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11 UNITED STATES BANKRUPTCY COURT U.S. BANKRUPTCY COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DISTRICT OF CALIFORNIA  
13 BY \_\_\_\_\_ DEPUTY CLERK

11 In re  
12  
13 BRUCE JAY CASLOWITZ,  
14  
15 Debtor.  
16  
17 SISCO SPORTS CORP.,  
18 Plaintiff,  
19 v.  
20 BRUCE JAY CASLOWITZ,  
21 Defendant.

Case No. 09-04988-JM7  
Adv. No. 09-90286-JM7

MEMORANDUM DECISION

22  
23 I  
24

25 On April 4, 2007, the California Superior Court entered a  
26 judgment for \$632,300 in favor of the Plaintiff and against Bruce  
27 Caslowitz and Cold Sports Distribution, Inc., after a two week jury  
28 trial ("Judgment"). The jury issued special verdicts. On Plaintiff's

1 conversion claim the jury found that Plaintiff was damaged when Bruce  
2 Caslowitz intentionally took possession or control of Plaintiff's  
3 snowboards and related equipment for a significant period of time  
4 without Plaintiff's consent. On the defendants' cross-claim for  
5 conversion, the jury found that Plaintiff intentionally took control  
6 of funds in the Cold Sports bank account. However, since the jury  
7 determined Cold Sports consented to this control, they were not  
8 allowed to address whether Cold Sports was damaged by Plaintiff's  
9 action. This Court has struggled to understand these seemingly  
10 inconsistent determinations.

11 Bruce Casolowitz ("Debtor", "Bruce" or "Mr. Caslowitz") filed a  
12 Chapter 7 bankruptcy petition on April 16, 2009, and Plaintiff filed  
13 this complaint seeking a ruling that the judgment was excepted from  
14 the discharge under 11 U.S.C. § 523(a) as either a breach of fiduciary  
15 duty or a willful and malicious injury. After denying Debtor's motion  
16 to dismiss and Plaintiff's motion for summary judgment, the case was  
17 tried before the Court on October 28 and 29, 2010. Charles Grots  
18 represented the Plaintiff, and Bruce Caslowitz represented himself.  
19 Windsor Chou and Bruce Caslowitz each testified, the parties  
20 stipulated to the admission of hundreds of pages of detailed exhibits,  
21 and the matter was taken under submission.

22 After a complete review of the trial transcript and the exhibits  
23 (which include two years of email correspondence between the parties,  
24 eighteen months of bank records and reconciliations of the financial  
25 information provided by both the Plaintiff and the Debtor), the Court  
26 issues this Memorandum Decision to announce findings of fact and  
27 conclusions of law. Based on these findings and conclusions, the  
28 Court has determined that the Plaintiff has not met its burden of

1 proof and therefore the debt represented by the Judgment will be  
2 included in the Debtor's Chapter 7 discharge.

3 II

4 FACTS

5 The Plaintiff, Sisco Sports Corporation ("Plaintiff" or "Sisco  
6 Sports") is based in Taipei, Taiwan and has been in business for  
7 thirty-five years (I Tr. 36:24-25)<sup>1</sup>. The owner and chief executive  
8 officer of Sisco Sports is Mr. Windsor Chou. Sisco Sports  
9 manufactures snowboards, skis and other sports equipment at a factory  
10 in China (I Tr. 37:15-19). When Sisco began to sell merchandise in  
11 the United States, it did so through a subsidiary called Empire  
12 Merchandise located in Inglewood, California (I Tr. 37:20-23). After  
13 three burglaries at the Inglewood location, Plaintiff closed Empire  
14 Merchandise in 2001, and formed a California corporation named Sisco  
15 Sports U.S.A. ("Sisco USA") (I Tr. 38:4-24). Sisco USA leased office  
16 and warehouse space on Sea Lion Place in Carlsbad, California (Ex. 4).  
17 Windsor Chou also obtained a business license as CEO of an entity  
18 named Source One Distributors, described as a wholesale distribution  
19 business located at the Sea Lion Place address ("Source One") (Ex. 5).  
20 Plaintiff operated through Sisco USA and Source One until the factory  
21 in China was destroyed by fire on August 23, 2003. Mr. Chou testified  
22 that he ran Sisco USA from Taiwan, that Raymond Li was his bookkeeper  
23 in the United States and he also hired Steve Cathey to manage Sisco  
24 USA in Carlsbad (I Tr. 39:19-40:9). Mr. Chou disbanded Sisco USA and  
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26 <sup>1</sup> Parenthetical references throughout this decision are to  
27 Exhibits admitted at the trial ("Ex. \_") or to the volume, page and  
28 line numbers of volumes I, II or III of the transcript of the trial  
in this proceeding, respectively found at docket numbers 43, 44 and  
47 and abbreviated "\_ Tr. \_\_: \_\_-\_\_").

