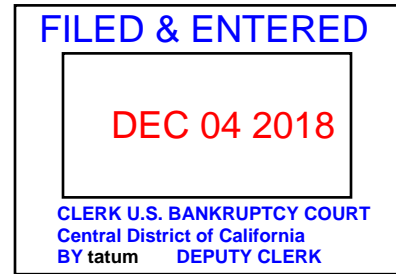


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CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

11 In re:
12 ANTHONY CURTIS WELLS,
13 Debtor.

Case No. 2:16-bk-18163-RK
Chapter 7
Adv. No. 2:16-ap-01341-RK

14 JOSE L. DUMAS,
15 Plaintiff,
16 vs.

**[CORRECTED SECOND AMENDED]
STATEMENT OF UNCONTROVERTED
FACTS AND CONCLUSIONS OF LAW**

DATE: November 28, 2018
TIME: 2:00 p.m.
PLACE: Courtroom 1675
Roybal Federal Building
255 E. Temple Street
Los Angeles, CA 90012

17 ANTHONY CURTIS WELLS,
18 Defendant.
19

UNCONTROVERTED FACTS

21 The following facts are uncontroverted.

22 1. On December 13, 2013, Jose L. Dumas filed a Second Amended Complaint (“the
23 SAC”) in the case of Jose L. Dumas v. Anthony C. Wells, et al., Superior Court of California,
24 County of Los Angeles, Case No. BC 451348. (“The Action”). A true and correct copy of the SAC
25 was filed herein on July 6, 2018, as Exhibit 1 in Support of Motion for Summary Judgment, Docket
26 No. 25, filed on July 6, 2018.

27 2. Dumas alleged in the SAC that in 2007, Defendant Anthony C. Wells (“Wells”) and
28 Dumas had been friends for 10 years and that in August 2007, at Wells’s request, Dumas agreed to

1 sell his small avocado ranch in Temecula (“the Temecula Property”) to Wells for \$1,400,000.
2 (Paras. 7-8 of Ex. 1)

3 3. Dumas alleged in the SAC a First Cause of Action for Fraud under California Civil
4 Code § 1572(5). (Fraud includes any “act fitted to deceive.”) In this Cause of Action, Dumas
5 alleged that Wells established an escrow for the sale of the ranch at Premiere Capital Escrow and that
6 Wells conspired with the other Defendants to steal and did steal from the escrow almost \$500,000 of
7 funds due Dumas. (Paras. 1-38 of Ex. 1)

8 4. Dumas also alleged a Second Cause of Action for Promissory Fraud. In this Cause of
9 Action Dumas alleged that Wells proposed to Dumas and promised Dumas that the consideration for
10 the Temecula Property would include a \$835,000 purchase money loan from Countrywide (“the
11 Countrywide Loan”), a \$300,000 carry back loan (“the Carryback Loan”) and a \$300,000 business
12 loan (“the Business Loan”), that Wells told Dumas that Gary Nishida was Wells’s partner in Chartex,
13 an import-export business, that Nishida would sign all the papers for the transaction and make all the
14 payments on the three loans, that Wells never intended anyone would make any payments on any of
15 the loans and that instead, Wells intended to steal the Temecula Property from Dumas so Wells could
16 refinance it to obtain funds for Chartex before Countrywide or Dumas could foreclose. (Paras. 8-16,
17 39-45 of Ex. 1)

18 5. On both causes of action in the SAC Dumas sought compensatory and punitive
19 damages. (Page 7 of Ex. 1)

20 6. On January 14, 2014, Wells filed by counsel an answer to the SAC in which he denied
21 all its allegations. A true and correct copy of the answer was filed herein on July 6, 2018, as
22 Exhibit 2 in Support of Motion for Summary Judgment, Docket No. 25, filed on July 6, 2018.

