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WRITTEN DECISION – NOT FOR PUBLICATION

ENTERED <u>AUG 24 2012</u>
FILED
<div style="border: 1px solid black; padding: 5px; text-align: center;">AUG 24 2012</div>
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: ) BANKRUPTCY NO: 11-11434-MM7  
)  
AKIBA TAMARA MINIEFEE, ) ADVERSARY NO: 11-90445-MM  
)  
) CHAPTER: 7  
Debtor, )  
) MEMORANDUM DECISION RE MOTION  
\_\_\_\_\_) FOR SUMMARY JUDGMENT FILED BY  
THOMAS FERNANDEZ AND ) THOMAS FERNANDEZ AND GLORIA G.  
GLORIA G. FERNANDEZ, ) FERNANDEZ  
)  
Plaintiffs, )  
)  
v. ) DATE: 7/19/2012  
) TIME: 10:00 a.m.  
) CRTRM: 1  
AKIBA TAMARA MINIEFEE, )  
) JUDGE: Margaret M. Mann  
Defendants, )  
)  
\_\_\_\_\_)

1 On April 13, 2011, the Superior Court of California entered a default judgment in the  
2 amount of \$393,029 ("Judgment") in favor of Thomas F. Fernandez and Gloria G. Fernandez  
3 ("Plaintiffs") against Akiba T. Miniefee ("Debtor") and several other defendants jointly and  
4 severally.<sup>1</sup> The Judgment was based upon Plaintiffs' business dealings with Tricomm  
5 Worldwide, LLC ("Tricomm"), of which Debtor was an employee. After Debtor filed Chapter 7  
6 bankruptcy several months later, Plaintiffs filed suit against Debtor to determine the  
7 nondischargeability of the Judgment, alleging claims for "actual fraud" and "fraud or  
8 defalcation while acting in a fiduciary capacity" under 11 U.S.C. §§ 523(a)(2)(A) and  
9 523(a)(4).<sup>2</sup>

10 Plaintiffs now seek summary judgment, contending that Debtor is precluded from re-  
11 litigating the issues inherent in the Judgment. Because the Judgment includes no findings of  
12 fact, and therefore no specific rulings on the issues of fraud or defalcation, and because the wide  
13 range of theories alleged in the Complaint do not establish fraud or defalcation by necessity,  
14 Plaintiffs have not carried their burden of demonstrating the absence of triable issues of fact for  
15 the Judgment to be excepted from discharge at this stage of the case. Summary Judgment is thus  
16 denied.

17 **I. Factual Background**

18 Plaintiffs sued Debtor, Tricomm, and the other defendants in state court on seven  
19 theories: breach of contract, fraud, conversion, unjust enrichment, breach of the covenant of  
20 good faith and fair dealing, intentional infliction of emotional distress, and civil conspiracy.  
21 Plaintiffs alleged in each cause of action that they hired the defendants to consult on the  
22 acquisition of ownership interests in real estate investment properties, paid \$60,000 for these  
23 services, but received no consulting services nor any ownership interests in real estate.

24  
25  
26 <sup>1</sup> The other defendants were James L. Hutchinson, Jr., Antipaz Cabotaje, Jr., Olivia Cabotaje and  
Tricomm.

27 <sup>2</sup> All statutory references for the remainder of this document will be to Title 11, United States Code,  
28 unless otherwise indicated.

1 After Debtor initially failed to respond to the state court complaint, a default was entered  
2 and then set aside. Debtor then failed to respond to discovery or to appear at a settlement  
3 conference, causing the state court to strike Debtor's answer. The Judgment of \$393,029, of  
4 which \$300,000 was awarded as punitive damages, was then entered after a further evidentiary  
5 hearing. No findings of fact were made in the Judgment to identify the theories on which the  
6 damage award was based.

7 In response to the nondischargeability complaint in this Court, Debtor confirms the  
8 business relationship Tricomm had with Plaintiffs, but denies either fraud or defalcation. Debtor  
9 claims that she abandoned her valid defenses to Plaintiffs' claims in state court because she  
10 could no longer afford an attorney. The Court notes Debtor is also unrepresented in this case.

