

FILED & ENTERED

JUN 22 2018

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION

In re:

Yoram Talasazan

Debtor(s).

Moeir Moussighi, Hanrit Moussighi, Moeir  
and Hanrit Moussighi dba Roll Tex

Plaintiff(s),

v.

Yoram Talasazan

Defendant(s).

CHAPTER 7

Case No.: 1:16-bk-11671-MT

Adv No: 1:16-ap-01119-MT

**MEMORANDUM RE CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

Date: June 6, 2018

Time: 1:00 p.m.

Courtroom: 302

**I. Introduction**

Yoram Talasazan ("Debtor") and Moeir and Hanrit Moussighi dba Roll Tex ("Plaintiffs") entered into approximately forty agreements, dating back to 2007, for purchasing discount "fire sales" of garments for resale to retailers. Debtor would locate

1 potential merchandise, purchase it, then store it in the warehouse of a business he  
2 operated, Ban-V, Inc., until a purchaser was located. When the goods were sold, profits  
3 were to be split between Ban-V and Plaintiffs 60%-40%, respectively.

4 The parties' business relationship ended after Debtor failed to honor the terms of  
5 the agreements. The parties have previously been involved in litigation in the Superior  
6 Court of the State of California for the County of Los Angeles (the "Superior Court") in  
7 connection with the allegations at issue in this adversary action. That case, assigned  
8 case number BC459337 (the "State Court Action"), was resolved with a judgment (the  
9 "Third Amended Judgment") and Statement of Decision (the "Statement of Decision")  
10 being entered in favor of Plaintiffs and against Debtor on six causes of action: breach of  
11 contract, open book account, account stated, unjust enrichment, negligent  
12 misrepresentation, and dishonored checks. The Third Amended Judgment and the  
13 Statement of Decision were, however, silent on a number of other causes of action  
14 against Debtor, including fraud, conspiracy to defraud, conversion, assault, battery, and  
15 intentional infliction of emotional distress.

16 This matter comes before the Court on cross-motions for summary judgment  
17 (referred to herein as "Plaintiffs' Motion," "Debtor's Motion," and, collectively, the  
18 "Motions"). Both parties agree that the Statement of Decision and Third Amended  
19 Judgment have preclusive effect on the Motions, though they disagree on which issues  
20 are precluded from re-litigation and in whose favor those issues should be decided. The  
21 extent of the application of collateral estoppel is the primary issue before the Court.

## 22 **II. Standard**

23 In order to succeed on a motion for summary judgment under Federal Rule of  
24

Civil Procedure 56, made applicable to adversary actions in bankruptcy by Federal Rule of Bankruptcy Procedure 7056, the movant must establish the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. In re Aubrey, 111 B.R. 268, 272 (BAP 9th Cir. 1990). The moving party must support its motion with credible evidence, as defined in Rule 56(c), which would entitle it to a directed verdict if not controverted at trial. Id. If a party fails to address another party's assertion of fact, the court may consider the fact undisputed for purposes of the summary judgment motion. Fed. R. Civ. P. 56(e)(2). Substantive law determines which facts are material for purposes of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The court must view all the evidence in the light most favorable to the nonmoving party. In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008). The court may not evaluate the credibility of a witness or weigh the evidence. California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001, 1003 (9th Cir. 1981).

### **III. Analysis**

Plaintiffs seek a nondischargeable judgment under §§ 523(a)(2)(A) and (a)(4). Debtor similarly seeks summary judgment on the claims under §§ 523(a)(2)(A) and (a)(4).

#### **a. Requests for Judicial Notice**

There are three separate requests for judicial notice filed in connection with the Motions. In the first, Plaintiffs request judicial notice of the Statement of Decision and the Third Amended Judgment entered in the State Court Action. (ECF Doc. No. 55).

1 The Court takes judicial notice of these documents under Federal Rule of Evidence 201.

2 In the second request for judicial notice (ECF Doc. No. 64), Debtor seeks to  
3 admit seven separate documents in support of Debtor's Motion. Each of these  
4 documents is a public record from prior court proceedings and is therefore properly  
5 subject to judicial notice.