23 7. On July 29, 2015, the Superior Court filed its First Amended Statement of Decision
24 (“the Decision”). A true and correct copy of the Decision was filed herein on July 6, 2018 as
25 Exhibit 3 in Support of Motion for Summary Judgment, Docket No. 25, filed on July 6, 2018.

26 8. The matter was tried in November 2013 and October and November 2014. The
27 Superior Court heard and denied all Wells’s pre-trial motions. Testimony and exhibits were received
28 in evidence, and the Superior Court heard oral arguments thereon. The Superior Court heard, read

1 and considered all Wells' post-trial motions. Based on this, the Superior Court found that Dumas
2 was entitled to \$1,485,603.24 with interest for compensatory damages for California Civil Code
3 § 1572(5) fraud on the First Cause of Action and promissory fraud on the Second Cause of Action.
4 The Superior Court also found Wells was liable for punitive damages. (Page 2 of Ex. 3)

5 9. The Superior Court made the following findings in the following paragraphs of the
6 Decision:

7 (1) In August 2007 Dumas and Wells had been friends for 10 years. In that month
8 they entered into a partly oral and partly written agreement pursuant to which Wells agreed to
9 buy Dumas' small avocado ranch in Temecula for \$1,400,000. The agreed upon price was a
10 compromise between a \$1,495,000 appraisal Dumas had obtained and a \$1,100,000 appraisal
11 Wells's agent, Franklin Palm, had obtained from Countrywide Bank.

12 ...

13 (3) The \$1,400,000 purchase price consisted of \$265,000 of cash deposits, a
14 \$835,000 Purchase Money Loan from Countrywide and a \$300,000 Carry Back Loan due in
15 one year. Before escrow opened, Wells told Dumas he wanted an additional \$300,000
16 Business Loan for Chartex. They agreed that Dumas would fund the Business Loan from the
17 proceeds he would receive from escrow for the sale of the Temecula Property.

18 (4) Wells told Dumas that because Wells had bad credit, Wells' friend, Nishida,
19 would sign all the papers for the deal, make the \$265,000 cash deposits into escrow, obtain
20 the \$835,000 purchase money loan from Countrywide, make all the payments to Countrywide
21 on the Purchase Money Loan and to Dumas on the Carry Back and the Business Loans.

22 (5) Wells told Dumas that Nishida was his partner in Chartex, and that Chartex
23 was in the import-export business, and that it was making lots of money, so that he would be
24 able to make all the payments to Countrywide and Dumas. Wells told Dumas the Carry Back
25 and the Business Loans would be evidenced by a single \$600,000 Note which would be
26 secured by 2nd Deeds of Trust on the Temecula Property and Nishida's house. Wells told
27 Dumas that Nishida's house was worth \$2,000,000.
28

1 (6) Everything Wells told Dumas about Nishida was false. Nishida had never
2 been a partner in Chartex or had anything to do with it. Nishida agreed to sign all the papers
3 for the property; sign the \$835,000 Note for the Purchase Money Loan from Countrywide and
4 the \$600,000 Note for the Carry Back and the Business Loans from Dumas only because
5 Wells told him Chartex would make all the payments on those loans, and that Wells would
6 “take care of everything.” Nishida relied on what Wells told him because they had been
7 friends for 28 years. For these same reasons Nishida also agreed to make a \$95,000 loan to
8 Wells to cover the escrow deposits for the purchase of the Temecula Property. Nishida’s
9 house was only worth \$699,000.

10 (7) Everything Wells told Dumas and Nishida about Chartex was also false.
11 Chartex had never been in the import-export business; it had no assets and had no money to
12 pay anything to anyone. It was merely the unsuccessful alter ego of Wells and Liberatore.

13 (8) Dumas also reasonably relied on everything Wells told him because they had
14 been friends for 10 years, and Dumas had no reason not to believe him. Dumas would not
15 have agreed to sell the property if he had known that everything Wells told him and Nishida
16 was false.

17 ...

