**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

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| In re<br><br>ARSHAG J. MINELIAN,<br><br>Debtor. | Case No. 2:05-bk-39946-RK<br><br>Chapter 7<br><br>Adv. No. 2:13-ap-02021-RK<br><br>**MEMORANDUM DECISION AND ORDER AFTER TRIAL ON THIRD AMENDED COMPLAINT OF PLAINTIFF MICHAEL SHANNAHAN FOR NONDISCHARGEABILITY OF DEBT PURSUANT TO 11 U.S.C. § 523(a)(2)(A)** |
| MICHAEL SHANNAHAN,<br><br>Plaintiff,<br><br>v.<br><br>ARSHAG J. MINELIAN,<br><br>Defendant. | |

This adversary proceeding came on for trial before the undersigned United States Bankruptcy Judge on March 3 and September 23, 2016, on the Third Amended Complaint ("Complaint") of Plaintiff Michael Shannahan ("Shannahan") for non-dischargeability of debts allegedly incurred through false pretenses, false representation, or actual fraud (11 U.S.C. § 523(a)(2)(A)), Electronic Case Filing Number ("ECF") 60, filed on October 29, 2014. Ronald P. Slates and Daren M. Schlecter, of the law firm of Ronald P. Slates, P.C.,

appeared for Shannahan. James R. Felton and Yi Sun Kim, of the law firm of Greenberg & Bass, LLP, appeared for Debtor and Defendant Arshag J. Minelian ("Minelian").

In his Complaint, Shannahan alleged a claim under 11 U.S.C. § 523(a)(2)(A) that Minelian knowingly made false representations about four aftermarket products and services and their anticipated effect on the performance of Shannahan's 2001 BMW 325i automobile (the "car" or the "vehicle"), that at the time of each alleged misrepresentation Minelian intended to deceive Shannahan that certain aftermarket systems were available and could be successfully installed in the car, and that in reliance upon Minelian's alleged misrepresentations, Shannahan paid a total of $12,650.12 to Minelian's business for installation of four systems (a Supercharger kit, an Aquamist system, a Fuelcharger computer and a Stage 3 Aftercooler system) in the car. *Third Amended Complaint*, ECF 60, at 2-12. Based on these allegations, Shannahan prayed for a judgment that Minelian's debt to Shannahan in an amount not less than $163,340.35, including punitive damages and attorney's fees and costs of over $108,802.84, is nondischargeable in this Chapter 7 bankruptcy case pursuant to 11 U.S.C. § 523(a)(2)(A).

On November 30, 2016, through his counsel of record, Shannahan lodged his proposed findings of fact and conclusions of law after trial. ECF 122. On January 18, 2017, Minelian, through his counsel of record, submitted his proposed findings of fact and conclusions of law after trial, and filed his objections to Shannahan's proposed findings of fact and conclusions of law. ECF 128 and 129. On March 8, 2017, Shannahan filed his objections to Minelian's proposed findings of fact and conclusions of law and filed his reply to Minelian's objections to his proposed findings of fact and conclusions of law. ECF 133 and 134. On April 19, 2017, the court heard closing arguments from the parties and took the adversary proceeding under submission.

Having considered the testimony of witnesses at trial, the documentary evidence received at trial, the oral and written arguments of the parties, the proposed findings of fact and conclusions of law and objections thereto, and the other matters of record before the court, the court hereby makes the following findings of fact and conclusions of law pursuant

to Rule 52 of the Federal Rules of Civil Procedure, made applicable here by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

## I. BACKGROUND

On August 9, 2005, Shannahan initiated a civil action in the Superior Court of California for the County of Los Angeles by filing a complaint against Race Marque Systems ("RMS") (identified in the complaint as "a California business enterprise, entity status unknown") and Minelian, which bore Case Number BC337986 (the "State Court Action"). *Amended Joint Pretrial Stipulation*, ECF 84, filed on October 13, 2015, at 2, ¶¶ 1 and 4; *Order Approving Amended Joint Pre-Trial Stipulation,* ECF 85, filed on October 14, 2015. On January 11, 2006, Shannahan filed his First Amended Complaint in state court (the "State Court Complaint"), which alleged claims for: (1) false advertising; (2) injunctive/restitutionary relief against violation of the Consumers' Legal Remedies Act; (3) injunctive relief against unfair competition; (4) restitutionary relief on account of unfair competition; and (5) Consumers' Legal Remedies Act. *Shannahan's First Amended Complaint in the State Court Action,* Shannahan's Trial Exhibit 4.

Shannahan obtained a default judgment against Minelian and RMS in the State Court Action, entered on April 11, 2007, which indicated that judgment was being rendered in favor of Shannahan against RMS and Minelian for damages in the total sum of $55,300.00 consisting of: (1) $5,650.00 as reimbursement for costs of restoring Shannahan's vehicle to an operable condition, (2) $2,000.00 as reimbursement for transportation costs Shannahan was caused to incur without just cause, (3) $12,650.00 as reimbursement for goods and services sold and provided to Shannahan in contravention of California Civil Code § 1770 and California Business & Professions Code §§ 17200 and 17500, (4) $20,000.00 as reimbursement for Shannahan's loss of use of his automobile for 422 days caused by Minelian's violations of California Civil Code § 1770 and California Business and Professions Code §§ 17200 and 17500; and (5) attorney's fees of $15,000 authorized by California Civil Code § 1780(d). *Judgment*, Shannahan's Trial Exhibit 6; *Shannahan's Third Amended Adversary Complaint*, ECF 60, filed on October 29, 2014,

¶ 6, and Exhibit 2 attached thereto; *Minelian's Answer to Third Amended Complaint*, ECF 62, filed on November 17, 2014, ¶ 6.

On October 12, 2005, Minelian commenced this bankruptcy case by filing a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. *Amended Joint Pretrial Stipulation*, ECF 84, filed on October 13, 2015, at 3, ¶ 7. Minelian's bankruptcy petition did not list Shannahan as a creditor, and thus no notice was given to Shannahan of Minelian's bankruptcy case. *Id.* at 3, ¶ 8. On October 14, 2005, Minelian was served with the Complaint in the State Court Action. *Id.* at 2, ¶5. On December 8, 2005, the Chapter 7 Trustee in Minelian's bankruptcy case filed a "no-asset" report. *Id.* at 2, ¶ 9. On February 27, 2006, Minelian received a discharge in this bankruptcy case, and the bankruptcy case was closed on March 3, 2006. *Id.* at 3, ¶¶ 10 and 11. On April 11, 2007, the court in the State Court Action entered a *Judgment Following Default Prove Up* in favor of Shannahan against Minelian and his business entity, RMS, in the total amount of $55,300.00. *Id.* at 3, ¶ 6. On July 25, 2013, Shannahan filed a motion to reopen this bankruptcy case, which the court granted on August 15, 2013. *Id.* at 3, ¶¶ 12 and 13. On October 11, 2013, Shannahan commenced this adversary proceeding by filing his complaint for nondischargeability of debt. *Id.* at 3, ¶ 14.

**A. The Parties**

Shannahan in his trial declaration provided his personal background regarding his interest in automobiles, the purchase of the car and his current occupation. Since the time Shannahan began college at the University of Southern California (USC) in 1999, he was always interested in automobiles and engineering. *Declaration of Plaintiff Michael Shannahan Regarding His Testimony at Trial* ("Shannahan's Declaration"), ECF 89, filed on January 29, 2016, ¶¶ 2, 3. In July 2001, Shannahan's father helped Shannahan purchase the car, a new 2001 BMW 325i. *Id.*, ¶ 2. In 2006, Shannahan graduated from USC with a Bachelor of Science in electrical engineering with a minor in video game design and management. *Id.*, ¶ 3. Shannahan is currently the Chief Executive Officer of

Threat Spectrum, Inc., a company focused on advanced robotics platforms for cameras, lasers, lights and other payloads at targets several miles away. *Id.*

Minelian in his trial declaration provided his personal background. Minelian left high school in tenth grade, after which he worked strictly in the automotive field. *Defendant's Trial Declaration of Arshag J. Minelian* ("Minelian's Declaration"), ECF 90, filed on February 11, 2016, ¶ 4. Beginning in 1982, Minelian primarily worked on servicing and modifying BMW cars. *Id.* Beginning in 1985, Minelian owned and operated his own automotive service businesses or shops. *Id.* Minelian primarily handled and executed the actual service of automobiles himself, including the installation of automotive products in vehicles, but he relied on others when possible to focus on sales and business operations of his businesses or shops. *Id.* Aside from providing standard servicing of cars, Minelian also installs certain "aftermarket" products for customers who desire to modify their cars with products that may enhance performance, but do not come standard when the car is first purchased. *Id.* Between the years 2002 and 2004, Minelian was the owner of a business called Race Marque Systems ("RMS"). *Amended Joint Pretrial Stipulation*, ECF 84, at 2, ¶ 2.

