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WRITTEN DECISION – NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY <u>mc</u> DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 10-12794-MM7
)
ANTONIO GALINDO,) CHAPTER: 7
)
Debtor,) ADV. NO. 10-90473-MM
)
_____) MEMORANDUM DECISION RE TRIAL TO
) DETERMINE DISCHARGEABILITY OF
JARRED L. WHITED,) DEBT
)
Plaintiff,)
)
v.) DATE: January 3, 2012
) TIME: 9:30 a.m.
) CRTRM: 1
ANTONIO GALINDO,)
) JUDGE: Margaret M. Mann
Defendant.)
_____)

1 Jarred L. Whited ("Whited") sued used car dealer Antonio Galindo ("Galindo") for non-
2 dischargeability, alleging claims under 11 U.S.C. §§ 523(a)(2)(A) and (6).¹ Although acknowledging
3 that "mistakes were made" in how the transaction was handled with Whited, Galindo claimed he
4 lacked the fraudulent, willful or malicious intent necessary to except Whited's debt from discharge.
5 Having considered Whited's and Galindo's properly admitted evidence and testimony at the trial held
6 on January 3 and 4, 2011, the Court disagrees. Based in part upon Galindo's proclivity to subvert the
7 law to turn a profit, the Court finds that Galindo intended to defraud Whited by concealing the car's
8 previous rental history when he sold it to Whited, and by assuring Whited that his car was financed by
9 a finance company when it had not been. The Court also finds that Galindo willfully and maliciously
10 repossessed Whited's car when Whited was current with his monthly payments.

11 For the reasons set forth below, the Court grants Whited judgment on his complaint as set forth
12 in this Memorandum Decision.

13 **I. FACTUAL BACKGROUND**

14 On December 3, 2009, Whited, a twenty-year-old Navy sailor, and his new eighteen-year-old
15 wife visited Galindo's used car dealership Southbay Preowned, the dba of Galindo's solely owned
16 corporation National KARS, Inc. ("Southbay"). The Whiteds were directed to Southbay after Jarred
17 Whited's credit was rejected at another used car dealership. Whited's credit was poor since he had
18 suffered two previous repossessions; one was when he was 17 and another when he was 18. The
19 Whiteds became interested in a 2006 Hyundai Sonata ("Sonata") they saw on the lot. The Southbay
20 salesman they were dealing with, Marco Duarte, told them that the Sonata had been owned by his
21 friend who had kept all of the maintenance records. This was not true. The Sonata had been owned by
22 a rental agency, as Galindo knew, because he was responsible for purchasing the inventory for
23 Southbay.

24 To finalize the sale, Whited was introduced to Galindo at the dealership's sales office. Galindo
25 identified himself as the owner and president of Southbay. He was also the individual holder of the

26 ¹ Whited initially alleged, but then abandoned, his 11 U.S.C. § 727(a)(2)(A) and (B) claims by the time of
27 trial, which were not viable in any event. The complaint alleged fraudulent conveyances by Galindo of
28 Whited's cars he acquired in the year prior to the petition date. However, after repossession, these cars were
owned by Southbay, and were not Galindo's property to fraudulently convey.

1 California Department of Motor Vehicles ("DMV") license for Southbay, and thus legally responsible
2 for the dealership's compliance with the law. Whited offered his wife's Ford Focus ("Focus") as a
3 trade-in on the sale, but Galindo told Whited the sale would be easier to finance if he could make a
4 cash down payment. This statement was also not true. Galindo insisted on reporting a cash down
5 payment to avoid paying a fee to the finance company, not to make the sale easier to finance. Since
6 Whited did not have cash, and needed to finance the Sonata, Galindo suggested Mrs. Whited transfer
7 her Focus to Southbay for a \$1,500 credit on the sale instead.² Southbay documented the transaction
8 with the DMV, not as a sale by Mrs. Whited to the dealership, but as an un-described transfer.

9 Whited and Galindo negotiated a price of \$10,999 for the Hyundai, eventually arriving at a
10 final price of over \$13,600 including taxes, fees, add-ons, and repair contracts. After the \$1,500 credit,
11 Whited financed the balance under a Retail Installment Sales Contract ("Contract") that listed
12 Southbay as the secured creditor and seller of the Sonata. As clearly stated in the Contract, Southbay
13 had 10 days after the sale to sell the Contract to a financing company, or Southbay would no longer
14 have the right to rescind the sale, and would have to carry the financing itself. Galindo intended to
15 immediately sell the Contract to Security National Automotive Acceptance Corporation ("SNAAC"),
16 and received immediate preliminary credit approval for Whited from SNAAC. Galindo told Whited
17 SNAAC had agreed to finance Whited's purchase of the vehicle, and assisted him in setting up an
18 allotment from Whited's military pay – an automatic debit from Whited's bank account – to facilitate
19 Whited's monthly payments to SNAAC. Despite Galindo's confirmation that SNAAC had financed the
20 Sonata, SNAAC had not at that time, or at any later time, bought the Contract to provide the financing
21 for the Sonata.