18 (28) Pursuant to California Civil Code § 1572(5) and *Wells v. Zenz*, 83 Cal.App.
19 137, 140 (1927) a defendant is liable for fraud for any enumerated act committed with intent
20 to deceive or cheat another party.

21 (29) As summarized above, the direct and circumstantial evidence and reasonable
22 inferences show Defendants acting as each other’s principals, agents and co-conspirators are
23 liable for California Civil Code § 1572(5) fraud because they entered upon and carried out a
24 plan to steal the Temecula Property from Dumas and money due Dumas from the sale of that
25 Property and diverted the Property and the funds due Dumas to themselves, all of which they
26 concealed from Dumas. Defendants also committed California Civil Code § 1572(5) fraud by
27 their conspiracy to commit promissory fraud as set forth below.

28

1 (30) Promissory Fraud includes making a promise to induce another to enter into a
2 contract without the means or intent to fulfill the contract where the Plaintiff reasonably relies
3 upon the false promise. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996): “Circumstantial
4 evidence of *subsequent conduct* is admissible and may be sufficient [to prove fraudulent
5 intent.” (Italics in original). Witkin, Summary of California Law (10th ed.) “Torts” § 782 p.
6 1132 [Citing many cases]. *Diamond Woodworks v. Argonaut Ins. Co.*, 109 Cal.App. 4th
7 1020, 1046 (2003).

8 (31) Wells induced Dumas to enter into a contract to cause Dumas to sell the
9 Temecula Property to Wells by making false representations to both Dumas and Nishida.
10 Dumas and Nishida reasonably relied on what Wells told them because they both had been
11 friends with Wells for a long time and had no reason not to believe him. Wells relied on
12 these friendships to perpetrate his frauds. Wells had no intention of making the payments on
13 the Temecula Property through Nishida and Chartex. For Nishida never agreed to make any
14 payments on the Property, and Chartex did not have funds or assets to make any payments to
15 anyone. Defendants then concealed what they had done from Dumas.

16 ...

17 (33) The Court finds by clear and convincing evidence that Wells and [his co-
18 defendant] Houg are liable for punitive damages as defined above and summarized as
19 follows: Wells caused Dumas to sell the Temecula Property to him by making false
20 representations to Dumas and Nishida and by taking advantage of his long friendships with
21 both men. At the time Wells made these misrepresentations he knew they were false.
22 Nevertheless, he made these misrepresentations so he could acquire the Temecula Property
23 for free and receive the benefit of the funds due Dumas and stolen from escrow. Houg knew
24 about, participated in and benefitted from the fraud. Then both Wells and [his co-defendant]
25 Houg concealed from Dumas what they had done knowing again that Dumas would rely on
26 Wells’ statements that there had merely been a mistake and [Wells’ co-conspirator, Franklin]
27 Palm [who Dumas did not join as a Defendant] would take care of it. The Court finds this
28

1 conduct to be “malice”, and/or “Oppression”, and/or “fraud” per California Civil Code
2 §§ 3294(a), (c)(1), (c)(2), and (c)(3).

3 10. On December 18, 2015 the Superior Court entered Judgment. After noting that Dumas
4 waived his claim for punitive damages the Superior Court entered judgment in the amounts set forth
5 in its Statement of Decision. A true and correct copy of the judgment was filed herein on July 6,
6 2018 as Exhibit 4 in Support of Motion for Summary Judgment, Docket No. 25, filed on July 6,
7 2018.

8 11. On July 29, 2016 Dumas in this adversary proceeding filed a Complaint for Non-
9 Dischargeability of Debt (11 U.S.C. § 523(a)(2)(A) and (a)(6)). A true and correct copy of the
10 Complaint was filed herein on July 6, 2018 as Exhibit 5 in Support of Motion for Summary
11 Judgment, Docket No. 25, filed on July 6, 2018.