## II. FACTS

### A. The Supercharger

On January 14, 2002, Shannahan attended the Los Angeles Auto Show and signed up for the installation of a supercharger system at the booth run by RMS. *Shannahan's Declaration*, ECF 89, ¶¶ 5, 7. The next day, Shannahan sent RMS a $2,500 deposit. *Id*. Shannahan did so as a result of his conversation with two employees of RMS who "encouraged" him to purchase the supercharger and an aftercooling system for Shannahan's car after Shannahan was told "by the staff at the RMS booth" that his car would perform more "like a BMW 330i or M3" with the installation of both systems. *Id.*, ¶¶ 6-7. One of those RMS employees was Jeff Zusman ("Zusman"), who was a sales and marketing manager who admittedly was not very knowledgeable about the technical aspects of the automotive product installation business. *Zusman Deposition* at 64:8-20.

Zusman was at the Los Angeles Auto Show to sell supercharger systems and performance parts for RMS. *Id.* at 66. Minelian was not present at the Los Angeles Auto Show on that day. *Minelian Testimony, March 3, 2016 Trial Transcript* at 65.

At the auto show, Zusman represented to Shannahan that RMS's products would improve the performance, power and speed of factory BMW cars. *Zusman Deposition* at 65:4-22. Zusman testified he would have told anyone that the addition of performance parts would improve the performance of the vehicle. *Id.* at 66:7-21. However, Zusman did not recall stating any specific percentages as to power and torque increase with an installed supercharger. *Id.* at 64:21-25 to 65:1-3. Zusman did not tell Shannahan that a supercharger kit was readily available for Shannahan's BMW 325i. *Id.* at 66:22-25. Zusman believed that the installation of a supercharger would improve performance and increase torque. *Id.* at 65:6-10.

On February 8, 2002, Shannahan delivered his car to Zusman at the RMS garage in Van Nuys, California. *Shannahan's Declaration*, ECF 89, ¶ 8. During that visit to the RMS shop, Shannahan met with Minelian, who, according to Shannahan, told him that a supercharger would improve the performance of the vehicle and that Minelian could successfully install it. *Id.* Furthermore, according to Shannahan, Minelian represented to him that the supercharger kits did not cause vehicle reliability problems. *Id.*

Minelian believed he could successfully install the supercharger in Shannahan's car because he had previously successfully installed approximately fifty superchargers in various vehicles. *Minelian's Declaration*, ECF 90, ¶ 8. Minelian testified, "It was and remains my belief that I have the experience, knowledge and tools to install a supercharger in a BMW vehicle. I do not recall ever thinking that I would not be able to, or that I otherwise should not install the supercharger in Shannahan's vehicle." *Minelian's Declaration*, ECF 90, ¶ 9. Although Minelian did not recall "exactly how many" and estimated the number at "less than five," he testified at trial that he had successfully installed the same supercharger system in other 2001 BMW 325i models in 2001. *Minelian Testimony, March 3, 2016 Trial Transcript* at 75. Zusman had personally seen about eight

to ten customers come into RMS for the installation of a supercharger during his time working there. *Zusman Deposition* at 35. William Knobloch ("Knobloch") identified himself as a prior "consultant" for Minelian. *Knobloch Testimony, March 3, 2016 Trial Transcript* at 116. Knobloch, who was called as a rebuttal witness by Shannahan, stated that he believed that Minelian had the experience necessary to install a supercharger on a car. *Id.* at 114. Knobloch first met Minelian as a customer, when Minelian installed a supercharger in Knobloch's own 2001 BMW Z8. *Id.* at 106; *Minelian Testimony, September 23, 2016 Trial Transcript* at 7-8.

Shannahan testified that during the course of the installation of the supercharger, he spoke with "RMS" and "Minelian and his staff" regarding the status of its completion. *Shannahan's Declaration*, ECF 89, ¶¶ 9-10, 12. However, Shannahan did not specify in his trial testimony any particular factual statement made by Minelian regarding the completion of the supercharger installation. *See id. generally*.

Minelian testified that the installation of a supercharger typically requires eight to ten hours, but that such time could not be spent consecutively within one day, taking into consideration other jobs and labor laws. *Minelian's Declaration*, ECF 90, ¶ 13. Minelian testified that it was his understanding and belief that the supercharger was successfully installed in Shannahan's car. *Id.*, ¶ 10.

Shannahan testified that he retrieved his car after completion of the supercharger installation on March 23, 2002. *Shannahan's Declaration*, ECF 89, ¶ 11. No evidence was admitted showing that the supercharger was not installed in Shannahan's vehicle. According to Shannahan, when he asked "Minelian and his staff" about the status of the supercharger installation on the vehicle, he was told "that the system was still being developed, but they recommended a different product that Minelian claimed he was successful in installing on other customers' vehicles called an Aquamist brand water injection system for a total cost of $500.00." *Id.*, ¶ 12. Shannahan further testified that "Minelian and his staff stated that the system at the time was providing similar performance benefits as the supercharger system at only a quarter of the cost." *Id.* Thus, according to

Shannahan, "[b]ased on the benefits touted by Minelian, I decided to install the Aquamist system on my BMW vehicle in early April 2002." *Id.*, ¶ 13. In this testimony, Shannahan did not specify the dates on which these alleged representations were made or who made them, but simply referred to "Minelian and his staff" in his testimony, not specifically referring to Minelian in isolation. *See id. generally*.

**B. The Aquamist System**

Shannahan decided to have an Aquamist brand water injection system ("Aquamist system") installed in his car in April 2002. *Shannahan's Declaration*, ECF 89, ¶ 13. Shannahan testified that Minelian "and his staff" recommended the installation of the Aquamist system and stated that Minelian was successful in installing it on other customers' cars which, at the time, provided similar performance benefits as the supercharger. *Id.*, ¶ 12.

Zusman testified that the Aquamist system could be used in conjunction with a supercharger. *Zusman Deposition* at 29. On or about March 23, 2002, Zusman told Shannahan that the Aquamist system would perform the charge cooling function of an aftercooler. *Id.* at 72-73. Zusman testified that he had no reason to believe it was untrue at the time, and continues to agree with that statement now. *Id.* at 73-74.

Minelian testified that he believed the Aquamist system would be compatible with Shannahan's car because the company that manufactured the system represented that its systems were universal and could be fitted to any type of turbo/supercharged engine. *Minelian's Declaration*, ECF 90, ¶ 18. Minelian testified that he did not recall ever being informed that the Aquamist system would not be compatible with a BMW 325i car. *Id.*, ¶ 19. Zusman testified that the Aquamist system was a universal adaptability system that was not designed around any specific car or engine. *Zusman Deposition* at 76.

Minelian testified that he had installed the Aquamist system on other BMW cars with little to no problems. *Minelian's Declaration*, ECF 90, ¶ 18. Minelian further testified that he was capable to install the Aquamist system because he had years of experience in doing so, as well as the knowledge and tools to install it, and that he did not recall ever

thinking he would not be able to install it or should not otherwise install it in Shannahan's car. *Id.*, ¶ 20. Minelian further stated that he did not recall representing any fact to Shannahan with respect to the installation of the Aquamist system that he knew to be false or untrue. *Id*. Minelian testified that it was his understanding and belief that the Aquamist system was successfully installed in Shannahan's car. *Id.*, ¶ 21.

On May 15, 2002, Shannahan retrieved his car after the installation of the Aquamist system. *Shannahan's Declaration*, ECF 89, ¶ 14. According to Shannahan, at that time, Minelian told him that "the Aquamist System was working but that, 'the engine software would need to be tuned at a later date to maximize performance.'" *Id*., ¶ 14-15. According to Shannahan, the Aquamist System malfunctioned later that day on a trip he took to Sacramento and had to be deactivated. *Id.*, ¶ 15. The court does not find Shannahan's testimony on this point to be credible because he did not explain in his testimony how he knew the system malfunctioned and had to be deactivated, only saying that it malfunctioned in a conclusory statement.

**C. The Fuel Charger**

Shannahan testified that Minelian recommended the installation of a fuel charger in December 2002. *Shannahan's Declaration*, ECF 89, ¶ 18. Shannahan testified that Minelian stated that Minelian paid to have it designed and that it was complete and operational as a "drop-in system" replacement for the Aquamist computer. *Id.*

Minelian testified that he assisted Scott Leanders ("Leanders") in developing the fuel charger system. *Minelian's Declaration*, ECF 90, ¶ 24. Minelian further testified that he personally installed fuel chargers in many cars, including the same model as Shannahan's car, and sold hundreds of fuel chargers to third parties and that he did not recall receiving any complaints. *Id.*, ¶ 25. Minelian testified that he was capable of installing the fuel charger system in BMW cars because he had the experience, knowledge and tools to install it, and that he did not recall ever thinking he would not be able to install it or should not otherwise install it in Shannahan's car. *Id.* Minelian further testified that he did not

recall representing any fact to Shannahan with respect to the installation of the fuel charger system that he knew to be false or untrue. *Id.*

Minelian testified that he did not recall installing a fuel charger in Shannahan's car. *Id.*, ¶ 26. Shannahan in his testimony did not state any specific facts regarding the installation of the fuel charger or offer any evidence as to any specific issues with the fuel charger. *See generally Shannahan's Declaration*, ECF 89.

**D. The Aftercooler System**

Shannahan testified that, in April 2003, Minelian showed Shannahan a Stage 3 Aftercooler System that was installed on a BMW M3 car, which had been in development and was now complete and ready for installation. *Shannahan's Declaration*, ECF 89, ¶ 19. Shannahan testified that Minelian represented that the aftercooler system would fit in Shannahan's car; installing it with the fuel charger would be economical; all necessary parts were available; and only a custom software adjustment would be needed for the 325i model. *Id.*, ¶ 20.