22 During December, the Sonata developed electrical problems and began to suffer from a bulging
23 tire, which did not deter Whited from wanting to keep it. Whited and Galindo cooperated with

24
25 ² Mrs. Whited was not a party to the suit despite providing the Focus, so the Court does not evaluate any
26 claims she might have against Galindo. Because the Focus was her separate property acquired before marriage,
27 Mrs. Whited is the only person who had the right to sue for the Focus' fair market value, as Evidence Code §
28 662 provides that "The owner of the legal title to property is presumed to be the owner of the full beneficial
title." *In re Marriage of Weaver*, 224 Cal. App. 3d 478, 485 (Cal. App. 2d Dist. 1990). Family Code § 752
reads "Except as otherwise provided by statute, neither husband nor wife has any interest in the separate
property of the other."

1 providing SNAAC additional information to assist it in evaluating whether to buy the Contract. On
2 December 31, 2009, SNAAC received its first payment on the Contract from the military allotment
3 arranged by Galindo from Whited, although the first payment was not due until January 17, 2010.

4 In early January, SNAAC called Whited with a paperwork problem and told Whited it had not
5 yet decided to buy the Contract from Southbay. Alarmed that he had been lied to by Galindo about the
6 financing, Whited returned to Southbay wanting to unwind the sale and retrieve the Focus if he had no
7 financing. Galindo assured Whited that the financing was approved and asked him to return on
8 January 11th, a Monday, so they all could speak with SNAAC. Whited did so, along with his wife.
9 After a group call with SNAAC during which nothing was resolved, Galindo separately spoke to
10 SNAAC. After that call, he reassured Whited that financing "was approved" and even congratulated
11 the young couple on their "new" car.

12 The Whiteds were somewhat reassured by Galindo's comments until two days later, when
13 SNAAC called Whited to conduct a loan interview. Whited agreed to the interview, confirmed that the
14 car drove well and that he liked it, and answered the SNAAC representative's questions. Whited
15 shared with SNAAC that Galindo had told him that SNAAC had already purchased the Contract.
16 SNAAC responded that Galindo "should not have said that," because the Contract had not been
17 purchased.

18 Mrs. Whited initially, and then together with her husband, returned to Southbay that same day
19 to clarify whether their car was financed. They alternatively sought to rescind the sale of the Sonata,
20 get a refund of the payment they had made to SNAAC, and get their Focus back. Galindo refused to
21 rescind the deal or to refund the payment even though he acknowledged the SNAAC deal was dead.
22 He blamed Whited for "sabotaging" the SNAAC financing, leaving Southbay obligated to hold the
23 Contract. Because Galindo refused to rescind the deal, Whited told Galindo he was going to stop the
24 allotment to SNAAC for the February payment, and later asked how he should make the February
25 payment under the Contract. Galindo insisted Whited make a second January payment by cash or
26 check before the first contractual due date of January 17. Whited was unwilling to make a second
27 January payment, but offered to set up another allotment from his military pay for Southbay's benefit
28 for the February payment. Whited also asked for a payment plan or invoice to reflect the status of the

1 payments Whited had already made on the Contract. Galindo refused both requests and warned
2 Whited that Southbay would repossess the Hyundai at the end of the month if Whited did not make a
3 second January payment.

4 That day Whited reported Galindo to the Better Business Bureau ("BBB"). Galindo responded
5 to the BBB acknowledging that Whited had made the January payment.³ Galindo asserted and Whited
6 denied that Whited requested a refund from SNAAC at that time. After the BBB took no action, the
7 Whiteds sought legal assistance. In the meantime, Galindo directed a tow company to repossess the
8 Sonata on January 31, 2010. Whited's counsel wrote Galindo on February 2, 2010, claiming the sale
9 violated myriad provisions of California law and demanding Galindo rescind the deal and return Mrs.
10 Whited's Focus.

11 Despite Galindo's receipt of the letter advising him of his violations of the law, Southbay sold
12 the Sonata to itself at a private foreclosure sale on February 19, 2010. Southbay filed no DMV records
13 for the Whited sale, and Southbay resold the Sonata on March 19, 2010 without a warranty contract for
14 \$148.29 more than it was sold to Whited. At this time, the Sonata's odometer was recorded at the exact
15 same mileage it had when it was sold to Whited, despite his having driven it for nearly two months,
16 including driving to visit family in Central California during the holidays. Southbay failed and closed
17 in May of 2010. At the end of May, Southbay sold the Focus to a related dealership owned by
18 Galindo, which then resold it to a customer for \$5,495.

19 When Galindo did not respond to Whited's counsel's letter, Whited sued Southbay and Galindo
20 in state court. As the personal guarantor on a commercial lease and commercial line of credit for the
21 dealership, Galindo's personal financial situation was tied to the dealership's woes. He filed Chapter 7
22 bankruptcy two months after Southbay closed.