12 12. On April 26, 2018, the California Court of Appeal affirmed the Judgment of the
13 Superior Court but corrected the Superior Court’s arithmetic error to reduce the compensatory
14 damages to \$1,185, 603.25. On June 27, 2018 the Court of Appeal issued the Remittitur. True and
15 correct copies of the Decision of the Court of Appeal and the Remittitur were filed herein on July 6,
16 2018 as Ex. 6.

17 13. The Judgment of the Superior Court is now final.

18 **CONCLUSIONS OF LAW**

19 14. The debt from the Judgment of the Superior Court is nondischargeable under 11
20 U.S.C. § 523(a)(2)(A) and § 523(a)(6)) for reasons set forth below.

21 **Five Elements of Fraud under 11 U.S.C. § 523(a)(2)(A)**

22 15. “[A] creditor must demonstrate five elements to prevail on any claim arising under
23 § 523(a)(2)(A). The five elements, each of which the creditor must demonstrate by a preponderance
24 of the evidence, are: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
25 (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive;
26 (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the
27 creditor proximately caused by its reliance on the debtor's statement or conduct.” *Slyman v. Slyman*
28 (*In re Slyman*), 234 F.3d 1081, 1085 (9th Cir. 2000) (internal citation omitted).

1 16. “[E]ither actual knowledge of the falsity of a statement, or reckless disregard for its
2 truth, satisfies the scienter requirement for nondischargeability of a debt.” *In re Grabau*, 151 B.R.
3 227, 234 (N.D. Cal. 1993) (quoting *In re Houtman*, 568 F.2d 651, 656 (9th Cir. 1978) (construing
4 predecessor statute in Bankruptcy Act))).

5 17. “The term ‘actual fraud’ in 11 U.S.C. § 523(a)(2)(A) encompasses forms of fraud, like
6 fraudulent conveyance schemes, that can be effected without a false representation.” *Husky*
7 *International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016).

8 18. The Superior Court Judgment meets the five requirements of 11 U.S.C.
9 § 523(a)(2)(A):

10 (1) Wells induced Dumas to sell the ranch by falsely representing to Dumas that
11 Nishida would make all the payments on the Countrywide Purchase Money Loan, the
12 Carryback Loan and the Business Loan. At the same time Wells induced Nishida to sign the
13 Notes and Deeds of Trust for those Loans by telling Nishida that Wells’s company, Chartex,
14 would make all the payments on those loans.

15 (2) Wells knew his statements to Dumas were false because Nishida never agreed
16 to make any of the payments on those loan. Wells knew his statements to Nishida were false
17 because Chartex had no money to pay anything to anyone.

18 (3) Wells made the above misrepresentations so he could steal the ranch from
19 Dumas.

20 (4) Dumas and Nishida justifiably relied on Wells’ misrepresentations because
21 they had been friends with Wells for 10 and 28 years respectively and neither had any reason
22 to distrust Wells.

23 (5) Wells’s fraud caused \$1,185,603.25 of damage to Dumas. *See* Paras. 9 and 10
24 [Summarizing Paras.1 and 3-8 of State Court Decision].

25 **Requirements of Collateral Estoppel**

26 19. Collateral estoppel applies in dischargeability proceedings in bankruptcy courts.
27 *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991).

28

1 20. “In determining the collateral estoppel effect of a state court judgment, the federal
2 courts must, as a matter of full faith and credit, apply that state’s law of collateral estoppel.” *Bugna*
3 *v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057 (9th Cir. 1994) (citing, *inter alia*, 28 U.S.C. § 1738).
4 Bankruptcy Courts must therefore give the preclusive effect to a state court judgment that it would
5 receive in the courts of that state. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800-801
6 (9th Cir. 1995).

7 21. Five requirements for collateral estoppel under California are: “First, the issue sought
8 to be precluded from relitigation must be identical to that decided in a former proceeding. Second,
9 this issue must have been actually litigated in the former proceeding. Third, it must have been
10 necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be
11 final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or
12 in privity with, the party to the former proceeding.” *Lucido v. Superior Court*, 51 Cal.3d 335, 341-
13 343 (1990); *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001). The party
14 asserting collateral estoppel has the burden to establish these requirements. *In re Harmon*, 250 F.3d
15 at 1245; *Plyam v. Precision Development, LLC (In re Plyam)*, 530 B.R. 456, 462 (9th Cir. BAP
16 2015).