Minelian testified that an aftercooler system had been developed and was ready to install once received from the manufacturer; the aftercooler would be compatible with the Vortech supercharger previously installed in Shannahan's car; the aftercooler would cool the air charged by the supercharger to enhance the supercharger's performance; and Minelian would just need to adjust the software so that the product would sync with the car's engine. *Minelian's Declaration*, ECF 90, ¶¶ 14-15.

Minelian testified that he installed the same aftercooler in a number of BMW cars, usually the M3 and M5 models, and he believed it would fit in Shannahan's car since the dimensions were similar to the M3 model. *Id.*, ¶ 16. Minelian testified that he was capable to install the aftercooler system in BMW cars because he had the experience, knowledge, and tools to install it, and that he did not recall ever thinking he would not be able to install it or should not otherwise install it in Shannahan's car. *Id.*, ¶ 17. Minelian testified that he did not recall representing any fact to Shannahan with respect to the installation of the aftercooler system that he knew to be false or untrue. *Id.*

Shannahan retrieved his car after the aftercooler was installed on September 27, 2003. *Shannahan's Declaration*, ECF 89, ¶ 22.

**E. Maintenance and Inspection by Beverly Hills BMW**

On September 20, 2002, four months after the installation and alleged malfunction of the Aquamist system on May 15, 2002, Shannahan took his car to the Beverly Hills BMW auto dealership for a routine oil change. *Shannahan's Declaration*, ECF 89, ¶ 16. According to Shannahan, an inspection of the car at Beverly Hills BMW "revealed a loose ground wire connection in the engine bay that the technician assessed as a somewhat serious oversight with the potential to overheat and damage the vehicle engine." *Id*. Shannahan's testimony about the inspection by the technician at Beverly Hills BMW and any assessment by the technician is inadmissible hearsay; the technician did not testify, and Shannahan's recounting what the technician allegedly told him in an out of court statement does not reflect Shannahan's personal knowledge. Thus, the court does not find Shannahan's testimony on these points to be credible because the testimony is based on inadmissible hearsay and not based on personal knowledge. Fed. R. Evid. 602 and 801 *et seq.*

Shannahan later took the car to RMS for repair of the Aquamist System, and the car was at the RMS garage between September 23 and October 11, 2002. *Id.*, ¶ 17. According to Shannahan, Minelian "assured [him] that the Aquamist System computer **was not defective** and that the problem had been corrected." *Id.* (emphasis in original). Afterwards, on November 19, 2003, Shannahan took his car back to Beverly Hills BMW for "servicing." *Id.*, ¶ 27. Shannahan testified that Beverly Hills BMW recommended to him that he return his car back to RMS since Minelian had installed the modification. *Id.*, ¶ 28. Specifically, Shannahan testified that Beverly Hills BMW discovered and told him about a number of problems discovered by Beverly Hills BMW, which included: (a) oil sprayed throughout the air intake system by the installed supercharger; (b) fuel lines that were "improperly spliced"; (c) removal of the floor liner panel; (d) obstruction of the engine coolant radiator by Minelian's aftercooler radiator; (e) spliced electrical connections in the

engine electronics that were "sloppy"; (f) improperly cut and rerouted tubes and pipes; (g) spliced vacuum lines; and (h) failure to replace the dust pan. *Id.* Shannahan's testimony about the discoveries of Beverly Hills BMW from the servicing of Shannahan's car is inadmissible hearsay; the unidentified personnel at Beverly Hills BMW did not testify, and Shannahan's recounting what they allegedly told him in out of court statements does not reflect Shannahan's personal knowledge. *Id.* Thus, the court does not find Shannahan's testimony on these points to be credible because the testimony is based on inadmissible hearsay and not based on personal knowledge. Fed. R. Evid. 602 and 801 *et seq.*

According to Shannahan, on or about November 19, 2003, Beverly Hills BMW told Shannahan that he should take his car to Long Beach BMW, and sometime in January 2004, Long Beach BMW recommended to Shannahan that the modifications and add-ons be entirely removed and that Shannahan's car be restored to its original factory condition. *Id.*, ¶¶ 27, 29, 30. Shannahan's testimony about what Beverly Hills BMW and Long Beach BMW recommended to him about the condition of his car is inadmissible hearsay; the unidentified personnel at Beverly Hills BMW and Long Beach BMW did not testify, and Shannahan's recounting what they allegedly told him in out of court statements does not reflect Shannahan's personal knowledge. Thus, the court also does not find this testimony of Shannahan on these points to be credible because the testimony is based on inadmissible hearsay and not based on personal knowledge. Fed. R. Evid. 602 and 801 *et seq.*

**F. Minelian's Business Operations and Financial Condition**

Minelian testified that he considered himself to be an "experiential engineer," rather than a businessperson, with more of a technical rather than business background. *Minelian Testimony, March 3, 2016 Trial Transcript* at 73; *Minelian's Declaration*, ECF 90, ¶¶ 36-37. Minelian testified that he relied on others, including Zusman and William Knobloch, to take care of the more financial and business aspects of RMS. *Minelian Testimony, March 3, 2016 Trial Transcript* at 44-45.

Minelian testified that for RMS financially, some months were good and some were bad, but it would be inaccurate to say that most were bad. *Id.* at 66:4-12; 67:21-25. Minelian denied taking Shannahan's money for the installation of certain aftermarket systems with the knowledge that he was suffering from financial problems that would make it impossible to complete the work on Shannahan's car. *Id.* at 71:1-24. Minelian testified, "I have always been able to successfully install systems in cars. That was never a problem." *Id.* at 72:7-8. There may have been some software issues, but such issues would cause minimal disruption and could be resolved. *Minelian's Declaration*, ECF 90, ¶¶ 8, 23.

Knobloch identified himself as a prior "consultant" for Minelian. *Knobloch Testimony, March 3, 2016 Trial Transcript* at 116:16-23. Knobloch (a rebuttal witness called by Shannahan) believed Minelian had the experience necessary to install a supercharger on a vehicle. *Id.* at 114:13-24. Knobloch first met Minelian as a customer when Minelian installed a supercharger in Knobloch's own 2001 BMW Z8, though Knobloch said that the installation was incomplete and that he completed it himself after his car was in Minelian's shop for a year. *Id.* at 106:2-107:5. Knobloch did not have personal interaction with Shannahan or personal knowledge of the transactions between Shannahan and Minelian. *Id.* at 118:24-119:5.

## III. ANALYSIS

### A. The Doctrine of Collateral Estoppel

#### 1. The State Court Default Judgment Does Not Have Collateral Estoppel Effect

Shannahan's claim in this adversary proceeding is under Bankruptcy Code § 523(a)(2)(A), which excepts from discharge any debt for money, property, or credit "obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Shannahan argues that the default judgment from the State Court Action has collateral estoppel effect in this case. After considering the judgment and applicable legal authority, the court determines that the state court judgment does not have collateral

estoppel effect because the required elements in this case of fraud and intent to deceive were not actually and necessarily decided in the State Court Action.

Shannahan's State Court Complaint alleged causes of action for (1) False Advertising, (2) Injunctive/Restitutionary Relief Against Violation of the Consumer Legal Remedies Act, (3) Injunctive Relief Against Unfair Competition, (4) Restitutionary Relief On Account of Unfair Competition, and (5) Consumers' Legal Remedies Act. *See* Shannahan's Trial Exhibit 4. The state court entered default judgment on the State Court Complaint in favor of Shannahan for damages in the total sum of $55,300.00. *See Judgment*, Shannahan's Trial Exhibit 6. These damages consisted of (a)(i) $5,650.00 as reimbursement for costs of restoring Shannahan's car to an operable condition, (ii) $2,000.00 as reimbursement for transportation costs Shannahan was caused to incur without just cause, (iii) $12,650.00 as reimbursement for goods and services sold and provided to Shannahan in contravention of California Civil Code § 1770 and California Business & Professions Code §§ 17200 and 17500, and (iv) $20,000.00 as reimbursement for Shannahan's loss of use of his automobile for 422 days caused by violations of California Civil Code § 1770 and Business and Professions Code §§ 17200 and 17500 by RMS and Minelian; and (b) attorney's fees of $15,000 authorized by California Civil Code § 1780(d). *Id.*

The principles of collateral estoppel (also called issue preclusion) apply in discharge exception proceedings under 11 U.S.C. § 523(a). *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 872 (9th Cir. 2005) (quoting *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991)). The full faith and credit requirement of 28 U.S.C. § 1738 requires that the bankruptcy court give collateral estoppel effect to a prior state court judgment in a debt dischargeability proceeding under 11 U.S.C. § 523(a)(2)(A). *Gayden v. Nourbakhsh (In re Nourbakhsh),* 67 F.3d. 798, 801 (9th Cir. 1995). Courts look to the law of the state where the judgment was obtained to apply collateral estoppel. *Id.* at 800.