23 Whited timely filed his non-dischargeability complaint on September 28, 2010.

24 **II. JURISDICTION**

25 Whether this Court has constitutional authority to enter findings of fact and conclusions of law
26 in this adversary proceeding based upon *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594, 2601-02

27 ³ Months later Whited secured a refund of the January payment from SNAAC, and it is no longer a part of
28 his claim for damages.

1 (2011), has not been raised by the parties. *See Musich v. Graham (In re Graham)*, 455 B.R. 227, 232
2 (Bankr. D.Colo. 2011). The Court believes it has such authority on a number of bases. Under 28
3 U.S.C. § 157(b)(1), bankruptcy judges may hear and enter final judgments in core proceedings "arising
4 under" or "arising in" Title 11. This case on debt dischargeability is "core" to the Bankruptcy Code.
5 28 U.S.C. § 157(b)(2)(L)(discharge issues are statutorily core); *Grogan v. Garner*, 498 U.S. 279, 284
6 (1991)(bankruptcy courts have exclusive jurisdiction over discharge matters). In the Ninth Circuit,
7 "the Bankruptcy Court has jurisdiction to enter a monetary judgment on a disputed state law claim in
8 the course of making a determination that a debt is dischargeable." *Sasson v. Sokoloff (In re Sasson)*,
9 424 F.3d 864, 867-868 (9th Cir. 2005); *see also Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015,
10 1018 (9th Cir. 1997). To corroborate the Court's authority to enter final judgment quantifying
11 Whited's debt as well as to determine its dischargeable nature, are the admissions made by Whited and
12 Galindo in their pleadings that this Court had jurisdiction to decide the matter as referred from the
13 District Court. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986)
14 (recognizing that parties can agree to be bound by a decision of a court that may lack specific
15 constitutional authority to make a final decision without their consent).

16 Nevertheless, the Court is aware of an issue that bankruptcy courts lack constitutional authority
17 to quantify a non-dischargeable debt, despite their recognized authority to determine the debtor's
18 ability to discharge that debt. *See Ohio Bureau of Workers' Comp. v. Damron (In re Damron)*, 457
19 B.R. 662, 667 n.4 (Bankr. S.D. Ohio 2011) (noting that Stern calls into question whether a bankruptcy
20 judge may enter a final money judgment in a nondischargeability action). If the District Court
21 determines this case to be only "related to" Title 11, to the extent that this Court lacks authority to enter
22 a final judgment, this Memorandum Decision may serve as the Court's recommended findings of fact
23 and conclusions of law for the District Court to review de novo.

24 **III. ANALYSIS**

25 The statutory exceptions to discharge generally are to be construed strictly in favor of the
26 debtor and against those seeking to except debts from the discharge. *See, e.g., Snoke v. Riso (In re*
27 *Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992). However, the right to a discharge is denied to a dishonest
28 debtor, such as Galindo. *Grogan v. Garner*, 498 U.S. at 287 ("The [Bankruptcy Code] limits the

1 opportunity for a completely unencumbered new beginning to the 'honest but unfortunate' debtor.")
2 The creditor bears the burden of proof to establish each element by a preponderance of the evidence.
3 *Id.* at 291.

4 **A. First Cause of Action – Violation of 11 U.S.C. § 523(a)(2)(A)**

5 Bankruptcy Code section 523(a)(2)(A) excepts from discharge debts obtained by "false
6 pretenses, a false representation, or actual fraud." The Ninth Circuit employs a five-part test for
7 determining when a debt is non-dischargeable under § 523(a)(2)(A). Whited must show that: (1)
8 Galindo made the representations; (2) Galindo knew they were false; (3) Galindo made them with the
9 intention and purpose of deceiving Whited; (4) Whited relied on the statements; and (5) Whited
10 sustained damages as the proximate result of the representations. *In re Britton*, 950 F.2d 602, 604 (9th
11 Cir. 1991) (applying elements to deny debt discharge in Chapter 7 bankruptcy where debtor
12 fraudulently convinced creditor to submit to surgery).

13 Whited contends Galindo defrauded him by failing to disclose the ownership history and the
14 mechanical problems with the Sonata, and by making affirmative misrepresentations in connection
15 with Whited's trade-in of the Focus and whether SNAAC had financed the Sonata by buying the sales
16 contract. The Court finds Whited met his burden of proof on fraud under § 523(a)(2)(A) on some, but
17 not all of these claims.

18 **1. Failure to Disclose the Ownership History and Mechanical Problems**

19 Whited claims he experienced electrical and tire problems with the Sonata within a week after
20 driving off of the lot, although he did not notice these problems during the test drive, and no one at
21 Southbay made any statements regarding the mechanical condition of the vehicle. Whited did not
22 prove fraud in connection with the mechanical problems. He did not offer evidence that these
23 problems were discussed with him or that the problems were in existence at the time of the sale, much
24 less that Galindo, or that anyone at Southbay, knew about the problems before they arose. There is no
25 evidence of a knowingly false representation to Whited, and two of the five necessary elements of
26 fraud are absent. *See In re Britton*, 950 F.2d at 604 (listing each element necessary to prove fraud).
27 While the timing of the appearance of these mechanical problems is suspicious, and may give rise to
28

1 state court remedies against non-debtor parties, the Court cannot find non-dischargeable fraud on this
2 record.