17 22. “The identical issue requirement addresses whether ‘identical factual allegations’ are
18 at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.”
19 *Lucido*, 51 Cal.3d at 342 (rejecting argument that sanctions in separate proceedings must be identical
20 and holding it is sufficient if the basic facts are the same).

21 23. An issue is “necessarily decided in the former proceeding” if it was not “‘entirely
22 unnecessary’ to the judgment in the initial proceeding.” *Id.*

23 24. California also imposes a notice requirement in addition to the above threshold
24 requirements. *In re Harmon*, 250 F.3d at 1244-1245, 1247 n. 7; *Baldwin v. Kilpatrick (In re*
25 *Baldwin)*, 249 F.3d 912, 919 (9th Cir. 2001).

26 25. Finally, California courts will not give preclusive effect to a previous litigation of
27 issues unless they find the public policies underlying the collateral estoppel doctrine would be
28 furthered by application of preclusion to the particular issue before the court. “[T]he public policies

1 underlying collateral estoppel [are] preservation of the integrity of the judicial system, promotion of
2 judicial economy, and protection of litigants from harassment by vexatious litigation.” *Lucido v.*
3 *Superior Court*, 51 Cal.3d at 343.

4 **The Elements of 11 U.S.C. § 523(a)(2)(A) Are Established by Collateral Estoppel**

5 26. The Superior Court Decision meets the seven requirements for Collateral Estoppel:

6 (1) Identity of issues. The Superior Court found Dumas was guilty of fraud,
7 including promissory fraud. (*See* Paras. 28-31 of Decision as set forth in Para. 9, *supra.*)
8 *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) sets forth the elements of promissory
9 fraud under California law. These are: “(a) misrepresentation, false representation,
10 concealment, or nondisclosure; (b) knowledge of falsity (or 'scienter'); (c) intent to defraud,
11 i.e., to induce reliance; defendant fraudulently induces the plaintiff to a contract.” These
12 elements are identical to those under 11 U.S.C. § 528(a)(2)(A). *See* Paras. 15-17, *supra.*

13 (2) Litigation of issues in prior proceeding. *See* Paras. 7-9, *supra*, and Exs. 1-4
14 and 6 filed herein on July 6, 2018 (the Second Amended Complaint (“SAC”), Wells’s
15 Answer to the SAC, the Decision, the Judgment and the Decision of the Court of Appeal)
16 establish there was litigation of issues in the prior proceeding.

17 (3) The issue of fraud was necessarily decided in the former proceeding. Dumas’s
18 SAC alleged fraud, Wells’ Answer to the SAC denied fraud, and the State Court found there
19 was fraud. (Exs. 1, 2, 3 and 6 to Motion.)

20 27. The decision in the prior proceeding is final and on the merits. (Exhibit 6 to Motion
21 in Support of Motion for Summary Judgment, Docket No. 25, filed on July 6, 2018.

22 (1) Wells was the defendant in the state court action and is the defendant in this
23 adversary proceeding.

24 (2) Wells’ Answer to the SAC, the Decision of the Superior Court and the
25 Decision of the Court of Appeal (Exs. 2, 3 and 6 to Motion) establish Wells had notice of the
26 Superior Court proceeding.

27 (3) Finally, applying issue preclusion here furthers the public policy underlying its
28 doctrine which is “preservation of the integrity of the judicial system, promotion of judicial

1 economy, and protection of litigants from harassment by vexatious litigation.” *Lucido v.*
2 *Superior Court*, 51 Cal.3d at 343.