1 Source One after the fire, and there were no longer any employees at  
2 the Carlsbad office (I Tr. 117:16-25, 121:17-20). Mr. Chou wanted to  
3 stop using the name Sisco for distribution purposes in the United  
4 States, because Sisco Sports is an original equipment manufacturer and  
5 the owner of three brands, Avalanche, Silence and Millennium 3,  
6 ("ASM"), and he did not want to appear to be competing with his  
7 customers. He explained that he did not think the Source One name was  
8 sufficient for that purpose, because it was a "doing business dba"  
9 rather than a "proper set up." (I Tr. pp. 41-42 and pp. 115-121).

10 A customer and a Source One employee recommended the Debtor as  
11 a sales person to help Mr. Chou resurrect the ASM brands, and  
12 introduced Mr. Chou to the Debtor and to Blaise Rosenthal ("Blaise"  
13 or "Mr. Rosenthal"), a professional snowboarder who had created the  
14 Millenium 3 ("M3") brand of snowboard (Ex. LL, I Tr. 41:24-42:7). Mr.  
15 Caslowitz started as a snowboard sales representative in 1989. From  
16 1999-2003, he was the Northeast representative for Silence Snowboards,  
17 which distributed the brands manufactured by Sisco Sports (Ex. E).  
18 Plaintiff acquired the licenses for ASM in 2003. When the fire in  
19 August 2003 destroyed the factory in China, Silence forfeited it's  
20 position as distributor to Sisco, since there was no product available  
21 for the 2003 - 2004 season (II Tr. 7:18-22).

22 In late October 2003, the Debtor entered a contract to become  
23 sales director for Source One from November 1, 2003 through October  
24 31, 2004 ("Employment Contract") (Ex.7). The Employment Contract  
25 identified Source One as the manufacturer and/or distributor of  
26 snowboards, boots, bindings and promotional goods bearing the M3,  
27 Avalanche and Silence trademarks. The address for Source One was the  
28 Sea Lion Place office, and the contract was signed by Windsor Chou on

1 behalf of Source One. The Employment Contract identified the Debtor  
2 as an independent contractor, listed goals and responsibilities he was  
3 to handle by May 30, 2004, and set amounts for monthly salary, annual  
4 expenses and a commission based on a percentage of sales. Source One  
5 also entered an employment contract with Mr. Rosenthal (Ex. 8).

6 According to a series of emails in late October and early  
7 November 2003, the Plaintiff, the Debtor and Blaise Rosenthal were in  
8 the process of forming a new company to distribute the ASM products  
9 and get orders for distribution for the '04-'05 season. They agreed  
10 on the name Cold Sports Distribution, Inc. ("Cold Sports") and decided  
11 to incorporate in the State of Connecticut where the Debtor lived at  
12 the time. Windsor Chou did not want his name associated with the  
13 company. On November 8, 2003, Windsor Chou met with Bruce and Blaise  
14 in California to discuss the new company, the product line and  
15 upcoming trade shows (Ex. 20, 8 pages designated 865 and 866).

16 There were no written agreements regarding ownership of Cold  
17 Sports (I Tr. 125:6-8). However, the documents filed for  
18 incorporation with the State of Connecticut indicate that Bruce  
19 Caslowitz and Blaise Rosenthal were the only officers, directors and  
20 shareholders of Cold Sports (Ex. 9). The Debtor owned 60% of the Cold  
21 Sports stock and Blaise Rosenthal owned 40% (II Tr. 9:1-5).

22 The Debtor moved to California and began working diligently to  
23 patch relationships with customers who would not be receiving ASM  
24 product for the '03-'04 season due to the factory fire, and to assure  
25 customers that they would be able to deliver the following season.  
26 He also put together a booth for a major trade show scheduled for Las  
27 Vegas in January 2004, and took orders for the '04-'05 season.