In California, five elements must be met for the court to give collateral estoppel effect to a judgment: (1) the issue must be identical to the issue litigated in the prior

proceeding; (2) the issue must have been actually litigated; (3) the issue must have been necessarily decided in the prior proceeding, (4) the decision in the prior proceeding must be final and on the merits, and (5) the party against whom preclusion will be applied must be the same as, or in privity with, the original party. *In re Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003) (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001) (citing *Lucido v. Superior Court,* 51 Cal.3d 335, 341 (1990))). "The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application." *Kelly v. Okoye (In re Kelly),* 182 B.R. 255, 258 (9th Cir. BAP 1995). "Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect." *Id*. (citations omitted).

In California, a default judgment may have collateral estoppel preclusive effect so long as two conditions are met: (1) the defendant has been personally served with the summons or has actual knowledge of the existence of the litigation, and (2) the record shows an express finding upon the allegation for which preclusion is sought. *In re Cantrell*, 329 F.3d at 1124 (citing *Williams v. Williams (In re Williams' Estate)*, 36 Cal.2d 289, 293-294 (1950). Regarding the second element, "a court's silence concerning a pleaded allegation does not constitute adjudication of the issue." *In re Harmon*, 250 F.3d at 1247. "However, the express finding requirement can be waived if the court in the prior proceeding necessarily decided the issue." *Id.* at 1248. In such circumstances, an express finding is not required because if an issue was "necessarily decided" in a prior proceeding, it was "actually litigated." *Id.*

Here, if the state court could have issued the default judgment without finding that Minelian committed fraud, then collateral estoppel does not apply. *See In re Phan*, No. 8:12-bk-16820-MW, Adv. No. 8:12-ap-01334-MW, 2015 WL 4183493, at *6 (Bankr. C.D. Cal. July 10, 2015). Conversely, if the state court could not have issued the default judgment without a finding of fraud, collateral estoppel applies. *Id.* If there is any reasonable doubt as to the basis on which the state court entered its judgment, collateral

estoppel will not apply. *Id*. The court should inquire into (1) what the judgment actually provides and (2) the viability of the various causes of action. *Id*. at *7.

Regarding Minelian's knowledge of the State Court Action, the parties do not dispute whether Minelian was served with the state court summons or had actual knowledge of the existence of the State Court Action. Further, the state court's default judgment states, "MINELIAN having been properly served with copies of the First Amended Complaint and Summons thereon . . ." *Judgment*, Shannahan's Trial Exhibit 6 at 1:25-26.

Regarding the second element, although the state court's default judgment held that RMS and Minelian were liable to Shannahan on the claims in the State Court Complaint and awarded damages to Shannahan, the state court did not make any express findings of fraud or intent to deceive. Thus, the collateral estoppel issue pending before this court is whether the issue of fraud was necessarily decided by the state court when it awarded the default judgment. The statutory predicates underlying the State Court Complaint were unfair competition and deceptive acts in the commercial context under California Civil Code § 1770, unfair competition under California Business and Professions Code § 17200, false advertising under California Business and Professions Code § 17500, and a claim for attorney's fees under California Civil Code § 1780. *See* Shannahan's Trial Exhibit 4. As discussed below, there is reasonable doubt about the basis on which the state court entered the default judgment, and such reasonable doubt must be resolved against allowing the collateral estoppel effect. *See In re Kelly*, 182 B.R. at 258.

**2. California Civil Code § 1770**

The Second Cause of Action in the State Court Complaint refers to California Civil Code §§ 1770(a)(5), (a)(7), (a)(9), (a)(13) and (a)(16). State Court Complaint, ¶ 47. The Fifth Cause of Action in the State Court Complaint refers to California Civil Code §§ 1770(a)(9), (a)(14) and (a)(19). *Id.*, ¶ 75. California Civil Code § 1770(a) enumerates 27 unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer debt which are unlawful. The default judgment does not contain

a specific finding of fraud and does not refer to a specific subsection of § 1770 on which the judgment is based.

The subsections of California Civil Code § 1770(a) referred to in the State Court Complaint enumerate the following unlawful actions:

> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have.
>
> . . .
>
> (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
>
> . . .
>
> (9) Advertising goods or services with intent not to sell them as advertised.
>
> . . .
>
> (13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions.
>
> (14) Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law.
>
> . . .
>
> (16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.
>
> . . .
>
> (19) Inserting an unconscionable provision in the contract.

California Civil Code §§ 1770(a)(5), (a)(7), (a)(9), (a)(13), (a)(14), (a)(16), (a)(19).

The default judgment does not contain an express finding of fraud by the state court, nor did it specify which subsection of California Civil Code § 1770 was violated. The subsections of California Civil Code § 1770 alleged in the State Court Complaint would not all require the state court to "necessarily decide" whether Minelian committed fraud. On the one hand, liability under California Civil Code §§ 1770(a)(5), (a)(7), (a)(9), (a)(13), (a)(14), and (a)(16) requires a misrepresentation or fraud. However, California Civil Code § 1770(a)(19) does not require either misrepresentation or fraud. Section 1770(a)(19) deals only with an unconscionable contract.

"Under California law, a contract term is unconscionable if it is both procedurally and substantively unconscionable." *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 473 (N.D. Cal. 2014) (citing *A&M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 485 (1982)). Procedural unconscionability takes into consideration the parties' relative bargaining strength and the extent to which a provision is hidden or unexpected, while substantive unconscionability requires terms that shock the conscience or at the least may be described as harsh or oppressive. *Id*. The unconscionability of a contract is not fraud.

Because the state court did not make a specific finding of fraud, and at least one of the statutory predicates underlying these causes of action dealt with an unconscionable contract term, not fraud, this court cannot determine that the issue of fraud was necessarily decided in a prior proceeding regarding the California Civil Code § 1770 causes of action. The damages could have been awarded based on an unconscionable contract. Reasonable doubt as to what was decided by a prior judgment is resolved against allowing the collateral estoppel effect. *See In re Kelly*, 182 B.R. at 258.

**3. California Business and Professions Code § 17200**

The Third and Fourth Causes of Action in the State Court Complaint refer to California Business and Professions Code § 17200. The state court awarded Shannahan $12,650 "as reimbursement for goods and services sold and provided to Shannahan" and $20,000 "as reimbursement for Shannahan's loss of use of his automobile" for violation of

California Business and Professions Code § 17200. *Judgment*, Shannahan's Trial Exhibit 6.

Under California Business and Professions Code § 17200 ("Unfair Competition Law"), "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by . . . the Business and Professions Code." "Because Business and Professions Code section 17200 is written in the disjunctive, it established three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." *Keegan v. American Honda Motor Co., Inc.*, 838 F. Supp.2d 929, 939 (C.D. Cal. 2012); *see also Paulus v. Bob Lynch Ford, Inc.*, 139 Cal.App.4th 659, 676-677 (2006) (stating that the purpose of California Business and Professions Code § 17200 is to protect consumers and competitors by promoting fair competition in commercial markets for goods and services and that the scope of unfair competition law is "broad" and covers a "wide range of conduct.").

The state court did not make a specific finding of a fraudulent business act under Business and Professions Code § 17200. The language of this statute includes acts that are unlawful, unfair, or fraudulent. Because the statute refers to acts other than fraud, this court cannot conclude that the state court necessarily decided the issue of fraud based on an award of damages under § 17200. *See In re Sabban*, 600 F.3d 1219, 1222-1224 (9th Cir. 2010) (award of damages made under a statute that is not premised on either fraud or actual harm is not a debt for money obtained by fraud within the meaning of 11 U.S.C. § 523(a)(2)(A)).

**4. California Business and Professions Code § 17500**

The First and Third Causes of Action in the State Court Complaint allege that Minelian engaged in false advertising pursuant to California Business and Professions Code § 17500. The state court awarded Shannahan $12,650 "as reimbursement for goods and services sold and provided to Shannahan" and $20,000 "as reimbursement for

Shannahan's loss of use of his automobile" for violation of California Business and Professions Code § 17500. *Judgment*, Shannahan's Trial Exhibit 6.

California Business and Professions Code § 17500 ("California False Advertising Law") prohibits the dissemination of false or misleading statements that relate to advertising. Section 17500 has been broadly construed to forbid not only false advertising, but also advertising which, although is true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public. *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 679 (2006) (citing *Kasky v. Nike, Inc.,* 27 Cal.4th 939, 951 (2002)); *Leoni v. State Bar of California*, 39 Cal.3d 609, 626 (1985). The general advertising regulations of the Business and Professions Code may be violated even if there is no specific intent to deceive or mislead. *Leoni v. State Bar of California*, 39 Cal.3d at 626 (citing *Chern v. Bank of America*, 15 Cal.3d 866, 875-876 (1976)) ("Whether a loan of money is a sale or a service, the language of section 17500 is sufficiently broad to include false or misleading statements made to the public by banking institutions in connection with their loans. Under this section, a statement is false or misleading if members of the public are likely to be deceived. Intent of the disseminator and knowledge of the customer are both irrelevant.").

The default judgment does not contain a specific finding that Minelian's advertisements constituted fraud. Unlike California Business and Professions Code § 17500, fraud under Bankruptcy Code § 523(a)(2)(A) requires a specific intent to deceive. *See Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991) (To make a claim under § 523(a)(2)(A), the creditor must prove by a preponderance of evidence that the debtor made a representation with the intention and purpose of deceiving the creditor.). Therefore, because the state court did not make a specific finding of fraud, and the default could have been entered against Minelian under § 17500 without a specific intent to deceive, the issue of fraud was not necessarily decided by the state court.

