this Court in December 2014. Appellant has appealed this Court's decision to the 9th Circuit.

4 As the Court of Appeal stated: "Since we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider ***defendants'*** additional contentions that liability was not supported by substantial evidence of breach of fiduciary duty, fraud, or unfair competition under Business and Professions Code section 17200." What this reveals is that the Court of Appeal was not in any way (as Debtor suggests) diminishing the success of Barton's claims nor was it qualifying or limiting its affirmance of the trial court's decision. Rather, the Court of Appeal was dismissive *of Appellant's additional arguments* on appeal. That Debtor felt it necessary to not raise and address this quote from the COA Opinion (a quote raised by Barton below) speaks volumes and demonstrates that Debtor also understands that it was his failed arguments that were cast aside by the COA, not Barton's victory. Moreover, as if Appellant's misguided ploy to convince this Court that it somehow won by losing needed further debunking, the Court of Appeal stated that, save for the reduction of emotional distress damages, "...**the judgment is affirmed**."

Gonzalez), on the one hand, to *Zevnik*, the Restatement and a local attorney's short practice article reveals **(a)** the Bankruptcy Court's Judgment rightly adhered to the law, **(b)** there is no "conflict in the law" or other ground either establishing some other (albeit non-existent) "modern approach" or warranting certification to the California Supreme Court, **(c)** the premise of the AOB in this regard is untenable as Appellant has chosen not to address the substantive threshold issue that the Fraud Judgment on all causes of action is not akin to a "motion" decided on "alternative grounds," and **(d)** the policy reasons *for* applying collateral estoppel – an issue also unaddressed and undeveloped in the AOB – were rightly followed by the Bankruptcy Court and are improvidently challenged here.

Further, Appellant here as made no showing that his rights have been abridged; in sharp contrast, as the COA Opinion makes clear, Appellant engaged in a highly manipulative series of fraudulent acts to deprive Barton of his shares in RPost International – acts which the COA found were malicious and deceitful and which the Trial Court held were based on fraud, malice and oppression. Notably, Appellant cites no authority where any similar litigant has circumvented such a COA Opinion affirming a fraud and conversion claim and punitive damages but attempting to parse an unqualified affirmance into yet another opportunity to litigate liability in contravention of the policies supporting the collateral estoppel doctrine. In short, Appellant's attempt to have another opportunity to relitigate his fraud and related intentional malfeasance and misconduct runs directly afoul to California's reasoning for the doctrine in the first place.

Fifth, Appellant's reliance on *Zevnik* and a non-determinative comment (in *dicta*) by a Bankruptcy Court in *In Re Aberle*, 533 B.R. 311 (Bankr. N.D. Cal. 2015)5 to prop-up a (non-existent) "modern approach" or "modern view" – when those cases are factually inapt and Appellant has not established the threshold question is proven (i.e. that causes of action are "alternative grounds") – is unpersuasive and misplaced.

---

5 Other than indicating that there was an interesting discussion going on concerning *Zevnik* and *DiRuzza*, on the facts and law, *Aberle* is not relevant to this Appeal or the underlying issues.

Here, unlike Zevnik, the Trial Court's SOD/RSOD (and Fraud Judgment) sustained each of Barton's separate causes of action, determinations which were not like the disqualification motion in Zevnik (which was denied on two alternative grounds (laches and on the merits).[6] In Zevnik, the law firm defending a malpractice action tried to use another trial court's denial of a third party's disqualification motion as collateral estoppel that the law firm did not commit malpractice. In reviewing the disqualification motion, the Court of Appeal relied on one of the alternative grounds (laches) to uphold the denial of the disqualification motion and expressly did not reach its merits. In other words, the Zevnik trial court had two grounds to sustain its lone holding that the law firm should not be disqualified; the Court of Appeal upheld that trial court's decision on the laches alternative ground, but did not reach the merits. Unlike here, there was no "Judgment" in Zevnik at issue; a distinction which Appellant never addresses. In sharp contrast to Zevnik, Judge Rice's SOD/RSOD and Judgment: (a) make no mention of "alternative grounds," but, instead, found that each cause of action on its own was proven. AOB fails to substantively analyze that issue and instead offers only sweeping conclusions untethered to any provisions of the SOD/RSOD/Judgment as it relates to the Zevnik

---

6 Like Appellant's errant citation to the inapposite Zevnik decision, Appellant's reliance on Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club (2006) 140 Cal.App.4th 1120, is unpersuasive. There, the Appellate Court did not affirm the entire judgment as occurred here (apart from a slight [and inconsequently for this proceeding] damages reduction). *Here, the Appellate Court affirmed the Judgment and reversed no cause of action.* Unlike Barton's separate and each successful causes of action sustained by the SOD/RSOD and Judgment, Newport involved alternative theories within a single cause of action, a distinction which Appellant does not address or account for. And, unlike Newport, the Appellate Court here noted specific findings which cross-over all the claims sustained by the Judgment: "[Defendants] took repeated actions to achieve their goal, from fabricating minutes with [Barton's] signature, claiming ownership of his shares was contingent on a law degree, destroying the company's shareholder registries, transferring assets to new companies and providing business opportunities to subsidiary companies that prevented Barton as a common shareholder of RIL from participating." Those findings (in addition to the fact that the Judgment was affirmed *in toto*) unmask Appellant's "win by losing" gambit for the mirage it is.

decision and Appellant's assertions simply have no bearing on the Bankruptcy Court's entry of summary judgment.

As detailed above, even if Appellant's inapplicable "alternative grounds" concept had any application here (and it does not given the absence of any such "alternative grounds" noted in the SOD/RSOD or Judgment or the COA Opinion), the 9th Circuit has held that the Court of Appeal's affirmance, even if addressing just one of the causes of action at issue, bestows an affirmance on the entirety of the trial court's judgment. As the *DiRuzza* Court held, following *Skidmore*, "an appellate court's affirmance for any reason implicitly ratifies all reasoning given in the Court below." As the *Zevnik* Court noted (fn. 9), "*DiRuzza* stated that *Skidmore* was 'controlling' on the question of the collateral estoppel effect of issues decided by the trial court after a reviewing court's affirmance on different grounds." While the *Zevnik* Court attempted to carve out an exception to *Skidmore* on the narrow factual grounds on the disqualification motion there (facts which are not at all on all fours with the State Court SOD/RSOD/Judgment here), the 9th Circuit has not accepted *Zevnik,* and *DiRuzza* continues to guide the federal courts on the issue (even assuming arguendo the State Court SOD/RSOD/Judgment could ever be construed as an underlying judgment on "alternative grounds," which Appellant has not demonstrated with any cogent argument and authority).[7] As the Federal District Court in *Flying J, Inc. v. Pistacchio* (E.D. Cal. March 31, 2008) 2008 WL 906396, concluded,

---

7 As the *DiRuzza* Court noted, citing *Skidmore*: "The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with that judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words 'judgment affirmed,' as they occur in the published report of the case. (17 Cal. 261).... The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. **But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression.** *Skidmore* at 292-293." *DiRuzza* at 1154-55.

"Therefore, we reiterate the understanding of California law we stated in *Markoff v. New York Life Insurance Co.*, 530 F.2d 841, 842 (9th Cir.1976) ...: '**[The California position] is that even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.**'"

As such, because Appellant's entire challenge to the Judgment hinges to the untenable assertion the COA's Opinion and the Trial Court's Fraud Judgment (and related undisputed rulings) should not have been given preclusive effect because the COA did not discuss in detail the fraud cause of action, and that challenge is contrary to 9th Circuit law and California appellate law on the subject and is factually inapt, the appeal is without merit. The Bankruptcy Court's summary judgment Order, the Judgment and the Cert. Denial order should all be affirmed.

B. The Bankruptcy Court Correctly Gave Preclusive Effect To The COA's Opinion (And Underlying Trial Court Judgment, Etc.) In Granting Summary Judgment Under Section 523(a)(2)(A).

Appellee Barton successfully proved his fraud cause of action against Appellant. The COA Opinion affirmed the Trial Court's Judgment – which included not just the established fraud claim but also proof of fraud by clear and convincing evidence so as to justify the imposition of punitive damages. The COA's summary of the Appellant's fraud and malice against Barton (See, Section II(6) above) is unequivocal and explicit. Not surprisingly, therefore, Appellant skirts any attempt at challenging the Trial Court's finding for Barton on his fraud cause of action. Instead, Appellant relies on the debunked plea that the COA's Opinion's affirmance does not contain a detailed discussion of the fraud claim and so, therefore (the theory goes), the affirmed Judgment was really "affirmed in part and reversed in part." For all the reasons discussed above, and as the *DiRuzza*, *Skidmore* and *Gonzalez* decisions discussed above make clear, Appellant's parsing of the COA Opinion is wholly unsustainable and both legally and factually

unsound. Barton succeeded on his Fraud cause of action and the Fraud Judgment was entered. The COA affirmed the Judgment. Under the collateral estoppel doctrine, Barton's successful litigation of the Fraud cause of action against Appellant was and is entitled to preclusive effect. The COA's affirmance of the Judgment cements that fact and the Bankruptcy Court – following 9th Circuit precedent and controlling California law – correctly granted summary judgment, which order and Judgment should be affirmed here.

C. The Bankruptcy Court Correctly Gave Preclusive Effect To The COA's Opinion (And Underlying Trial Court Judgment, Etc.) In Granting Summary Judgment Under Section 523(a)(6).

As the COA Opinion and State Court Fraud Judgment (and related Trial Court orders) confirmed that Appellant's wrongful acts against Barton were undertaken with fraud, malice and oppression, the Bankruptcy Court correctly held that Barton had proven his claim for non-dischargeability under Section 523(a)(6). On appeal, and again dependent upon the off-the-mark challenges to the collateral estoppel effect of the COA's Opinion, Appellant tries to re-write the appellate opinion to avoid summary disposition and an affirmance here. Appellant's efforts again are not persuasive.

Appellant relies upon *Plyam v. Precision Development, LLC (In Re Plyam)* (9th Cir. BAP 2015) 530 B.R. 456, but that reliance is misplaced. Here, the LASC expressly found that Appellant's nefarious acts (corporate records destruction, fabrication and forgery, etc.) were undertaken with fraud, malice *and* oppression, but in *Plyam* the Court reversed because the state court's jury finding was in the disjunctive (that the Appellant acted with malice, oppression *or* fraud) and, therefore, the punitive damages findings on that record were insufficient to satisfy the willfulness element under Section 523(a)(6) for purposes of summary judgment based on collateral estoppel. Yet, the AOB fails to address this dispositive distinction between the unequivocal LASC findings and the equivocal findings of the jury in *In Re Plyam*.

It is settled that intentional conversion of another's property has long been confirmed and held to satisfy the non-dischargeability standards under Section 523(a)(6) (and its predecessor statutes). *In Re Jercich* (9th Cir. 2001) 238 F.3d 1202, 1207; *McIntyre v. Kavanaugh* (1916) 242 U.S. 138, 37 S.Ct. 38 (Supreme Court affirms conversion of corporate shares "willful and malicious" to except from discharge); *In Re Bailey* (9th Cir. 1999) 197 F. 3d 997 (though upholding discharge on the narrow facts there, 9th Circuit confirms that: "The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6)."). *Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini)* (9th Cir. 1986) 780 F.2d 1440; *Transamerica Comm. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551 (9th Cir.1991). The LASC found that Appellant's malfeasance was "willful" through at least two showings: (a) Appellant knew Barton was a shareholder and his constructs to the contrary were rejected, and (b) Appellant acted fraudulently in converting the shares, which fraudulent conduct is, by definition, intentional and willful. "Willful" is satisfied by intentional malice or fraud, as noted in *Plyam*. Moreover, even if the State Court had not (though it did) expressly found Appellant's conduct to be malicious, this Court can readily conclude that the nature of the intentional/willful conduct by Appellant was malicious. In *Littleton*, the Ninth Circuit explained its holding in *Cecchini* as meaning that in the case of a conversion—referring to a conversion that is both intentional and "willful"—"malice may be inferred from the nature of the wrongful act." *Littleton* at 554. Here, the State Court held that (a) that, to convert Barton's Shares, Appellant did so by destroying, fabricating and forging corporate records to manufacture the sham that Barton was never a shareholder; and (b) the deliberate conduct constituting the conversion was undertaken by Appellant with "fraud, malice and oppression," thereby satisfying both the "willful" and "malicious" components of Section 523(a)(6).

Appellant's generic offering that the conversion of another's property is not always nondischargeable under Section 523(a)(6) is of no moment. Appellant cites *In Re*

Peklar (9th Cir. 2001) 260 F.3d 1035, with no analysis to change the disposition here. In *Peklar*, the Appellant, a lessee, was alleged to have removed furniture from leased premises purportedly in derogation of the lessor's rights under a lease. The only evidence of the Appellant's wrongful act related to the issue of willful and malicious was that the Appellant-lessee claimed that she removed the furniture on the advice of her counsel, and the Appellant filed a declaration to the effect. *Peklar*, at 1038-1039. Moreover, no punitive damages were at issue or awarded in *Peklar*. Here, however, the State Court specifically found that the taking of Barton's Shares by Appellant **(a)** the product of Appellant's fabrication and forgery of RIL corporate minutes, **(b)** involved the destruction of other corporate records, and **(c)** was proven by clear and convincing evidence to have been done with fraud, malice and oppression. Appellant's malfeasance was determined to be intentional (fraudulent), malicious and oppressive, not merely negligent or reckless. Unlike Ms. Peklar, Appellant cannot present any evidence that his conversion of Barton's Shares was anything but willful and malicious. The COA's Opinion affirmed the State Court's Judgment.

Succinctly, Appellant cannot avoid the dispositive effect of the SOD/RSOD and Judgment flowing therefrom on the errant theory that the LASC's SOD/RSOD and Judgment were based on "alternative grounds" (when they are not). Further, even if such a construction could be placed on the SOD/RSOD and Judgment (and it cannot), 9th Circuit law rejects Appellant's inapt theory in any case.[8] Appellant did not have a viable

---

8 Putting aside Appellant's erroneous assertion that the Appellate affirmance of the Judgment only permits preclusive effect of the State Court's conversion findings, Appellant's citation to *In Re Peklar*, *infra*, affirms the rule that the LASC's final judgment is entitled to preclusive effect. "A state court judgment is given the same preclusive effect by a federal court as it would be given by a court of the state in which the judgment is rendered. 28 U.S.C. Section 1738; *Marrese v. Am. Acad. Of Orthopedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). Under California preclusion law, collateral estoppel effect is given to a judgment that 'actually and necessarily' decides the issue in question. [citation omitted]." *In Re Peklar*, at 1039. Debtor has failed to rebut that the LASC necessarily decided the fraud, intentional breach of fiduciary duty and conversion claims as well as determined the propriety of punitive damages. Collateral estoppel was properly applied here.

response to that authority before and does not now present one in his AOB, giving this Court no reason to disturb the Bankruptcy Court's determinations.