6 The third request for judicial notice was submitted by Debtor in support of his  
7 opposition to Plaintiffs' Motion. (ECF Doc. No. 77). The documents listed are all the  
8 same documents subject to the Debtor's request for judicial notice in support of Debtor's  
9 Motion. As stated above, the Court will take judicial notice of each of these documents.

10 b. Section 523(a)(2)(A)

11 Section 523(a)(2)(A) excepts from discharge any debt "to the extent obtained by  
12 false pretenses, a false representation, or actual fraud, other than a statement  
13 respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). A  
14 creditor's claim of nondischargeability based on § 523(a)(2)(A) must satisfy five  
15 elements: (1) misrepresentation, fraudulent omission, or deceptive conduct by the  
16 debtor; (2) the debtor knew of the falsity or deceptiveness of their statement or conduct;  
17 (3) the debtor made the representation with the intent to deceive the creditor; (4) the  
18 creditor justifiably relied on the representation; and (5) the creditor sustained damage  
19 resulting from its reliance on the debtor's representation. In re Slyman, 234 F.3d 1081,  
20 1085 (9th Cir. 2000). Each element must be shown by a preponderance of the  
21 evidence. Id. In order to avoid unjustifiably impairing a debtor's fresh start, exceptions to  
22 discharge should be strictly construed against creditors and in favor of debtors. Klapp v.  
23 Landsman, 706 F.2d 998, 999 (9th Cir. 1983).

1                   *i. Preponderance of Evidence Standard Applied to California Fraud*  
2                   *Claim*

3           Plaintiffs argue that the fraud claim was denied in the State Court Action solely  
4 because the evidentiary standard for fraud under California state law is clear and  
5 convincing evidence, whereas the burden under § 523(a)(2)(A) is preponderance of the  
6 evidence. Debtor correctly points out that Plaintiffs are wrong in stating that fraud under  
7 California law requires a showing by clear and convincing evidence. Liodas v. Sahadi,  
8 19 Cal. 3d 278, 292 (1977) (fraud need not be proven by clear and convincing  
9 evidence).

10                   *ii. Fraud Under California Law and § 523(a)(2)(A)*

11           Both parties request summary judgment in their favor on this claim based upon  
12 the collateral estoppel effect of the judgment in the State Court Action. Collateral  
13 estoppel principles apply in a discharge exception proceeding under § 523(a). Grogan  
14 v. Garner, 498 U.S. 279, 284 n.11 (1991). Under 28 U.S.C. § 1738, as a matter of full  
15 faith and credit, federal courts are required to apply the pertinent state's collateral  
16 estoppel principles. In re Nourbakhsh, 67 F.3d 798, 800 (9th Cir. 1995). Under  
17 California law, collateral estoppel applies only if certain threshold requirements are met:  
18 1) the issue sought to be precluded from relitigation is identical to that decided in the  
19 former proceeding; 2) the issue was actually litigated in the former proceeding; 3) the  
20 issue was necessarily decided in the former proceeding; 4) the decision in the former  
21 proceeding was final and on the merits; and 5) the party against whom preclusion is  
22 sought is the same, or in privity with, the party to the former proceeding. In re Harmon,  
23 250 F.3d 1240, 1245 (9th Cir. 2001). If the threshold requirements are met, the court  
24

1 must also find that giving the previous judgment preclusive effect would further the  
2 public policies underlying the collateral estoppel doctrine. Id. at 1245.

3 Plaintiffs argue that, while a judgment for fraud under California law satisfies  
4 § 523(a)(2)(A) for purposes of collateral estoppel, denial of a state law fraud claim does  
5 not necessarily preclude a § 523(a)(2)(A) claim because § 523(a)(2)(A) is broader than  
6 fraud under California law. Plaintiffs point to the language of the statute: “to the extent  
7 obtained by false pretenses, a false representation, or actual fraud.” Plaintiffs argue that  
8 the underlined language establishes that “[f]raud is just one way to establish  
9 § 523(a)(2)(A).” Plaintiffs provide no authority other than this statutory language.