3 But Whited did prove fraud in regard to the false statements regarding the ownership history
4 made by salesman Marco Duarte. That Galindo did not personally make the statements regarding the
5 rental history of the Sonata does not foreclose a finding of fraud against him. *See McIntyre v.*
6 *Kavanaugh*, 242 U.S. 138, 139 (1916) (holding a corporate tort nondischargeable by individual partner
7 because tortious act was within scope of firm's business). Nondisclosure of information that Galindo
8 has a duty to disclose may also constitute a false representation under § 523(a)(2)(A). Galindo, as the
9 holder of the DMV license and owner of Southbay, had a specific statutory duty under California law
10 to accurately disclose the rental history of the Sonata. Section 260.02⁴ of the California Code of
11 Regulations requires sellers of former taxicabs, rental, salvage, and publicly owned vehicles to identify
12 those vehicles as such if they know the vehicles' status. 13 C.C.R. § 260.02. California Civil Code §§
13 1770(a)(2) and (5) also prohibit the misrepresentation of the source, sponsorship, approval, or
14 certification of goods or services. Civil Code § 1770(a)(16) bars representing "that the subject of a
15 transaction has been supplied in accordance with a previous representation when it has not." Galindo's
16 deceptive omission therefore violates state law, rendering his debt nondischargeable. *See Apte v.*
17 *Japra (In re Apte)*, 96 F.3d 1319, 1323-24 (9th Cir. 1996) (holding debt nondischargeable for material
18 omission contrary to state law and the Restatement of Torts).

19 As the holder of the DMV license, Galindo knowingly bore the duty to disclose the ownership
20 history of the cars he sold. He regularly checked vehicles' prior ownership via the Carfax service upon
21 Southbay's acquiring them. He also was the person who purchased the Sonata at auction. While
22 Galindo denies knowing about the prior rental status of the Sonata when he sold it to Whited, the Court
23 does not believe him⁵ under these facts. Even if the Sonata auction purchase was Galindo's unusual

24 ⁴ California Code of Regulations § 260.02(b) states :

25 (b) Former taxicabs, rental vehicles, publicly owned vehicles,
26 insurance salvage vehicles and revived salvage vehicles shall be clearly
identified as such if the previous status is known to the seller.

27 ⁵ In applying the evidence to the elements of Whited's claims, the Court discounts much of Galindo's
28 testimony since it was not credible. Galindo, an experienced, sophisticated used car dealer, repeatedly skirted, if
not outright violated, the law to his personal financial advantage; the odometer problem and the salesman's

1 exception to checking the title before purchasing a car at auction, his ignorance would be manifestly
2 unreasonable given his legal obligations. He had a duty to disclose the car's rental status, a basic,
3 material fact of the sale that Whited could not discover without a Carfax subscription of his own. *See*
4 *id.* at 1324 ("[A] party to a business transaction has a duty to disclose when the other party is ignorant
5 of material facts which he does not have an opportunity to discover."). Duarte's knowing
6 misrepresentation and Galindo's concealment combined to form fraud by giving Whited a false
7 impression. *See Loomas v. Evans (In re Evans)*, 181 B.R. 508, 515 (Bankr. S.D. Cal. 1995) (holding
8 debtor's false representations and material omissions regarding sale of a vacant lot as nondischargeable
9 fraud).

10 While the evidence of actual reliance by Whited on the rental history of the car is scant, if not
11 absent, "(r)eliance is not a factor since it is not possible to rely on facts which have been concealed."
12 *In re Evans*, 181 B.R. at 515. Justifiable reliance similarly need not be further proven when a party
13 with a duty to disclose a material fact fails to do so. *See Tallant v. Kaufman (In re Tallant)*, 218 B.R.
14 58, 68 (B.A.P. 9th Cir. 1998) (excepting individual lawyer's debt from discharge based on fraudulent
15 nondisclosure). Whited's reliance was also established by law in light of his youth and lack of
16 knowledge, in comparison to Galindo's status as a seasoned expert. *See Eugene Parks Law Corp.*
17 *Defined Benefit Pension Plan v. Kirsh (In re Kirsh)*, 973 F.2d 1454, 1458 (9th Cir. 1992) (stating that
18 the standard for justifiable reliance "is not that of the average reasonable person. It is a more
19 subjective standard which takes into account the knowledge and relationship of the parties
20 themselves.").

21 The comprehensive state law protecting consumers from shady used car dealers also helps
22 Whited satisfy the element of proximate cause. Galindo's concealment of the title history, in violation

23 misrepresentations were just two of the examples before the Court. Frequently evasive and forgetful during his
24 testimony in Court, Galindo denied knowing that Whited was current in his payments to SNAAC when he
25 repossessed the Sonata, despite his contemporaneous email to the Better Business Bureau that confirmed this
26 knowledge. Galindo also sought to deceive SNAAC out of a fee by treating the trade-in as a cash purchase —
27 further evidence of his shady business practices.

