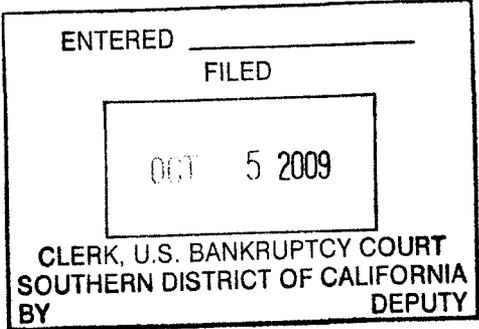


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**WRITTEN DECISION - FOR PUBLICATION**



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: James Douglas Tills  Debtor.	}	Bankruptcy No. 08-13210-LT7 Adversary No. 09-90054-LT
Elizabeth Mollasgo  Plaintiff,  v. James Douglas Tills  Defendant.	}	MEMORANDUM DECISION

Plaintiff Elizabeth Mollasgo ("Creditor") asserts pre-petition claims against Defendant James Tills ("Debtor," and together with Creditor, the "Parties") based on California securities law violations and common law fraud and negligent misrepresentation in connection with the sale of a security (collectively and as ultimately evidenced by the settlement agreement discussed below, the "Creditor's Claim"). In connection therewith, the Parties entered into a pre-petition Settlement Agreement and Mutual General Release (the "Settlement Agreement") that includes a recital providing that the Parties entered into the Settlement Agreement "[w]ithout conceding any fault or liability." Post-settlement and prior to any payment under the Settlement Agreement, Debtor initiated a chapter 7

1 bankruptcy (the "Debtor's Bankruptcy"). Creditor now asserts that Creditor's Claim is non-  
2 dischargeable in Debtor's Bankruptcy as a result of 11 U.S.C. § 523(a)(19)<sup>1</sup> and seeks  
3 summary judgment in her non-dischargeability action. Thus, the Court must determine  
4 whether summary judgment is appropriate in a case where a settlement agreement resolves  
5 allegations of security law violations, but also contains an express denial of any fault or  
6 liability by the Debtor.

## 8 **FACTS**<sup>2</sup>

9  
10 Prior to his bankruptcy, Debtor and Richard A. Calderone began Jacoba Enterprises,  
11 LLC ("Jacoba"). Jacoba was an umbrella organization that purchased apartment buildings,  
12 converted them into condominiums, and formed a separate limited liability company in  
13 connection with each condo conversion project. Jacoba Taft, LLC ("Jacoba Taft") is the  
14 holder of the condo conversion project involved in this case.

15 In order to obtain a "partner" for a project, Jacoba, through Mr. Calderone, placed an  
16 ad in the San Diego Union Tribune seeking a serious LLC partner and requiring a  
17 \$100,000.00 minimum investment in connection with the 38 unit condo conversion project.  
18 Creditor, individually or through her real estate agent daughter, responded to the ad.  
19 Creditor allegedly considered several Jacoba condo conversion projects, but ultimately  
20 invested in Jacoba Taft.

21 Unfortunately, Jacoba Taft was unsuccessful, and Creditor lost the investment. In  
22 May of 2008, Creditor initiated an arbitration proceeding against Debtor and claimed therein  
23 that Debtor violated California Corporations Code §§ 25501 and 25504 and committed  
24 fraud and made negligent misrepresentations in connection with her investment.

25  
26 \_\_\_\_\_  
27 <sup>1</sup> Hereinafter references to code sections refer to Title 11 of the United States Code, also referred to  
as the "Bankruptcy Code" unless otherwise specified.

28 <sup>2</sup> The factual recitations set forth herein are based on the Declarations of Richard A. Calderone,  
Elizabeth Mollasgo, and James Swiderski, and undisputed statements in other documents filed by  
the Parties and/or advanced at hearing.

1 Immediately prior to the November 11, 2008 arbitration hearing, counsel for Creditor  
2 offered the Settlement Agreement to Debtor. The Settlement Agreement terms, in most  
3 relevant detail, are as follows:

- 4 1. Neither of the Parties admitted fault or liability;
- 5 2. Debtor agreed to pay Creditor \$241,000 plus all of Creditor's arbitration and  
6 court expenses incurred to date in connection with the arbitration. This equated to full  
7 payment of amounts claimed as damages in the arbitration;
- 8 3. Creditor's counsel agreed not to undertake representation of other Jacoba  
9 investors;
- 10 4. Creditor agreed not to pursue any collection efforts against the separate  
11 property of Debtor's wife, with the exception of any community property if transferred to  
12 her as a means of hindering Creditor's collection efforts;
- 13 5. The Parties exchanged mutual releases; and
- 14 6. The Parties agreed that any disputes arising out of or relating to the Settlement  
15 Agreement would be resolved through arbitration.