28 During this time, Cold Sports apparently had no income or assets.

1 The salaries and other expenses were paid by Sisco USA (Ex. 11). Cold  
2 Sports eventually qualified to do business in California. At the end  
3 of March 2004, the Debtor met at a restaurant in Monterey Park,  
4 California, with Mr. Chou, Mr. Rosenthal and Raymond Li, the  
5 bookkeeper for Sisco USA and Cold Sports. A major point of discussion  
6 focused on opening a checking account in the name of Cold Sports at  
7 the Monterey Park Branch of Bank of America. As the owner of Cold  
8 Sports, the Debtor wanted to be a signer on the account. Since  
9 Plaintiff was providing all the product to get the company started,  
10 Mr. Chou wanted only himself and Mr. Li authorized to write checks on  
11 the account. There was a lengthy discussion between Mr. Chou and Mr.  
12 Li in Chinese. Mr. Li then assured the Debtor that Mr. Li would be  
13 handling all the finances, he was a competent bookkeeper and had done  
14 this before, and he would watch out for the interests of the Debtor  
15 and Mr. Rosenthal. The Debtor would have on-line access to the bank  
16 information to review the cash flow. Under these circumstances, and  
17 because he would prefer to focus on marketing and sales rather than  
18 on finances and bookkeeping, the Debtor agreed to the arrangement (II  
19 Tr. pp. 11-12). The Debtor testified a number of times that he  
20 trusted Mr. Li. The checking account was opened with the deposit of  
21 a check payable to Cold Sports in the amount of \$19,309.62 (Ex. 14,  
22 II Tr.11:3-4) for sales made by the Debtor.

23 In the summer of 2004, the Debtor also sold some other product  
24 Sisco had in a warehouse that was rejected or returned when another  
25 company went out of business. Through these sales he was able to  
26 generate some working capital for Cold Sports (II Tr. 12:17-13:5).  
27 Raymond Li used some of this money to pay expenses of Cold Sports, but  
28 the majority of the money from the account went to Sisco USA that

1 summer (Ex. 14, pp. 870-888). The Debtor worked from his Connecticut  
2 office during the summer of 2004, and continued to receive his  
3 paychecks from Sisco USA in accordance with the Employment Contract  
4 (Exs. 7 & 11). In mid-August 2004, Raymond Li began to issue checks  
5 for salaries from the Cold Sports bank account (Ex. 14, pp. 889-1001).

6 Plaintiff was apparently able to rebuild the factory in China,  
7 manufactured product during the summer, and shipped the orders  
8 generated by Cold Sports so they arrived in the United States during  
9 the Fall of 2004 (II Tr. 13:8-20). A company called Itochu provided  
10 financing to Plaintiff by factoring the purchase orders, and once  
11 delivered to the United States, the product was held in Itochu's  
12 warehouse until Cold Sports received payment from the customers (II  
13 Tr. 16:1-9). Cold Sports sent all funds received immediately to  
14 Raymond Li to deposit in the Cold Sports bank account and pay bills.

15 In November 2004, the Plaintiff, Bruce and Blaise began to  
16 formulate the terms for their relationship for the next season (Ex.  
17 20, p. 883-884). Correspondence from the Plaintiff came from either  
18 Windsor Chou, or his assistants in Taiwan, Lillian Cheng and Cecilia  
19 Yap. Trade shows for the '05-'06 season began in January 2005, and  
20 Cold Sports obtained some large orders from a company called Zumiez.  
21 As the new selling season began, Bruce and Blaise requested and  
22 received a higher base salary than the amounts in their initial  
23 employment contracts. Although no formal written agreement was  
24 created, there were a series of emails to memorialize the increase in  
25 the Debtor's base salary from \$40,000 to \$70,000 per year. In  
26 correspondence dated January 13, 2005 with the subject of  
27 "confidential", the Debtor and Mr. Chou were reviewing the operation  
28 and Mr. Chou disclosed his intent to allow another distributor to sell

1 the Avalanche and Silence brands to the lucrative multiple outlet, or  
2 "big box" accounts (Ex. 20, pp. 887-889). As indicated by comments  
3 in the Debtor's replies such as "I do not understand what you are  
4 trying to say here", "what do you mean?" and "I don't know what you  
5 mean about...", the language barrier made communication difficult  
6 between the Plaintiff and the Debtor.