IV. *THE BANKRUPTCY COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO CERTIFY THE APPEAL.*

Bereft of any new authority or arguments on the issue of collateral estoppel and the preclusive effect of Barton's State Court Judgment, and only after repeating the authorities and arguments which have already been rejected, Appellant argues that the Bankruptcy Court erred in denying certification for appellate review. The basis for the argument is that there is a purported "conflict" regarding the law of collateral estoppel, but no such conflict exists hence there was (and is) no need for certification. Succinctly, what has occurred is that Appellant has attempted to create a conflict, but has failed to do so. And rather than accept that there is no conflict, Appellant instead argues that the Bankruptcy Court erred in not seeing what isn't there, i.e. a conflict over the law of collateral estoppel.

As below, Appellant fails to demonstrate that the Bankruptcy Court's denial of the Certification Motion was erroneous. There is no doubt that neither FRBP 8006(f) or 28 U.S.C. Section 158(d)(2) apply here. With respect to FRBP 8006(f)(2)(A)-(D), Appellant has failed to meet its burden: under subsection (A), Appellant has failed to present any facts and law that the state court's Fraud Judgment on all causes of action somehow constitutes the undefined "alternative grounds" concept at issue in *Zevnik*, et al. Appellant's presentation presupposes a conclusion that Appellant has not presented the facts and law to substantiate and, as such, subsection (A) has not been satisfied; with respect to subsection (B), the statement of the question is incomplete, at best, and overlooks the key threshold question – which Appellant has not addressed factually or legally. Hence, the Appeal is defective in this regard; and with respect to subsection (C), the statement is not sustainable – the "current law" is *Skidmore*, *DiRuzza* and several other decisions following same and cited above. The "current law" is not *Zevnik* (as the

Gonzalez Court confirms) and *Zevnik* is neither factually or legally on all fours with the instant action. For the reasons discussed in Section III(A) above, Appellant has not met his burden here.

With respect to subsection (D), which looks at satisfaction of the requirements of Section 158(d)(2)(A)(i)-(iii), Appellant remains unable to meet the criteria: with respect to subsection (d)(2)(A)(i), Appellant suggests without much discussion that the Appeal is based on an alleged "matter of public importance," which effectively concedes that the remaining grounds in subsection (i) ["the judgment …involves a question of law as to which there is no controlling decision…."]. However, Appellant's mere conclusions are (and were below) devoid of any facts and parroting the public policies supporting collateral estoppel does not buttress the plea here. Rather, the integrity of the judicial system, promotion of judicial economy and protection of litigants from harassment each strongly compel the affirmance of the Bankruptcy Court's Orders. With three courts having affirmed Appellant's fraud and the Fraud Judgment's propriety, the integrity of the judicial system and judicial economy would best be served by Appellant ending the on-going litigation on matters that have already been fully litigated and decided. Permitting Appellant, who engaged in myriad acts of fraud, to keep burdening the courts and an aggrieved victim thereof, is not in furtherance of any public policy; with respect to subsection (d)(2)(A)(ii), as discussed *infra*, there are no "conflicting decisions" or questions of law that are not already decided. There is no Federal decision in conflict. There is no California decision that is in conflict (and the *Gonzalez* decision reflects the legal untenability of the very premise of the Appeal). Appellant cannot satisfy this prong either; and, with respect to subsection (d)(2)(A)(iii), based on the controlling law and the insight and guidance provided by the *Gonzalez* decision, the Appellant's withdrawal of this appeal is the only remaining prudent steps that respect the decisions of now several courts on these issues.

V. ***CONCLUSION.***

Appellant's reliance on the same failed arguments, and his continuing failure to address controlling legal authority and evidence (and, instead, simply choosing to ignore all of Appellee Barton's arguments and case authority provided below) doom the instant appeal. Accordingly, the Bankruptcy Court's Summary Judgment Order, Non-Dischargeability Judgment and Cert. Denial Order are properly affirmed in full.

Dated: June 27, 2016

MCGARRIGLE, KENNEY & ZAMPIELLO, APC

By: *s/ Michael J. Kenney*
Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorney for Appellee
Kenneth Barton

CERTIFICATION REQUIRED BY FRBP 8015(a)(7)(C)

The undersigned certifies that the foregoing brief complies with the type-volume (a)(7)(C). According to the word count of the word-processing system used to prepare the brief, the brief contains 7,102 words.

Dated: June 27, 2016

By: *s/ Michael J. Kenney*
Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorney for Appellee
Kenneth Barton

DECLARATION OF SERVICE

I, Vanessa Bravo, the undersigned, do declare:

1. I am a citizen of the United States, over the age of eighteen (18) years and not a party to the within action.

2. I hereby certify that on 27th day of June, 2016, I electronically filed **APPELLEE KENNETH BARTON'S RESPONSIVE BRIEF ON APPEAL** with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system:

3. **Service by Notice of Electronic Filing.** I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

Mr. Lewis R. Landau, Attorney

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th Day of June, 2016, At Chatsworth, California.

s/ Vanessa Bravo
Vanessa Bravo

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re
Zafar David Khan,

Debtor.

Zafar David Khan,

Appellant,

vs.

Kenneth Barton,

Appellee.

BAP No. CC-16-1076
Bk No. 2:13-bk-19713 WB
Adv. No. 2:13-ap-01752 WB

APPELLANT'S REPLY BRIEF

Lewis R. Landau (SBN 143391)
Attorney-at-Law
22287 Mulholland Hwy., # 318
Calabasas, CA 91302
Voice and Fax: (888)822-4340
Email: Lew@ Landaunet.com

Attorney for Appellant,
Zafar David Khan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

OTHER

TREATISES

Pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 8014(c), Zafar David Khan ("Appellant," "Debtor" or "Khan") submits this Reply Brief to the brief filed by Kenneth Barton ("Barton") in regard to Appellant's appeal of the Bankruptcy Court's March 7, 2016 Order Granting Summary Judgment and Judgment thereon (collectively "Judgment") [AER 9:257, 10:260][1] and April 27, 2016 Order Denying Motion for Certification for Direct Review ("Order") [AER 16:418]. For all the reasons set forth herein, the Judgment and Order should be *reversed.*

I.

BARTON'S MONEY JUDGMENT IS INDISPUTABLY BASED ON FOUR ALTERNATE GROUNDS; THE CCA'S AFFIRMANCE BASED ONLY ON THE CONVERSION CLAIM ELIMINATES COLLATERAL ESTOPPEL EFFECT FOR THE UNREVIEWED CLAIMS

Appellant's primary argument in this appeal is that the Bankruptcy Court erred in granting issue preclusive effect to Barton's fraud claim because California law does not grant collateral estoppel effect to a claim that the California Court of Appeal ("CCA") expressly declines to review when affirming a money judgment on an alternate basis. Because the CCA expressly refused to review Barton's fraud claim, the fraud claim lost collateral estoppel effect. Thus, the Bankruptcy Court erred in entering its Judgment of non-dischargeability under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).

Barton's primary argument in response is that, "the COA's unqualified affirmance of the Fraud Judgment compelled granting of summary judgment." Barton Responsive Brief on Appeal ("BB") at 6:10. Barton repeatedly argues that the CCA's affirmance of Barton's August 30, 2013 Judgment After Court Trial [AER 4:121 ("LASC Judgment")] imbues Barton's fraud claim with collateral estoppel effect even though the CCA expressly refused to review the fraud claim on

[1] Record references refer to Appellant's Appendix of Experts of Record on Appeal ("AER") by "Exhibit:Page".

appeal. AER 4:126, 143 ("Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition.") Barton argues that "appellate affirmance of a judgment is just that, an affirmance of the *entire* judgment." BB at 7:20. While Barton is correct that the CCA affirmed the entire judgment, save the emotion distress award, his argument misses the issue herein which is the loss of collateral estoppel effect for the unreviewed fraud claim.

In replying to Barton's brief, it is first necessary to call out Barton's manipulation of a crucial defined term in his brief in a transparent attempt to mischaracterize the record. This manipulation first appears on Barton's brief at page 2 line 5 whereat Barton deploys the defined term "State Court Fraud Judgment." This capitalized defined term is nowhere defined in Barton's brief, yet it appears seven (7) times therein.[2] Barton also uses the undefined yet capitalized term "Fraud Judgment" thirteen (13) times in his brief.[3]

Barton's twenty (20) uses of the terms "State Court Fraud Judgment" and "Fraud Judgment" mischaracterize the record because Barton's LASC Judgment is a money judgment establishing a liability of $4,070,081.91 premised independently on any one of four claims, not one claim. The LASC entered the LASC Judgment on claims of conversion, fraud, breach of fiduciary duty and unfair competition.[4] Barton's repeated use of the term "Fraud Judgment" is meant to mislead the Court into believing that the LASC Judgment was solely based on a fraud claim. This misleading characterization alerts the Court to the lack of credibility in Barton's arguments. The LASC Judgment is not a "Fraud Judgment" but a money judgment based on four claims.

---

[2] BB at 2:5, 6:3, 6:7, 7:12, 8:15, 8:16 and 15:11.
[3] BB at 5:24, 6:9, 7:11, 7:20, 8:19, 10:5, 10:8, 11:6, 12:1, 14:8, 15:1, 18:19 and 19:14.
[4] The LASC Judgment also included an emotional distress award for $100,000 that was reversed on appeal.

An accurate characterization defines the LASC Judgment as a *money judgment* for liability based any one of four causes of action; conversion, fraud, breach of fiduciary duty and unfair competition. When the CCA affirmed the LASC Judgment, it found that the conversion claim supported the "finding of liability" with substantial evidence and the CCA therefor did not need to "consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." AER 4:126, 143. The question thus becomes whether the unreviewed claims of fraud, breach of fiduciary duty and unfair competition carry collateral estoppel effect. They do not because the unreviewed claims were "not necessarily decided" and as a matter of public policy were denied appellate review for purposes of the collateral estoppel effect. Because the CCA determined that the single claim of conversion independently supports the entire liability contained in the LASC Judgment, the unreviewed claims carry no collateral estoppel effect.

Barton claims that Appellant's analysis of the impact of the CCA decision on the collateral estoppel effect of the unreviewed claims within the LASC Judgment is unsubstantiated "rhetoric" because the CCA's affirmance of the LASC Judgment supposedly affirmed all the claims underlying the LASC Judgment, even the unreviewed claims. But affirmance of the LASC Judgment for liability is not the relevant issue; ***whether the claim was reviewed on appeal*** is the critical issue for establishing collateral estoppel effect.[5]

[5] The only case cited by Barton to support his argument is the unpublished Gonzalez v. Beyer Pongratz & Rosen, 2010 WL 4849920 (Cal. Ct. App. 2010) ("Gonzalez"). BB 2:23. AER 14:376. Barton cites Gonzalez arguing that Appellant is "unsustainabl[y] parsing" the effect of the CCA decision. But Gonzalez is not a collateral estoppel case. Gonzalez involves a remitted case that returned to the same trial court after an appellate affirmance on one of several claims. On return, the plaintiff attempted to relitigate a claim not reviewed on appeal. The trial court rejected the attempt at relitigation and the CCA sanctioned the plaintiff for a frivolous second appeal when plaintiff asserted that the "inapposite" Zevnik case supported the attempt at relitigation. The Gonzalez case has nothing to do with collateral estoppel law and Barton's citation to the case herein is utterly inapt.

There is no legitimate argument that Zevnik, Newport and Butcher reflect the current state of California collateral estoppel law which eliminates the collateral estoppel effect for Barton's fraud claim once the CCA decided to not review the fraud claim on appeal. *See*, Zevnik v. Superior Court, 159 Cal. App. 4th 76, 79 (Cal. Ct. App. 2008) ("Zevnik"); Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club, 140 Cal. App. 4th 1120, 1132 (Cal. Ct. App. 2006) ("Newport"); Butcher v. Truck Ins. Exchange, 77 Cal. App. 4th 1442, 92 Cal. Rptr. 2d 521 (Cal. Ct. App. 2000) ("Butcher"); *see also*, People ex rel. Brown v. Tri-Union Seafoods, LLC, 171 Cal. App. 4th 1549, 1574 (Cal. Ct. App. 2009) (same).

Zevnik, agreeing with Newport and Butcher, holds that:

> In our view, after review by an appellate court, the final decision and the issues ***"necessarily decided" for purposes of collateral estoppel encompass only the grounds relied on by the appellate court***. Apart from the reasons cited above, we find support for this conclusion in consideration of the important role of appellate review in ensuring the reliability of a determination.

Zevnik, 159 Cal. App. 4th at 85 (emphasis added).

Newport confirms the merit of Appellant's argument herein:

> We believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second of Judgments, section 27.
>
> We therefore adopt the modern/Restatement Second rule and, agreeing with *Butcher*, hold that 'if a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, ***declining to consider the other, the second ground is no longer conclusively established***.' (*Butcher, supra*, 77 Cal. App. 4th at p. 1460.)

Newport, 140 Cal. App. 4th at 1130-1132 (emphasis added).

Barton's primary argument is an attempt to seize on the term "alternative grounds" in Newport to argue that Appellant did not establish that the LASC Judgment was, in fact, based on "alternative grounds." BB 8-9. This argument

cannot withstand the slightest scrutiny. Notwithstanding Barton's twenty (20) mischaracterizations of the LASC Judgment as a "Fraud Judgment," the LASC Judgment is a money judgment for a single liability premised on four (4) causes of action; conversion, fraud, breach of fiduciary duty and unfair competition. The CCA affirmed the LASC Judgment's ***liability*** based on substantial evidence of conversion and once determined, found that it was unnecessary to review the remaining three claims, including the fraud claim. It is undeniable that the four claims establishing the single liability in the LASC Judgment are "alternative grounds" because the LASC Judgment's liability was affirmed by the CCA only on the grounds of conversion, independently of consideration of the fraud, breach of fiduciary duty and unfair competition claims.

The concept of "alternative grounds" set forth in Zevnik, Newport and Butcher derives from the *Restatement of Judgments, Second* as follows:

> If the judgment of the court of first instance was based on a ***determination of two issues, either of which standing independently would be sufficient to support the result***, and ... the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination.

Restatement of Judgments, Second, § 27, Comment "o" (in relevant part; emphasis added).[6]

Thus, the concept of "alternative grounds" means that the judgment of the trial court in the first instance was based on a determination of more than one issue, *each of which standing independently supports the result*. The issue herein that Barton seeks to establish by issue preclusion is Debtor's purported fraud. The fraud claim within the LASC Judgment obviously stands independently of the conversion claim because the CCA affirmed the liability contained in the LASC Judgment without reviewing the fraud claim. As such, the LASC Judgment is based on

[6] A complete history of the development of collateral estoppel law in regard to alternative grounds is available at: Adam Siegler, Alternative Grounds in Collateral Estoppel, 17 Loy.LAL.Rev 1085 (1984).

"alternative grounds." The foregoing rebuttal to Barton's "no alternative grounds" obfuscation defeats arguments repeated throughout Barton's brief.