## 11 **II. Jurisdiction**

12 Under 28 U.S.C. § 157(b)(1), this Court has authority to enter final judgment and  
13 findings of fact and conclusions of law in this nondischargeability proceeding, which is "core"  
14 to the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(L) (2012) (discharge issues are statutorily core);  
15 *Grogan v. Garner*, 498 U.S. 279, 284 (1991) (bankruptcy courts have exclusive jurisdiction  
16 over discharge matters); *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 867-68 (9th Cir.  
17 2005); *see also Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997)  
18 (affirming bankruptcy court's entry of a monetary judgment on a state-law fraud claim).  
19 Additionally, this order denying summary judgment is not a final order under Bankruptcy Rule  
20 7054, but an interlocutory one, since further proceedings will be had before this case is  
21 resolved. *See O'Toole v. McTaggart (In re Trinsum Group, Inc.)*, 467 B.R. 734, 741 (Bankr.  
22 S.D.N.Y. 2012) (summary judgment decisions that do not resolve the entire case are  
23 interlocutory). The Court has jurisdiction on these bases.

## 24 **III. Summary Judgment Standards**

25 On a motion for summary judgment, the moving party bears the burden of  
26 demonstrating that "there is no genuine dispute as to any material fact" and that it "is entitled to  
27 judgment as a matter of law." FED. R. CIV. P. 56(a); FED. R. BANKR. P. 7056. To prevail, the  
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1 moving party must establish that each essential element of its claim is undisputed. *See Celotex*  
2 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court is "required to view all facts and draw all  
3 reasonable inferences in favor of the nonmoving party" when reviewing the Motion. *Brosseau v.*  
4 *Haugen*, 543 U.S. 194, 195 n.2 (2004). Because the underlying purpose of the Bankruptcy Code  
5 is to grant the debtor a "fresh start," courts construe exceptions to discharge narrowly. *Retz v.*  
6 *Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010) (quoting *Bernard v. Sheaffer (In re*  
7 *Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996)). The moving party also bears the burden of proof  
8 on all elements of issue preclusion. *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 825  
9 (B.A.P. 9th Cir. 2006). Regardless, if the necessary elements are met, this Court must give  
10 preclusive effect to the nondischargeability issues decided in state court as a matter of full faith  
11 and credit. *Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057 (9th Cir. 1994).

12 Here, Plaintiffs have not met their burden because the Judgment does not make express  
13 or implied findings of the elements of fraud or defalcation as required by §§ 523(a)(2)(A) and  
14 523(a)(4). In the absence of these findings, the Judgment does not preclude the issue of  
15 dischargeability. Material issues of fact remain, and summary judgment cannot be granted.

#### 16 **IV. Application of Collateral Estoppel to State Court Judgments**

17 Pursuant to 28 U.S.C. § 1738, federal courts apply the issue preclusion principles from  
18 the state in which the judgment was entered. *Grogan*, 498 U.S. at 284; *Honkanen v. Hopper (In*  
19 *re Honkanen)*, 446 B.R. 373, 382 (B.A.P. 9th Cir. 2011). In California, the state in which the  
20 Judgment was entered, collateral estoppel applies if five threshold elements are met: (1)  
21 identical issue; (2) actually litigated in the former proceeding; (3) necessarily decided in the  
22 former proceeding; (4) former decision final and on the merits; and (5) party against whom  
23 preclusion sought either the same, or in privity with, party in former proceeding. *Khaligh*, 338  
24 B.R. at 824. Even if all five requirements are met, the Court must also ensure that the  
25 application of collateral estoppel is fair and consistent with sound public policy. *Alonso v.*  
26 *Summerville (In re Summerville)*, 361 B.R. 133, 143 (B.A.P. 9th Cir. 2007); *Lucido v. Superior*  
27 *Court*, 51 Cal. 3d 335, 343 (Cal. 1990).