10 Plaintiffs seem to assume erroneously that the phrase “actual fraud” means fraud  
11 under applicable state law, while “false pretenses” and “false representations” allow for  
12 a nondischargeable judgment for unspecified, non-fraudulent conduct. However, the  
13 term “actual fraud” in § 523(a)(2)(A) “encompasses forms of fraud, like fraudulent  
14 conveyance schemes, that can be effected without a false representation.” See Husky  
15 Int’l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016). All conduct that falls within  
16 § 523(a)(2)(A) is fraudulent. See 4 Collier on Bankruptcy ¶ 523.08[1][d] (16th ed.) (“Not  
17 all frauds are included within the exception of section 523(a)(2)(A), but only those  
18 involved in the obtaining of money, property or services by ‘false pretenses or false  
19 representations’”).

20 Furthermore, Plaintiffs argue “[a]s can clearly be seen from just looking at the  
21 elements, many of the elements required to establish a common law cause of action for  
22 fraud are not required to establish a nondischargeability action under § 523(a)(2)(A).”  
23 Plaintiffs provide the following list of elements:

The common law fraud cause of action requires the following elements: 1. Defendant represented to plaintiff fact was true; 2. defendant's representation was false; 3. defendant knew that the representation was false when he made it, or that he made the representation recklessly and without regard for its truth; 4. defendant intended that plaintiff rely on the representation; 5. plaintiff reasonably relied on defendant's representation; 6. plaintiff was harmed; and 7. plaintiff's reliance on defendant's representation was a substantial factor in causing his harm.

(Reply to Moussighi MSJ, 4:8-16). This articulation of the elements of a fraud claim, which Plaintiffs seem to have taken from CACI 1900, appears to be a disambiguation of the more common five-element statement of the requirements of fraud under California law:

Elements of Fraud under California Law	Elements of § 523(a)(2)(A)
<p>1. <b>Misrepresentation</b>, that is, false representation, concealment, or nondisclosure</p> <p>2. <b>Knowledge</b> of falsity or scienter</p> <p>3. <b>Intent</b> to defraud</p> <p>4. <b>Justifiable Reliance</b></p> <p>5. <b>Resulting Damage</b></p> <p><u>Lazar v. Superior Court</u>, 12 Cal. 4th 631, 638 (1996).</p>	<p>1. <b>Misrepresentation</b>, fraudulent omission, or deceptive conduct by the debtor</p> <p>2. The debtor <b>knew</b> of the falsity or deceptiveness of their statement or conduct</p> <p>3. Debtor made the representation with the <b>intent</b> to deceive the creditor</p> <p>4. Creditor <b>justifiably relied</b> on the representation</p> <p>5. Creditor sustained <b>damage resulting</b> from its reliance on the debtor's representation</p> <p><u>In re Slyman</u>, 234 F.3d at 1085.</p>

The Court rejects Plaintiffs' reasoning. Fraud under California law and § 523(a)(2)(A) are identical for purposes of collateral estoppel. In re Younie, 211 B.R. 367, 373 (B.A.P.

9th Cir. 1997), aff'd, 163 F.3d 609 (9th Cir. 1998); In re Jung Sup Lee, 335 B.R. 130, 136 (B.A.P. 9th Cir. 2005).

*iii. The Superior Court Found in Favor of Debtor on the Issue of Fraud*

While it is very common for creditors who were granted a state court judgment for fraud to assert collateral estoppel offensively in a nondischargeability action, it is less common, as here, for a Debtor to assert collateral estoppel defensively to preclude a creditor's § 523(a)(2)(A) claim based upon an unsuccessful state court action for fraud.

Each party argues that the State Court Action has preclusive effect in their favor on the issue of fraud; however, while fraud was pled, argued, and briefed after trial, the Third Amended Judgment does not include fraud in the list of causes of action on which Plaintiffs prevailed.