The analysis then turns to the issue of whether the Court is bound by the 150 year old collateral estoppel rule set forth in Skidmore adopted by DiRuzza. *See*, People v. Skidmore, 27 Cal. 287 (1865) ("Skidmore"); DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003) ("DiRuzza"). On this issue, Appellant cited the Ninth Circuit's Torrance National Bank decision as follows:

> This Court does not overlook that in some situations a federal court, in a diversity suit, may refuse to follow a state supreme court decision. It is not necessary that a case be expressly overruled in order to lose its persuasive force. *Cf. Mason v. American Emery Wheelworks*, 1 Cir., 1957, 241 F.2d 906. The law is in part an evolutionary process of judicial reasoning. If convinced that the California Supreme Court would no longer follow the case, then, under the *Erie Bendit Railroad Co. v. Tompkins* decision ..., this Court should apply the same standards which it believes the highest court of this State would use.

Torrance National Bank v. The Aetna Casualty & Surety Company, 251 F.2d 666, 669 n.5 (9th Cir. 1958) ("Torrance National Bank").

Barton fails to address Torrance National Bank and instead cites the Ninth Circuit's Lewis decision for the bromide that federal courts are bound by decisions of the state's highest court. *See*, Lewis v. Telephone Employees Credit Union, 87 F.3d 1537 (9th Cir. 1996). While true, the Lewis holding misses the issue presented. The issue herein is whether Skidmore is factually binding on the issue presented, and if so, whether the "evolutionary process of judicial reasoning" convinces this Court that the California Supreme Court would no longer follow Skidmore.

For all the reasons, cited in Zevnik, the evolutionary process of judicial reasoning confirms that Skidmore is not binding on the issue of whether an alternate ground supporting a judgment retains collateral estoppel effect after an appellate affirmance on a different independent alternate ground:

> *Skidmore* involved only res judicata, or claim preclusion. *Skidmore* did not discuss the requirements for collateral estoppel or conclude that the issues decided by the trial court were collateral estoppel.[8] In particular, *Skidmore* did not decide whether issues presented in the second action were actually litigated or necessarily decided in the first action. For these reasons and because *Skidmore* offered no compelling rationale applicable to collateral estoppel, we decline to extend the rule from *Skidmore* to collateral estoppel and express no opinion on its continuing validity.

Zevnik, 70 Cal.Rptr.3d at 826.

Zevnik's reasoning on the applicability of Skidmore to collateral estoppel cases gives the Court ample authority to not apply the Skidmore "old rule" (i.e., from the year 1865) to the case at bar. The only remaining question is whether the Bankruptcy Court erred in concluding that DiRuzza mandated application of Skidmore in this case. The *stare decisis* impact of DiRuzza on the issue at bar is the central issue in this appeal as it was the entire basis for the Bankruptcy Court's entry of the Judgment and Order. As explained herein, the Court is not bound by DiRuzza because DiRuzza did not consider the public policy factor that is mandatory to application of collateral estoppel.

The BAP has held in numerous cases that in addition to the five (5) standard factors necessary for issue preclusion to apply under California law, there is a sixth critical factor placing an additional limitation on issue preclusion: courts may give preclusive effect to a judgment "only if application of preclusion furthers the public policies underlying the doctrine." *See*, Plyam v. Precision Development, LLC (In re Plyam), 530 B.R. 456, 461-462 (9th Cir. BAP 2015). The "public policy" factor is nowhere analyzed within DiRuzza.

A word search of the DiRuzza case reveals the term "public policy" is not mentioned anywhere within the case. Thus, while DiRuzza may be binding on the issue of whether Skidmore dictates that an unreviewed appellate issue upon alternate ground affirmance is nonetheless "necessarily decided" for the collateral estoppel analysis, the case does not address whether California public policy

precludes application of collateral estoppel under these circumstances. As will be shown herein, California public policy does preclude application of collateral estoppel under these circumstances. Thus, *stare decisis* does not mandate that this Court follow DiRuzza blind to the impact of developments in California collateral estoppel law. *See*, Yarnall v. Martinez (In re Martinez), 418 B.R. 347 (9th Cir. BAP 2009) (BAP is not bound under *stare decisis* to follow Ninth Circuit holding "where it is merely a prelude to another legal issue that commands the panel's full attention").

Two current California Supreme Court decisions hold that the "opportunity for judicial review of adverse rulings" is a critical public policy interest weighing against application of collateral estoppel if such review is unavailable. *See*, Murray v. Alaska Airlines, Inc., 50 Cal.4th 860, 114 Cal.Rptr.3d 241, 237 P.3d 565 (2010) ("Murray"); *citing*, Rest.2d Judgments, § 28(1), p. 273 (issue preclusion will not apply if the party to be precluded could not, as a matter of law, obtain review); *and see*, Vandenberg v. Superior Court, 21 Cal.4th 815, 829, 88 Cal.Rptr.2d 366, 982 P.2d 229 (1999) (nonmutual collateral estoppel effect of private arbitration award inconsistent with California public policy due to third party's inability to obtain appellate review of award). This public policy interest is central to the rationale of the Zevnik decision:

> The opportunity for review of a decision is an important procedural protection against a potentially erroneous determination and is a factor to consider in determining whether collateral estoppel applies. [citations] Appellate review provides a degree of assurance that the issue was correctly decided and enhances the reliability of the determination. When an appellate court declines to review a particular ground for a trial court decision, the reliability of that ground is not enhanced and is left in the same condition as if there had been no opportunity for review. The principal reason for an appellate court to decline to review alternative grounds for a trial court decision is judicial economy, which is a justification that we would not impugn. ***With regard to ensuring the reliability of a determination, however, an appellate court's failure to review an alternative ground on***

> ***appeal has the same effect as the absence of an opportunity for review and, we believe, should result in no collateral estoppel as to that alternative ground.***
>
> Moreover, to accord collateral estoppel effect to alternative grounds relied on by the trial court after the appellate court affirmed on another ground and declined to review the alternative grounds would put pressure on appellate courts to review alternative grounds as a matter of course, in order to avoid the unintended consequence of establishing collateral estoppel on grounds that the appellate court did not review. This would dramatically increase the burden on appellate courts. Any benefit that might result from precluding the relitigation of issues in potential collateral litigation, which may or may not arise, would come at the cost of increasing the burden on the appellate court in the initial action. If an appellate court is aware of or anticipates collateral litigation and believes that to establish collateral estoppel on an alternative ground would be beneficial, the court may affirm the trial court judgment on more than one ground. (See Rest.2d Judgments, § 27, com. o, p. 263.)[5] The respondent on appeal may urge the court to do so. In our view, a blanket rule according collateral estoppel effect to each alternative and unreviewed ground for a trial court decision in these circumstances for the purpose of precluding relitigation of issues in collateral litigation is unnecessary and would be unwise.

Zevnik, 159 Cal. App. 4th at 85 (emphasis added); *see also*, In re Aberle, 533 B.R. 311 (Bankr. N.D. Cal. 2015) ("Murray decision indicates the opportunity for appellate review is important under California law").

When the CCA refused to consider Appellant's appeal of the Barton's fraud claim, Appellant was effectively denied appellate review on that issue. As a matter of public policy, the CCA's decision to decline review of Barton's fraud claim within the LASC judgment means that the reliability of that ground is not enhanced and is left in the same condition as if there had been no opportunity for review. The lack of opportunity for appellate review results in California public policy weighing against application of collateral estoppel in this case.

For these reasons, the Court should find that the Bankruptcy Court erred in finding that DiRuzza bound the Bankruptcy Court to enter its Judgment based on

the collateral estoppel effect of the LASC Judgment. The BAP is not bound under *stare decisis* to follow the Ninth Circuit's DiRuzza decision because DiRuzza did not address the public policy exception to application of collateral estoppel and it is therefore merely a "prelude to another legal issue that commands the Court's full attention in this case."

For all these reasons, Appellant prays for an order of this Court *reversing* the Judgment and remanding the matter for further proceedings.

II.

BARTON'S § 523(a)(2) CLAIM CANNOT BE ESTABLISHED BY COLLATERAL ESTOPPEL BECAUSE THE CCA EXPRESSLY REFUSED TO CONSIDER BARTON'S FRAUD CLAIM

The foregoing argument concerning the lack of collateral estoppel effect for Barton's fraud claim contained in the LASC Judgment is determinative of Barton's claim under § 523(a)(2)(A). Barton's theory for affirmance is clearly set forth on page 14 to 15 of his brief:

> Instead, Appellant relies on the debunked plea that the COA's Opinion's affirmance does not contain a detailed discussion of the fraud claim and so, therefore (the theory goes), the affirmed Judgment was really "affirmed in part and reversed in part." For all the reasons discussed above, and as *DiRuzza*, *Skidmore* and *Gonzalez* decisions above make clear, Appellant's parsing of the COA Opinion is wholly unsustainable and both legally and factually unsound.

BB at 14-15.

The foregoing responsive argument in Barton's brief completely mischaracterizes Appellant's argument. First, Appellant does not argue that the CCA opinion does not contained a "detailed discussion of the fraud claim." The issue is that the CCA opinion *expressly declined to review* the fraud claim. *See*, AER 4:133, 149 ("Because we conclude the trial court's finding of liability is supported by substantial evidence of conversion, we need not consider whether defendants were additionally liable under theories of fraud, breach of fiduciary duty

and unfair competition.") As explained above in detail, the lack of appellate review eliminates collateral estoppel effect.

Second, Appellant does not argue that the CCA opinion effectively "affirmed in part and reversed in part" the fraud claim within the LASC Judgment. There was no reversal, other than the emotional distress award. The money judgment was affirmed. But the CCA's decision to not review the fraud claim, because the conversion claim independently supported the liability contained in the LASC Judgment, eliminates collateral estoppel effect of the fraud claim.

Third, Appellant is not "parsing" anything. The CCA clearly, unequivocally and expressly did "not consider" the fraud claim. The CCA's decision to not review the fraud claim eliminates its collateral estoppel effect.

Finally, for all the reasons set forth in Section I above, the DiRuzza, Skidmore and Gonzalez decisions do not address the issue at bar. Skidmore is a *res judicata* case. DiRuzza does not address the public policy issue. The unpublished Gonzalez decision is utterly inapt.

Barton has no legitimate rebuttal to the argument that Zevnik, Newport and Butcher reflect the current state of California collateral estoppel law which eliminates collateral estoppel effect for Barton's fraud claim once the CCA decided to not review the fraud claim on appeal. The only argument in Barton's brief against application of these cases is that the "alternate grounds" concept does not apply to Barton's fraud claim. The fraud claim within the LASC Judgment obviously stands independently of the conversion claim because the CCA affirmed the liability contained in the LASC Judgment without reviewing the fraud claim. As such, the LASC Judgment is indisputably based on "alternative grounds."

For all these reasons, Appellant prays for an order of this Court *reversing* the Judgment and remanding the matter for further proceedings.

///

///

III.

BARTON'S § 523(a)(6) CLAIM CANNOT BE ESTABLISHED BY COLLATERAL ESTOPPEL BECAUSE THE CCA EXPRESSLY REFUSED TO CONSIDER BARTON'S FRAUD CLAIM

Appellant argues for reversal of the Judgment on the grounds that no claim other than Barton's conversion claim carries any preclusive effect because the CCA decision solely affirmed on the grounds of Barton's conversion claim. Because a conversion claim can, under certain circumstances become a non-dischargeable debt under 11 U.S.C. § 523(a)(6), the issue herein is whether the LASC Judgment as affirmed by the CCA establishes a non-dischargeable debt for willful and malicious injury under § 523(a)(6). It does not and the Judgment must therefore be reversed.

The appellate issue identified in Appellant's opening brief is whether the LASC Judgment as affirmed by the CCA establishes the "willfulness" element of a § 523(a)(6) claim by collateral estoppel. Willfulness under § 523(a)(6) requires a finding that Debtor acted *deliberately or intentionally to harm Barton*. Plyam, 530 B.R. at 465. Barton's brief confirms that the LASC Judgment as affirmed by the CCA contains no express finding that Appellant acted deliberately or intentionally to harm Barton.

Barton's brief solely relies on the LASC's fraud claim as establishing the willfulness element under § 523(a)(6). BB at 15-18. This is consistent with the Bankruptcy Court's error. The Bankruptcy Court's ruling on this element states:

> So I think ***the fraud finding itself can satisfy the willfulness requirement*** and also the malice requirement under the Bankruptcy Code for a finding of liability under 523(a)(6). And so on that basis, I'm going to grant summary judgment under 523(a)(6), so that is my ruling on that.

AER 18:440 (emphasis added).

As explained in Appellant's opening brief and herein, the fraud claim lost collateral estoppel effect when the CCA refused to consider it on appeal. *See, infra,* Section I. Barton's brief simply restates his arguments concerning the applicability of the DiRuzza, Skidmore and Gonzalez to the collateral estoppel analysis. For the same reasons that Barton is wrong on his § 523(a)(2) claim, his same arguments fail under § 523(a)(6). Zevnik, Newport and Butcher reflect the current state of California collateral estoppel law which eliminates collateral estoppel effect for Barton's fraud claim once the CCA decided to not review the fraud claim on appeal.

For the same reason, the CCA decision limits its affirmance of punitive damages solely to "malice and deceit" which is consistent with the CCA's overall refusal to consider Barton's fraud claim on appellate review. While the "malice" finding satisfies the "maliciousness" element of § 523(a)(6), the issue on appeal is whether the "deceit" finding satisfies the "willfulness" element. Appellant's brief walks through the analysis under Plyam to show how punitive damages based on "deceit" do not satisfy the element of willfulness under § 523(a)(6) by collateral estoppel because deceit as defined in California Civil Code § 1710(2) includes negligent misrepresentations ***which do not require an intent to defraud***. *See,* Small v. Fritz Companies, Inc., 30 Cal. 4th 167, 132 Cal. Rptr. 2d 490, 494 (2003). Barton's brief does not so much as mention this issue and utterly fails to rebut it.

The only cases Barton cites to address his shortfall on the willfulness element are Transamerica Comm. Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 1440 (9th Cir. 1991)("Littleton") which relied on Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440, 1443 (9th Cir. 1986)("Cecchini"). But Littleton and Cecchini predate the Supreme Court's Geiger decision in which the Supreme Court held that the willfulness element requires intent to cause the injury, "not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)("Geiger"). That is why the Ninth Circuit's Peklar decision holds that Geiger "necessarily limited" the

reach of the Cecchini decision. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037-1038 (9th Cir. 2001). Thus, Barton's fails in his attempt to blur the distinction between the willfulness and maliciousness elements by citing Littleton and Cecchini. Willfulness requires a finding that Debtor intended to harm Barton.

The Bankruptcy Court erred as a matter of law in ruling that "the fraud finding itself can satisfy the willfulness requirement and also the malice requirement under the Bankruptcy Code for a finding of liability under 523(a)(6)." The fraud claim in the LASC Judgment carries no collateral estoppel effect because it was not reviewed on appeal. Thus, the LASC's fraud determination cannot establish the willfulness element of a § 523(a)(6) claim.

For all these reasons, the Judgment should be *reversed*.

IV.