16 It is not disputed that prior to signing the Settlement Agreement, Debtor informed  
17 Creditor that Debtor intended to file bankruptcy. Creditor's attorney does not argue that he  
18 discussed section 523(a)(19) in response, but Debtor concedes that the attorney made clear  
19 Creditor's intention to pursue Debtor notwithstanding a bankruptcy filing.

20 Debtor also stated at the summary judgment hearing that prior to signing the  
21 Settlement Agreement, he consulted an attorney who assured him that the Settlement  
22 Agreement would yield a dischargeable debt.

23 Debtor signed the Settlement Agreement on November 11, 2008. Creditor signed it  
24 on November 12, 2008.

25 Debtor made no payments to Creditor and on December 23, 2008, filed a voluntary  
26 chapter 7 petition. Creditor initiated this adversary proceeding against Debtor on  
27 February 5, 2009 and seeks a determination of non-dischargeability under  
28 section 523(a)(19).



1 favorable to the non-moving party. *Lake Nacimiento Ranch Co. v. County of San Luis*  
2 *Obispo*, 841 F.2d 872, 875 (9<sup>th</sup> Cir. 1987).

## 3 4 DISCUSSION

### 5 6 **A. The Settlement Agreement Is Valid Notwithstanding This Court's** 7 **Determination As To The Applicability Of Section 523(a)(19).**

8 Whether Debtor can discharge Creditor's Claim depends first on the validity of the  
9 Settlement Agreement. This Court applies state law when resolving contract disputes. *In re*  
10 *Qintex Entertainment, Inc.*, 950 F.2d 1492, 1497 (9<sup>th</sup> Cir. 1991).

11 A contract tainted by mistake is voidable by an innocent mistaken party. *Oubre v.*  
12 *Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998). Here, Debtor argues that he would not  
13 have signed the Settlement Agreement but for his belief that bankruptcy would discharge his  
14 debt and that Creditor knew of Debtor's belief. Creditor clearly believes that the Settlement  
15 Agreement creates a non-dischargeable obligation under section 523(a)(19). Obviously, one  
16 of the Parties is mistaken as to the impact of bankruptcy law on the Creditor's Claim. The  
17 Court determines, however, that the Settlement Agreement is a valid contract that binds  
18 Debtor notwithstanding the Court's determination regarding the availability of discharge as a  
19 result of section 523(a)(19).

20 Here, Debtor clearly understood and appreciated the material terms of the Settlement  
21 Agreement – he knew he agreed to pay the Creditor's Claim and that he waived and released  
22 all defenses to payment of the same. Where a contracting party understands the material  
23 elements of a contract and is only mistaken about a collateral matter, the contract is not  
24 voidable. *See Bellwood Discount Corp. v. Empire Steel Bldgs. Co.*, 175 Cal. App. 2d 432,  
25 435 (1959).

26 In this case, non-dischargeability is not a material element of the Settlement  
27 Agreement terms, and, indeed, is not discussed therein. Instead, it may be a collateral  
28 consequence of Debtor's Bankruptcy. Thus, even if the Parties entered into the Settlement

1 Agreement based on a misunderstanding regarding the implications of section 523(a)(19) ,  
2 the Settlement Agreement remains valid, and the Parties remain bound by its terms.

3 **B. The Settlement Agreement Fully And Finally Liquidates The Creditor's Claim.**

4 There is also no question that the Settlement Agreement created a payment  
5 obligation, Creditor's Claim, that must be paid in full to the extent estate assets are sufficient  
6 to do so. The Court must interpret the Settlement Agreement to give effect to the Parties'  
7 mutual intent. *See* Cal.Civ.Code § 1636. To do so, the Court, first and foremost, looks to  
8 the language of the Settlement Agreement. *See* Cal.Civ.Code § 1639. Here it is clear to the  
9 Court that the Parties completely and finally expressed their intentions in the Settlement  
10 Agreement and that the Settlement Agreement is an integrated contract. *See Renwick v.*  
11 *Bennett (In re Bennett)*, 298 F.3d 1059, 1064 (9<sup>th</sup> Cir. 2002). As a result, the Court would  
12 consider extrinsic evidence only to interpret existing terms that are "ambiguous." *Id.* A  
13 resort to extrinsic evidence is unnecessary in this case.