Debtor cites three cases in support of his argument that the Superior Court ruled in his favor on the issue of fraud. Debtor cites a Florida bankruptcy court ruling that an arbitration panel's silence with regard to a claim for fraud collaterally estopped the court "from finding fraud to support a judgment of non-dischargeability" under § 523(a)(2)(A). In re Schurtenberger, 2014 WL 92828, at \*6 (Bankr. S.D. Fla. Jan. 9, 2014). The court reasoned that "however inappropriate, inexcusable, and deceptive the Debtor's conduct was to violate FDUTPA, such conduct did not rise to the level of fraud so as to be non-dischargeable under 523(a)(2)(A). If it had, an award would have been entered in favor of the Plaintiffs on the fraud claim." Id. at 7. In similar circumstances, a Texas bankruptcy court recognized that an arbitrator's finding of "no finding of fraud" can have collateral estoppel effect in an action under § 523(a)(2)(A). In re Horne, 2011 WL 350473 (Bankr. W.D. Tex. Feb. 2, 2011). Where an arbitrator explicitly denied a party's



1 claim for fraud, another court found that “the arbitrator necessarily considered the claim  
2 and found that all elements of a fraud claim were not present, and thus reason existed  
3 to deny it.” 114 Kimbell Square, Ltd. v. Ritter, 2007 WL 1660676, at \*5 (N.D. Tex. June  
4 8, 2007). While these cases are not directly on point here, they provide useful analysis  
5 for this situation.

6 The Statement of Decision in this case includes specific findings that Plaintiffs  
7 argue amount to a colorable fraud claim. Plaintiffs assert that the Statement of Decision  
8 should control, arguing that the findings of the state court, as drafted largely by Plaintiffs  
9 themselves, demonstrate an entitlement to a fraud judgment. This conclusion, however,  
10 would be flatly contradictory to the actual outcome of the State Court Action. The  
11 doctrine of collateral estoppel is intended to prevent relitigation of matters that were  
12 actually litigated previously between the same parties. In re Lopez, 367 B.R. 99, 104  
13 (B.A.P. 9th Cir. 2007) (“The doctrine is intended to avoid inconsistent judgments and the  
14 related misadventures associated with giving a party a second bite at the apple.”); See  
15 In re Keith, 2011 WL 6934485, at \*7 (B.A.P. 9th Cir. Aug. 5, 2011) (upholding the  
16 “defensive” use of collateral estoppel by a Debtor to prevent a creditor from asserting an  
17 action under § 523(a)).

18 Debtor’s conduct according to the Statement of Decision was fairly egregious,  
19 but the Court cannot go back and correct the mistakes made in the State Court Action.  
20 If the Plaintiffs believed that the Superior Court was mistaken in failing to rule in their  
21 favor on the fraud cause of action, their remedies were to ask the Superior Court to  
22 reconsider its ruling or to appeal the decision. It appears that the Superior Court ruled in  
23  
24

1 Plaintiffs' favor on the negligent misrepresentation cause of action rather than fraud.<sup>1</sup>

2 For purposes of collateral estoppel, as detailed below, the Superior Court's silence with  
3 respect to the fraud action, in the context of undisputed evidence from both sides that  
4 the issue was fully litigated, was a ruling in favor of the Debtor and not the Plaintiffs.

5 *iv. Debtor has Met all Requirements for Collateral Estoppel*

6 The Superior Court had a multiple-day trial on the same facts which give rise to  
7 this § 523(a)(2)(A) claim. The fraud claim litigated by the Superior Court was identical to  
8 the requirements of § 523(a)(2)(A), as described above.

9 The issue of fraud was actually litigated, as detailed by the Superior Court  
10 pleadings attached to the Declaration of Steve Scandura. Plaintiffs' closing brief to the  
11 Superior Court, filed December 4, 2012, detailed the fraud cause of action, as set forth  
12 in California Civil Jury Instructions CACI 1900. Declaration of Steve Scandura, Exhibit B  
13 14:20-16:5. Plaintiffs' closing brief argued that the facts surrounding the "Y Agreement"  
14 and "YD agreement" supported a finding of fraud. Debtor and his co-defendants, Ban-V,  
15 Inc., Mika-El Clothing, LLC, and Noga Lahiji (aka Noga Talasazan) (collectively, "State  
16 Court Defendants") then filed a responsive post-trial brief on December 26, 2012, which  
17 responded to all causes of action and argued that the duplicative invoices were not  
18 fraudulent. Declaration of Steve Scandura, Exhibit C. Plaintiffs filed their reply brief on  
19 January 7, 2013, which further argued that Debtor's actions were fraudulent.