THE CONFLICT IN CALIFORNIA COLLATERAL ESTOPPEL LAW SUPPORT DIRECT REVIEW BY THE NINTH CIRCUIT

The Court need only reach Appellant's second issue on appeal if the Court finds that DiRuzza binds the Court to apply Skidmore as the final statement of California law on the issue of collateral estoppel as presented herein. If the Court determines that Zevnik, Newport and Butcher are applicable and that it is not bound by DiRuzza because the case does not address the public policy factor of the collateral estoppel analysis, then there is no conflict in the law presented. But if the Court finds itself bound to apply Skidmore as adopted by DiRuzza and must affirm the Bankruptcy Court Judgment on those grounds, then the Court should find that the Bankruptcy Court erred in refusing to certify the Judgment for direct review.

The conflict in the application of the law of California collateral estoppel between the Zevnik and DiRuzza cases is described in detail in the Shatz Article. *See*, Benjamin A. Shatz and Lara M. Krieger, Preclusion Rules Cause Conflict, Manatt Appellate Law, Vol. V Issue 8 (2015) ("Shatz Article") [AER 12:338]. Barton's brief adds no substance to the issue other than again citing the unpublished and inapplicable Gonzalez decision. *See*, *infra* at footnote 5.

If the Court finds that DiRuzza compels the conclusion that the LASC's fraud determination is collateral estoppel even though it was not reviewed on appeal, then the Court should *reverse* the Order and allow the case to be certified for direct appeal so the Ninth Circuit can address DiRuzza and revisit the development of California law on the issue as soon as possible.

For all these reasons, the Order should be *reversed*.

V.

CONCLUSION

For all these reasons, Appellant prays for an order of this Court *reversing* the Order and Judgment and remanding the matter for further proceedings.

Dated: August 1, 2016

Lewis R. Landau
Attorney-at-Law

By: */s/ Lewis R. Landau*
Lewis R. Landau
Attorney for Appellant

CERTIFICATION REQUIRED BY FRBP 8015(a)(7)(C)

The undersigned certifies that the foregoing brief complies with the type-volume limitation of FRBP 8015(a)(7)(C). According to the word count of the word-processing system used to prepare the brief, the brief contains 5,003 words.

Dated: August 1, 2016

/s/ Lewis R. Landau
Lewis R. Landau

DECLARATION OF SERVICE

I, Lewis R. Landau, the undersigned, do declare:

1. I am a citizen of the United States, over the age of eighteen (18) years and not a party to the within action.

2. On the 1st day of August, 2016, I served the following documents: **APPELLANT'S REPLY BRIEF** on the interested parties in this matter in the following manner:

3. **Service by Notice of Electronic Filing.** I declare that I served a true copy of the within document by causing a notice of electronic filing to be sent to the following parties:

Mr. Lewis R. Landau, Attorney
Patrick C McGarrigle

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 1ST DAY OF AUGUST, 2016, AT LOS ANGELES, CALIFORNIA.

/s/ Lewis R. Landau
Lewis R. Landau

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: ZAFAR DAVID KHAN Debtor	BAP No. CC-16-1076-TaFMc

ZAFAR DAVID KHAN Appellant	Bankr. No. 2:13-bk-19713-WB Adv. No. 2:13-ap-01752-WB Chapter 7
v.	
KENNETH BARTON Appellee	January 5, 2017

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for California Central - Los Angeles.

THIS CAUSE came on to be heard on the record from the above court.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is **AFFIRMED**.

FOR THE PANEL,

Susan M Spraul
Clerk of Court
By: Freddie Brown, Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No.	CC-16-1075-TaFMc
TERRANCE ALEXANDER TOMKOW,	Bk. No.	2:13-bk-19712-WB
Debtor.	Adv. No.	2:13-ap-01751-WB
TERRANCE ALEXANDER TOMKOW;		
Appellant,		
v.		
KENNETH BARTON,		
Appellee.		
In re:	BAP No.	CC-16-1076-TaFMc
ZAFAR DAVID KHAN,	Bk. No.	2:13-bk-19713-WB
Debtor.	Adv. No.	2:13-ap-01752-WB
ZAFAR DAVID KHAN,		
Appellant,		
v.	**MEMORANDUM***	
KENNETH BARTON,		
Appellee.		

Argued and Submitted on October 21, 2016
at Pasadena, California

Filed - January 5, 2017

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1(c)(2).

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Julia Wagner Brand, Bankruptcy Judge, Presiding

Appearances: Lewis R. Landau on behalf of appellants Terrance Alexander Tomkow and Zafar David Khan; Patrick C. McGarrigle of McFarrigle, Kenney & Zampiello, APD on behalf of appellee Kenneth Barton.

Before: TAYLOR, FARIS, and MCKITTRICK,** Bankruptcy Judges.

INTRODUCTION

Appellants[1] Terrance Tomkow and Zafar Khan appeal from two orders: (1) an order granting summary judgment in favor of Kenneth Barton determining that a California state court judgment against them was nondischargeable under § 523(a)(2)(A)[2] and (a)(6); and (2) an order denying their subsequent motion for direct appeal certification to the Ninth Circuit.

Binding Ninth Circuit authority controls our decision here; we AFFIRM the bankruptcy court's orders.

** The Hon. Peter C. McKittrick, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

[1] Appellants submitted two separate briefs on appeal. The briefs are identical, save for an additional paragraph in Tomkow's brief at page 19, lines 7-22.5 (and references to Appellant's name and record citation). As discussed in this memorandum, we conclude that the argument addressed in that paragraph lacks merit. We address both appeals in this memorandum. The BAP Clerk of Court is instructed to enter this disposition in both appeals.

[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All "Rule" references are to the Federal Rules of Bankruptcy Procedure. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

FACTS

During the late 1990s, Appellants and Barton co-founded start-up companies including RIL, which owned or controlled various patents relating to authentication and verification of emails and electronic payments. Barton later suffered a stroke and was sidelined from active involvement in the businesses. Afterward, his relationship with Appellants deteriorated to the point that he commenced state court litigation seeking unpaid compensation and reimbursement of expenses.

During that litigation, Barton discovered that Appellants had taken control of his 6,016,500 common stock shares in RIL and returned them to the company treasury, thereby divesting him of an equity interest in the company. In response, he commenced a second action against Appellants and RIL, among others, in California state court alleging causes of action including conversion and fraud.

The state court ruled in Barton's favor on both the conversion and fraud causes of action and against Appellants and RIL. It determined that Appellants had acted with malice, oppression, and fraud and, thus, that Barton was entitled to punitive damages. The state court then conducted a second phase of trial to quantify punitive damages.

Following the parties' submission of the punitive damages issue to the state court, Appellants each filed a chapter 13 petition.

In a revised statement of decision and ruling on punitive damages, the state court awarded Barton the value of his

converted stock in RIL.[3] It ultimately entered an amended judgment awarding Barton compensatory damages in the amount of $2,840,060, damages for emotional distress, and $880,021.91 in prejudgment interest. For punitive damages, the state court awarded $250,000 against Khan and $150,000 against Tomkow. In so doing, it found that Khan and Tomkow acted with malice, oppression, and fraud. Appellants appealed from the state court judgment to the California Court of Appeal.

In the meantime, Barton filed an adversary complaint against Appellants in the bankruptcy court, seeking a nondischargeability determination under § 523(a)(2)(A), (a)(4), and (a)(6) based on the state court judgment.

The California Court of Appeal subsequently affirmed the state court's determination of Appellants' liability based on conversion. But, because the determination of liability was supported by substantial evidence, it did "not consider whether [Appellants] were additionally liable under theories of fraud, breach of fiduciary duty and unfair competition." It affirmed the punitive damages award based on a finding of malice and deceit. The California Supreme Court denied Appellants' petition for review of the appellate court's decision. Thus, that decision is now final. In response, Barton moved for summary judgment on his nondischargeability complaint in the bankruptcy court.

---

[3] Based on stipulations between Barton and Appellants, the bankruptcy court entered orders granting stay relief to proceed in the state court action. See 2:13-bk-19713-WB, Dkt. Nos. 9, 16; 2:13-bk-19712-WB, Dkt. Nos. 9, 16.

Appellants opposed the motion. They asserted primarily that pursuant to Zevnik v. Superior Court, 159 Cal. App. 4th 76 (2008), where a trial court decided a case based on alternate grounds and the court of appeal affirmed on only one of those grounds, issue preclusion was available only on the ground affirmed by the appellate court. Appellants pointed out that the California Court of Appeal had affirmed the state court judgment only on Barton's conversion claim under California law; thus, they argued, the state court judgment was not entitled to issue preclusion based on the state court's ruling of fraud or breach of fiduciary duty in relation to the § 523(a)(2)(A) or (a)(4) claims. At best, Appellants contended, the state court judgment for conversion potentially supported a claim under § 523(a)(6). But, even then, they asserted, Barton barely addressed the conversion claim in his motion for summary judgment. And, they noted, conversion under California law did not establish a § 523(a)(6) claim conclusively. Appellants also argued that the punitive damages award on the conversion claim, to the extent affirmed on appeal, fell short of establishing a § 523(a)(6) claim. Finally, Tomkow argued that Barton neglected to address the fact that, with respect to the punitive damages award, there was a difference in liability between Khan and Tomkow; namely, the amount of damages assessed against Appellants reflected a difference in the level of culpability.

In response, Barton argued that binding Ninth Circuit precedent - DiRuzza v. County of Tehama, 323 F.3d 1147 (9th Cir. 2003) - established that the California Court of Appeal's affirmance of any ground contained in the state court judgment

implicitly ratified all of the trial court's reasoning in the judgment.

At the hearing, the bankruptcy court determined that the state court judgment was entitled to issue preclusive effect for the § 523(a)(2)(A) and (a)(6) claims and, thus, granted summary judgment in Barton's favor on them. It, however, denied the motion as to the § 523(a)(4) claim. In response, Appellants' counsel requested direct appeal certification to the Ninth Circuit. The bankruptcy court agreed that additional briefing and a hearing on Appellants' request were warranted.

The bankruptcy court then entered judgments determining that, with the exception of the damages award for emotional distress, the state court judgment was excepted from Appellants' discharges under § 523(a)(2)(A) and (a)(6). Appellants timely appealed.

Appellants made good on their request and filed a motion for direct appeal certification. They stated that the bankruptcy court "understandably rejected application of the Zevnik rule based on a Ninth Circuit decision [DiRuzza] predating Zevnik and that applied the 1865 California Supreme Court's Skidmore case." As a result of DiRuzza, they urged the bankruptcy court to certify the appeal directly to the Ninth Circuit under 28 U.S.C. § 158(d)(2)(A); they opined that the Ninth Circuit could and would then certify the question to the California Supreme Court.

Barton opposed the motion, and the bankruptcy court agreed with him. It concluded at a subsequent hearing that Appellants had not satisfied 28 U.S.C. § 152(d)'s requirements for direct

appeal certification. It believed that the law in the Ninth Circuit was clear and that there was no dispute requiring resolution among the California courts. The bankruptcy court noted that the Ninth Circuit had considered and rejected the Zevnik analysis in DiRuzza and that the California Supreme Court also had, but declined, the opportunity to revisit the issue.

The bankruptcy court subsequently entered an order denying Appellants' motion. Appellants amended their notice of appeal to include this order.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court erred in granting summary judgment in Barton's favor on his § 523(a)(2)(A) claim based on the issue preclusive effect of the fraud claim in the state court judgment, given that the California Court of Appeal affirmed that judgment on another ground.

2. Whether the bankruptcy court erred in granting summary judgment in Barton's favor on his § 523(a)(6) claim based on the issue preclusive effect of the state court judgment.

3. Whether the bankruptcy court erred in denying Appellants' motion for direct appeal certification to the Ninth Circuit.

STANDARDS OF REVIEW

We review de novo the bankruptcy court's decisions to grant summary judgment and to except a debt from discharge under

§ 523(a). See Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1221-22 (9th Cir. 2010); Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009); see also Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002) (nondischargeability presents mixed issues of law and fact and is reviewed de novo).

We also review de novo the bankruptcy court's determination that issue preclusion was available. Black v. Bonnie Springs Family Ltd. P'Ship (In re Black), 487 B.R. 202, 210 (9th Cir. BAP 2013). If issue preclusion was available, we then review the bankruptcy court's application of issue preclusion for an abuse of discretion. Id. A bankruptcy court abuses its discretion if it applies the wrong legal standard or misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in inferences that may be drawn from the facts in the record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

We may affirm the decision of the bankruptcy court on any basis supported by the record. See Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550, 554 (9th Cir. 2016).

DISCUSSION

A. Standards

Summary judgment. Summary judgment is appropriate where the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (applicable in adversary proceedings under

Rule 7056). The bankruptcy court must view the evidence in the light most favorable to the non-moving party when determining whether genuine disputes of material fact exist and whether the movant is entitled to judgment as a matter of law. See Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014). And, it must draw all justifiable inferences in favor of the non-moving party. See id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

Issue preclusion in a nondischargeability proceeding. The bankruptcy court may give issue preclusive effect to a state court judgment as the basis for excepting a debt from discharge. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). The party asserting preclusion bears the burden of establishing the threshold requirements. Id. This means providing "a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). Ultimately, "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect." Id.

We apply the forum state's law of issue preclusion when determining if issue preclusion is appropriate based on a state court judgment. In re Harmon, 250 F.3d at 1245. Here we must apply California law.

California issue preclusion. California permits application of issue preclusion to an existing judgment: (1) after final adjudication; (2) of an identical issue;

(3) actually litigated in the former proceeding; (4) necessarily decided in the former proceeding; and (5) asserted against a party in the former proceeding or someone in privity with a party. See DKN Holdings LLC v. Faerber, 61 Cal. 4th 813, 825 (2015). In addition, the court must determine that issue preclusion "furthers the public policies underlying the doctrine." In re Harmon, 250 F.3d at 1245 (citing Lucido v. Super. Ct., 51 Cal. 3d 335, 342–42 (1990)); see also Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 824-25 (9th Cir. BAP 2006).

B. Based on binding Ninth Circuit authority, the bankruptcy court appropriately gave issue preclusive effect to the fraud claim in the state court judgment; thus, it did not err in granting summary judgment in Barton's favor on his § 523(a)(2)(A)[4] claim.

Appellants focus the majority of their appellate arguments on one narrow issue: whether the bankruptcy court could give issue preclusive effect to the state court judgment's fraud determination, given that the California Court of Appeal did not review that aspect of the judgment on appeal. They acknowledge that under Ninth Circuit authority, DiRuzza, the entire judgment is subject to issue preclusion. They contend, however, that the law in California has developed in the past 15 years such that the Ninth Circuit's decision no longer correctly reflects California law.

Based on an early California Supreme Court case, DiRuzza adhered to the "general California rule" that, "even if the

---

[4] The elements for actual fraud under California law match those of § 523(a)(2)(A). See Tobin v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 203 (9th Cir. BAP 2001).

appellate court refrains from considering one of the grounds upon which the [trial court's] decision . . . rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect." 323 F.3d at 1156. We acknowledge that subsequent California Courts of Appeal decisions have disagreed with DiRuzza and make compelling arguments in support of their position to the contrary. That said, DiRuzza remains controlling precedent in our circuit. Consequently, we conclude that issue preclusion was available and that the bankruptcy court did not abuse its discretion in giving preclusive effect to the fraud determination in the state court judgment.