This court determines that the award for damages to Shannahan under Civil Code § 1770 and Business & Professions Code §§ 17200 and 17500 did not show that the state court "necessarily decided" the issue of fraud.

**5. California Civil Code § 1780(d)**

The Second Cause of Action in the State Court Complaint refers to California Civil Code §§ 1780(a)(2), (a)(3), (a)(4) and (a)(5), which provide in relevant part that "[a]ny consumer who suffers any damages as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain . . . (1) Actual damages . . . ; (2) An order enjoining the methods, acts, or practices; (3) Restitution of property; (4) Punitive damages; [or] (5) Any other relief the court deems proper." California Civil Code § 1780(a). The default judgment does not contain a specific finding under (a)(2), (a)(3), (a)(4) or (a)(5) of Civil Code § 1780. On the contrary, the state court awarded attorney's fees of $15,000 as damages to Shannahan pursuant to *subsection (d)* of Civil Code § 1780, which merely describes the venue and procedural requirements for a valid attorney's fees claim brought under § 1780. *See id.* (setting forth proper venue and requiring a plaintiff to, "concurrently with the filing of the complaint, . . . file an affidavit stating facts showing that the action has been commenced in a county described in this section as a proper place for the trial of the action").

Based on the state court's award of attorney's fees under California Civil Code § 1780(d), this court cannot determine that the state court necessarily decided the issue of fraud. Accordingly, the court finds that collateral estoppel does not apply to the state court default judgment.

**B. 11 U.S.C. § 523(a)(2)(A)**

Shannahan's Third Amended Complaint asserts one claim under 11 U.S.C. § 523(a)(2)(A) to determine that the debt owed by Minelian to Shannahan is excepted from discharge as a debt incurred by the debtor under "false pretenses, a false representation, or actual fraud . . . " For Shannahan to prevail on his claim under 11 U.S.C. § 523(a)(2)(A),

he must prove by a preponderance of the evidence each of the following five elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Slyman v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000) (citation omitted). "[E]ither actual knowledge of the falsity of a statement, or reckless disregard for its truth, satisfies the scienter requirement for nondischargeability of a debt." *In re Grabau*, 151 B.R. 227, 234 (N.D. Cal. 1993) (quoting *In re Houtman,* 568 F.2d 651, 656 (9th Cir. 1978)). In addition, "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud . . . that can be effected without a false representation." *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016). Section 523 should be narrowly construed against the objecting creditor and liberally in favor of the debtor. *In re Miller*, 39 F.3d 301, 304 (11th Cir. 1994) (citation omitted).

Shannahan alleges that Minelian made certain representations regarding the following four installed systems: (1) Supercharger; (2) Aquamist system; (3) Fuelcharger system; and (4) Stage 3 Aftercooler. After reviewing the evidence and testimony, the court finds that the Shannahan has not established the necessary elements under 11 U.S.C. § 523(a)(2)(A) by a preponderance of the evidence. As to all four systems, Shannahan did not prove by a preponderance of the evidence that Minelian made any of the alleged misrepresentations to Shannahan with actual knowledge or reckless disregard for the truth of such statements, that Minelian intended to deceive Shannahan when each such alleged misrepresentation was made, and that Shannahan justifiably relied on Minelian's alleged misrepresentations. Accordingly, the court finds that Shannahan's debt is not excepted from discharge under for 11 U.S.C. § 523(a)(2)(A) for the reasons discussed below.

///

**1. The Supercharger System**

**a. Alleged Misrepresentations Regarding the Supercharger System**

Shannahan attributes to Minelian four alleged misrepresentations regarding the supercharger:

(1) **January 14, 2002 (The Auto Show)**: Zusman encouraged Shannahan to buy a supercharger and told him that a supercharger would make his vehicle perform "like a BMW 330i or M3." *Shannahan's Declaration*, ECF 89, ¶ 6.

(2) **February 8, 2002 (The Shop)**: When Shannahan dropped off his vehicle approximately three weeks later, Minelian stated that (1) a supercharger would make the vehicle perform like larger models; (2) Minelian could successfully install it; and (3) Minelian had not had reliability problems with superchargers. *Id.*, ¶ 8.

(3) **March 8, 2002**: Shannahan "was assured" that installation would take more than 7-10 days. *Id.*, ¶ 9.

(4) **March 18, 2002**: Shannahan called and "'was informed' that . . . [RMS] had not yet finished the supercharger system." *Id.*, ¶ 10.

**b. Alleged Misrepresentations 1, 3, and 4**

Shannahan's Complaint proceeds on the theory that all acts of RMS "are properly deemed to be the acts of [Minelian]." *Third Amended Complaint*, ¶ 3. This blanket assertion is incorrect. "[B]efore an agent's fraud can be imputed to a principal-debtor, proof [is] required that the principal 'knew or should have known of the fraud.'" *Sachan v. Huh (In re Huh),* 506 B.R. 257, 265-266 (9th Cir. BAP 2014) (citation omitted).

The first alleged misrepresentation was that Zusman—not Minelian—told Shannahan that the supercharger would enhance the performance of the vehicle. Shannahan failed to allege any facts or present any evidence demonstrating why Minelian knew or should have known about Zusman's alleged fraud. Because Shannahan failed to establish by a preponderance of the evidence that Minelian knew or should have known

what Zusman allegedly represented to Shannahan at the LA Auto Show, the first alleged misrepresentation cannot be imputed to Minelian.

The third alleged representation occurred when Shannahan visited RMS on March 8, 2002, where someone (presumably an RMS employee) assured him that the installation would take 7-10 days. *Shannahan's Declaration*, ECF 89, ¶ 9. Shannahan did not identify who allegedly told him this; he simply alleges that a statement was made at RMS. Because Shannahan did not establish a link between this alleged representation and Minelian's knowledge, the third alleged misrepresentation cannot be imputed to Minelian.

The fourth alleged misrepresentation was that Shannahan called RMS and "'was informed' that . . . [RMS] had not yet finished the supercharger system." *Id*., ¶ 10. As with the first and third alleged misrepresentations, Shannahan failed to present sufficient evidence to establish that Minelian knew or should have known about this alleged misrepresentation. Therefore, the fourth alleged misrepresentation cannot be imputed to Minelian.

Because Shannahan cannot impute RMS's alleged representations to Minelian, Shannahan has not established by a preponderance of the evidence that Minelian made these alleged representations. Accordingly, Shannahan's allegations as to representations 1, 3, and 4 fail to satisfy the first element of a § 523(a)(2)(A) claim.

**c. Alleged Misrepresentation 2**

Minelian's second alleged misrepresentation was that (1) a supercharger would make the vehicle perform like larger models; (2) Minelian could successfully install it; and (3) Minelian did not have reliability problems with superchargers. *Shannahan's Declaration*, ECF 89, ¶ 8. Neither party disputes that a conversation about the supercharger took place in Minelian's shop and that Minelian generally recommended the supercharger to Shannahan. However, the details of this conversation are not established. Shannahan's only evidence that Minelian made the above representations is his own testimony. *See id.* As discussed below, even if Shannahan proves that Minelian generally estimated a performance improvement, stated that he could install the supercharger, or

stated he had not had reliability problems, the alleged misrepresentations were either true or amounted to no more than mere puffery.

**i. Alleged Misrepresentation That a Supercharger Would Make the Vehicle Perform Like Larger Models**

"The creditor seeking to prove nondischargeability under [11 U.S.C. § 523(a)(2)(A)] must establish: (1) a misrepresentation *of fact* by the debtor…" *Cossu v. Jefferson Pilot Securities Corporation (In re Cossu)*, 410 F.3d 591, 596 (9th Cir. 2005) (emphasis added). "To be actionable, the representation must be one of existing fact and not merely an expression of opinion, expectation or declaration of intention." *Smith v. Meyers* (*In re Schwartz & Meyers),* 130 B.R. 416, 423 (Bankr. S.D.N.Y. 1991) (citations omitted). A general statement about the quality of a product in a sales pitch that does not go beyond "mere puffing" is not a misrepresentation. *See Rezin v. Barr (In re Barr)*, 194 B.R. 1009, 1018-1020 (Bankr. N.D. Ill. 1996). "[S]tatements that are vaguely optimistic, general, or subjective are often not actionable." *Cutler v. Rancher Energy Corp.,* No. SACV 13-00906 DOC (JPRx), 2014 WL 1153054, at *7 (C.D. Cal. Mar. 11, 2014).

Here, the alleged representation about the expected performance benefits of the supercharger fits squarely within the realm of puffery. The statement is a general expression of opinion about the quality of the supercharger, and it contains no quantifiable specifics about its qualities or performance. Minelian did not allegedly promise that the supercharger would boost performance by a certain percentage or that it had some endorsement that it did not have. Therefore, because the alleged representation is puffery and is not actionable, this alleged representation fails to establish the first element of a claim under § 523(a)(2)(A).

**ii. Alleged Misrepresentation That Minelian Could Install the Supercharger**

Shannahan alleges that Minelian misrepresented his ability to install the supercharger, but Shannahan does not allege that Minelian made any specific representations about his credentials, training, education, experience, or endorsements.