7 The Debtor then heard from another sales representative, who was  
8 not employed by Cold Sports, that others were selling the Avalanche  
9 product line (Ex. AA). The Debtor confronted Mr. Chou about this and  
10 was told that Cold Sports would still be competitive because the  
11 landed price for the other distributor was \$59 per board (II Tr. pp.  
12 17-19). The landed price includes shipping to the United States,  
13 customs duties, and any profit for Sisco (II Tr. 18:1-8). This price  
14 was consistent with the \$50-\$65 range Plaintiff billed Cold Sports on  
15 the invoices for inventory shipped to Cold Sports (II Tr. 18:9-17).

16 Raymond Li prepared the Cold Sports tax return for 2004, which  
17 covered the period from April through December, after the the Cold  
18 Sports bank account was opened. Just before the tax return was due,  
19 Mr. Li presented it to the Debtor for signature as president of Cold  
20 Sports. It appeared to the Debtor that Cold Sports had not made any  
21 profit that year, but had about covered the expenses. He thought that  
22 sounded reasonable, so he signed the return (II Tr. 13:20 -14:4).  
23 After the tax return was prepared, the Debtor began to ask Mr. Li when  
24 Cold Sports would start to make money, and wanted a reconciliation to  
25 know where the company stood (II Tr. 19:7-16, 86:15-18).

26 The Plaintiff, Debtor and Blaise Rosenthal continued to operate  
27 on the salary and commission structure for the next few months.  
28 However, things became contentious between Mr. Chou, Mr. Rosenthal and

1 the Debtor as they tried to define their relationship after January  
2 1, 2005 (Ex. 20, pp. 884, 887-975). Based on the testimony and emails  
3 included in the exhibits, it is clear that the Debtor and Mr. Chou  
4 each had a very different understanding of the relationship. Both  
5 witnesses were credible at the trial, and each believed his version  
6 of the relationship.

7         Mr. Chou viewed Cold Sports as he saw entities such as Sisco USA,  
8 Empire Merchandise and Source One: as different names and accounts of  
9 an overall entity that he owned. He believed he could move money  
10 between the accounts in any manner he chose and that Mr. Li would take  
11 care of whatever paperwork was necessary to document what was done for  
12 accounting purposes (I Tr. pp. 45-50, 78:2-17, 91:10-23, 92:18-24,  
13 94:7-18, 98:11-105:24, 108:2-7, 112:8-24, 180:21-25). He viewed Bruce  
14 and Blaise as his employees, and people who had agreed to let him use  
15 their names and social security numbers to form Cold Sports (I Tr. 14-  
16 25). Mr. Chou did not fully understand the distinctions between a  
17 shareholder, officer or director in relation to a corporate entity (I  
18 Tr. 128:3-23, 184:1-185:9).

19         The Debtor, on the other hand, viewed Cold Sports as a  
20 distribution company owned by himself and Blaise Rosenthal that was  
21 being financed by Plaintiff during the start up period. Mr. Caslowitz  
22 understood that as the shareholders and officers of Cold Sports, he  
23 and Mr. Rosenthal were responsible for taxes and other liabilities  
24 owed by the company. He relied on Mr. Li for keeping the accounts  
25 straight, but objected when he saw invoices or expenses to Cold Sports  
26 that should have been charged to another entity (Exs. W, Y, Z, 20 p.  
27 946, and II Tr. 69:14-70:15). This appears consistent with Mr.  
28 Rosenthal's understanding of the relationship when he sent an email

1 to Mr. Chou that read, "As for myself, I feel both ways. I always  
2 considered myself an employee of Sisco but I also was always working  
3 with the knowlege that I was strengthening a company I owned 40% of  
4 (sic)." (Exs. EE & 20 p. 919).