14 At the outset, paragraph 2 of the Settlement Agreement recitals provides that neither  
15 of the Parties concedes "any fault or liability." The title, "Settlement Agreement and Mutual  
16 General Release," signals finality. The release provides that it is "mutual" and "general,"  
17 precludes any further action on the underlying claims by either of the Parties, and extends to  
18 all possible issues, claims, and defenses notwithstanding the discovery of new facts as it  
19 contains a standard California Civil Code section 1542 waiver.

20 The Court finds that the Settlement Agreement fully and finally resolves all disputes  
21 as to the Debtor's monetary liability, fully liquidates the Creditor's Claim, and is effective to  
22 prohibit any further litigation as to the amount of Creditor's Claim even in a bankruptcy  
23 context. As a result, Debtor cannot assert any defense to the payment of Creditor's Claim  
24 from the assets of his chapter 7 estate (the "Estate"). Unfortunately, however, this provides  
25 no comfort to Creditor. Debtor claims the loss of significant assets prior to bankruptcy, and,  
26 consistent with this assertion, his schedules evidence that the Estate has no ability to pay the  
27 Creditor's Claim. Thus, Creditor's only possible avenue for recovery is through post-  
28

1 bankruptcy pursuit of the Debtor; and such pursuit is possible only if the Creditor's Claim is  
2 not dischargeable in Debtor's Bankruptcy.

3 **C. Section 523(a)(19) Analysis.**

4 Creditor asserts that the determinations discussed above lead inexorably to a  
5 conclusion that the Creditor's Claim is non-dischargeable. As noted, the Debtor argues to  
6 the contrary. In order to resolve this dispute, the Court reviews section 523(a)(19).

7 **1. The Plain Language Of Section 523(a)(19) Requires That The Non-**  
8 **Dischargeable Debt Result From Securities Violations.**

9 To discern the requirements of section 523(a)(19), this Court begins its inquiry with  
10 the statutory language itself. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). "It  
11 "It is well established that 'when the statute's language is plain, the sole function of the  
12 courts – at least where the disposition required by the text is not absurd – is to enforce it  
13 according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters*  
14 *Bank, N.A.*, 530 U.S. 1, 6 (2000)).

15 Section 523 lists debts that are not dischargeable and at (a)(19) provides that a debt is  
16 not discharged if it:

17 (A) is for –

18 (i) the violation of any of the Federal securities laws . . . , any of the State  
19 securities laws, or any regulation or order issued under such Federal or State  
20 securities laws; or

21 (ii) common law fraud, deceit, or manipulation in connection with the  
22 purchase or sale of any security; and

23 (B) results, before, on, or after the date on which the petition was filed, from –

24 (ii) any settlement agreement entered into by the debtor . . .

25 11 U.S.C. § 523(a)(19).

26 Section 523(a)(19) has two separate conditions for non-dischargeability separated by  
27 a semicolon and the word "and." The statute, thus, plainly indicates that the conditions must  
28 be independently satisfied – securities violations must have occurred **and** a settlement (or  
other final resolution of the claim) must be completed. *Peterman v. Whitcomb (In re*

1 *Whitcomb*), 303 B.R. 806, 810 (Bankr. N.D. Ill. 2004) (debt dischargeable under  
2 section 523(a)(19) if two conditions met.)

3 This interpretation also is consistent with the canon of statutory construction  
4 requiring that the Court must give meaning to each word and must assume that Congress  
5 does not include any word unnecessarily. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).  
6 The word "violation" is rendered meaningless if a settlement based on mere allegations of  
7 securities violations is non-dischargeable without any consideration of culpability.

8 Additionally, the text associated with section 523(a)(19) in the Corporate and  
9 Criminal Fraud Accountability Act of 2002 (the "Act") supports the interpretation that  
10 requires an actual securities violation in addition to the settlement of securities violation  
11 allegations. The Act targets fraudulent actors and the title of section 803 of the Act, which  
12 amended section 523(a) to include subsection (19) reads: "Debts Nondischargeable If  
13 Incurred In **Violation** Of Securities Fraud Laws." 107 Pub. L. 204, 116 Stat. 745, 801, 802  
14 (2002) (emphasis added). Thus, the exception to discharge focuses on securities violations  
15 rather than resolutions of allegations of securities violations.