Moreover, there was credible testimony of Minelian from which to conclude that the alleged representation concerning his abilities, if made, was true. Minelian testified, "It was and remains my belief that I have the experience, knowledge and tools to install a supercharger in a BMW vehicle. I do not recall ever thinking that I would not be able to, or that I otherwise should not install the supercharger in Shannahan's vehicle." *Minelian's Declaration*, ECF 90, ¶ 9.

Minelian's testimony about his ability to install the supercharger successfully in Shannahan's vehicle is credible because Minelian had previously installed approximately fifty superchargers in various vehicles. *Id.*, ¶ 8. As to the specific supercharger kit, Zusman testified that "[the supercharger kit] to the best of [his] knowledge, had not been put on another vehicle," *Zusman Deposition* at 33:9-16, but he denied that "the installation of a supercharger kit on a 2001 BMW 325i was experimental," *id.* at 33:17-21. Moreover, while Minelian did not recall "exactly how many" and estimated the number at "less than five," he confirmed at trial that he had successfully installed the same supercharger in other 2001 BMW 325i models in 2001. *March 3, 2016, Trial Transcript* at 75. Also, it is undisputed that Minelian did install the supercharger. Shannahan did not offer any evidence to rebut Minelian's credible testimony and to otherwise show that the alleged misrepresentation was false.

Therefore, the alleged misrepresentation that Minelian could install the supercharger fails to satisfy the first element of a 11 U.S.C. §523(a)(2)(A) claim because Shannahan failed to meet his burden of proving by a preponderance of the evidence that this statement was false.

**iii. Alleged Misrepresentation That Minelian Did Not Have Reliability Problems with Superchargers**

The allegation about RMS superchargers not causing vehicle reliability problems is also too vague to rise beyond the level of puffery. What might be considered a problem with "vehicle reliability" to one person could be a simple matter of making an adjustment to another. If Shannahan had asked Minelian whether Minelian had ever seen the

supercharger cause a vehicle to need further servicing in order to operate properly, or whether he had ever seen the supercharger cause a vehicle to become inoperable, that would be different. However, Shannahan's alleged question left "vehicle reliability" up to Minelian's interpretation, and Minelian's denial that the supercharger interfered with vehicle reliability is not specific enough to amount to a representation of fact.

Similarly, Shannahan did not meet his burden of proving by a preponderance of the evidence that this representation, if made, was false. Shannahan did not present evidence showing that Minelian had experienced reliability problems with superchargers prior to this alleged misrepresentation. Minelian testified that he recommended the Vortech supercharger to Shannahan based on research and his own personal experience showing that Vortech's supercharger products were considered the best available at the time. *Minelian's Declaration*, ECF 90, ¶ 7.

Moreover, the alleged misrepresentations occurred in a conversation that took place *after* Shannahan had already decided to have the supercharger installed and *after* he had paid a $2,500 deposit. *See Shannahan's Declaration*, ECF 89, ¶¶ 7-8. "To be actionable under § 523(a)(2)(A), the prescribed conduct must have occurred *before* the debtor obtains the money. In other words, the prescribed conduct must induce the creditor to act." *Hopper v. Lewis (In re Lewis),* 551 B.R. 41, 48 (Bankr. E.D. Cal. 2016) (emphasis in original) (citing *Shah v. Chowdaury (In re Chowdaury),* No. EC-13-1346-KuJuTa, 2014 WL 2938274, at *3 (9th Cir. BAP May 15, 2014)). "[I]f the misrepresentation occurred *after* the creditor lent the money, it cannot be said that the loan was 'obtained by' the misrepresentation as required for nondischargeability under section 523(a)(2)." *In re Ashai*, 211 F. Supp.3d 1215, 1220 (C.D. Cal. 2016) (citing *New Falls Corp. v. Boyajian (In re Boyajian)*, 367 B.R. 138 (9th Cir. BAP 2007), *affirmed*, 564 F.3d 1088 (9th Cir. 2009)). Accordingly, even if Shannahan had proven that there were misrepresentations on February 8, 2002, they would not be actionable because they could not have induced Shannahan to purchase the supercharger from RMS.

For the reasons stated above, the court finds that the alleged misrepresentations of February 8, 2002, were either true or amounted to no more than puffery. Further, these alleged misrepresentations could not have induced Shannahan to purchase the supercharger because they allegedly occurred in a conversation that took place after Shannahan had already decided to purchase it. Thus, the alleged misrepresentations fail to satisfy the first and fourth elements of a 11 U.S.C. § 523(a)(2)(A) claim.

**2. The Aquamist System**

**a. Alleged Misrepresentations Regarding the Aquamist System**

Shannahan attributes to Minelian three alleged misrepresentations regarding the Aquamist system:

(1) Minelian and his staff "recommended [the Aquamist system,] that [Minelian] claimed he was successful in installing on other customers' vehicles . . . for a total cost of $500.00." *Shannahan's Declaration*, ECF 89, ¶ 12.

(2) "[Minelian] and his staff stated that the [Aquamist] system at the time was providing similar performance benefits as the supercharger system at only a quarter of the cost." *Id*.

(3) "[Minelian] told [Shannahan] that the Aquamist System was working but that, 'the engine software would need to be tuned at a later date to maximize performance.'" *Id.*, ¶ 14.

The evidence offered in support of these three alleged representations is limited to Shannahan's testimony. Furthermore, Shannahan's testimony fails to differentiate between Minelian and other individuals (i.e., "his staff"), making it unclear who exactly represented what. *See, e.g., Shannahan's Declaration*, ECF 89, ¶¶ 12-13.

As discussed above, Shannahan's theory of the case relies on the blanket claim that all acts of RMS "are properly deemed to be the acts of [Minelian]." *Third Amended Complaint*, ¶ 3. Representations do not become Minelian's simply by virtue of an RMS staff member having made them. To impute to Minelian representations of "his staff," Shannahan must prove that Minelian "knew or should have known" about them—that he

was somehow complicit. *See In re Huh,* 506 B.R. at 265-266 ("[B]efore an agent's fraud can be imputed to a principal-debtor, proof [is] required that the principal 'knew or should have known of the fraud.'").

While there is some evidence that Minelian knew or should have known that "his staff" could make representations about the Aquamist system, Shannahan has failed to establish the connection between the specific alleged misrepresentations and Minelian such that Minelian was culpable in any alleged fraud. Specifically, Zusman, a former RMS employee, testified that he "believe[d]" that he conferred with Minelian in the process of discussing the Aquamist system with Shannahan. *Zusman Deposition* at 72:3-73:18. While this evidence raises the possibility that Minelian knew of a conversation between an RMS employee and Shannahan, Shannahan failed to prove anything further. Shannahan failed to prove with specificity the content of Zusman's representations and generally failed to establish a "knew or should have known" connection between those specific representations and Minelian's knowledge. Even setting aside Shannahan's failure to prove that the alleged representations of others may be imputed to Minelian, the alleged representations still fail because they turned out to be true, were not proven, or were not representations of fact.

**i. Alleged Misrepresentation 1 (Recommendation to Purchase)**

Shannahan testified that "[Minelian and his staff] recommended [the Aquamist system,] that [Minelian] claimed he was successful in installing on other customers' vehicles . . . for a total cost of $500.00." *Shannahan's Declaration*, ECF 89, ¶ 12. Minelian testified, "At some point, I informed [Shannahan] about an 'Aquamist System.'" *Minelian's Declaration*, ECF 90, ¶ 18. Also, Zusman recalled a telephone conversation with Shannahan about the Aquamist system and *believed* that he conferred with Minelian in the scope of that conversation. *Zusman Deposition* at 72-73. Zusman also stated that "this was the system that [Minelian] had recommended after that." *Id.* at 73.

As discussed above, a § 523(a)(2)(A) claim will not lie where the representation is mere puffery, an expression of opinion, expectation or declaration of intention. *See In re Schwartz & Meyers,* 130 B.R. at 423 (citations omitted). Thus, even if Minelian generally recommended the Aquamist system to Shannahan, there is no evidence that his doing so went beyond non-actionable puffery.

Minelian testified that he believed the Aquamist system would be compatible with Shannahan's car because he had successfully installed it on other BMWs. *Minelian's Declaration*, ECF 90, ¶ 18, However, Minelian did not testify that he told Shannahan about his past success. *See id.* Shannahan's own testimony falls short of asserting that Minelian told him about his past success with the product. It is merely a passive description of the system "that Minelian claimed he was successful in installing. . . . " *Shannahan's Declaration*, ECF 89, ¶ 12. Even if construed liberally as an assertion that Minelian made the representation to Shannahan, there is no description of what Minelian actually stated. There are no details about the date, place, or other circumstances surrounding the alleged statement, and it is not clear from the testimony that Minelian made it *to Shannahan* (i.e., to *whom* "Minelian claimed"). Thus, there is insufficient evidence that Minelian represented to Shannahan that he had successfully installed the Aquamist system on other occasions.