1 As to elements two, four and five, the analysis is the same for both of Plaintiffs' §§  
2 523(a)(2)(A) and 523(a)(4) claims. Element two, the "actually litigated" requirement ensures  
3 that parties in the former proceeding had "notice of the hearing as well as the opportunity and  
4 incentive to present [their] case." *Lucido*, 51 Cal. 3d at 354. In California, a default judgment is  
5 conclusive to the issues tendered by the complaint as if it had been rendered after answer filed  
6 and trial had on all allegations denied by the answer. *Newsome v. Moore (In re Moore)*, 186  
7 B.R. 962, 971 (Bankr. N.D. Cal. 1995) (citing *Fitzgerald v. Herzer*, 177 P.2d 364, 366 (Cal. Ct.  
8 App. 1947)).

9 The state court case was actually litigated to a greater degree than would result from a  
10 mere failure to respond to a complaint. After Plaintiffs filed their complaint in the state court  
11 action, Debtor filed an answer on May 21, 2010, and also provided written responses to  
12 plaintiffs' discovery requests on July 15, 2010. Debtor then abandoned her defense by declining  
13 to appear for both her original and rescheduled depositions and the mandatory settlement  
14 conference. After the missed settlement conference, the judge struck her answer for failure to  
15 appear to the settlement Conference and entered a default. Debtor had the opportunity and  
16 incentive to present her case, *Lucido*, 51 Cal. 3d at 354, and the "actually litigated" requirement  
17 is satisfied.

18 Element four, that the decision in the former proceeding must be final and on the merits,  
19 is also present for all of Plaintiffs' claims. *Khaligh*, 338 B.R. at 824. The default judgment was  
20 not appealed, and it is therefore final on its merits.

21 Element five, that the party against whom preclusion sought must be either the same, or  
22 in privity with, the party in the former proceeding, is met as well. *Khaligh*, 338 B.R. at 824.  
23 While Plaintiff's Judgment is against Debtor and James L. Hutchinson, Jr., jointly and severally,  
24 the "same parties" requirement is met when a party asserts claim preclusion against a single  
25 defendant from a joint and several judgment. In *Baldwin*, the Ninth Circuit Bankruptcy  
26 Appellate Panel rejected the argument that the plaintiff had to show which portion of the  
27 judgment was attributable to the conduct of the defendant because the default judgment  
28

1 imposed joint and several liability on each defendant. *See Baldwin v. Kilpatrick (In re Baldwin)*,  
2 245 B.R. 131, 137 (B.A.P. 9th Cir. 2000) (citing *Coca-Cola Bottling Co. v. Lucky Stores, Inc.*,  
3 11 Cal. App. 4th 1372, 1376 (1992)). This is consistent with the definition of joint and several  
4 liability, which permits apportionment of liability either among multiple parties or to only one  
5 of the group, at the adversary's discretion. BLACK'S LAW DICTIONARY 997 (9th ed. 2009).

6 Where Plaintiffs' request for summary judgment fails is regarding elements one and  
7 three, which the Court applies below to each of the §§ 523(a)(2)(A) and 523(a)(4) claims  
8 separately. Since these technical elements are not satisfied, the Court need not address the  
9 public policy implications of applying issue preclusion to a state court judgment. *See Khaligh*,  
10 338 B.R. at 824 (analysis of public policy is obviated where other elements of issue preclusion  
11 are not met).

12 **A. Identical Issue and Necessarily Litigated Elements Applied to Fraud Claim**

13 The "identical issue" requirement addresses whether "identical factual allegations" are at  
14 stake in the two proceedings. *Lucido*, 51 Cal. 3d at 342. The § 523(a)(2)(A) elements "mirror  
15 the elements of common law fraud" in California. *Younie v. Gonya (In re Younie)*, 211 B.R.  
16 367, 373 (B.A.P. 9th Cir. 1997) (citing *In re Hashemi*, 104 F.3d 1122, 1125 (9th Cir. 1997), *as*  
17 *amended, cert. denied*, 117 S. Ct. 1824 (1997)). Identical factual elements are at stake in the  
18 Judgment and in Plaintiffs' claim under § 523(a)(2)(A); as such, element one is satisfied as to  
19 the fraud claim.