16 **2. A Review Of Committee Reports Indicates That Congress Intended**  
17 **Section 523(a)(19) To Require Culpability Of The Debtor.**

18 When statutory language is plain, the Court may still look to legislative history to  
19 ensure that the result of the Court's interpretation comports with the statutory purpose.  
20 *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d  
21 1064, 1067 n. 7 (9<sup>th</sup> Cir. 1995). The Court largely limits its legislative history query to  
22 official committee reports. *In re Kelly*, 841 F.2d 908, 912 n.3 (9<sup>th</sup> Cir. 1988) (citing  
23 *Garcia v. United States*, 469 U.S. 70, 76 (1984)). The Senate committee report for the Act  
24 (the "Report") stated that section 523(a)(19): ". . . would . . . make judgments and  
25 settlements arising from state and federal securities law *violations* brought by state and  
26 federal regulators and private individuals non-dischargeable. Current bankruptcy law may  
27 permit *wrongdoers* to discharge their obligations under court judgments or settlements  
28 based on securities *fraud* and securities law *violations*." S. Rep. 107-146 (2002) (emphasis

1 added). The Report speaks of debts arising from "violations" and aims at eliminating  
2 loopholes in bankruptcy law that permit "wrongdoers" to discharge debts. The Report  
3 focuses on resolved securities violations, rather than on settled claims of securities  
4 violations.

5 The section by section analysis and discussion of the Act submitted by Senator  
6 Patrick Leahy, author of the Act, provides that section 523(a)(19) would "prevent  
7 wrongdoers from using the bankruptcy laws as a shield and [would] allow defrauded  
8 investors to recover as much as possible . . . . The provision applies to all judgments and  
9 settlements arising from state and federal securities laws violations . . . ." 148 Cong Rec S  
10 7418 at 7418 (2002). This discussion and analysis are in concert with the Report's focus on  
11 culpable debtors and wronged creditors. Defrauded investors can avoid losses through  
12 section 523(a)(19). *Id.* at 7419. The Report and the Act's author thus support the  
13 conclusion that section 523(a)(19) is intended to target securities laws violators, not to  
14 generally penalize all debtors who settle allegations of securities violations.

15 **3. In Appropriate Cases The Terms Of A Settlement Agreement May Allow**  
16 **The Court To Assume That A Securities Violation Actually Occurred**  
17 **And That Section 523(a)(19) Is Satisfied.**

18 Section 523(a)(19) allows a court in appropriate circumstances to base a finding of  
19 securities violations on the debtor's entry into a settlement agreement. What is at issue here  
20 is whether the Court is required to do so in all cases.

21 A 2007 article provides context for this discussion as it outlines drafting tips  
22 designed to render a claim under a pre-petition securities fraud settlement agreement non-  
23 dischargeable under section 523(a)(19). *See* Menton, James P., Jr., *Sarbanes-Oxley and the*  
24 *New Nondischargeable Debt: Drafting Tips for Pre-Bankruptcy Settlements*, 8 Comm. &  
25 Bus. Lit. 9 (2007). The author suggests that such a settlement agreement identify securities  
26 fraud claims, provide factual foundation supporting the claims, specifically indicate that  
27 settlement agreement payments resolve losses from securities fraud, and contain agreements  
28 that the debt is nondischargeable and that the settlement agreement satisfies the

1 requirements of section 523(a)(19). *Id.* While such careful drafting seemingly assures the  
2 desired non-dischargeability finding, the Court stops short of finding that all or any of these  
3 provisions are required. Indeed, a settlement agreement that settles allegations of securities  
4 violations and is silent as to fault may be sufficient. But in this case, the Settlement  
5 Agreement contains no discussion of the basis for non-dischargeability and, instead,  
6 contains a provision expressly stating that fault and liability are not conceded. The Court  
7 thus finds that the Settlement Agreement does not independently establish that Debtor  
8 committed securities violations and does not independently satisfy section 523(a)(19)(A).

9       Clearly, Congress provided that settlement agreements can independently satisfy  
10 section 523(a)(19). But it is also clear that Congress required that the settling party be a  
11 wrongdoer. Here, Creditor drafted the Settlement Agreement and obtained an agreement to  
12 pay the Creditor's Claim in full. But Creditor also made a concession to obtain this  
13 agreement – and took a risk in connection therewith – as she did not obtain any agreement  
14 regarding fault or non-dischargeability and allowed the Debtor to maintain his position that  
15 he had not committed a securities violation as required section 523(a)(19). She, thus,  
16 obtained an agreement that cannot form the sole basis for a determination that Debtor  
17 committed securities violations.