1. The general California (or traditional) rule.

At the outset, we note that an unpublished federal district court case - Flying J, Inc. v. Pistacchio, 2008 WL 906396, at *33-43 (E.D. Cal. Mar. 31, 2008), aff'd, 351 F. App'x 236 (9th Cir. 2009) - provides a highly detailed overview of the pertinent cases, including DiRuzza, People v. Skidmore, 27 Cal. 287 (1865), and the three California Courts of Appeal cases that Appellants contend have changed the legal landscape in California: Zevnik, 159 Cal. App. 4th 76; Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club, 140 Cal. App. 4th 1120 (2006); and Butcher v. Truck Insurance Exchange, 77 Cal. App. 4th 1442 (2000).

A brief description of these cases as they relate to the general California rule follows.

DiRuzza. The Ninth Circuit examined whether issues decided by a California trial court and crucial to its decision were

entitled to preclusive effect after the court of appeal affirmed on different grounds. 323 F.3d at 1153. The Ninth Circuit acknowledged that California case law addressing the issue was sparse but that Skidmore, a venerable California Supreme Court case, "support[ed] the conclusion that an appellate court's affirmance for any reason implicitly ratifie[d] all reasoning given in the court below." Id. In doing so, it noted that "a nebulous exception to the rule and a recent California appellate decision [Butcher] cut against the timeworn precedent and may counsel in favor of more selective application of collateral estoppel principles." Id. It concluded, however, that Skidmore was controlling because the California Supreme Court had not "undermin[ed] the authority of its early holding" and notwithstanding Butcher's analysis. Id.

Skidmore. As explained in DiRuzza, Skidmore involved a judgment in favor of defendant. On initial appeal, the California Supreme Court "affirmed the judgment, but relied upon a procedural issue—misjoinder[—]in reaching its decision." This issue was corrected and the case made its way to the court a second time, for a determination as to whether the plaintiff could pursue the action again. "The court determined that, regardless of its previous opinion's reliance on the misjoinder issue, the . . . [underlying recommendation] report and resulting judgment, which reached the merits of the case, had been affirmed by the judgment accompanying [its] previous opinion." Id. at 1154. Thus, the California Supreme Court determined, the plaintiff was precluded from bringing the action a second time, "as the merits of the case had already been

adjudicated . . . ." Id. The Ninth Circuit quoted the following language from Skidmore:

> The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression.

Id. at 1154-55 (quoting 27 Cal. at 292-93).

Subsequent courts have referred to this rule as the general California rule, the Skidmore rule, or the traditional rule.

Skidmore's "progeny." Following Skidmore, two decisions were issued that bear mention based on subsequent case law discussion: Bank of America National Trust & Savings Association v. McLaughlin Land & Livestock Co. ("McLaughlin"), 40 Cal. App. 2d 620 (1940), and Natural Soda Products Co. v. City of Los Angeles, 109 Cal. App. 2d 440 (1952).

As noted by Flying J, 2008 WL 906396 at *35, McLaughlin reached the same conclusion as Skidmore, although it did not refer to Skidmore. Instead, McLaughlin relied on a rule expounded in the Corpus Juris Secundum ("CJS"), providing that "[a] general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action and passed upon by the court below, although the appellate court does not consider or decide upon all of them." 40 Cal. App. 2d at 628-29 (quoting 34 C.J. 773). Thus, the McLaughlin panel determined that, where the ruling of the district court (sitting as the bankruptcy court) was predicated

on two alternate grounds and the Ninth Circuit affirmed the decision on the first ground, the district court's entire decision was entitled to preclusive effect. Id. at 629.

Natural Soda reiterated the general rule delineated by Skidmore and McLaughlin. In doing so, however, it stated that "the rule [was] not without exceptions, and where a finding [was] unnecessary and immaterial the rule of collateral estoppel [did] not operate." 109 Cal. App. 2d at 446.

As the Ninth Circuit in DiRuzza observed, "[a]fter Natural Soda, all was generally quiet on the [issue preclusion] front in the courts of California for almost fifty years." 323 F.3d at 1156. Enter Butcher.

The trilogy of recent California Courts of Appeal cases and the "modern" rule.

Butcher. As noted by DiRuzza, 323 F.3d at 1156, Butcher made no reference to Skidmore at all. There, a panel of the Second District Court of Appeal examined the preclusive effect of a federal court judgment based on diversity jurisdiction in an insurance coverage action. It noted that there were two lines of cases: (1) cases following "the rule that the appellate court in the prior action determines the preclusive effect of its judgment, i.e., the judgment [was] conclusive on the [] ground" affirmed by the appellate court, as reflected in Moran Towing & T. Co. v. Navigazione Libera Triestina, S.A., 92 F.2d 37 (2d Cir. 1937), and the Restatement (Second) of Judgments; and (2) cases holding "that it [was] the judgment of the trial court, which [was] affirmed, that governs the preclusive effect, i.e., the judgment [was] conclusive on both grounds," as

reflected in McLaughlin. 77 Cal. App. 4th at 1456.

The first line of cases relies heavily on the Restatement (Second) of Judgments § 27[5] and embodies the "modern" approach approved of by the three California Courts of Appeal decisions. The Butcher panel observed that the rule cited by the McLaughlin panel, based on the CJS, was subsequently abandoned in favor of the rule followed by the Second Restatement. It, thus, "conclude[d] [that] the reasoning of the McLaughlin court has not withstood the test of time, and it would be unwise to follow a rule that looks only to the judgments, without taking account of the reasons for those judgments as stated in the appellate courts' opinions." Id. at 1460.

The Ninth Circuit, in DiRuzza, concluded that while

> Butcher advance[d] plausible arguments against the general California rule, . . . it [came] from an intermediate appellate court which failed to acknowledge that the California Supreme Court, in Skidmore, had addressed the subject. Until we receive a definitive indication that Skidmore no longer represents the law of California, we will adhere to that case's precepts.

323 F.3d at 1156. The Ninth Circuit, thus, rejected the Butcher panel's analysis.

Newport Beach Country Club. Newport Beach, decided by a panel of the Fourth District Court of Appeal, was issued three years after DiRuzza. The Newport Beach panel held that, where

---

[5] The Restatement (Second) of Judgments § 27 comment o (1982) provides that when "a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties."

"a trial court judgment decide[d] a case on two alternate grounds, and the appellate court affirm[ed] based on one ground, the judgment [was] binding under principles of res judicata and collateral estoppel only on the ground addressed by the appellate court." 140 Cal. App. 4th at 1123. The Newport Beach panel, thus, "decline[d] to follow [Skidmore] because subsequent developments in California law and the trend of decisions ha[d] weakened that case's authority to the point where [it could] conclude it no longer reflect[ed] the views of the California Supreme Court." Id.

After examining Skidmore, McLaughlin, DiRuzza, Butcher, Moran Towing, and the Second Restatement, the Newport Beach panel expressly rejected what it referred to as the "traditional" Skidmore rule in favor of the "modern" rule established in the Second Restatement. It agreed with Butcher's observation that Skidmore "ha[d] not withstood the test of time." 140 Cal. App. 4th at 1130. Although Skidmore was a California Supreme Court case, the Newport Beach panel did not believe it controlled for several reasons. First, it stated that since Skidmore was decided, "the law of res judicata ha[d] undergone tremendous change culminating in the Restatement Second of Judgments." Id. at 1131. And it noted that "[t]he California Supreme Court ha[d] expressed approval of . . . [and] cited approvingly to section 27 and the comments to it." Second, it stated that the Skidmore rule was inconsistent with its duty as an appellate court under the California state constitution, which required that it "set forth its decisions in writing 'with the reasons stated.'" Id. at 1132. It concluded

with its belief that if the California Supreme Court were presented with the issue again, it would adopt the modern rule as expressed in the Second Restatement. Id.

Zevnik. In the most recent case, a panel in another division of the Second District Court of Appeal agreed with Newport Beach and Butcher, concluding "that the governing rule of law [was] that if a trial court relie[d] on alternative grounds to support its decision and an appellate court affirm[ed] the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court [could] establish collateral estoppel." 159 Cal. App. 4th at 79. In doing so, it also examined the cadre of cases discussed above.

In a departure from Newport Beach, however, the Zevnik panel concluded that it "need not decide whether Skidmore retain[ed] viability because [it] read the opinion narrowly to apply only to res judicata, not collateral estoppel." Id. at 88.

2. Analysis.

Against this extensive backdrop of case law, we conclude, as did the bankruptcy court, that DiRuzza remains good law and thus binds the Panel. Although Appellants make compelling arguments based on recent cases by panels of the California Courts of Appeal, we cannot turn a blind eye to binding precedent from the Ninth Circuit. Nor is this a situation where the Ninth Circuit's reasoning or theory in DiRuzza is clearly irreconcilable with a decision of the California Supreme Court, the only intervening higher authority on a matter of California

state law. See Rodriguez v. AT & T Mobility Servs. LLC, 728 F.3d 975, 979 (9th Cir. 2013) ("[T]he relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable. But it is not enough for there to be some tension between the intervening higher authority and the prior circuit precedent.") (internal quotation marks and citation omitted); Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

Here, the California Supreme Court has neither overruled Skidmore nor adopted the modern rule announced in Butcher, Newport Beach, and Zevnik. In the absence of a decision by the California Supreme Court contrary to the Skidmore rule, we remain bound by DiRuzza.[6] In Flying J, the district court

---

[6] Some justices of the California Courts of Appeal no longer follow Skidmore. As stated, we are bound by Ninth Circuit authority; thus, we, without question, follow DiRuzza and, as a result, Skidmore.

The Appellants, no doubt, will urge the Ninth Circuit to directly certify this question for review by the California Supreme Court or to reconsider DiRuzza en banc. We acknowledge that the Ninth Circuit implicitly rejected such a request in Flying J. In anticipation of such a renewed request, however, we note our concerns as bankruptcy judges.

Decisions regarding dischargeability are weighty ones. The failure to discharge a debt may leave a debtor incapable of a normal future financial life. And bankruptcy courts frequently consider the issue preclusive effect of California judgments in determining whether a debtor can discharge a debt.

In cases involving California judgments that have gone through appeal, the bankruptcy courts need certainty regarding the law we must apply; DiRuzza currently supplies this certainty.

Given the impact of our dischargeability decisions,

(continued...)

arrived at the same conclusion, stating that:

> Because the California Supreme Court's decision in Skidmore and the Ninth Circuit's decision in DiRuzza are binding law of the state and Ninth Circuit, respectively, and a federal trial court does not have the authority to change the state law of California even if a Supreme Court decision is criticized and not followed by more recent intermediate California appellate decisions, see Butcher, Newport Beach, and Zevnik, the rule of Skidmore applies.

2008 WL 906396, at *41. We note that the Ninth Circuit affirmed the district court in Flying J in 2009, although its memorandum decision does not refer to the DiRuzza/Skidmore issue. See 351 F. App'x 236.

We also recognize certain limitations in the precedential

---

[6](...continued)
however, we also should know the assumptions of the California Court of Appeal panel reviewing a California judgment. In order to do justice, we need to know either that the panel jurists assume that issues they do not decide will have preclusive effect, as is the rule articulated in Skidmore, or that the panel jurists assume that issues not decided are not entitled to preclusive effect in other proceedings. Given the current state of law, we do not have complete certainty that our interpretation of a specific California Court of Appeal decision is consistent with the interpretation of the jurists who decided the matter on appeal. We do not know whether a failure to address a claim means that the panel agreed that the state court below correctly decided the issue or whether the panel detected error but did not raise it given that the judgment could be affirmed on another basis. In situations where only an issue **not** decided on appeal subsequently supports a nondischargeable judgment, as may be the case here, the current disconnect between Skidmore and certain jurists of the California Courts of Appeal may lead to inequitable results.

We acknowledge that this is a problem that neither the Ninth Circuit nor the BAP nor the trial courts can solve in any absolute sense. It apparently will require that the California Supreme Court either reiterate its holding in Skidmore or state that it is no longer the law.

value of decisions of the California Courts of Appeal. For example, the judges of the Courts of Appeal – divided into six geographical districts – are not bound by decisions of either sister districts or even panels within the same district. See Froyd v. Cook, 681 F. Supp. 669, 673 n.9 (E.D. Cal. 1988) (collecting cases). And it is well established that "[d]ecisions of every division of the District Courts of Appeal are binding . . . upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court." Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara Cty., 57 Cal. 2d 450, 455 (1962). That said, where California Courts of Appeal decisions conflict, the superior court "can and must make a choice between the conflicting decisions." Id. at 456.

Here, Butcher, Newport Beach, and Zevnik theoretically bind the California trial courts, but the trial courts clearly remain bound by Skidmore. See Auto Equity Sales, Inc., 57 Cal. 2d at 455 ("The decisions of [the California Supreme] [C]ourt are binding upon and must be followed by all the state courts of California."). Further, the precedential value of Court of Appeal decisions do not extend to another panel within the same appellate district, let alone to another appellate district in California. As the case law reflects, appellate panels in the Second and Fourth District Courts of Appeal did not follow Skidmore; it remains to be seen whether other panels of the

California Courts of Appeal will follow suit.[7]

Appellants do not argue that the other elements of California issue preclusion were not satisfied as to Barton's § 523(a)(2)(A) claim. On this record, we conclude that issue preclusion was available with respect to the fraud claim based on the state court judgment and that the bankruptcy court did not abuse its discretion in applying issue preclusion to the state court judgment. As that left no genuine dispute of material fact for the bankruptcy court to adjudicate, it did not err in granting summary judgment in Barton's favor on his § 523(a)(2)(A) claim.

C. The bankruptcy court properly granted summary judgment on Barton's § 523(a)(6) claim.

Section 523(a)(6) excepts from discharge debts arising from a debtor's "willful and malicious" injury to another person or to the property of another. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). The "willful" and "malicious" requirements are conjunctive and subject to separate analysis. Id.; In re Su, 290 F.3d at 1146-47.

A "malicious" injury requires: "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and

---

[7] For example, in People ex rel. Brown v. Tri Union Seafoods, LLC, 171 Cal. App. 4th 1549, 1574 (2009), one panel in the First District Court of Appeal appears to approve the position advanced by Newport Beach. In an unpublished case, however, another panel in the First District Court of Appeal distinguished Newport Beach. See Borrette Lane Estates, LLC v. Warren, 2010 WL 292754, at *5 & n.4 (Cal. Ct. App. Jan. 26, 2010).

(4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001).