5 The Debtor and Mr. Rosenthal were apparently able to express  
6 their concerns to Mr. Chou at a meeting in Carlsbad with the help of  
7 Mr. Li. With this additional understanding, the Plaintiff proposed  
8 three options for Cold Sports on April 25, 2005 (Ex. 20, p. 905). On  
9 Thursday May 2, 2005, Mr. Chou wanted "the case to be finalized by  
10 weekend, since we have to move forward next season without late start  
11 and without further discussion, either." (Ex. 20, p. 922). On Sunday  
12 May 5, 2005, the Debtor sent three alternate options to Mr. Chou,  
13 including a proposal that Plaintiff purchase Cold Sports from the  
14 Debtor and Blaise for \$50,000 (Ex. 20, pp. 924-925). On May 6, 2005,  
15 Mr. Chou responded to the Debtor "please go ahead to do your own  
16 business, I'm not interested in to work together any more." (Ex. 20,  
17 pg. 926). Despite this missive, the parties continued to discuss  
18 options for another month (Ex. 20, pp. 930-935). At that point,  
19 Raymond Li had a heart attack and was hospitalized, so the Debtor, Mr.  
20 Rosenthal and Mr. and Mrs. Chou all traveled to Monterey Park. Mr.  
21 Chou tried to buy Cold Sports from Mr. Rosenthal and the Debtor for  
22 \$5,000 each. Mr. Chou testified that an agreement was reached and put  
23 in writing (I Tr. 69:24-70:20). The Debtor testified that he and  
24 Blaise refused the offer (II Tr. 21:7-17). During cross-examination,  
25 Mr. Chou admitted that there was no written agreement on the matter  
26 and that the Plaintiff never paid \$5,000 to Blaise or Bruce (I Tr.  
27 172:10-19). The Debtor hired an independent bookkeeper and started  
28 a reconciliation of the Cold Sports finances (II Tr. 21:25-22:7, III

1 Tr.105:5-17).

2 On July 22, 2005, Cecilia Yap began to draft an updated agreement  
3 between the Plaintiff, the Debtor and Blaise Rosenthal (Ex. 20, p.  
4 941). On August 10, 2005, Mr. Rosenthal sent an email to Mr. Chou to  
5 let him know that they had decided that Cold Sports would remain a  
6 separate entity from Plaintiff, and would seek outside financing to  
7 continue the operation (Ex. 20, p. 944). Plaintiff refused to sell  
8 the M3 trademark to Cold Sports and indicated that Mr. Chou would "be  
9 in usa in early september to solve the remaining matters of what we  
10 have to work out and what we have to do (sic)." (Ex. 20, p. 947).

11 On September 6, 2005, Plaintiff sent a proposed Memorandum of  
12 Understanding dated September 30, 2003, between the Plaintiff, the  
13 Debtor and Blaise Rosenthal ("MOU") which contained Plaintiff's  
14 version of the relationship (Ex. 20, p.954-955, FF). On September 9,  
15 Plaintiff insisted the MOU be signed or the shipment of product would  
16 not be delivered to Zumiez since the purchase order was for Cold  
17 Sports rather than Sisco USA (Ex. 20, p.956). On September 12, the  
18 Debtor sent a response concerning Zumiez and told Plaintiff that he  
19 and Mr. Rosenthal were confused about much of the content of the MOU  
20 and would have the document reviewed by a lawyer (Ex. 20, p. 958).  
21 At the same time, Blaise continued his efforts to acquire the M3  
22 license from the Plaintiff (Ex. 20, p. 960-961). On September 16,  
23 Mr. Chou wrote that he would be in Carlsbad on September 21, and asked  
24 Bruce and Blaise to meet there. The Debtor responded that he was at  
25 a trade show in Orlando, and addressed the payment of the Zumiez  
26 order, indicating Cold Sports would pay Sisco a fair price as soon as  
27 they were paid by Zumiez. Windsor Chou responded, "What you mean  
28 agreed price to pay Sisco? CSD has to pay all full amount what

1 received from Zuimiez and full amount from any other account shipped  
2 ex-CSD. Please clarify? (sic)" (Ex 20, p. 962).

3 During September 2005, Debtor's bookkeeper completed a  
4 reconciliation which indicated that Plaintiff had taken far more from  
5 the Cold Sports account than the amount reflected on the invoices  
6 Plaintiff issued to Cold Sports. Armed with this information, the  
7 Debtor approached the economic crimes division of the San Diego  
8 district attorneys' office in an attempt to press criminal charges.  
9 (II Tr. 42:8-17, 43:14-16).

10 On October 4, Plaintiff sent Bruce an email which stated "all the  
11 inventory at CSD belongs to Sisco till you pay back for it, even the  
12 table and chair you are sitting down. We are sending you the invoice  
13 for the inventory." (Ex. 20, p. 965). On October 5, Plaintiff refused  
14 to fill the orders Cold Sports placed for Zumiez because the Debtor  
15 would not sign the MOU. Plaintiff explained the invoices Cold Sports  
16 received were just for customs clearance but not the actual cost for  
17 delivering the product to Carlsbad. Plaintiff indicated Sisco USA  
18 would provide Cold Sports with the invoices of all shipments to pay  
19 back (Ex. 20, p.968). No exhibit was submitted to show that the  
20 Plaintiff ever presented any amended invoices to Cold Sports.