28 On another critical issue, Galindo again changed his story about whether he offered to return the Focus
to the Whites. At trial, he testified he had no obligation to do so. In his trial brief, Galindo blamed the
Whites' loss of the Focus on their lack of efforts to reclaim it after January, even though they had written a
letter in February demanding the car's return, which he ignored.

1 of 13 C.C.R. § 260.02, resulted in Whited trading in his Focus, causing him harm because of Galindo's
2 false pretenses.

3 Since each of the elements of fraud is met as to the history of the Sonata, Whited has proven
4 this claim.

5 **2. Affirmative Misrepresentations Regarding Trade-in and Financing**

6 In addition to his concealment claims, Whited has two claims of direct misrepresentation by
7 Galindo. He first contends Galindo committed fraud by listing the Focus as a sale by Mrs. Whited to
8 Southbay and then showing the trade-in value of the Focus as a cash down payment for Whited's
9 purchase of the Sonata. This unnecessarily complicated treatment of the down payment credit to the
10 Contract was inaccurate. No cash was exchanged in what was functionally a trade-in. The way
11 Galindo insisted the deal be structured was meant to benefit Galindo personally. Galindo testified he
12 characterized the Focus as a trade-in to avoid a fee from SNAAC.

13 Despite this evidence, the Court does not find fraud on the trade-in claim. First, Galindo's
14 intent to deceive was directed not at Whited, but potentially at SNAAC. This does not prove fraud for
15 Whited because the cause of action requires intent to deceive the plaintiff. *See In re Eashai*, 87 F.3d at
16 1090.

17 Second, false statements do not prove fraud unless they are "substantially inaccurate" and are of
18 the type that "would affect the creditor's decision making process." *Candland v. Ins. Co. of N. Am. (In*
19 *re Candland)*, 90 F.3d 1466, 1470 (9th Cir. 1996). Galindo's manner of handling the Focus as a trade-
20 in did not seem to make any difference to Whited's rights. It did not affect Whited's rescission rights.
21 California Civil Code § 2982.7(b)⁶ provided Whited upon breach of the contract either a right to return

22
23 ⁶ California Civil Code § 2982.7(b) provides:

24 (b) In the event of breach by the seller of a conditional sale contract or
25 purchase order where the buyer leaves his motor vehicle with the seller
26 as downpayment and such motor vehicle is not returned by the seller to
27 the buyer for whatever reason, the buyer may recover from the seller
28 either the fair market value of the motor vehicle left as a downpayment
or its value as stated in the contract or purchase order, whichever is
greater. The recovery shall be tendered to the buyer within 5 business
days after the breach. (Emphasis added.)

1 of the Focus or its value, which would be the trade-in amount. For this reason, the Court does not find
2 Whited proved fraud on the trade-in claim.

3 The Court finds Whited did successfully prove his case of fraud by Galindo's multiple false
4 assurances that SNAAC had bought the Contract, however. These assurances were knowingly false.
5 All SNAAC ever did was provide initial credit approval; it never funded the deal. Galindo knew
6 SNAAC had not bought the Contract since he had dealt with SNAAC numerous times and his contract
7 with SNAAC said the Contract was not bought until the financing was funded. Under California
8 Vehicle Code § 11713, Galindo was responsible for explaining the financing accurately and
9 completely. *See Ford Dealers Assn v. Dep't of Motor Vehicles*, 32 Cal.3d 347, 357 (1982) (explaining
10 that under the California Vehicle Code, the scope of actionable representations by a car dealer to a
11 consumer is extremely broad, including oral statements).

12 The Court also finds Galindo made the financing misrepresentations with intent to deceive, the
13 most important element of a § 523(a)(2)(A) inquiry. *See In re Eashai*, 87 F.3d at 1090. There is a
14 wealth of circumstantial evidence of Galindo's intent to sell cars only if he could also arrange third-
15 party financing, regardless of whether these efforts deceived his customers including Whited. To
16 encourage a sale of the Sonata, and then receive cash from SNAAC from the purchase of the Contract,
17 Galindo advised at the outset that the financing was approved and set up a payment plan for Whited
18 with SNAAC. This left Whited vulnerable to a default when the SNAAC deal fell through. Galindo
19 then continued to make false promises of financing to discourage Whited from exercising his legal
20 rights to rescind the deal. Galindo refused to provide Whited with invoicing or documentation of the
21 status of the financing with Southbay. Galindo reacted sharply when he learned the SNAAC deal was
22 dead, accusing Whited of sabotage. Being unable to cash out the sale to Whited with financing from
23 SNAAC, Galindo asserted a pre-textual default which enabled him to resell both cars at a profit. By
24 asserting this false claim of default, Galindo managed to avoid his acknowledged obligation to hold the
25 financing since Southbay's rescission right expired on December 13, 2009.