3 **Elements of Willful and Malicious Conduct under 11 U.S.C. § 523(a)(6)**

4 28. 11 U.S.C. § 523(a)(6) excepts from discharge debts arising from a debtor's “willful
5 and malicious” injury to another person or to the property of another. The “willful” and “malicious”
6 requirements are conjunctive and subject to separate analysis. *Plyam v. Precision Development, LLC*
7 (*In re Plyam*), 530 B.R. 456, 463 (9th Cir. BAP 2015).

8 29. The willful injury requirement speaks to the state of mind necessary for
9 nondischargeability. An exacting requirement, it is satisfied when a debtor harbors “either a
10 subjective intent to harm, or a subjective belief that harm is substantially certain. The injury must be
11 deliberate or intentional, “not merely a deliberate or intentional act that leads to injury.” *Id.*

12 30. A “malicious” injury involves “(1) a wrongful act, (2) done intentionally, (3) which
13 necessarily causes injury, and (4) is done without just cause or excuse.” *Petralia v. Jercich (In re*
14 *Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001); *In re Sicroff*, 401 F.3d 1101, 1106-1107 (9th Cir.
15 2005). This definition “does *not* require a showing of biblical malice, i.e. personal hatred, spite or ill-
16 will.” *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) (emphasis in original).

17 31. “The ‘willful’ and ‘malicious’ requirements are conjunctive and subject to separate
18 analysis.” *In re Plyam*, 530 B.R. at 463-464.

19 32. Exceptions to dischargeability of debt under 11 U.S.C. § 523(a) must be proven by the
20 creditor by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

21 33. The creditor may prove these elements by circumstantial as well as direct evidence.
22 *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005) (malice inferred from graduate
23 student’s defamatory statements about a professor); *In re Khaligh*, 338 B.R. 817, 831-832 (9th Cir.
24 BAP 2006) (malice established because “there is no assertion that the defamation by Khaligh was
25 directed towards a goal that might implicate just cause or excuse”).

26 34. A bankruptcy court may rely on the issue preclusive effect of an existing state court
27 judgment as the basis for granting summary judgment. *In re Plyam*, 530 B.R. at 462.

28

The Elements of 11 U.S.C. § 523(a)(6) Are Established by Collateral Estoppel

1 **The Elements of 11 U.S.C. § 523(a)(6) Are Established by Collateral Estoppel**
2 35. The Decision of the Superior Court establishes that Wells’s acts were “willful”
3 because he had a subjective intent to harm Dumas or a subjective belief that harm was substantially
4 certain. This is established by the findings regarding Wells’s elaborate lies to Dumas and Nishida
5 which Wells made to induce Dumas to sell the Temecula Property to Wells without anyone paying
6 for it. Wells’s intent is further established by Wells’s participation in the conspiracy to steal from the
7 escrow almost \$500,000 of the funds due Dumas. (*See* Para. 9, *supra*, citing Paras. 4-29 of
8 Decision.)

9 36. Wells’s acts were malicious because they: (1) were wrongful, (2) were done
10 intentionally, (3) necessarily caused injury and (4) were without just cause. Importantly, both *Sicroff*
11 and *Khaligh, supra*, establish the elements of intent for willful and malicious misconduct do not
12 require direct evidence, such as an admission from the Debtor. Rather, the requisite intent can be
13 inferred from the natural attributes and consequences of the Debtor’s wrongful acts. Both cases
14 recognize the obvious fact that it is highly unlikely any debtor would admit he intended to harm a
15 creditor.

16 37. The issues in the Superior Court action and this one are “identical” because in the
17 SAC and in his complaint here, Dumas alleged facts to show that Wells’s acts were intentional,
18 certain to cause harm, wrongful, and were without just cause.

19 38. These issues were “necessarily decided” in the Superior Court Action because the
20 supporting evidence was not “entirely unnecessary” to a determination of those issues.

21 39. Wells committed willful and malicious injury to another within the meaning of
22 11 U.S.C. § 523(a)(6).

23 ///
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