The willful injury requirement speaks to the state of mind necessary for nondischargeability. An exacting requirement, it is satisfied when a debtor harbors "either a subjective intent to harm, or a subjective belief that harm is substantially certain." In re Su, 290 F.3d at 1144; see also In re Jercich, 238 F.3d at 1208. The injury must be deliberate or intentional, "not merely a deliberate or intentional **act** that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis in original). Thus, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64. Under California law, an award of punitive damages under California Civil Code ("CC") § 3294 requires a finding of fraud, malice, or oppression. Only fraud and one aspect of malice, as that term is defined for the purposes of the California punitive damages statute, satisfy the willful injury requirement of § 523(a)(6). Plyam v. Precision Development, LLC (In re Plyam), 530 B.R. 456 (9th Cir. BAP 2015).

Appellants contend that the bankruptcy court erred in determining that the fraud finding in the punitive damages award of the state court judgment established the willful and malicious injury requirements necessary for nondischargeability under § 523(a)(6). More specifically, they contend that the bankruptcy court erred because the California Court of Appeal "did not carry the [state court judgment's] conjunctive findings [of fraud, malice, and oppression] forward into its [d]ecision."

Instead, the Court of Appeal's decision "affirmed the award of punitive damages based solely on the finding of there being substantial evidence of 'malice and deceit' with no reference to fraud." Under Plyam, Appellants contend that "malice" by itself in a punitive damages award under CC § 3294 does not, without an accompanying finding of "intentional malice," establish the willful injury requirement under § 523(a)(6). They similarly argue that under California law, "deceit" may include negligent misrepresentation, which does not require an intent to defraud.

Issue preclusion was available. First, the state court's ruling on conversion and punitive damages satisfied § 523(a)(6)'s requirement of an underlying tort and "malicious" injury. And there is no dispute that this aspect of the state court judgment was affirmed by the California Court of Appeal. Conversion under California law does not per se establish the necessary state of mind for § 523(a)(6) nondischargeability because intent is not a necessary element. But there is no question that it establishes a tort that can support a § 523(a)(6) nondischargeability claim and a wrongful act that necessarily causes injury as required for a finding of § 523(a)(6) malicious injury. And there is also no question that the acts of conversion were intentional and without just cause or excuse. The California Court of Appeal as well as the trial court made clear findings that Tomkow and Khan harmed Barton intentionally, with malice, and through deceit. On this record, then, § 523(a)(6) malice was established through specific findings at both the trial court and appellate court level.

Second, given the foregoing discussion of DiRuzza and Skidmore, we similarly conclude that the bankruptcy court appropriately gave issue preclusive effect to the state court's punitive damages award, which was based on findings of fraud, malice, and oppression; this satisfies § 523(a)(6)'s willfulness requirement.

The trickier issue is one we need not decide: whether, if issue preclusion is based only on the appellate court's affirming the conversion determination (i.e., the modern trend), rather than the entirety of the trial court's decision (i.e., Skidmore), a **willful** injury is established. The California Court of Appeal's decision gives us pause in two respects. First, a determination of conversion, even if intentional, does not necessarily establish an intent to injure or a substantial certainty that injury will occur. Thus, the California Court of Appeal's decision, in isolation, may not establish § 523(a)(6) willfulness. Second, the Court of Appeal limited its affirmance of the punitive damages award to "malice" and "deceit," which could differ in substance from the trial court's finding of fraud, malice, and oppression for the purposes of CC § 3294.

We acknowledge that the labels used by the California Court of Appeal may not be sufficient for a § 523(a)(6) willfulness determination. Given the extensive comment that underscores these conclusions, however, this is a close call. As we acknowledge, we must draw all justifiable inferences in favor of the Appellants. Accordingly, we decline to affirm on this basis. Instead, we affirm because binding Ninth Circuit authority, as the bankruptcy court recognized, compels this

result notwithstanding any limitations in the basis for affirmance. Thus, the bankruptcy court appropriately gave issue preclusive effect to the punitive damages award, and it did not err in granting summary judgment in Barton's favor on his § 523(a)(6) claim.

D. Even though lesser punitive damages were assessed against him, Tomkow was equally complicit in willfully injuring Arnold.

Tomkow alleges that both the California state court and the Court of Appeal recognized that his conduct was less egregious than that of Khan's for purposes of the punitive damages award. He contends that they found that he was complicit in the conversion and, thus, that his liability was imputed based on Khan's acts. Tomkow asserts that a subjective state of mind cannot be imputed for the purposes of § 523(a)(6).

Tomkow's argument is unavailing. First, the Ninth Circuit has imputed the knowledge and intent of a business partner to a debtor for the purposes of § 523(a)(6). See Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440 (9th Cir. 1986). As this Panel has recognized, however, that decision predates the United States Supreme Court's decision in Geiger and, thus, "the continued efficacy of Cecchini as precedent on related questions is compromised." See Cal. Capital Ins. Co. v. Riley (In re Riley), BAP No. CC-15-1379-TaLKi, 2016 WL 3351397, at *7 (9th Cir. BAP June 8, 2016).

Second, the California state court and Court of Appeal determined that both Khan and Tomkow engaged in conversion. In its initial statement of decision, the state court found:

Tomkow and Khan determined that Barton was making

> little or no contributions to the success of [RIL]. Tomkow provided the idea and technical savvy and Khan proved to be a skilled fundraiser to keep the company afloat. What was Barton's role they wondered, and if indeed he was not even providing legal counsel, why should he continue as a shareholder of [RIL]? . . . The manner by which Khan and Tomkow attempted to separate him from that ownership gives rise to a proper claim for punitive damages.

The state court made no distinction between Khan and Tomkow. True, in its revised decision, the state court found that Tomkow's conduct was less onerous and that he was "complicit in the conversion of [Barton's] shares." That said, the finding does not impact or negate the state court's prior finding of intent.

The California Court of Appeal then reaffirmed that "Barton's harm resulted from Kahn **and** Tomkow's malice and deceit, not mere accident." (Emphasis added.) That Tomkow's conduct was less egregious than Khan's is reflected in the reduced amount of punitive damages assessed individually against Tomkow. This distinction, however, does not change the analysis of the § 523(a)(6) willful injury requirement.

E. The bankruptcy court did not err in denying Appellants' motion for direct appeal certification.

Appellants also contend that the bankruptcy court erred by denying their application for direct appeal certification to the Ninth Circuit pursuant to Rule 8006 and 28 U.S.C. § 158(d)(2)(A)(i)-(iii). They urge us to reverse the bankruptcy court's ruling.

Although the case law on this issue is sparse, it does not appear that a denial of an application for direct appeal certification under Rule 8006 and 28 U.S.C.

§ 158(d)(2)(A)(i)-(iii) is a final order. For example, denial of a 28 U.S.C. § 1292(b) certification is not appealable. See May v. Warner Amex Cable Commc'ns, 871 F.2d 1088 (6th Cir. 1989) (table); see also McCall v. Deeds, 849 F.2d 1259 (9th Cir. 1988) (denial of Civil Rule 54(b) certification is not appealable); Mem'l Hosp. for McHenry Cty. v. Shadur, 664 F.2d 1058 (7th Cir. 1981) (court of appeals reviewed matter by petition for writ of mandamus after denial of 28 U.S.C. § 1292(b) certification).

Even if such an order is final and subject to review when joined with the final decision on summary judgment, for the reasons discussed above, we conclude that the bankruptcy court did not err in denying the application. As stated, the bankruptcy court correctly determined that it was bound by DiRuzza and Skidmore. As a result, whether it believed that the matter was of public importance or required resolution of conflicting decisions is irrelevant. Finally, even if the bankruptcy court erred in denying Appellants' application – something that we do not determine – Appellants now have a direct path of appeal to the Ninth Circuit without the need for a Rule 8006 certification. Reversing the bankruptcy court on this point would be impractical and a waste of judicial resources.

CONCLUSION

Based on the foregoing, we AFFIRM.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ZAFAR DAVID KHAN, *Debtor*, *Zafar David Khan*, *Appellant*, v. KENNETH BARTON; THOMAS BURKE; NANCY K. CURRY, Chapter 13 Trustee, *Appellees.*	No. 15-60002 BAP No. 14-1021

IN RE TERRANCE ALEXANDER TOMKOW, *Debtor*, TERRANCE ALEXANDER TOMKOW, *Appellant*, v. KENNETH BARTON, *Appellee.*	No. 15-60003 BAP No. 14-1060

IN RE TERRANCE ALEXANDER TOMKOW, *Debtor*, TERRANCE ALEXANDER TOMKOW, *Appellant*, v. KENNETH BARTON, *Appellee*.	No. 15-60004 BAP No. 14-1020
IN RE ZAFAR DAVID KHAN, *Debtor*, ZAFAR DAVID KHAN, *Appellant*, v. KENNETH BARTON, *Appellee*.	No. 15-60005 BAP No. 14-1041

IN RE TERRANCE ALEXANDER TOMKOW, *Debtor*, TERRANCE ALEXANDER TOMKOW, *Appellant*, v. KENNETH BARTON, *Appellee.*	No. 15-60006 BAP No. 14-1061
IN RE ZAFAR DAVID KHAN, *Debtor*, ZAFAR DAVID KHAN, *Appellant*, v. KENNETH BARTON, *Appellee.*	No. 15-60007 BAP No. 14-1062 OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Taylor, Dunn, and Kirscher, Bankruptcy Judges, Presiding

Argued and Submitted November 9, 2016
Pasadena, California

Filed January 23, 2017

Before: Diarmuid F. O'Scannlain, Ferdinand F. Fernandez, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Fernandez;
Partial Concurrence and Partial Dissent by
Judge Rawlinson

SUMMARY*

Bankruptcy

On appeal from the Bankruptcy Appellate Panel, the panel affirmed (1) the bankruptcy court's decision that a creditor's claims were not subordinated and (2) the bankruptcy court's conversion of the debtors' Chapter 13 bankruptcy proceedings to Chapter 7 proceedings.

11 U.S.C. § 510(b) requires that claims for damages arising from the purchase or sale of a security of the debtor or an affiliate of the debtor be subordinated to certain other claims or interests. Disagreeing with the BAP, and following *Liquidating Tr. Comm. of the Del Biaggio Liquidating Tr. v. Freeman (In re Del Biaggio)*, 834 F.3d 1003 (9th Cir. 2016), the panel held that § 510(b) applies when debtors are individuals. Nevertheless, the panel agreed with the bankruptcy court that the creditor's claims did not arise out of a purchase or sale of securities, but rather were based upon a

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

judgment entered against the debtors on account of their actions in fraudulently converting the creditor's stock.

The panel held that the bankruptcy court did not clearly err when it found bad faith and did not abuse its discretion when it converted the debtors' Chapter 13 proceedings to Chapter 7 proceedings.

Concurring in part, Judge Rawlinson agreed with the majority that the bankruptcy court acted within its discretion when it converted the proceedings from Chapter 13 to Chapter 7. She also joined the majority's conclusion that 11 U.S.C. § 510(b) applies to debtors who are individuals. Judge Rawlinson dissented from the conclusion of the majority that § 510(b) was inapplicable because the creditor's claims did not arise from a purchase or sale of securities.

COUNSEL

Lewis R. Landau (argued), Calabasas, California, for Appellants.

Patrick C. McGarrigle (argued) and Michael J. Kenney, McGarrigle Kenney & Zampiello APC, Chatsworth, California, for Appellees.

OPINION

FERNANDEZ, Circuit Judge:

Zafar David Khan and Terrance Alexander Tomkow (collectively "Debtors") appeal the judgment[1] of the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"), which affirmed the decision of the bankruptcy court that the claim of Kenneth Barton was not subordinated pursuant to the provisions of 11 U.S.C. § 510(b),[2] and converted[3] the Debtors' Chapter 13 bankruptcy proceedings[4] to Chapter 7 proceedings.[5] We affirm the decision of the bankruptcy court.

BACKGROUND

In 2013, Barton obtained a Superior Court of the State of California ("Superior Court") judgment against the Debtors and RPost International, Ltd. ("RIL") for conversion, fraud, breach of fiduciary duty, and violation of California Business and Professions Code Section 17200, based upon Barton's allegations that the Debtors fraudulently converted his 6,016,500 shares of common stock in RIL.

---

[1] *Khan v. Barton, (In re Khan)* ("*Khan I*"), 523 B.R. 175, 178 (B.A.P. 9th Cir. 2014).

[2] Hereafter all references to section numbers are to sections of Title 11 of the United States Code, unless otherwise indicated.

[3] *See* § 1307(c).

[4] §§ 1301–1330.

[5] §§ 701–784.

The Superior Court found that after Barton and the Debtors founded RIL, they each received an initial distribution of RIL stock in 2001. The consideration for the stock "was stated to be unreimbursed expenses and compensation."

After suffering a stroke, Barton took leave from RIL. Thereafter, the Debtors cancelled Barton's shares of stock and returned them to the RIL treasury in June or July of 2009. The Superior Court held that the Debtors fraudulently converted Barton's stock in 2009 and determined that they had forged corporate resolutions in an attempt to support their fraud and either "misplaced or destroyed" the shareholder registry, which was "the best evidence of the issuance of [the] stock." The Superior Court then ruled that Barton should recover damages and that his 6,016,500 shares should be reinstated. After further hearings, the Superior Court determined Barton should, instead, receive the value of the converted stock. Therefore, it fixed damages for the conversion at $3,850,560, based upon the value of the RIL stock as of June 30, 2009, the date of conversion, which was $0.64 per share. After adjustments, a judgment including $3,840,060 for the converted shares was entered in Barton's favor.

A few days before the Superior Court intended to determine the value of the RIL stock for the award of compensatory and punitive damages, each of the Debtors had separately filed a Chapter 13 petition for bankruptcy. At the § 341 (creditors meeting) hearing, the Debtors did not give meaningful information regarding their companies' business transactions, stock valuation, and settlements. And, in their Chapter 13 Schedules, they each reported their RIL stock as having a $0 value and listed Barton's conversion judgment as

having a value of only $100,000 with a "[remainder] unliquidated; pending [the Superior Court] proceedings." Neither Debtor filed amended schedules or an amended Plan that included the full value of the judgment after it was rendered.

Barton filed a proof of claim in each case and the Debtors objected. They argued that the claims should be mandatorily subordinated under § 510(b), which, they said, would render the claim unenforceable and subject to disallowance under § 502(b)(1). The Debtors also filed separate actions for mandatory subordination and disallowance on the same grounds as those alleged in their objections. The bankruptcy court dismissed the separate actions after the parties litigated the claim objections to resolution because the same result would apply to those actions.

Barton had filed separate motions to convert each case to Chapter 7, arguing that the Debtors acted in bad faith, which was cause to convert under § 1307(c).

After a hearing, the bankruptcy court ruled on the Debtors' claim objections based on subordination and disallowance and on Barton's motions to convert. It held that Barton's claims were not subject to subordination because they were not "for damages arising from the purchase or sale of . . . a security." § 510(b). Rather, the bankruptcy court determined that Barton's claims were based upon the Superior Court judgment for fraud and conversion. The bankruptcy court did not specifically address the disallowance issue, but did dismiss the Debtors' separate objections related to that issue. Finally, the court granted Barton's motions to convert. As to each of the Debtors, it found that "the timing of the filing was intended to defeat the

state court action . . . [because] it was likely that there was going to be an award of damages that would have put these Debtors outside a Chapter 13." It also found that the Debtors manipulated the bankruptcy process and concealed assets. The Debtors then appealed to the BAP.