20 Declaration of Steve Scandura, Exhibit D 5:7-23.

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21 <sup>1</sup> An action for negligent misrepresentation differs from a fraud cause of action in that the scienter  
22 required is reduced. To prove negligent misrepresentation, a plaintiff must show: 1) misrepresentation of  
23 a past or existing material fact without reasonable ground for believing it to be true, and with intent to  
24 induce another's reliance on the fact misrepresented; 2) ignorance of the truth and justifiable reliance on  
the misrepresentation by the party to whom it was directed; and 3) resulting damage. Goonewardene v.  
ADP, LLC, 5 Cal. App. 5th 154, 175, 209 Cal. Rptr. 3d 722, 741 (Ct. App. 2016), as modified on denial of  
reh'g (Nov. 29, 2016).

1 The Tentative Decision/Judgment released by the Superior Court on February 4,  
2 2013 (the "Tentative Decision/Judgment"), did not mention fraud, but found in favor of  
3 Plaintiffs on the action for negligent misrepresentation. Declaration of Steve Scandura,  
4 Exhibit E. Subsequently, the parties litigated the contents of the Superior Court's  
5 Tentative Decision/Judgment. The State Court Defendants filed Defendants and Cross-  
6 Complainants' Objections to Tentative Decision, arguing that Noga Talasazan should be  
7 removed from the judgment and that there was no evidence presented at trial to support  
8 alter ego liability. Declaration of Steve Scandura, Exhibit F. The State Court Defendants  
9 then filed a request for a Statement of Decision on February 13, 2013, but did not  
10 request any details about the fraud allegation against Debtor. Declaration of Steve  
11 Scandura, Exhibit G. The Superior Court released a First Amended [Tentative]  
12 Decision/Judgment on February 20, 2013 and made no specific ruling on the fraud  
13 cause of action. Declaration of Steve Scandura, Exhibit H. The Superior Court issued  
14 Rulings/Orders the same day, sustaining in part and overruling in part objections made  
15 by the State Court Defendants.<sup>2</sup> Declaration of Steve Scandura, Exhibit I. Neither party  
16 requested further findings or a specific ruling on the fraud cause of action.

17 A [Proposed] Statement of Decision was filed on March 21, 2013 by Plaintiffs.  
18 Declaration of Steve Scandura, Exhibit J. The State Court Defendants filed objections to  
19 the Proposed Statement of Decision, including an objection to its silence with regard to  
20 the actions against Noga Talasazan, its conclusion regarding the alter ego theory, and  
21 the inclusion of certain facts that were never put into evidence. Declaration of Steve  
22 Scandura, Exhibit K. The State Court Defendants requested certain specific changes to

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23 <sup>2</sup> The Rulings/Orders issued by the Superior Court states that "Defendants filed Objections" on February  
24 13, 2012, but then rules on "Plaintiff's Objections." The Court assumes that this is simply a typographical  
error, and that the Superior Court was in fact ruling on State Court Defendants' objections.

1 be made to the Proposed Statement of Decision to address these objections. Plaintiffs  
2 filed an extensive reply addressing the State Court Defendants' objections. Declaration  
3 of Steve Scandura, Exhibit L. In their reply, Plaintiffs specifically refer to the Superior  
4 Court's failure to find Debtor liable for fraud, and repeats their argument that "the  
5 standard of proof to show fraud is extraordinarily high"—i.e., clear and convincing  
6 evidence. Declaration of Steve Scandura, Exhibit L 14:21-25. This appears to be an  
7 admission that Debtor, and not Plaintiffs, prevailed on the action for fraud.

8 The Superior Court issued a judgment on October 11, 2013 in favor of Plaintiffs  
9 on six causes of action and in favor of Noga Talasazan on all causes of action, but was  
10 silent as to the fraud action against Debtor. Declaration of Steve Scandura, Exhibit O.  
11 The final Statement of Decision was issued on the same day, and includes no  
12 discussion on the fraud cause of action. Declaration of Steve Scandura, Exhibit P.  
13 There were a number of minor amendments to the judgment, but there were no further  
14 objections or clarifications relating to a lack of a specific ruling on the fraud cause of  
15 action. At no point did the Superior Court adopt Plaintiffs' fraud allegations as set forth  
16 in the complaint and post-trial brief. The Statement of Decision must be read in light of  
17 this history, which demonstrates that the issue of fraud was actually litigated.