21 On October 11, 2005, the Debtor sent an email to Plaintiff which  
22 attached a declaration of understanding of Cold Sports of its  
23 relationship to Plaintiff (Ex. II). On October 12, Mr. Caslowitz got  
24 the Cold Sports check book and files from Mr. Li and retrieved the  
25 signature cards from the Bank of America in Monterey Park to remove  
26 Plaintiff's representatives from the account and add himself and  
27 Blaise as the authorized signers. The Debtor also sought Mr. Li's  
28 assistance in reconciling the records of deposits with the 2004 tax

1 return (Ex. MM, NN, II Tr. 24:23-29:25), but it is not clear from the  
2 record whether Mr. Li provided the information requested.

3 On October 13, the Debtor sent Plaintiff an audit and  
4 reconciliation of the Cold Sports account which showed that the  
5 Plaintiff owed Cold Sports \$1,362,811.69 (Exs. OO & PP). During the  
6 next two weeks, Bruce and Blaise proposed various offsets for  
7 inventory and the M3 license to reduce the amount they claimed the  
8 Plaintiff owed Cold Sports (Ex. 20, pp. 970-974).

9 On October 21, 2005, the Plaintiff sued the Debtor, Cold Sports  
10 and Blaise Rosenthal. Plaintiff initially obtained a temporary  
11 restraining order, which the state court dissolved after a hearing  
12 (Ex. H). At the beginning of November 2005, the Debtor moved Cold  
13 Sports from the Sea Lion Place office to a new location, and continued  
14 in business with Elan, an Austrian manufacturer of winter sports  
15 equipment (II Tr. 41:1-22, 87:23-24). Debtor testified that based on  
16 the reconciliation, he believed Cold Sports had overpaid Plaintiff for  
17 the inventory at Sea Lion Place, was therefore the owner and entitled  
18 to move the inventory to the new location (II Tr.83:10-85:18, 88:2-4).

19 In addition to the Debtor's reconciliation, the Plaintiff  
20 submitted extensive financial records for Cold Sports. Exhibit 14  
21 contains the Cold Sports bank statements from March 29, 2004 -  
22 November 3, 2005 and copies of the checks issued during that period.  
23 Exhibit 16 is a summary of deposits and withdrawals prepared by an  
24 accountant for the Plaintiff (I Tr. 96:2-97:16). During the trial,  
25 Plaintiff took issue with the Debtor's reconciliation because it did  
26 not give credit to the Plaintiff for the expenses paid on behalf of  
27 Cold Sports. The Debtor explained that Cold Sports' expenses were  
28 paid from the Cold Sports account, and not by the Plaintiff. The

1 Debtor's explanation makes sense for the Cold Sports expenses that  
2 were paid from the Cold Sports account. However, the Court notes that  
3 the Debtor did fail to credit the Plaintiff with expenses of Cold  
4 Sports that were covered by Sisco USA beginning in November 2003 until  
5 some time in mid-2004. The record contains evidence of the checks  
6 issued by Sisco USA to the Debtor for his base salary and some  
7 commissions and expenses (Ex. 11), but the Plaintiff did not provide  
8 evidence of any other expenses borne by Plaintiff on behalf of Cold  
9 Sports. In any event, this Court need not reconcile the accounting  
10 between the parties or liquidate the debt. What is important to the  
11 role of this Court is the indication that these exhibits provide a  
12 reasonable foundation to support the Debtor's position that he  
13 believed that he was justified in moving the inventory to the new  
14 location.

15  
16 III

17 DISCUSSION

18  
19 The Plaintiff has the burden to prove by a preponderance of the  
20 evidence that the Judgment falls within the scope of § 523(a). Grogan  
21 v. Garner, 498 U.S. 279, 291 (1991). Although the burden of proof is  
22 measured by the civil standard, exceptions to the Debtor's discharge  
23 are narrowly construed and limited to those plainly expressed in the  
24 Bankruptcy Code. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998).