The BAP affirmed the bankruptcy court's subordination determination, but on different grounds. It determined that § 510(b) did not "apply in an individual debtor case." *Khan I*, 523 B.R. at 183. The BAP also affirmed the bankruptcy court's refusal to disallow Barton's claims because they were not subject to subordination and, even if they were, "there [was] no basis for claims disallowance under § 502(b)(1)." *Id.* at 182. Lastly, the BAP held that the bankruptcy court did not abuse its discretion when it found bad faith and converted the cases from Chapter 13 proceedings to Chapter 7 proceedings. *Id.* at 185–87. These appeals followed.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 158(d)(1).

"We review decisions of the BAP de novo." *Aalfs v. Wirum (In re Straightline Invs., Inc.)*, 525 F.3d 870, 876 (9th Cir. 2008). "This court independently reviews the bankruptcy court's rulings on appeal from the BAP." *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 547 (9th Cir. 2004). "'Because we are in as good a position as the BAP to review bankruptcy court rulings, we independently examine the bankruptcy court's decision, reviewing the bankruptcy court's interpretation of the Bankruptcy Code de novo and its factual findings for clear error.'" *Id.* "[We] accept findings of fact made by the bankruptcy court unless [those] findings leave the definite and firm conviction that a mistake has been

committed by the bankruptcy judge." *Aalfs*, 525 F.3d at 876 (internal quotation marks omitted).

"We review for abuse of discretion the bankruptcy court's ultimate decisions . . . to convert [the cases] from Chapter 13 to Chapter 7." *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 771 (9th Cir. 2008). A court abuses its discretion when it makes "a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). We "review the bankruptcy court's finding of bad faith for clear error." *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1222–23 (9th Cir. 1999).

DISCUSSION

We will first consider the Debtors' assertion that the bankruptcy court and the BAP erred when they determined that § 510(b) did not apply.[6] Thereafter, we will consider their argument that those courts should not have determined that the conversion of their proceedings from Chapter 13 to Chapter 7 was appropriate.

I. *Subordination of Barton's Claims*

Section 510(b) requires that claims for damages "arising from the purchase or sale" of a "security of the debtor or of an affiliate of the debtor" shall be subordinated to certain

[6] In light of our determination that § 510(b) does not apply, we need not consider the Debtors' assertion that Barton's claims should be disallowed because they were subordinated.

other claims or interests.[7] As already noted, the bankruptcy court determined that the section did not apply because Barton's claims did not arise from the purchase or sale of a security. The BAP affirmed the bankruptcy court on the basis that the section did not apply because the Debtors were individuals. *See Khan I*, 523 B.R. at 183–84. However, after the BAP ruled, we held that § 510(b) does apply when debtors are individuals and in doing so we specifically disagreed with *Khan I*. *See Liquidating Tr. Comm. of the Del Biaggio Liquidating Tr. v. Freeman (In re Del Biaggio)*, 834 F.3d 1003, 1010 (9th Cir. 2016). That effectively overturned the basis of the BAP's decision, and we now make that explicit by rejecting the BAP's contrary decision.

Nevertheless, we affirm the bankruptcy court's decision on the basis stated by that court, that is, we agree that Barton's claims did not arise out of a purchase or sale of securities. No doubt Barton did purchase securities in RIL in 2001 shortly after RIL was founded. Also, we assume that RIL is an affiliate of the Debtors.[8] However, Barton's claims

---

[7] More particularly, the section reads as follows:

> For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

[8] The Debtors alleged that each owned over 20% of RIL. *See* § 101(2)(B) (defining "affiliate").

against the Debtors do not arise from his purchase of RIL securities. Rather, they are based upon the judgment entered against the Debtors by the Superior Court on account of their actions many years later (2009) when they fraudulently converted Barton's stock.

Of course, we have given a broad interpretation to the "arising from"[9] language of the statute. For example, in *Del Biaggio*, we found a sufficient nexus to a purchase and sale where the claimant (Freeman) had been fraudulently induced by the individual debtor to invest in an affiliate of the debtor. We pointed out that "Freeman's claim is really no claim at all but for his investment in [the affiliate]." *Del Biaggio*, 834 F.3d at 1009. In fact, Freeman's claim was not for misrepresentations as such, but for the investment he made in "detrimental reliance on those misrepresentations." *Id.* And what he sought "correspond[ed] exactly to the amount he invested." *Id.*

The case at hand is quite different from *Del Biaggio* because here what Barton seeks has nothing to do with his investment, other than the fact that he had purchased the now-purloined securities many years earlier. And the damages he sought were not remotely related to the purchase; they were simply a judgment measured by the value of the converted property when the conversion took place.

We recognize that in other cases, where no actual purchase or sale had been consummated, we found that claims, nevertheless, arose from a purchase or sale transaction. *See, e.g.*, *Pensco Tr. Co. v. Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC)*, 782 F.3d

[9] *See* § 510(b).

492, 496–97 (9th Cir. 2015) (the claim arose out of a failed agreement by the debtor to purchase claimant's stock); *Am. Broad. Sys., Inc. v. Nugent (In re Betacom of Phoenix, Inc.)*, 240 F.3d 823, 829–31 (9th Cir. 2001) (a merger fell through so no ultimate sale took place, but claim still arose from a sales transaction). While those cases do bespeak a broad interpretation of "arising from," there is a limit to the reach of § 510(b), which stops short of encompassing every transaction that touches on or involves stock in a corporation. That is well explicated in *Racusin v. Am. Wagering, Inc. (In re Am. Wagering, Inc.)*, 493 F.3d 1067 (9th Cir. 2007).

In *Racusin*, the claimant was promised that due to past services he would be paid, in part, with common stock of the company upon completion of a common offering or initial public offering. *Id.* at 1070. When the contract was breached, he sued the company and others for damages. *Id.* The district court determined that Racusin should receive shares of stock, and he appealed. *Id.* He did so on the basis that he did not want stock; he wanted damages. We agreed with him. *Id.* Thus, we "remanded the case to the district court to calculate the monetary value of the . . . shares." *Id.* The amount was determined, the debtors quickly filed for bankruptcy, Racusin filed a claim, and the debtors asserted that § 510(b) required subordination. *Id.* We disagreed. *Id.* at 1071. We pointed out that Racusin did not seek to be, and was not, a shareholder. Rather, the value of the stock was just the measuring stick for determining the "compensation owed for services he performed pursuant to a contract that the debtors breached." *Id.* at 1073. Thus, he was a true creditor rather than an equity investor in a "now-bankrupt corporation." *Id.*; *see also In re Angeles Corp.*, 177 B.R. 920, 926 (Bankr. C.D. Cal. 1995) (debtor had committed bad acts after claimant's purchase of securities was complete, and

claims did not arise from the purchase), *aff'd*, 199 B.R. 220 (B.A.P. 9th Cir. 1996).

Here, Barton sought and obtained damages. Even though his damage award for conversion was based on the value of the securities at the time of conversion, his action did not arise out of the purchase of the securities and the risks that the purchase might entail. It arose out of the Debtors' conversion of the securities many years later. The value of the securities at the date of conversion was the measuring stick.

Moreover, the oft-quoted rationales for the § 510(b) subordination requirement[10] do not apply here. Primarily, the separate wrongdoing of the Debtors had no connection to the purchase or sale of Barton's shares of stock in RIL; nor did the judgments against the Debtors that form the basis for Barton's bankruptcy claims arise from a purchase or sale. In any event, the risk that those who purchase or sell stock (investors in a corporation) assume and expect to take is not that the shares themselves will later be stolen outright by other individuals.[11] Nor, to the extent it applies at all, does the equity cushion rationale affect our decision here.[12] Even if the Debtors' creditors did, somehow, rely upon the equity contributed by RIL's investors, that does not touch upon the separate torts committed by the Debtors in this case.

---

[10] *See Betacom*, 240 F.3d at 830 (dissimilar risks and equity cushion rationales).

[11] *See id.*; *see also Del Biaggio*, 834 F.3d at 1010–11.

[12] *Betacom*, 240 F.3d at 830; *see also Del Biaggio*, 834 F.3d at 1011–12.

In short, the bankruptcy court did not err when it refused to subordinate Barton's claims pursuant to § 510(b).

II. *Conversion of Chapter 13 Proceedings to Chapter 7 Proceedings*

The Debtors also assert that the bankruptcy court clearly erred when it found bad faith,[13] and abused its discretion[14] when it converted their Chapter 13 proceedings to Chapter 7 proceedings.[15] We disagree. The bankruptcy court was required to and did consider "the totality of the circumstances." *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994) (per curiam) (internal quotation marks omitted). However, the Debtors point to the factors we outlined in *Leavitt*, 171 F.3d at 1224. Those are:

> (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner;
>
> (2) the debtor's history of filings and dismissals;

[13] *See Leavitt*, 171 F.3d at 1222–23; *de la Salle v. U.S. Bank, N.A. (In re de la Salle)*, 461 B.R. 593, 605 (B.A.P. 9th Cir. 2011).

[14] *See Rosson*, 545 F.3d at 771; *see also Hinkson*, 585 F.3d at 1263–64.

[15] *See* § 1307(c).

> (3) whether the debtor only intended to defeat state court litigation; and
>
> (4) whether egregious behavior is present.

Id. (citations, internal quotation marks, and brackets omitted). The bankruptcy court was well aware of those factors, and declared that the second factor did not cut against the Debtors. It did, however, find manipulation of the bankruptcy proceedings (first factor) and interference with the state proceedings (third factor). Moreover, although it did not specifically mention the egregiousness of the Debtors' behavior, it plainly thought that the behavior was quite troubling at the very least (fourth factor). The BAP agreed with the bankruptcy court's analysis. *See Khan I*, 523 B.R. at 185–87.

The Debtors attack those determinations and concentrate a good deal of their firepower on *Leavitt*'s third factor. *Leavitt*, 171 F.3d at 1224; *see also Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1445 (9th Cir. 1986). They focus on the word "only" and take that to mean that defeating state court litigation had to be the sole motive, but we have not so treated it. For example, in *Leavitt* itself we decided that avoidance was merely the "primary" motive. *Leavitt*, 171 F.3d at 1225; *see also Eisen*, 14 F.3d at 470 (if only intent is to defeat state court litigation, that *is* bad faith); *Chinichian*, 784 F.2d at 1445 (multitude of factors showed bad faith, including the real purpose of the filing). The Debtors do not appear to recognize that the factors are simply factors to consider and that not every one of them must be met. That rather blinds them to the overarching requirement that what matters is "the 'totality of the circumstances.'" *Eisen*, 14 F.3d at 470; *see also Ho v. Dowell (In re Ho)*,

274 B.R. 867, 877 (B.A.P. 9th Cir. 2002) (a court must decide "'in the light of *all* militating factors'"). The BAP recognized that. *See Khan I*, 523 B.R. at 185. As the BAP put it: "Even if a debtor presents more than one purpose for filing, the third *Leavitt* factor does not fail to support cause if the other purpose also reflects bad faith. And, once again, the third factor is considered in a totality of the circumstances context." *Id.* at 186.

We have carefully reviewed the record together with decisions of the bankruptcy court and the BAP, and are satisfied that the evidence fully supports the determinations that there was bad faith and that conversion was appropriate. The highly suspect timing of the Debtors' Chapter 13 petitions, their failure and refusal to provide financial information critical to the determination of the value of their assets, and their further failure to provide information regarding the movement of funds among their various business entities all combined to justify the conversion decision.

Thus, the bankruptcy court did not clearly err or abuse its discretion.

CONCLUSION

This case presents a saga of picaresque behavior. The Debtors converted Barton's stock and were required by the Superior Court to pay substantial damages as a result. In the bankruptcy proceedings, their timing was at least suspicious, and they continued their inappropriate behavior by refusing to be forthcoming about the nature and activities of the business entities they controlled. On this record, the bankruptcy court properly determined that Barton's claims

should not be subordinated and that the Chapter 13 proceedings should be converted to Chapter 7 proceedings. We, therefore, affirm the bankruptcy court.[16]

AFFIRMED. Barton shall recover his costs on appeal.

RAWLINSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the bankruptcy court acted within its discretion when it converted the debtors' bankruptcy proceedings from Chapter 13 to Chapter 7. I also join the majority's conclusion that 11 U.S.C. § 510(b) applies to Debtors who are individuals. However, I dissent from the conclusion of the majority that § 510(b) is inapplicable because the claims of Kenneth Barton did not arise from a purchase or sale of securities. In my view, the opposite conclusion is inescapable–that Barton's claim *did* arise from the purchase or sale of a security under § 510(b).

It is undisputed that Barton purchased securities in RPost International, Ltd. It is also undisputed that Debtors impermissibly converted Barton's stock. However, that conversion did not erase the fact that Barton's subsequent claims against Debtors arose from his previous purchase of securities.

The majority acknowledges that we have consistently interpreted the phrase "arising from" broadly. *Majority*

---

[16] Of course, in so doing we have rejected the reasoning of the BAP on the subordination issue.

Opinion, p. 12–12. We most recently reiterated that interpretation in *Del Biaggio Liquidating Trust v. Freeman (In re Del Biaggio)*, 834 F.3d 1003, 1009 (9th Cir. 2016) ("[W]e observe that § 510(b)'s arising from language reaches broadly to subordinate damage claims involving qualifying securities.") (citation and internal quotation marks omitted). We went on to explicate that the "arising from" phraseology is "broader than causation" and is "ordinarily understood to mean 'originating from,' 'having its origin in' 'growing out of,' or 'flowing from' or in short, 'incident to or having connection with.'" *Id.* (citation omitted).

We rejected the creditor's contention that his claims did not arise from the purchase or sale of securities because the claimant was indisputably an investor in the debtor's affiliate. *See id.* at 1008–09. Rather, we continued to adhere to "one of the general principles of corporate and bankruptcy law" embodied within the text of § 510(b): "that creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets." *Id.* at 1008 (quoting *Racusin v. American Wagering Inc.* (*In re American Wagering*), 493 F.3d 1067, 1071 (9th Cir. 2007)).

In *Del Biaggio*, we cited our precedent concluding that a claimant was a shareholder even though the debtor's defalcation "converted the claimant's interest from an equity interest to a debt interest before the bankruptcy filing." *Id.* at 1009 (quoting *Pensco Trust Co. v. Tristar Esperanza Properties, LLC* (*In re Tristar Esperanza Properties, LLC*), 782 F.3d 492, 497–98 (9th Cir. 2015)).

We also referenced *American Broadcasting Sys. v. Nugent* (*In re Betacom of Phoenix, Inc.*), 240 F.3d 823, 830 (9th Cir. 2001), as an example of our broad interpretation of

§ 510(b). *See id.* We explained that we applied § 510(b) to a damages claim predicated on a "purported breach of contract in a merger agreement" because the claim was "one 'surrounding' the sale or purchase of a security of the debtor." *Id.* (quoting *In re Betacom*, 240 F.3d at 829).