Moreover, Minelian testified that he had "years of experience installing the Aquamist system and similar systems in BMW vehicles." *Minelian's Declaration*, ECF 90, ¶ 20. Zusman testified that "[t]he Aquamist system was a universal adaptability system." *Zusman Deposition* at 76:1-4. Shannahan presented no evidence to call into question Minelian's testimony on this point. Thus, the court finds that Shannahan has not shown by a preponderance of the evidence that Minelian had falsely represented to Shannahan that Minelian had successfully installed the Aquamist system on other vehicles and had the skills to do so in Shannahan's vehicle.

Through the testimony of Zusman, Shannahan unsuccessfully attempted to prove that Minelian was incompetent. When asked whether "it [was] fair to say that Mr. Minelian's technical skill in installing high performance systems was lacking," Zusman

responded, "I don't think that was the problem." *Zusman Deposition* at 53. When asked whether he ever told "Mr. Shannahan at any time that Race Marque could not possibly deliver on several of the systems that Mr. Minelian was promising customers," he responded, "I don't think so." *Zusman Deposition* at 69-70.

Thus, the court finds that Shannahan did not carry his burden of proving by a preponderance of the evidence that Minelian made a misrepresentation in the process of recommending the Aquamist system to Shannahan.

**ii. Alleged Misrepresentation 2 (Performance Benefits and Cost)**

Shannahan testified that "Minelian and his staff then stated that the [Aquamist] system at the time was providing similar performance benefits as the supercharger system at only a quarter of the cost." *Shannahan's Declaration*, ECF 89, ¶ 12.

Again, Shannahan's testimony is ambiguous about who said what, when, and under what circumstances. Zusman testified that he told Shannahan in a telephone conversation that "[t]he Aquamist would perform the charge cooling function of the unavailable *aftercooler*, nearly as effectively as the radiator-type true *aftercooler*" and that he *believed* that he conferred with Minelian in the scope of doing so. *Zusman Deposition* at 72-73 (emphasis added). If Zusman's belief was correct, then there is some evidence to support the possibility that Minelian knew or should have known that Zusman discussed the expected performance of an Aquamist system with Shannahan. However, this evidence is insufficient, and other than Shannahan's testimony, there is no evidence that Minelian or his staff stated that the expected Aquamist benefits would be similar to a *supercharger*.

Also, as explained above, general representations or puffery about the expected performance benefits of aftermarket systems—as opposed to guarantees of specific, measurable results—are too general and opinion-based to be actionable as misrepresentations. *See In re Schwartz & Meyers,* 130 B.R. at 423; *In re Barr*, 194 B.R. at 1018-1020; *Cutler v. Rancher Energy Corp.,* No. SACV 13-906-DOC (JPRx), 2014 WL 1153054, at *7. The alleged statement about the expected performance benefits of the

Aquamist system fits squarely within the realm of puffery. Even if Shannahan had proven that Minelian generally estimated a performance improvement, such a general statement does not rise beyond the level of non-actionable puffery.

Thus, Shannahan's evidence regarding alleged misrepresentations regarding the performance benefits and cost of the Aquamist system fails to prove by a preponderance of the evidence the first element of a claim under 11 U.S.C. § 523(a)(2)(A).

**iii. Alleged Misrepresentation 3 (Aquamist System Working But Would Need Tuning at a Later Date)**

Minelian does not appear to dispute that he told Shannahan that the Aquamist system would need tuning at a later date. Shannahan testified, "[Minelian] told [Shannahan] that the Aquamist System was working but that, 'the engine software would need to be tuned at a later date to maximize performance.'" *Shannahan's Declaration*, ECF 89, ¶ 14. Shannahan presented no evidence other than his own testimony that Minelian stated that the system was working. Moreover, if Minelian made this representation at all, he would have made it *after* Shannahan had already decided to install an Aquamist system and *after* it was installed.

As discussed above, to be actionable under § 523(a)(2)(A), the alleged misstatement must have occurred *before* the debtor obtains a benefit such that the statement must induce the creditor to act. *See Hopper v. Lewis (In re Lewis),* 551 B.R. at 48. Accordingly, the alleged representation here is not actionable because it could not have induced Shannahan to purchase the Aquamist system from RMS.

For the foregoing reasons, Shannahan failed to prove by a preponderance of the evidence the first and third elements of a 11 U.S.C. § 523(a)(2)(A) claim as it relates to the Aquamist system.

**3. The Fuelcharger System**

**a. Alleged Misrepresentations Regarding the Fuelcharger System**

Regarding the Fuelcharger system, Shannahan alleges that in December 2002, Minelian:

(1) "[R]ecommended that [Shannahan] install a 'Fuelcharger' computer"

(2) Stated that the Fuelcharger design was complete and operational;

(3) Stated that the Fuelcharger would improve the performance of the Aquamist system that was then represented to be "defective"; and

(4) Stated that the Fuelcharger was a "drop in system" to replace the Aquamist system.

*Shannahan's Declaration*, ECF 89, ¶ 18.

**i. Alleged Misrepresentation 1 (General Recommendation to Purchase the Fuelcharger)**

Shannahan alleges that in December 2002, Minelian "recommended that [Shannahan] install a 'Fuelcharger' computer." *Id.*, ¶ 18. Shannahan's only evidence to support the claim that Minelian recommended the Fuelcharger to Shannahan is Shannahan's own testimony. Minelian testified that he did not recall any communications with Shannahan regarding the fuelcharger. *Minelian's Declaration*, ECF 90, ¶ 26.

Shannahan appears to proceed on a theory that implicit in the recommendation to install the Fuelcharger—a recommendation that Shannahan did not prove Minelian made—is a representation of Minelian's competency to install the Fuelcharger. However, as to Minelian's competency, Minelian testified credibly as follows:

(1) Minelian had personally installed Fuelchargers in many vehicles, including BMW vehicles, that he had sold hundreds of Fuelchargers to third parties, and that he did not recall ever experiencing any problems with installed Fuelchargers. *Id.*, ¶ 25.

(2) Minelian had the experience, knowledge, and tools to install the Fuelcharger. *Id.*

(3) Minelian assisted Scott Leanders in developing the Fuelcharger. *Id.*, ¶ 24.

The court finds that even if Minelian had made an express or implied representation to Shannahan in December 2002 about his ability to install a Fuelcharger in Shannahan's vehicle, it was accurate and not a misrepresentation of fact.

For the foregoing reasons, Shannahan failed to prove by a preponderance of the evidence the first element of a 11 U.S.C. § 523(a)(2)(A) claim as to these alleged representations regarding the Fuelcharger system.

**ii. Alleged Misrepresentation 2 (Fuelcharger Design Was Complete and Operational)**

Shannahan alleges that in December 2002, Minelian represented that the Fuelcharger design was complete and operational. *Shannahan's Declaration*, ECF 89, ¶ 18. Shannahan's only evidence in support of this alleged representation is his own testimony, and he failed to present any evidence to show that such a representation, if made, was actually false. Minelian testified credibly that he assisted Scott Leanders in developing the Fuelcharger system. *Minelian's Declaration*, ECF 90, ¶ 24. Therefore, the court finds that if Minelian made this representation, it was not false.

Thus, Shannahan failed to meet the first element of a § 523(a)(2)(A) claim as to the alleged representation regarding the design of the Fuelcharger system.

**iii. Alleged Misrepresentation 3 (Fuelcharger Would Improve the Performance of the Aquamist System That Was Then Represented to Be "Defective")**

Shannahan alleges that in December 2002, Minelian represented that the Fuelcharger would improve the performance of the Aquamist system that was then represented to be "defective." *Shannahan's Declaration*, ECF 89, ¶ 18. Shannahan's only evidence in support of this alleged representation is his own testimony. Moreover, as discussed above, such a representation is not actionable because it is merely a statement about the expected benefits of the product. *See In re Schwartz & Meyers,* 130 B.R. at 422 (citations omitted). The statement about the expected performance benefits of the Fuelcharger fits squarely within the realm of puffery. Thus, even if Shannahan had proven that Minelian generally estimated a performance improvement resulting from the Fuelcharger, this does not rise beyond the level of non-actionable puffery.

For the foregoing reasons, Shannahan failed to prove by a preponderance of the evidence the first element of a § 523(a)(2)(A) claim as to the alleged representations regarding the Fuelcharger system's effect on the Aquamist system's performance.

**iv. Alleged Misrepresentation 4 (Fuelcharger Was a "Drop in System" to Replace the Aquamist System)**

Shannahan's only evidence in support of this alleged representation is his own testimony, and Shannahan did not present any evidence to show that such a representation, if made, was actually false. The court finds that the evidence shows that Shannahan failed to meet his burden of proof by a preponderance of the evidence as to this alleged misrepresentation.

For the foregoing reasons, Shannahan failed to meet the first element of a § 523(a)(2)(A) claim as to all the alleged representations regarding the Fuelcharger system.