18       **4. Section 523(a)(19)(B) Expands The Use of Collateral Estoppel To**  
19       **Resolution of Securities Violations Through Settlement, But Not Under**  
20       **The Narrow Circumstances Of This Case.**

21       As discussed above, legislative history contains comments from Senator Leahy  
22 making clear a Congressional intent that section 523(a)(19) give settlement agreements a  
23 collateral estoppel effect similar to judgments. Creditor, thus, argues that Congress intended  
24 to preclude debtors from contesting liability if they settled claims of securities violations  
25 notwithstanding language in any such agreement indicating that fault and/or liability are not  
26 conceded. The Court, however, finds no evidence in the legislative history indicating that  
27 Congress intended such a broad result and such a drastic alteration of the doctrine of  
28 collateral estoppel.

1 Typically, five threshold requirements must be satisfied before courts apply issue  
2 preclusion. *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824 (BAP 9<sup>th</sup> Cir. 2006).  
3 The issue as to which preclusion is sought must have been resolved through a prior  
4 determination that: (1) resolved an identical issue; (2) actually litigated the identical issue;  
5 (3) necessarily decided the identical issue; (4) is final and resolved the issue on its merits;  
6 and (5) occurred between parties in privity to one another, in the former proceeding. *Id.*  
7 Additionally, the Court must consider whether preclusion would be fair and consistent with  
8 public policy in light of the circumstances of each case. *Id.* at 824-825. In  
9 section 523(a)(19), Congress clearly intended to alter the "actually litigated" requirement so  
10 that a settlement agreement has a preclusive effect not otherwise available. There is,  
11 however, ample evidence that Congress did not abrogate the requirement that the issue  
12 necessarily be decided and that violation be established.

13 A settlement agreement is fully capable of necessarily deciding an issue; as the  
14 article cited above notes, a settlement agreement can include an express agreement as to  
15 both fault and liability. Even if a settlement agreement is silent as to fault and liability, an  
16 argument could be made that the issues were necessarily decided based on the facts  
17 surrounding the settlement process. But here, no such argument is available as the  
18 Settlement Agreement expressly provides that fault and liability are not conceded. There is  
19 absolutely no basis for applying principals of issue preclusion where the issue is expressly  
20 not resolved by the settlement agreement in question.

21 Further, as noted above, a court considering issue preclusion must also consider the  
22 broad implications of public policy prior to applying the doctrine. Here public policy  
23 weighs against Creditor. First, there is a strong public policy in favor of settlement. *See e.g.*  
24 *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *see also Evans v. Jeff D.*, 475 U.S. 717  
25 (1986). Creditor takes the position that as a result of 523(a)(19) all securities litigation  
26 settlements are non-dischargeable, which this Court believes would result in discouragement  
27 of settlement agreements. This strident position is irresponsible. If Congress wished to  
28 deviate so completely from the public policy favoring settlements it easily could have done

1 so. Instead of referencing a "violation" of securities law, Congress could have required non-  
2 dischargeability as to any settlement arising from a complaint alleging such violations.  
3 Given the strong public policy in favor of settlements, it is reasonable to assume that  
4 Congress would be completely clear if it intended to render it impossible to settle without  
5 resultant non-dischargeability. Thus, the Court concludes that Congress provided plaintiffs  
6 with a valuable tool in securities litigation, but also allowed the parties to avoid de facto  
7 non-dischargeability through settlement agreement language that expressly avoids any  
8 concession of fault or liability.

9       Such a view is also consistent with Supreme Court authority generally allowing a  
10 court to "look behind" a settlement agreement in non-dischargeability proceedings. In  
11 *Archer v. Warner*, 538 U.S. 314 (2003)<sup>3</sup>, the Supreme Court held that a settlement  
12 agreement settling a creditor's claims against a debtor does not bar the creditor from raising  
13 those claims for purposes of section 523. Prior to *Archer*, the Supreme Court had cautioned  
14 that "res judicata shields the fraud and the cheat as well as the honest person. It, therefore,  
15 is to be invoked only after careful inquiry." *Brown v. Felsen*, 442 U.S. 127, 132 (1979).  
16 Following *Brown*, the Supreme Court, thus, determined that a settlement agreement should  
17 not be available as a shield if it arises from an otherwise non-dischargeable debt. *Archer*,  
18 538 U.S. at 323. The *Archer* analysis similarly suggests that a settlement agreement should  
19 not be used as a cudgel to force a determination of non-dischargeability as to an allegedly  
20 innocent debtor unless Congress expressly so states or the settlement agreement so provides.