25 Plaintiff contends the Debtor owed it a fiduciary duty based on  
26 either his status as an employee of the Plaintiff, or as the president  
27 of Cold Sports, in which the Plaintiff was the sole investor. The  
28 definition of "fiduciary capacity" under § 523(a)(4) is governed by

1 federal law, which has adopted a narrow definition of fiduciary, one  
2 arising from an express or technical trust. In re Cantrell, 329 F.3d  
3 1119, 1125 (9<sup>th</sup> Cir. 2003); In re Honkanen, 446 B.R. 373, 379 (9<sup>th</sup> Cir.  
4 BAP 2011). Plaintiff has not established by a preponderance of the  
5 evidence that the loose and relatively undefined relationship between  
6 the Debtor and the Plaintiff falls within the narrow federal  
7 definition of fiduciary under § 523(a)(4).

8 To find the Judgment is excepted from the discharge under §  
9 523(a)(6), the Court must determine the Debtor's actions are both  
10 "willful" and "malicious". In re Ormsby, 591 F.3d 1199, 1206 (9<sup>th</sup>  
11 Cir. 2010). The Court must separately analyze the "willful" and  
12 "malicious" prongs of the statute, and find that each is established  
13 by the evidence. In re Barboza, 545 F.3d 702, 711 (9<sup>th</sup> Cir. 2008).

14 The scope of § 523(a)(6) was reduced in this circuit after the  
15 Supreme Court held that nondischargeability takes a deliberate or  
16 intentional injury, not just a deliberate or intentional act that  
17 results in injury. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). A  
18 judgment for conversion, without more, is no longer sufficient to  
19 prove that a debt is non-dischargeable under § 523(a)(6). In re  
20 Peklar, 260 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2001).

21 To show that the injury was willful, the Plaintiff must prove  
22 that the Debtor had a subjective intent to cause harm, or that the  
23 Debtor believed injury was substantially likely to occur. In re Su,  
24 290 F.3d 1140, 1142 (9<sup>th</sup> Cir. 2002); In re Thiara, 285 B.R. 420, (9<sup>th</sup>  
25 Cir. BAP 2002). The state court judgment in this case contains a  
26 finding that the Debtor intentionally took possession of the  
27 Plaintiff's snowboards and related equipment for a significant period  
28 of time without Plaintiff's consent, which could supply the requisite

1 finding of a willful injury. This finding is offset by the Debtor's  
2 belief that Cold Sports owned the inventory because the Plaintiff had  
3 already taken far more from the Cold Sports bank account than the  
4 invoiced price of the goods. Based on his understanding, he lacked  
5 the subjective intent to harm the Plaintiff.

6 The Plaintiff must also prove that the injury was malicious,  
7 which is defined as "(1) a wrongful action, (2) done intentionally,  
8 (3) which necessarily causes injury and (4) is done without just cause  
9 or excuse." Ormsby, 591 F.3d at 1207. Given the loose structure of  
10 the relationship, the lack of formal documentation, the ongoing  
11 negotiations and indications from Plaintiff that it would be sending  
12 amended invoices to properly account for the cost of the inventory,  
13 the Debtor had a sufficient reason to move the inventory to Cold  
14 Sports' new location. Based on his understanding of the relationship  
15 between Cold Sports and Sisco Sports, his belief was not an  
16 unreasonable one.

17 This ruling is likely troublesome for the Plaintiff after having  
18 obtained a jury verdict for conversion in its favor in state court.  
19 As stated earlier, the Peklar case teaches that a judgment for  
20 conversion, without more, is no longer sufficient to prove that a debt  
21 is non-dischargeable under § 523(a)(6). To an even greater degree  
22 than with the summary judgment motion, the Court has struggled with  
23 the extent to which concepts of issue or claim preclusion dictate the  
24 scope of this Court's role. However, after superimposing the  
25 additional subjective requirements necessary to find both a willful  
26 and malicious injury under the federal law, the Court concludes that  
27 Plaintiff cannot prevail on the § 523(a)(6) claim.

28

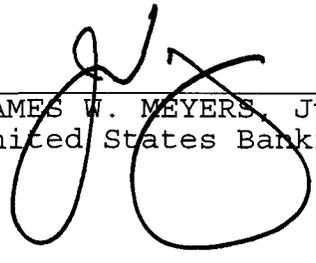
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IV

CONCLUSION

This decision contains the Court's findings of fact and conclusions of law. Plaintiff has not proven by a preponderance of the evidence that the debt represented by the Judgment should be excepted from the discharge under § 523(a)(4) or (6). The Court will issue a separate judgment in favor of the Debtor.

Dated: **JUN 13 2011**

  
\_\_\_\_\_  
JAMES W. MEYERS, Judge  
United States Bankruptcy Court