18 The third requirement of collateral estoppel is whether the issue of fraud was  
19 necessarily decided in the prior action. Whether an issue was "necessarily decided" has  
20 been interpreted to mean that the issue was "not entirely unnecessary" to the judgment  
21 in the prior proceeding. Castillo v. City of Los Angeles, 92 Cal. App. 4th 477, 482  
22 (2001).

23 The Schurtenberger case, while not binding, supports Debtor's argument that  
24

1 silence on the part of the prior adjudicator can be sufficient grounds for application of  
2 collateral estoppel. “[T]he lack of factual findings in an arbitration award may not be fatal  
3 to its use for collateral estoppel purposes, where the court may infer facts for purposes  
4 of collateral estoppel if ‘the finding is necessarily implied from the nature of the claim  
5 and award.’” In re Schurtenberger, No. 2014 WL 92828, at \*4. Furthermore, there is  
6 authority to support the proposition that where an affirmative defense is pled and the  
7 court enters judgment against defendant without any explicit finding on the affirmative  
8 defense, it must be assumed that the court rejected the affirmative defense. Calzada v.  
9 Sinclair, 6 Cal. App. 3d 903, 916 (Ct. App. 1970); Kaye v. Jacobs, 122 Cal. App. 421,  
10 431 (Cal. Ct. App. 1932), overruled on other grounds in Bumb v. Bennett, 51 Cal. 2d  
11 294 (1958) (“Appellant by his answer raised the issue of laches. While no express  
12 finding was made by the court upon this issue, it must be assumed in support of the  
13 judgment that it was decided adversely to appellant”). In the criminal law context, an  
14 implied acquittal can occur for purposes of the collateral estoppel aspect of double  
15 jeopardy where a jury convicts a defendant of a lesser included charge but remains  
16 silent as to the greater offense. Lemke v. Ryan, 719 F.3d 1093, 1100 (9th Cir. 2013).  
17 Analogously, the Superior Court found against Debtor on negligent misrepresentation,  
18 but remained silent as to fraud. The requirements of negligent misrepresentation are the  
19 same as the requirements of fraud, with the exception of the required scienter  
20 requirements. Knight v. Aqui, 966 F. Supp. 2d 989, 1001 (N.D. Cal. 2013). In making a  
21 determination on the negligent misrepresentation claim, therefore, the Court necessarily  
22 determined that the Debtor’s actions met all elements of a fraud cause of action other  
23 than the scienter requirement. Id. If the Superior Court believed that Debtor acted with  
24

1 knowledge and intent to defraud, rather than negligently, it presumably would have  
2 found for Plaintiffs on the fraud cause of action.<sup>3</sup> See In re Schurtenberger, 2014 WL  
3 92828, at \*5 (“In fact, the Court believes that if fraud had been proven, the Panel would  
4 have found for Plaintiffs on their claim for fraud, but it specifically did not do so.”).

5 Fraud was alleged, litigated, initially briefed but never adopted by the Superior  
6 Court’s ruling. While an explicit ruling would have been helpful, neither party requested  
7 it. Fraud was, however, necessarily decided by the Superior Court despite the silence in  
8 the Third Amended Judgment and Statement of Decision.

9 The decision in the former proceeding was final and on the merits and the party  
10 against whom preclusion is sought is the same party to the former proceeding. The  
11 threshold requirements of collateral estoppel under California law are therefore all met.  
12 In re Harmon, 250 F.3d at 1245.

13 Furthermore, application of collateral estoppel here furthers public policy  
14 interests underlying the doctrine by not relitigating a multiple-day trial between identical  
15 parties. In re Lopez, 367 B.R. at 104. A court of competent jurisdiction tried these facts  
16 and found Plaintiffs’ case inadequate on the claim for fraud.

17 Debtor’s Motion is GRANTED as to the action under § 523(a)(2)(A). For the  
18 same reasons, Plaintiffs’ Motion is DENIED as to the action under § 523(a)(2)(A).