21       The strong bankruptcy policy in favor of the debtor's fresh start underscores the  
22 appropriateness of this determination. See *Grogan v. Garner*, 498 U.S. 279, 286 (1991). As  
23 a result of this policy, creditors carry the burden of proving that a section 523 exception to

24 \_\_\_\_\_  
25 <sup>3</sup> Congress is presumed to be aware of relevant case law and "if Congress intends for legislation to  
26 change the interpretation of a judicially created concept, it makes that intent specific". *Midlantic*  
27 *Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). Although  
28 the original date of enactment for section 523(a)(19) predated *Archer*, Congress has since amended  
the statute and, in light of *Archer*, did not amend section 523(a)(19)(A) to include language that  
would cover unproved and denied claims of violations of securities laws and common law fraud,  
deceit, or manipulation in connection with the purchase or sale of any security. Therefore, *Archer* is  
particularly relevant to this Court's interpretation of Congress' intent and the effect of the statutory

1 discharge applies. *Id.* at 291. Here Creditor urges the Court to ignore the burden she bears,  
2 Debtor's argument that he is an honest but unfortunate debtor entitled to the fresh start that  
3 is a central purpose of the Bankruptcy Code, and a defense to non-dischargeability that  
4 Debtor implicitly reserved in the Settlement Agreement. Creditor could have bargained for  
5 language that satisfied her burden and waived Debtor's right to argue that he did not commit  
6 securities violations. In enacting section 523(a)(19), Congress clearly intended to preclude  
7 re-litigation of stipulated facts establishing a prima facie case for securities violations or re-  
8 litigation of admitted securities violations in settlement agreements. There is no evidence,  
9 however, that Congress intended to preclude litigation over securities violations where the  
10 Debtor bargained for and obtained the right to contest fault in the very settlement agreement  
11 at issue.

12 **5. Section 523 (a)(11) Compels The Court To Read Section 523(a)(19) To**  
13 **Require Actual Securities Violations.**

14 When interpreting a statute, the Court will not look solely at the provision, but to  
15 other provisions of the same code to maintain internal harmony among related provisions.  
16 *See Perlman v. Catapult Entertainment (In re Catapult Entertainment)*, 165 F.3d 747, 751  
17 (9<sup>th</sup> Cir. 1999). Analysis of section 523(a)(11) offers interpretive insight when analyzing  
18 section 523(a)(19) and contrary to the argument of Creditor supports the position advanced  
19 by Debtor in this case.

20 Section 523(a)(11) provides in pertinent part that "[a debt] provided in any final  
21 judgment, unreviewable order, or consent order . . . or contained in any settlement  
22 agreement entered into by the debtor, arising from any act of fraud or defalcation while  
23 acting in a fiduciary capacity . . . with respect to any depository institution or insured credit  
24 union" is non-dischargeable. Subsections 523(a)(11) and (4) apply to the same debts to the  
25 extent the creditor is a depository institution or insured credit union, except that  
26 section 523(a)(11) allows non-dischargeability of a debt not previously liquidated through a  
27 judgment. *Meyer v. Rigdon*, 36 F.3d 1375, 1379 (7<sup>th</sup> Cir. 1994).

28 \_\_\_\_\_  
language.

1 In *Meyer*, the Seventh Circuit interpreted section 523(a)(11) to extend the collateral  
2 estoppel doctrine to preclude re-litigation of issues after default judgments, settlement  
3 agreements, and administrative agency decisions. *Id.* at 1380. It noted further that  
4 section 523(a)(11) alters collateral estoppel doctrine by giving preclusive effect to decisions  
5 and agreements not "actually litigated." *Id.* at 1379. The court adopted this interpretation to  
6 avoid rendering the added language in section 523(a)(11) meaningless and the section  
7 completely duplicative of section 523(a)(4). *Id.* at 1381.