20 The third element, that the issues have been necessarily litigated, is the one lacking for  
21 the fraud claim and bars the application of issue preclusion. A prior decision can be given  
22 preclusive effect in later proceedings "where the record shows an express finding upon the  
23 allegation" for which preclusion is sought. *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d  
24 1119, 1124 (9th Cir. 2003) (quoting *Estate of Williams*, 223 P.2d 248, 254 (Cal. 1950)). The  
25 state court failed to make specific findings on the five statutory elements of fraud: "(1)  
26 misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the  
27 falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable  
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1 reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor  
2 proximately caused by its reliance on the debtor's statement or conduct." *Harmon v. Kobrin (In*  
3 *re Harmon)*, 250 F.3d 1240, 1246 (9th Cir. 2001). *Younie*, 211 B.R. at 374. But no findings  
4 were made here of any kind.

5       Alternatively, "the express finding requirement can be waived if the court in the prior  
6 proceeding necessarily decided the issue." *In re Harmon*, 250 F.3d at 1246; *see also Chew v.*  
7 *Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994) (general verdict will support estoppel only if issue as  
8 to which estoppel is sought must necessarily have been determined in a prior proceeding). In  
9 these circumstances, an express finding is not required because "if an issue was necessarily  
10 decided in a prior proceeding, it was actually litigated." *Id.* Though Plaintiffs properly *alleged*  
11 fraud in their state court complaint,<sup>3</sup> the Court cannot determine if fraud was actually the basis  
12 for the Judgment because allegations other than fraud were also alleged in the state court  
13 complaint and could have been the basis for the Judgment.

14       **B. Collateral Estoppel Application to the § 523(a)(4) Claim**

15       Plaintiffs' second cause of action under § 523(a)(4) requires proof that Debtor was (1)  
16 acting in a fiduciary capacity and (2) in that capacity, committed fraud or defalcation. *Teichman*  
17 *v. Teichman (In re Teichman)*, 774 F.2d 1395, 1398 (9th Cir. 1985). Because exceptions to  
18 discharge in bankruptcy are construed narrowly to fulfill the Bankruptcy Code's ambition to  
19 give the debtor a "fresh start", a fiduciary relationship is narrowly defined for the purposes of §  
20 523(a)(4). *Id.* Outside of a bankruptcy context, a fiduciary relationship can be any one that  
21 involves confidence, trust, and good faith, but this broader definition is inapplicable here.

22  
23 <sup>3</sup> Each of the elements of the fraud claim under California law were alleged in the state court complaint:  
24 (1) at the time Debtor promised to provide the consulting and investing services to Plaintiffs, Debtor had  
25 no intention of doing so and did not have the expertise claimed; (2) Debtor's representations regarding  
26 real estate and investment expertise were made with the intent to induce Plaintiffs to enter the agreement  
27 and pay the consulting fees to Debtor; (3) Plaintiffs could not have discovered with reasonable diligence  
28 Debtor's lack of expertise or intention not to perform and acted in reliance on Debtor's false promises in  
entering the agreement; (4) Plaintiffs would not have entered the agreement had they known the true  
intentions of Debtor; and (5) Debtor failed to perform and as a proximate result, Plaintiffs suffered the  
loss of their \$60,000. Plaintiffs also sought damages exemplary and punitive damages under California  
Civil Code § 3294(a).

1 *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986). In the § 523(a)(4) context, "fiduciary  
2 capacity" only includes express or technical trust relationships; implied or constructive trusts do  
3 not create a fiduciary relationship. *Lovell v. Stanifer (In re Stanifer)*, 236 B.R. 709, 714 (B.A.P.  
4 9th Cir. 1999). The general characteristics of an express trust are: (1) sufficient words to create  
5 a trust; (2) a definite subject; and (3) a certain and ascertained object or res. *Schlect v. Thornton*  
6 (*In re Thornton*), 544 F.2d 1005, 1007 (9th Cir. 1976); *In re Stanifer*, 236 B.R. at 714; *Reagh v.*  
7 *Kelley*, 10 Cal.App.3d 1082, 1089 (1970). Another requirement under § 523(a)(4), is that the  
8 fiduciary relationship must have existed before the alleged incident of fraud or defalcation.  
9 *Woodworking Enterprises, Inc. v. Baird (In re Baird)*, 114 B.R. 198, 202 (B.A.P. 9th Cir. 1990).  
10 In short, for a debt to be excepted from discharge, it "is not enough that, by the very act of  
11 wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a  
12 trustee *ex maleficio*." *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934); *Honkanen*, 446  
13 B. R. at 378-79. The state and bankruptcy issues are thus not identical for issue preclusion  
14 purposes, and element one is lacking.