26 That Galindo's actions took place a few months before Southbay failed and closed supports this
27 finding of Galindo's intent to deceive. As the guarantor of Southbay's financing, with his personal
28 financial status directly related to the dealership, Galindo advanced his personal interests by the resale

1 of both vehicles. In fact, Galindo's bankruptcy was caused by Southbay's financial woes when it failed
2 a few months later.

3 All of these circumstances show Galindo's misstatements of the status of the financing and
4 other non-disclosures were not innocent, but motivated by self-interest. This evidence establishes
5 Galindo's intent to deceive. *See Alexander & Alexander of Washington, Inc. v. Hultquist (In re*
6 *Hultquist)*, 101 B.R. 180, 183-84 (B.A.P. 9th Cir. 1989) (intent to deceive could be inferred from the
7 totality of the circumstances where debtor sales agent took sale commission even though third party
8 insurance company had only preliminarily approved creditor).

9 Galindo's misrepresentations also induced Whited to rely to his detriment. The reasonableness
10 of Whited's reliance is evaluated under a subjective standard. *See Field v. Mans*, 516 U.S. 59, 74
11 (1995); *Tallant*, 218 B.R. at 67 (justifiable reliance standard considers circumstances and relationship
12 between parties, lowering standard where parties are friends). Galindo was far more sophisticated
13 about dealership financing, and Whited justifiably relied upon him. *See In re Kirsh*, 973 F.2d at 1458-
14 59 (reasonable reliance is determined by a subjective standard, taking into account the parties'
15 characteristics). Galindo took advantage of Whited, who was deeply concerned about obtaining
16 financing before he traded in his wife's Focus. Galindo was aware both that Whited had had two
17 repossessions while still a teenager, and that he had already been turned down for financing by one
18 dealer before visiting Southbay. Most importantly, the first two times Whited received information
19 casting doubt on whether SNAAC had actually bought the Contract, Galindo intervened to falsely
20 reassure Whited. These reassurances justified Whited's reliance in making the payment. *See In re*
21 *Eashai*, 87 F.3d at 1091 (debtor's minimum monthly payments justified creditor's reliance in extending
22 credit).

23 Next to be considered is the proximate cause element. *In re Britton*, 950 F.2d at 604. Galindo
24 argued Whited is the one to blame for the loss of both his new car and his old one because Galindo did
25 not know about Whited's January payment to SNAAC. Not only Whited's credible testimony, but also
26 Galindo's contemporaneous email to the BBB, proves Galindo's feigned ignorance to be false.
27 Galindo also claims he was entitled to demand a second January payment since Whited could have
28 claimed, and eventually did claim, a refund from SNAAC. Galindo provides no authority justifying

1 his right to a second payment, neither under the Contract or the law. The Automobile Sales Finance
2 Act ("ASFA") puts the burden on the dealer, not the customer, to assure the lack of a default before a
3 repossession can occur in any event. California Civil Code § 2983.3 prohibits repossession of a motor
4 vehicle in the absence of a buyer's default.⁷

5 Due to Galindo's fraud, Galindo should have foreseen that Whited would insist upon his legal
6 rights to unwind the transaction, or at least to respect the transaction as Galindo had set it up. *See In re*
7 *Britton*, 950 F.2d at 605 (finding proximate cause elements satisfied when creditor responds in a
8 foreseeable manner to fraudulent acts). In disrespect of both of these legally valid courses of action,
9 Galindo instead pursued a third—one proscribed by law but the one most advantageous to Galindo's
10 financial interests. Even when Whited's counsel pointed out all of Galindo's legal transgressions in a
11 letter that demanded the deal be unwound under California Civil Code § 2984,⁸ Galindo proceeded to
12 foreclose on Southbay's lien on the Sonata, and sold both cars at higher prices than what was reflected
13 in his deal with Whited. Proximately caused damages may thus be found.

14 **B. Second Cause of Action – Violation of 11 U.S.C. § 523(a)(6)**

15 Section 523(a)(6) of the Bankruptcy Code renders a debt arising from a "willful and malicious
16 injury by the debtor to another entity or to the property of another entity" non-dischargeable. The
17 Court finds that Galindo injured Whited in the tortious, willful and malicious manner required under §
18 523(a)(6) by repossessing and selling the Sonata when Whited was current under the Contract, and
19 then failing to return Whited's \$1,500 deposit from the trade-in of the Focus.

20 ⁷ California Civil Code § 2983.3 states:

21 In the absence of default in the performance of any of the buyer's
22 obligations under the contract, the seller or holder may not accelerate
23 the maturity of any part or all of the amount due thereunder or
repossess the motor vehicle. (Emphasis added)

24 ⁸ The relevant part of California Civil Code § 2984 provides:

25 "If notified in writing by the buyer of such a failure to comply with any
26 provision of this chapter, the correction shall be made within 10 days of
27 notice. Where any provision of a conditional sale contract fails to
28 comply with any provision of this chapter, the correction shall be made
by mailing or delivering a corrected copy of the contract to the buyer."