8 Because section 523(a)(11) extends preclusive effect to settlement agreement  
9 determinations, cases involving section 523(a)(11) and settlement agreements offer insight  
10 into the proper analysis of section 523(a)(19). *See Commissioner v. Keystone Consol.*  
11 *Indust.*, 508 U.S. 152, 159 (1993) ("identical words used in different parts of the same act  
12 are intended to have the same meaning" (*quoting Atlantic Cleaners & Dyers, Inc. v.*  
13 *United States*, 286 U.S. 427, 433 (1932))). Creditor insists that the *Meyer* decision requires  
14 that this Court preclude Debtor from litigating securities violations claims in a non-  
15 dischargeability context. The Court agrees that subsections 523(a)(11) and (19) expand the  
16 Court's ability to utilize issue preclusion, but concludes that this expansion is not as broad as  
17 Plaintiff suggests.

18 In considering the appropriateness of collateral estoppel this Court applies California  
19 law. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9<sup>th</sup> Cir. 1995); *Lee v.*  
20 *TCAST Communications, Inc. (In re Lee)*, 335 B.R. 130, 136 (9<sup>th</sup> Cir. BAP 2005). As  
21 discussed above, California law extends preclusive effect only to issues "necessarily  
22 decided" and "actually litigated" in a former proceeding. *Khaligh*, 338 B.R. at 824. The  
23 *Meyer* court held that Congress intended to extend preclusive effect to proceedings that did  
24 not "actually litigate" issues. In fact, in a hypothetical provided by the *Meyer* court, it  
25 stated, "[b]efore Congress enacted section 523(a)(11), a bank officer could enter into a  
26 private settlement agreement . . . , admit that he had committed acts of fraud, and still have  
27 the debt arising from his fraud discharged in bankruptcy." *Meyer*, 36 F.3d at 1380. Thus,  
28 the *Meyer* court contemplated a scenario where either a Debtor admitted to fault or a

1 settlement agreement conceded fault. *Id.* Notwithstanding, the *Meyer* court, in the default  
2 judgment context, looked behind the default judgment to the text of the complaint to  
3 determine whether the findings required for non-dischargeability were sufficiently pled to  
4 have been necessarily decided for application of cash estoppel. *Id.* at 1385.

5 If one analogizes section 523(a)(19) to 523(a)(11) as interpreted by the *Meyer* court,  
6 one must conclude that while Congress intended to extend issue preclusion to cover  
7 settlement agreements for purposes of section 523(a)(19), it does not follow that Congress  
8 intended settlement agreements to have preclusive effect on issues not "necessarily  
9 decided." And, again, the Settlement Agreement here did not necessarily decide securities  
10 violations issues – it expressly provides that these issues were not conceded and therefore  
11 not determined. Thus, to the extent case law under section 523(a)(11) and cited by Creditor  
12 is relevant, it supports a denial of issue preclusion in this case.

13 **6. A Review Of Case Law Identifies No Case Supportive Of Creditor's**  
14 **Position.**

15 The Creditor supplies no case law finding a debt non-dischargeable under  
16 section 523(a)(19) where the underlying settlement agreement contained an express  
17 statement that fault and liability were not conceded. The case on which Creditor relies most  
18 strongly is the *Whitcomb* case. *Whitcomb*, however, is clearly distinguishable from the case  
19 at hand. First, *Whitcomb* involves a plaintiff's unopposed motion for judgment on the  
20 pleadings in a section 523(a)(19) action. *Whitcomb*, 303 B.R. at 809-10. The lack of  
21 opposition allowed the Court considerable latitude in regards to the plaintiff's liability  
22 allegations. Having said this, however, the *Whitcomb* court carefully discussed the **two**  
23 requirements of section 523(a)(19) liability in reaching its determination. *Id.* at 810. While  
24 the record is not detailed and it does not appear that the *Whitcomb* settlement agreement  
25 contained detailed admissions, the *Whitcomb* court found that: "the agreed judgment order  
26 provided that the Debtor agreed that he damaged the Petermans." *Id.* at 808. In this case the  
27 Debtor has admitted neither fault nor liability. And unlike the *Whitcomb* defendant, the  
28 Debtor expressly reserved his right to assert innocence through Settlement Agreement



1 ambiguity in the Settlement Agreement on this point coupled with the Calderone declaration  
2 are sufficient to create a triable issue of material fact as to whether securities violations exist  
3 in this case. Thus, Creditor's motion for summary judgment is DENIED.

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DATED: October 5, 2009

  
LAURA S. TAYLOR, JUDGE  
United States Bankruptcy Court