19 c. Section 523(a)(4)

20 The parties each seek summary judgment in their favor under § 523(a)(4).  
21 Section 523(a)(4) excepts from discharge any debt “for fraud or defalcation while acting  
22 in a fiduciary capacity, embezzlement, or larceny.” Section 523(a)(4) contains multiple

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23 <sup>3</sup> The Statement of Decision is ambiguous as to whether Debtor made each of the various  
24 misrepresentations with knowledge and intent to defraud, and instead paints all of the transactions with a  
very broad brush.

1 theories for relief, each with their own requirements. The First Amended Complaint  
2 (“FAC”) requested nondischargeability under § 523(a)(4), but was ambiguous as to  
3 which theory Plaintiffs were pursuing.

4 *i. Embezzlement*

5 In its ruling on the Debtor’s Motion to Dismiss the FAC, the Court found that the  
6 Plaintiffs failed to state a claim as to embezzlement under § 523(a)(4). (ECF Doc. No.  
7 27). However, the Court found that the Plaintiffs stated a plausible claim under  
8 § 523(a)(4) as to fraud or defalcation while acting in a fiduciary capacity. An order was  
9 entered to that effect on April 21, 2017. (ECF Doc. No. 30).

10 Plaintiff argues that summary judgment should be granted under § 523(a)(4)  
11 because all of the requirements of embezzlement under that subsection have previously  
12 been found by the Superior Court. Debtor properly responds that Plaintiffs’ claim for  
13 embezzlement cannot be granted because it was dismissed. Plaintiffs did not amend  
14 their complaint after the Court’s order and accompanying ruling dismissing the  
15 embezzlement claim without prejudice. The Court therefore need not address the  
16 embezzlement claim further. Summary judgment is GRANTED in favor of Debtor on the  
17 claim for embezzlement under § 523(a)(4).

18 *ii. Fraud or Defalcation While Acting in a Fiduciary Capacity*

19 Plaintiffs inexplicably argue in their reply that Debtor failed to address whether  
20 summary judgment should be granted as to § 523(a)(4) for fraud or defalcation while  
21 acting in a fiduciary capacity. Plaintiffs’ Motion simply did not contain any request for  
22 judgment on that theory. The memorandum of points and authorities in support of  
23 Plaintiffs’ Motion cites no law regarding fraud or defalcation while acting in a fiduciary  
24

1 capacity. Nothing in the Plaintiffs' Motion indicates that Debtor should defend against  
2 such allegations. Plaintiffs' Motion is denied without prejudice as to fraud or defalcation  
3 while acting in a fiduciary capacity. As Debtor also requests summary judgment under  
4 this theory, it is discussed further below.

5 A creditor seeking a relief under § 523(a)(4) for fraud or defalcation while acting  
6 in a fiduciary capacity must establish three elements: (1) an express trust existed; (2)  
7 the debt was caused by fraud or defalcation; and (3) that the debtor was a fiduciary to  
8 the creditor at the time the debt was created. Nahman v. Jacks, 266 B.R. 728, 735  
9 (B.A.P. 9th Cir. 2001).

10 "Defalcation is the misappropriation of trust funds or money held in any fiduciary  
11 capacity, or the failure properly to account for such funds." Id. at 737. Alternatively, it  
12 has been defined as "a failure to produce funds entrusted to a fiduciary." 4 Collier on  
13 Bankruptcy ¶ 523.10[1][b] (16th ed.). Furthermore, defalcation requires a "culpable state  
14 of mind ... involving knowledge of, or gross recklessness in respect to, the improper  
15 nature of the relevant fiduciary behavior. Bullock v. BankChampaign, N.A., 569 U.S.  
16 267, 269 (2013). Defalcation can encompass a breach of fiduciary obligation that  
17 involves neither conversion nor taking and carrying away another's property, nor  
18 falsity. Id.