15 Element three, that the claim have been necessarily decided in state court, also cannot be  
16 found for Plaintiffs' defalcation claim. The Judgment on which Plaintiffs rely contains no  
17 findings of fact. Application of issue preclusion as to the fiduciary duty claim faces the  
18 additional obstacle that no fiduciary relationship was even alleged in state court in any of the  
19 seven causes of action in the state court complaint. The complaint does allege that Debtor is an  
20 owner and shareholder of Tricomm, though these allegations are vigorously denied by Debtor.  
21 If those allegations are true, that would likely make her a fiduciary of Tricomm, but that is  
22 distinct from any alleged fiduciary relationship between Debtor and Plaintiffs, which would  
23 have to meet the higher standard in bankruptcy of a fiduciary relationship for the debt to be  
24 nondischargeable. *See Lewis v. Scott (In re Lewis)*, 97 F.3d 1182 (9th Cir. 1996). Summary  
25 judgment on this claim must also be denied for failure of elements one and three of the issue  
26 preclusion test.

1           **C. Effect of Punitive Damage Assessment in State Court Judgment**

2           Plaintiffs argue that the assessment of punitive damages in the amount of \$300,000 by  
3 the state court judgment implies a finding of fraud. Under California law, exemplary and  
4 punitive damages may be granted in an action for the breach of a non-contractual obligation  
5 where it is proven by clear and convincing evidence that the defendant is guilty of oppression,  
6 fraud, or malice. Cal. Civ. Code § 3294(a). The terms are statutorily defined, and a judge may  
7 award exemplary and punitive damages for any one or a combination thereof. Oppression is  
8 defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious  
9 disregard of that person's rights," *id.*, and oppression does not constitute fraud or willfulness.  
10 *See Brandstetter v. Derebery (In re Derebery)*, 324 B.R. 349, 356 (Bankr. C.D. Cal. 2005)  
11 (finding that punitive damages do not indicate willfulness); *Urological Group Ltd v. Peterson*  
12 (*In re Petersen*), 296 B.R. 766, 788 (Bankr. C.D. Ill. 2003) (denying punitive damages on fraud  
13 claim because no intentional and outrageous conduct and thus dischargeable).

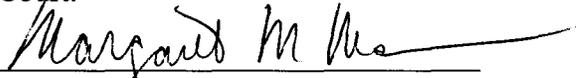
14           The state court judgment breaks down the total award of \$393,029 into five categories:  
15 \$60,000 for damages, \$30,000 for prejudgment interest, \$2,500 for attorney's fees, \$529 for  
16 costs, and \$300,000 for punitive damages. While it is plausible that the punitive damage amount  
17 was assessed due to a finding of fraud by the state court, this is not the only possibility. If  
18 Debtor's conduct was due to oppression or despicable conduct, the award of punitive damages  
19 would still be dischargeable, and an award of punitive damages under California law does not  
20 preclude the issue of nondischargeability for this reason. *See Petersen*, 296 B.R. at 788.

21           **V. Conclusion**

22           The Judgment does not make findings that necessarily determine the issue of fraud or  
23 breach of fiduciary duty. Nor can the Court find that these findings are implicit because other  
24 claims that are dischargeable were before the state court to decide. Because all five threshold  
25 elements of application of issue preclusion are not met, the Judgment is not entitled to  
26 preclusive effect. Material disagreements of fact remain, and the Motion for Summary  
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1 Judgment must be denied. Plaintiffs still have the opportunity to prove their fraud claims at trial,  
2 but the issue is not precluded from being tried in this Court.

3 Dated: August 24, 2012

  
MARGARET M. MANN, JUDGE  
United States Bankruptcy Court

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