1 Galindo's knowingly unjustified repossession of the Sonata is the type of tortious breach of
2 contract recognized by the Ninth Circuit to be non-dischargeable under § 523(a)(6). An intentional
3 breach of a contract alone will not trigger the "willful and malicious injury" dischargeability exception.
4 *See Lockerby v. Sierra*, 535 F.3d 1038, 1043 (9th Cir. 2008) (debt arising from an unjustified breach of
5 a settlement agreement without separate tortious conduct is dischargeable). However, Galindo's breach
6 of contract was accompanied by tortious or unlawful conduct that resulted in willful and malicious
7 injury. In these circumstances, the resulting debt is excepted from discharge. *See Banks v. Gill*
8 *Distrib. Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001) (taking a knowingly unjustified
9 position in a contract dispute to cause the other party to accept less than it was due was a willful and
10 malicious injury); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001)(failure of a
11 corporate officer to pay employees when funds were available created a non-dischargeable debt when
12 the action was a California misdemeanor, and the state court had awarded punitive damages).

13 Galindo's conduct also constituted a willful and malicious conversion of the Sonata that may be
14 non-dischargeable under § 523(a)(6). *See McIntyre v. Kavanaugh*, 242 U.S. 138, 139 (1916) (holding
15 a corporate conversion nondischargeable in bankruptcy by an individual partner because unjustified act
16 created injury and was within scope of firm's business).⁹ *See Leonard v. Guillory (In re Guillory)*, 285
17 B.R. 307, 316 (Bankr. C.D. Cal. 2002) (finding an unjustified car repossession willful and malicious).

18 Addressing each of the willful and malicious prongs separately, Galindo's conversion of the
19 Sonata is willful due to his subjective awareness that his intentional actions would cause injury.
20 Whited proved the first "willful" prong of the test since Galindo's repossession and resale of the Sonata
21 was calculated and purposeful as in *Banks*, 263 F.3d at 869, rather than reckless. *Cf. Carillo v. Su (In*
22 *re Su)*, 290 F.3d 1140, 1145-46 (9th Cir. 2002) (reckless injury from car accident was dischargeable);
23 *Thiara v. Spycher Bros. (In re Thiara)*, 285 B.R. 420, 434 (B.A.P. 9th Cir. 2002) (conversion case
24 remanded due to lack of findings on either subjective intent to injure or knowledge that injury would
25 result). Galindo arranged the repossession knowing that injury would result to Whited and his wife,
26 one of whom would be without transportation, which they could not easily replace due to their youth

27 ⁹ The Supreme Court in *Geiger* cited *McIntyre* as consistent with its clarification of the definition of
28 willful and malicious. *Kawaauhau v. Geiger*, 523 U.S. 57, 63-64 (1998).

1 and previous financing problems. This breach was not only tortious, but also unlawful under the
2 provisions of California Civil Code § 2983.3 and contrary to California's fundamental policy of
3 protecting consumers from unethical used car dealers.¹⁰ *Jercich*, 238 F. 3d at 1204.

4 Whited also proved the second "malicious" prong to the § 523(a)(6) test. This prong involves:
5 "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without
6 just cause or excuse." *Jercich*, 238 F.3d at 1209. While many of the willful and malicious elements
7 overlap, the key differentiating factor between the "willful" and "malicious" tests is whether Galindo
8 acted without just cause or excuse. *See id.* Similar to the facts of *Banks*, 263 F.3d 862, and *Jercich*,
9 238 F.3d 1202, Galindo deliberately breached the Contract without justification or excuse when he
10 repossessed the Sonata while Whited was current on his payments. He knew that Whited had already
11 made the first payment under the plan to SNAAC – in fact, Whited had done so with Galindo's
12 assistance and at his direction. But Galindo ignored that payment, either to ensure he received a
13 second payment for the same month, or to set up a pre-text for repossession in violation of California
14 Civil Code § 2983.3.

15 Galindo continued to act without justification when he foreclosed upon and resold the Sonata,
16 and then sold the Focus, despite having received Whited's counsel's letter explaining to Galindo the
17 legal problems with the repossession. Rather than rescind the transaction and return Mrs. Whited's
18 vehicle once advised of the law, Galindo compounded the harm by selling both the Sonata and the
19 Focus, despite Whited's counsel's demand for the latter's return. Even if Galindo had a plausible
20 argument that he could retain one or both vehicles before his receipt of that letter, his foreclosure and
21 resale of both vehicles after that was without "just cause or excuse." *See Jett v. Sicroff (In re Sicroff)*,
22 401 F.3d 1101, 1107 (9th Cir. 2005) (holding repeated libelous statements malicious when they went
23 beyond the debtor's initial arguable justification).

24 The Court finds both the willful and malicious elements of § 523(a)(6) have been met.

25
26
27 ¹⁰ The Consumers Legal Remedies Act, California Civil Code §1770 et. seq., is "to be liberally construed
28 and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive
business practices and to provide efficient and economical procedures to ensure such protection."