19 Debtor argues that he is entitled to summary judgment on the § 523(a)(4) claim  
20 because collateral estoppel, particularly the Superior Court's "lack of findings of actual  
21 fraud," has preclusive effect on Plaintiffs' ability to bring a successful action under  
22 § 523(a)(4). Defalcation while acting in a fiduciary capacity, however, includes behavior  
23 that does not meet the standard of fraud in § 523(a)(2)(A). Id. at 275 ("defalcation,"  
24



1 unlike “fraud,” may be used to refer to *nonfraudulent* breaches of fiduciary duty).  
2 Debtor’s theory that the § 523(a)(4) claim must fail because the Superior court ruled  
3 against Plaintiff on actual fraud is incorrect and not a basis for summary judgment on  
4 this claim.

5 Debtor further argues that uncontroverted evidence, in the form of declarations  
6 by David Lahiji and Yoram Talasazan, has been raised in support of Debtor’s argument  
7 that Debtor did not misappropriate any merchandise within the meaning of “defalcation”  
8 under § 523(a)(4). Debtor’s Motion, 15:8-13. The entirety of Debtor’s evidence,  
9 according to Debtor’s Statement of Uncontroverted Facts, is as follows:

10 I am convinced that Talasazan did not misappropriate any of the  
11 merchandise/goods purchased from Greenwest in connection with the  
12 Greenwest deal.

13 Dec. of David Lahiji, 2:17-19.

14 I did not misappropriate any of the merchandise/goods that was purchased from  
15 Greenwest Textile, Inc. (“Greenwest”) in connection with the Greenwest Deal.

16 Dec. of Yoram Talasazan, 2:9-11.

17 Debtor is incorrect that this evidence is uncontroverted. Plaintiffs argue that the  
18 Statement of Decision establishes Debtor's misappropriation. Plaintiffs' Opposition to  
19 Defendant's Motion, 9:6-20. The Superior Court findings read in conjunction with the  
20 declarations raise material issues of disputed fact, including whether defalcation  
21 occurred within the meaning of § 523(a)(4).

22 More significantly, Debtor has not shown that the issues decided in the Superior  
23 Court were identical to one of the required elements of § 523(a)(4) for fraud or  
24

1 defalcation while acting in a fiduciary capacity such that Plaintiffs would be unable to  
2 prove their case. Until that analysis is done, evidence that may relitigate what was  
3 already litigated may not be considered. Because it has not been established that this  
4 Court can consider the issue on the merits with no consideration of the Superior Court  
5 record, Plaintiffs' evidentiary objections to the declarations submitted in support of this  
6 motion are also sustained.

7 Debtor may not submit additional evidence on these issues without first  
8 establishing that the Superior Court did not decide the issue. Thirteen causes of action  
9 were alleged in the state court complaint. It appears that all were litigated. It may be that  
10 the elements of some of those causes of action are the same as the requirements of a  
11 § 523(a)(4) fraud or defalcation in a fiduciary capacity claim. Debtor has not shown that  
12 the Superior Court necessarily determined that no defalcation occurred within the  
13 meaning of § 523(a)(4). The briefs have not explained what specifically in the Superior  
14 Court's decision establishes that defalcation occurred or did not occur, particularly with  
15 respect to the scienter requirement set forth in Bullock. Any further consideration of this  
16 issue would require such an analysis.

17 As to fraud or defalcation while acting in a fiduciary capacity, Debtors' motion is  
18 DENIED without prejudice.

19 **IV. Conclusion**

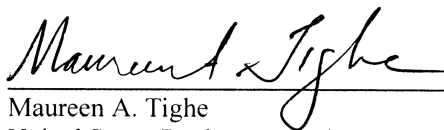
20 Plaintiffs' Motion is DENIED.

21 Debtor's Motion is GRANTED as to § 523(a)(2)(A) and embezzlement under  
22 § 523(a)(4), and DENIED as to fraud or defalcation while acting in a fiduciary capacity  
23 under (a)(4).  
24

1 The issues that remain are § 523(a)(4) for fraud or defalcation while acting in a  
2 fiduciary capacity along with the §§ 727(a)(2), (a)(3), and (a)(4) claims which were  
3 included in the first amended complaint and were found to be adequately pled by the  
4 order on the Motion to Dismiss the First Amended Complaint.

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20 Date: June 22, 2018  
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Maureen A. Tighe  
United States Bankruptcy Judge