**4. The Stage 3 Aftercooler System**

**a. Alleged Misrepresentations Regarding the Stage 3 Aftercooler System**

Shannahan alleges that in April 2003, Minelian showed him a Stage 3 Aftercooler system installed in a BMW M3 that had been in development and was then complete and ready for installation. *Shannahan's Declaration*, ECF 89, ¶ 19. Minelian's alleged representations to Shannahan regarding the Stage 3 Aftercooler system are as follows:

(1) The Stage 3 Aftercooler had been in development and was then complete and ready for installation, *id.*, ¶ 20;

(2) It would fit in Shannahan's vehicle, *id.*;

(3) It would be economical to install it with the Fuelcharger, *id.*;

(4) All necessary parts were available, *id.*; and

(5) Only a custom software adjustment was needed for Shannahan's vehicle, *id.*

**i. Alleged Misrepresentation 1 (Aftercooler Had Been in Development and Was Then Complete and Ready For Installation)**

Shannahan alleges that Minelian showed him "a Stage 3 Aftercooler system installed on a BMW M3 which he represented had been in development at the time [he] purchased the Aquamist System and was [then] complete and ready for installation." *Shannahan's Declaration*, ECF 89, ¶ 19. Other than his declaration, Shannahan provided no evidence that Minelian made this representation or that it was untrue. Minelian credibly testified that when he ordered the aftercooler, it had already been developed and would be ready for installation upon receipt, with only a minor adjustment needed. *Minelian's Declaration*, ECF 90, ¶ 15.

Thus, in light of Minelian's credible testimony, the court finds that Shannahan did not carry his burden of proving by a preponderance of the evidence the first element of a 11 U.S.C. § 523(a)(2)(A) claim as to this alleged misrepresentation.

**ii. Alleged Misrepresentation 2 (Aftercooler Would Fit)**

Shannahan alleges that Minelian told him that the aftercooler would fit his car. *Shannahan's Declaration*, ECF 89, ¶ 20. Shannahan's evidence in support of this is limited to his own testimony. As it turned out, the aftercooler did not fit "by a small margin". *Minelian's Declaration*, ECF 90, ¶ 16. Even if Minelian told Shannahan the aftercooler would fit his car, and this turned out to be false, such a representation does not amount to fraud simply by virtue of its falsity. Minelian testified that he did not realize that the aftercooler would not fit until he began to install it, and before that he believed that it would fit because he had previously installed it on BMW models that he believed were similar in dimensions to Shannahan's model. *Id.* Minelian's credible testimony undermines the requirement that Minelian made the representation knowing it was false and with an intent to deceive Shannahan.

Not only is there insufficient evidence to establish that Minelian made the representation, there is no evidence that Minelian knew the aftercooler would not fit or that

he was recklessly indifferent to the truth. Accordingly, Shannahan did not prove by a preponderance of the evidence the first and second elements of a § 523(a)(2)(A) claim as to this alleged misrepresentation.

**iii. Alleged Misrepresentation 3 (Aftercooler Would Be Economical With the Fuelcharger)**

Shannahan alleges that Minelian represented that it would be economical to install the aftercooler with the Fuelcharger. *Shannahan's Declaration*, ECF 89, ¶ 20. Shannahan provided no evidence other than his declaration that Minelian made this representation. Minelian testified that an aftercooler may be installed to enhance the performance of a vehicle with a supercharger. *Minelian's Declaration*, ECF 90, ¶ 14. Moreover, the representation that it would be "economical" is too vague and opinion-based to be actionable as a misrepresentation. *See In re Schwartz & Meyers,* 130 B.R. at 422.

Accordingly, Shannahan did not prove by a preponderance of the evidence the first element of a § 523(a)(2)(A) claim as to this alleged misrepresentation.

**iv. Alleged Misrepresentation 4 (All Necessary Parts Were Available)**

Shannahan alleges that Minelian told him that all necessary parts were available to install the aftercooler system. *Shannahan's Declaration*, ECF 89, ¶ 20. The only evidence in support of this representation is Shannahan's testimony. The meaning of "available" is unclear in this context. A part could have been available for delivery within a few days without being physically present in the shop when the statement was made. Minelian testified that "[t]he aftercooler had already been developed and would be ready to install once received from the manufacturer." *Minelian's Declaration*, ECF 90, ¶ 15. Therefore, the court finds that even if there were sufficient evidence that Minelian made this representation, the evidence does not show that it was false.

Accordingly, Shannahan did not prove by the preponderance of the evidence the first element of a § 523(a)(2)(A) claim as to this alleged misrepresentation.

**v. Alleged Misrepresentation 5 (Only a Custom Software Adjustment Was Needed)**

Shannahan alleges that Minelian told him that only a custom software adjustment was needed in relation to the aftercooler. *Shannahan's Declaration*, ECF 89, ¶ 20. Shannahan's only evidence of this statement is his testimony. Moreover, Minelian testified that this was true. *Minelian's Declaration*, ECF 90, ¶ 15. Minelian's credible testimony undermines Shannahan's showing that this representation was false and that Minelian made it knowing it was false and with an intent to deceive Shannahan.

Accordingly, Shannahan did not satisfy the first element of a § 523(a)(2)(A) claim as to this alleged misrepresentation.

**C. Fraud Under California Law**

As discussed above, the alleged misrepresentations as to each installed system all fail to satisfy the standard under 11 U.S.C. § 523(a)(2)(A). However, 11 U.S.C. § 523(a)(2)(A) can still be satisfied without a showing of a false representation. *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016) ("The term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud . . . that can be effected without a false representation."). Accordingly, if Minelian's alleged conduct satisfies the elements of fraud under state law, it may satisfy 11 U.S.C. § 523(a)(2)(A). For the reasons discussed below, the court finds that Shannahan has not met the elements of fraud under California law, so Minelian's debt to Shannahan should not be excepted from discharge under 11 U.S.C. § 523(a)(2)(A).

The California Supreme Court has set forth the elements of fraud as follows: "(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996) (citing 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 676, p. 778).

Shannahan's allegations, as detailed above, must establish all the elements of fraud under California law. Shannahan claims that, in order to induce him to give more money to

RMS, Minelian misrepresented to him that he could successfully install four aftermarket systems despite the fact that Minelian knew or should have known he could not meet Shannahan's request to install the systems in the vehicle. *Shannahan's Trial Brief*, ECF 100, 1:3-13. However, Minelian testified that it was his understanding and belief that the supercharger and the Aquamist system were successfully installed in Shannahan's vehicle. *Minelian's Declaration*, ECF 90, ¶¶ 10, 21. There was no evidence admitted at trial that the supercharger or the Aquamist system were not installed in Shannahan's vehicle. Regarding the fuelcharger, Minelian did not recall installing a fuelcharger in Shannahan's vehicle. *Id.*, ¶ 26. Shannahan did not testify as to any specific facts regarding the installation of the fuelcharger. As for the Stage 3 Aftercooler system, Minelian testified that he partially installed it based on his belief that it would fit in Shannahan's vehicle. *Id.*, ¶ 16.

Shannahan also argues that Minelian knew his business was poorly managed and suffered from known operational and financial problems so that he could never follow through on his promises to perform. *Shannahan's Trial Brief*, ECF 100, 1:3-13. The court finds that Shannahan was unable to prove whether Minelian's knowledge of the financial and operational problems at RMS had an effect on his ability to successfully install the systems Shannahan hired him to install in his vehicle.

Further, Shannahan argues that Minelian engaged in a "custom, pattern or practice that [rose] to recklessness in use of customer monies, inappropriate use of [research and development], use of many business managers . . . resulting in improper management and installation delegation, lack of specialized experience, and general cash flow mismanagement and lack of due diligence." *Id.* at 2:23-3:1. Shannahan claims that such practices show Minelian's economic incentive to deceive Shannahan to take his money to finance other customers' projects, while knowing he did not have resources necessary to complete specific installations on Shannahan's vehicle. *Id.* at 3:1-4. However, the testimony of Knobloch, Shannahan's rebuttal witness, cut directly against such allegations. *March 3, 2016 Trial Testimony* at 131:17-132:1. Knobloch testified, among other things, that Minelian did not use his pricing as an incentive to draw customers. *Id.* The court finds

Knobloch's testimony on this point to be credible. Moreover, Minelian specifically and credibly testified that he did not take Shannahan's money knowing that he could not perform the purchased services. *Id.* at 71:1-5.

As detailed above, Shannahan attempted to present evidence of a mismanaged business to prove fraud but ultimately was unable to dispute Minelian's testimony that he did not take Shannahan's money knowing he could not perform the purchased services. In fact, the totality of circumstances shows at most a negligent business practice that did not rise to the level of recklessness or fraud. Accordingly, the court finds that Shannahan has not proven by the preponderance of the evidence the elements of fraud, and Minelian's debt to Shannahan is not excepted from discharge under 11 U.S.C. § 523(a)(2)(A).

## IV. CONCLUSION

For the foregoing reasons, the court determines that Shannahan has not proven his claim under 11 U.S.C. §523(a)(2)(A) by a preponderance of the evidence to except the debt owed by Minelian from discharge. The court determines that the default judgment in the State Court Action has no collateral estoppel effect in this adversary proceeding. Thus, this court must find that the debt that Minelian owed to Shannahan from the default judgment in the State Court Action in the amount of $55,300.00 is not excepted from discharge. The court also determines that Shannahan is not the prevailing party, and therefore is not entitled to an award of attorneys' fees.

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This memorandum decision constitutes the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable here by Rule 7052 of the Federal Rules of Bankruptcy Procedure. A separate judgment is being entered concurrently herewith.

IT IS SO ORDERED. **###**

Date: September 27, 2018

Robert Kwan
United States Bankruptcy Judge