1 **IV. DAMAGES**

2 Having determined that Galindo's debt to Whited for statutory and common law fraud and
3 conversion is not dischargeable, the Court must quantify it by reference to applicable state law. *Cohen*
4 *v. de la Cruz*, 523 U.S. 213, 223 (1998) (discharge exception under § 523 (a)(2) applies to all liability
5 arising on account of a debtor's fraudulent conduct, including treble damages and attorney's fees and
6 costs under state law); *Fry v. Dinan (In re Dinan)*, 448 B.R. 775, 782 (B.A.P. 9th Cir. 2011) (discharge
7 exception "applies to all liability arising on account of a debtor's fraudulent conduct"); *Bertola v. N.*
8 *Wis. Prod. Co. (In re Bertola)*, 317 B.R. 95, 99-100 (B.A.P. 9th Cir. 2004) (attorney's fees included in
9 non-dischargeability award when they were recoverable under state statute).

10 Whited's fraud damages recovery is one for actual damages under California Civil Code §
11 1770. See *Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 106, 122-23 (Cal. App. 2d Dist.
12 2011) (Consumers Legal Remedies Act ("CLRA") permissible damages are actual and punitive
13 damages). The Court will not award the resale value of the Focus because Whited's wife owned the
14 Focus and she is not a party to this action. However, the Court awards Whited the trade-in value of the
15 Focus, \$1,500, which was its value provided to the transaction by Whited.

16 Whited cited the Song-Beverly Consumer Warranty Act ("SBCA") as a basis for recovery of
17 double damages.¹¹ Whited failed to prove a violation of the SBCA, or fraud based on the Sonata's
18 mechanical problems, since the problems did not deter the Whiteds from driving the car. A breach of
19 the implied warranty of merchantability requires a showing that "the product did not possess even the
20 most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 408
21 (Cal. App. 4th Dist. 2003).

22 For Whited's conversion claim, California Civil Code § 3336 provides that the recovery for
23 conversion is the fair market value of the property plus interest, in addition to fair compensation for

24 ¹¹ California Civil Code § 1794(c) provides:

25 "If the buyer establishes that the failure to comply was willful, the judgment may
26 include, in addition to the amounts recovered under subdivision (a), a civil
27 penalty which shall not exceed two times the amount of actual damages. This
28 subdivision shall not apply . . . with respect to a claim based solely on a breach of
an implied warranty."

1 time and money spent in pursuit of the property. *In re Guillory*, 285 B.R. at 315. Given that the
2 Sonata was encumbered by the Contract, its fair market value to Whited was merely the difference
3 between the lien and the value, or \$1,500 here. To award Whited the value of the lien amount is not
4 proper since Whited did not provide that value to the transaction. After Galindo wrongfully
5 repossessed, he refused to provide an accounting to Whited. For this act, Automobile Sales Finance
6 Act, California Civil Code § 2983.2¹² requires the return of his profits from the repossession. This
7 amount of \$148.29 calculated by Whited by cancelling out the warranty contract which was never
8 activated is added to Whited's total recovery.

9 Galindo must compensate Whited for his legal expenses due to the mandate of California Civil
10 Code § 1780(e).¹³ An award of attorney's fees, even if larger than Whited's personal loss, furthers the
11 public goal of deterring unfair or deceptive business practices. *See Hayward v. Ventura Volvo*, 108
12 Cal. App. 4th 509, 511-13 (Cal. App. 2d Dist. 2003) (affirming a \$98,000 attorney's fee award in auto
13 dealer CLRA violation case where compensatory damages were \$14,812). The fees awarded will be
14 based on the lodestar method of calculation, based on time spent and hourly rate. *Graham v.*
15 *DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579 (Cal. 2004).

25 ¹² California Civil Code § 2983.2(c) provides: "In all sales which result in a surplus, the seller or holder
26 shall furnish an accounting as provided in subdivision (b) whether or not requested by the buyer. Any surplus
shall be returned to the buyer within 45 days after the sale is conducted."

27 ¹³ California Civil Code § 1780(e) provides that "[t]he court shall award court costs and attorney's fees to a
28 prevailing plaintiff in litigation filed pursuant to this section." (Emphasis added).

1 **V. CONCLUSION**

2 Galindo's conduct in this case demonstrates a calculated attempt to profit at the expense of the
3 Whiteds. For his tortious nondisclosure, misrepresentation, and conversion, he must return to Whited
4 the \$1,500 he wrongfully acquired from him. He also must return the \$148.29 profit from his wrongful
5 resale of the Sonata, and he must compensate Whited for his legal expenses. Whited is to file a
6 declaration no later than **February 13, 2012** with the amount of his attorney's fees to be added to the
7 judgment, to which Galindo may reply no later than **February 21, 2012**. A hearing will be held on the
8 amount of attorney's fees and costs on **March 1, 2012 at 2:00 p.m.** in this Court.

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10 Dated: February 1, 2012

11 
12 MARGARET M. MANN, JUDGE
13 United States Bankruptcy Court
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