In addition, we noted that our broad interpretation of the "arising from" language of § 510(b) is consistent with the interpretations advanced by our sister circuits. *See id.* (referencing *Templeton v. O'Cheskey* (*In re Am. Hous. Found.*), 785 F.3d 143 (5th Cir. 2015); *SeaQuest Diving, LP v. S&J Diving, Inc.* (*In re SeaQuest Diving, LP*), 579 F.3d 411, 421–22 (5th Cir. 2009); *Rombro v. Dufrayne* (*In re Med Diversified, Inc.*), 461 F.3d 251, 254–55 (2d Cir. 2006)).

The majority also cites our precedent and does not attempt to distinguish it, other than to try to fit the facts of this case within the confines of our decision in *American Wagering*. *See Majority Opinion*, p. 12–13. However, the fit is cramped and imperfect. Preliminarily, in *Del Biaggio*, we described our decision in *American Wagering* as requiring subordination "where there exists *some nexus or causal relationship* between the claim and the purchase of the securities." *Del Biaggio*, 834 F.3d at 1009 (citation and internal quotation marks omitted) (emphasis added). We explained that the facts in *American Wagering* did not fall within our broad interpretation because, and only because, the claimant's contract with the debtor was explicitly *not* for the purchase or sale of securities. *See id.* Rather, the contract was explicitly for services as a financial advisor. The resulting agreement stated:

> Should [the creditor] bring in a buyer . . . said company will be paid a commission based on 5% of the purchase price.

In re Am. Wagering, 493 F.3d at 1069.

Seven months later, another agreement was entered into between the same parties, with the following provision:

> [Claimant] has been our financial advisor for the purpose of an initial public offering . . . As compensation he would be paid 4 ½% of the final evaluation in the form of . . . common stock and $150,000 cash.

Id. at 1070.

After two years, the debtor filed an action against the creditor seeking to invalidate the contract in its entirety. *See id.* Following a jury trial, a verdict was rendered in favor of the creditor for "stock . . . in an amount equal to 4.5% of $45,000,000 [the final valuation of the common stock] and $150,000 in cash." *Id.* Consistent with this verdict, the court awarded the creditor 337,500 shares of stock worth $2.025 million. *See id.*

The creditor appealed the award, arguing that it was error for the court to award specific performance by way of bestowing stock, when the creditor requested money damages. *See id.* We agreed and remanded for the court to calculate the monetary equivalent of the 337,500 shares. *See Leroy's Horse and Sports Place v. Racusin*, 21 Fed. Appx. 716, 717–18 (9th Cir. 2001). On remand, the creditor was awarded monetary damages of $2,310,000–$150,000 cash

plus $2,160,000 (the value of the stock as of the date when the creditor could have sold his shares). *See American Wagering*, 493 F.3d at 1070.

Shortly after the damages award, the debtor filed for Chapter 11 bankruptcy protection, and sought to subordinate the creditor's claim pursuant to § 510(b). *See id.*

As we observed in *Del Biaggio*, the creditor in *American Wagering* never sought "to recover an investment loss." *Del Biaggio*, 834 F.3d at 1009. Rather, the creditor's "contract with the debtor merely used stock value as a basis for calculating compensation." *Id.* We clarified in *American Wagering* that the creditor "received a money judgment for services rendered." 493 F.3d at 1073. We referenced "[o]ur earlier decision" reversing the award of stock to the creditor as making it clear that the creditor's "underlying claim [was] a debt claim, not an equity claim." *Id.* The creditor "did not sue debtors as an equity investor seeking monetary damages for fraud . . . related to their mishandling of shareholders' economic investment." *Id.* Instead, the creditor brought his action as an individual who was not compensated as provided in an employment agreement. *See id.*

In contrast, Barton initially brought his action in state court specifically describing himself as a shareholder who had been wrongfully deprived of his shares by the debtors. In his Third Amended Complaint, Barton asserted that he was issued 6,016,500 shares of RPost International Limited Stock, that Defendants owed. Barton alleged that he was "a shareholder," owed a fiduciary duty of disclosure, and Defendants wrongfully converted Barton's shares of stock, causing Barton to suffer damages "[a]s a direct, proximate, and foreseeable result of the taking and conversion of

Barton's shares . . ." *Third Amended Complaint, Barton v. RPost International Ltd*, Case No. YC061581, Superior Court of the State of California for the County of Los Angeles-Southwest District, February 16, 2011, pp. 5–9.

Consistent with Barton's allegations focusing exclusively on the conversion of his shares, the Superior Court judge continued in the same vein. Indeed, the decision of the state court judge leaves no doubt about the genesis of Barton's claims. The state court "issue[d] a declaration that Plaintiff Barton was at all relevant times an owner of 6,016,500 common shares . . . and that he provided appropriate consideration for said shares of stock. . . ." *Statement of Decision, Barton v. RPost International Ltd.*, Case No. YC061581, Superior Court of the State of California for the County of Los Angeles, August 3, 2012, p. 5. The state court prohibited RPost International "from taking any action to encumber, forfeit, and/or cancel Barton's shares without having obtained prior written approval from either the court, Barton or his duly authorized counsel." *Id.*

The court ordered Defendants to restore the shares of stock to Barton. *See id.*, p. 8. Leaving no doubt that the remedy was intended to restore Barton to the position of shareholder, the state court ordered that Barton "have no role in the management of the company but . . . be given reasonable notice of meetings of its shareholders and major transactions." *Id.* The state court "encouraged [the parties] to meet and confer to determine, *on their own*, a purchase price for Barton's shares of stock so that a potentially uncomfortable relationship going forward can be avoided." *Id.* (emphasis added).

The state court's order unequivocally restored Barton to his status as a shareholder in RPost International. Unlike the creditor in *American Wagering*, the record nowhere reflects that Barton objected to the remedy of specific performance. It was only after the punitive damages phase of the trial that the state court awarded the monetary value of the stock to Barton. *See Ruling on Punitive Damages and Revisions to Statement of Decision, Barton v. RPost International Ltd.*, Case No. YC061581, Superior Court of the State of California for the County of Los Angeles, June 18, 2013, pp. 1–2. Nevertheless, the state court continued to link its damages award to the conversion of Barton's shares. *See id.*, p. 2. The court explained that because "the assets and character of RPost International had changed dramatically . . . returning the 6,016,500 shares to Mr. Barton would undoubtedly spark an endless round of post-judgment motions and additional lawsuits." *Id.* However, the court never strayed from its conclusion that Mr. Barton was entitled to this remedy as a shareholder of RPost International. *See id.*

The facts of this case are not even close to those we considered in *American Wagering*. In that case, the creditor was never a shareholder of the debtor and never sought or accepted specific performance by way of the award of shares. *See Am. Wagering*, 493 F.3d at 1069–70. The plaintiff in that case steadfastly based his claim on an employment contact that was simply measured by the price of the stock. *See id.* at 1071 (noting that the original contract "only gave [the creditor] the monetary value of the shares of stock, not the stock itself"). Notably, the plaintiff in *American Wagering* actually appealed the district court's decision awarding stock as a remedy. *See id.* at 1070. In contrast, Barton predicated his entire complaint on his status as a shareholder. No other

basis for recovery was ever articulated, and Barton posed no objection when the state court awarded him shares and shareholder rights as a remedy. At bottom, Barton's claim is closer to the facts of *Del Biaggio*, where we characterized the damages claim in a similar fraudulent scheme resulting in the loss of equity shares as "clearly one arising from the sale or purchase of securities." 834 F.3d at 1009. As in *Del Biaggio*, the damages sought by Barton and awarded by the state court "correspond exactly to the amount [Barton] invested in [RPost International] through his initial purchase of [RPost International] securities . . ." *Id.* As in *Del Biaggio*, "[Barton's claim is really no claim at all but for his investment in [RPost International]. *Id.*

Similar to the majority's approach, the creditor in *Del Biaggio* sought to "analogiz[e] his case to the facts *of American Wagering*." *Id.* We rejected the proposed analogy because the creditor in *Del Biaggio*, like Barton, sought to "recover an investment loss," *id.*, rather than "valu[ing] a free-standing injury by reference to a security." *Id.* at 1009–10. As in *Del Biaggio*, without a separate source of injury unrelated to his security holdings, Barton's "asserted injury is inseparable from his [RPost International] investment." *Id.* at 1010.

The majority also relies upon the decision of a bankruptcy court, *In re Angeles Corp.*, 177 B.R. 920, 927 (Bankr. C.D. Cal. 1995) that was summarily affirmed by the Bankruptcy Appellate Panel. *See* 199 B.R. 220 (B.A.P. 9th Cir. 1996).

The discussion section of *Angeles* is light on the underlying facts. The court noted only that "it appears that approximately $250 million of money invested by limited partners was lost from inception of the partnerships to the

present." *Angeles*, 177 B.R. at 924. Addressing the subordination question, the court ruled that "claims alleging misconduct, breach of fiduciary duty, or wrongful acts by Debtor . . . in managing the partnerships *subsequent* to the purchase of the limited partnership interests are *not* . . . subject to subordination . . ." *Id.* at 926 (emphases in the original).

This interpretation ignores the broad language of § 510. *See Weissman v. Pre-Press Graphics Co., Inc.* (*In re Pre-Press Graphics Co., Inc.*, 307 B.R. 65, 76 (N.D. Ill. 2014) (describing *Angeles* as "supporting the narrow approach" to interpreting § 510). It is also directly contrary to more recent precedent. *See SeaQuest Diving*, 579 F.3d at 418 (involving rescission of creditor's equity investment *subsequent* to the purchase); *Tristar Esperanza Prop.*, 782 F.3d at 497 (explicitly rejecting the argument that the subsequent nature of the claim dictates the outcome); *Del Biaggio*, 834 F.3d at 1007 (addressing a subsequent fraud claim stemming from an equity investment).

In the twenty-plus years that *Angeles* has been in existence, the case has been widely and roundly criticized. In the case of *In re Enron Corp.*, 341 B.R. 141, 154 (Bankr. S.D.N.Y. 2006), the bankruptcy court questioned whether *Angeles* "can still be considered good law" in view of "the recent trend in the case law." The court described *Angeles* as "embrac[ing a] restricted reading of section 510(b)" that had been "uniformly rejected" in more recent cases, and observed that these more recent cases "explicitly disagree[ ] with the legal principles" espoused in *In re Angeles*. *Id.* The bankruptcy court expressly referenced our decision in *Betacom*, noting that the holding in *Betacom* "eviscerates the logic of *Angeles* even if the *Betacom* court did not address

[*Angeles*] directly. *Id.* at 155 (citation omitted); *see also Frankum v. Int'l Wireless Comm. Hldgs, Inc.* (*In re Int'l Wireless*), 279 B.R. 463, 469 n.2 (D. Del. 2002) ("[T]he validity of . . . *Angeles* in this circuit is suspect . . . Accordingly, the Court declines to adopt the rationale[ ] of [*Angeles.*"]); *In re Pre-Press Graphics*, 307 B.R. at 77–78 (declaring *Angeles* "not . . . persuasive" and undermined by more recent precedent from the Ninth Circuit); *Id.* at 76 ("The statutory interpretation set forth in [*Angeles*] . . . has been called into doubt by recent decisions from the Third, *Ninth* and Tenth Circuits.") (emphasis added); *In re Granite Partners*, 208 B.R. 332, 342–43 (Bankr. S.D.N.Y. 1997) (characterizing *In re Angeles* as "not persuasive").

Finally, but not incidentally, I disagree with the majority's conclusion that Barton should not be included within the category of investors who assumed the risk of investment loss. As a shareholder, Barton was the quintessential investor whose fortune was tied to the ups and downs of his investment, including those linked to fraud. *See Del Biaggio*, 834 F.3d at 1011 ("As an investor, [the creditor] bargained for increased risk in exchange for an expectation in the profits . . ." "Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud . . . to bootstrap their way to parity with general unsecured creditors . . .") (citation and footnote reference omitted). Unfortunately, Barton is not exempt.

In sum, considering the broad language of § 510(b) and the correspondingly broad interpretation we have consistently applied in our precedent, Barton, a shareholder in the debtor corporation, asserted conversion claims arising from the purchase of his shares. Without a doubt, his claim stemmed directly from the wrongful appropriation of the very shares he

purchased. *See Del Biaggio*, 834 F.3d at 1009. I respectfully dissent from the majority's contrary conclusion which, in my view, contravenes circuit precedent and the policy underlying § 510(b).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

ill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

ttorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

tition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

ounsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

rm 10. Bill of Costs ..... *(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

	v.		9th Cir. No.	

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED *(Each Column Must Be Completed)*				ALLOWED *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

* *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

ttorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, [ ], swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature [ ]
("s/" plus attorney's name if submitted electronically)

Date [ ]

Name of Counsel: [ ]

Attorney for: [ ]

(To Be Completed by the Clerk)

Date [ ] Costs are taxed in the amount of $ [ ]

Clerk of Court

By: [ ], Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ZAFAR DAVID KHAN, Debtor, --- ZAFAR DAVID KHAN, Appellant, v. KENNETH BARTON, Appellee.	No. 17-60011 BAP No. 16-1076 ORDER

The parties' stipulated motion (Docket Entry No. 12) to stay appellate proceedings pending the Supreme Court of California's decision in *Samara v. Matar*, 8 Cal. App. 5th 796 (Cal. Ct. App. 2017), is granted. This case is stayed until February 14, 2018.

On or before February 14, 2018, the appellant shall file the opening brief or a motion for further relief. If the opening brief is filed, the answering brief will be due March 16, 2018. The optional reply brief is due within 21 days after service of the answering brief.

SM/Pro Mo/8/14/2017

The filing of the opening brief or the failure to file a motion for further relief will terminate the stay.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Samantha Miller
Deputy Clerk
Ninth Circuit Rule 27-7

PROOF OF SERVICE BY MAIL

Document: MOTION FOR JUDICIAL NOTICE IN SUPPORT OF KENNETH BARTON'S AMICUS CURIAE BRIEF AND APPENDIX OF EXHIBITS FILED IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR D.D.S.

Caption: Rana Samara,
Plaintiff and Appellant,

vs.

Haitham Matar D.D.S.,
Defendant and Respondent.
Court of Appeal Case No.: B265752

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, CA 91311. On this date, I served the persons interested in said action by placing one copy of the above-entitled document as follows:

X By OVERNIGHT MAIL – See Attachment to Proof of Service.

X By U.S. MAIL – See Attachment to Proof of Service.

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed February 7, 2018 at Chatsworth, California.

/ Vanessa Bravo /
Vanessa Bravo

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant: Alexis Galindo Curd, Galindo & Smith, LLP 301 E. Ocean Blvd., Suite 1700 Long Beach, CA 90802 Facsimile: (562) 624-1178 *Via U.S. Mail*	***Attorney for Respondent:*** Katherine M. Harwood Ford, Walker, Haggerty & Behar One World Trade Center, 27th Floor Long Beach, CA 90831-2700 Facsimile: (562) 983-2555 *Via U.S. Mail*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 *Via Federal Express*	