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NOT FOR PUBLICATION

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION

IN RE: MICHAEL BENSIMON MIZRACHI, Debtor, ST-CARE GROUP, LLC, Plaintiff, v. MICHAEL BENSIMON MIZRACHI, Defendant.	CASE NO.: 2:16-bk-10961-RK ADV. NO.: 2:16-ap-01215-RK CHAPTER: 7 STATEMENT OF UNCONTROVERTED FACTS, AND CONCLUSIONS OF LAW, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLAIMS UNDER 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6) Date: September 12, 2017 and November 28, 2017 Time: 2:30 p.m. Ctrm: 1675

This adversary proceeding came on for hearing before the undersigned United States Bankruptcy Judge on September 12, 2017 and November 28, 2017 on the Motion of Plaintiff St-Care Group, LLC, for Summary Judgment on its claims under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6) in its First Amended Complaint. David Brian Lally, of the Law Office of David B. Lally, appeared for Plaintiff. Defendant Michael Bensimon Mizrachi appeared for himself at the hearing on September 12, 2017, but he did not appear at the hearing on November 28, 2017.

Plaintiff filed and served its motion for summary judgment on or about July 6, 2017. Docket Number 54. Plaintiff's motion for summary judgment requested summary judgment on

two of the three claims of the First Amended Complaint, the claims under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6), but not the claim under 11 U.S.C. § 523(a)(4). See Conclusion, Motion at 16 ("For all of these reasons, this Motion should be granted, and a nondischargeability judgment rendered in favor of Plaintiff and against Defendant for $771,053, pursuant to 11 U.S.C. Section 523(a)(2)(A) and (6)."). (However, this is not completely clear in that Plaintiff in the Introduction to the Motion states that Judgment ought to be rendered in favor of Plaintiff and against Defendant holding that the debt is non-dischargeable pursuant to 11 U.S.C. Section 523(a)(2)(A), (4) and (6)." Introduction, Motion at 2. The court construes the Motion as only being made on two claims, the claims under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6), but the briefing in the Motion does not address the elements of a claim under 11 U.S.C. § 523(a)(4) and Plaintiff has not met its burden of showing under Federal Rule of Civil Procedure 56 that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on its claim under 11 U.S.C. § 523(a)(4)).

Although Defendant had time and opportunity to file a written opposition to the motion, he never did so. *See* Docket Number 64, Order Vacating Oral Ruling on Plaintiff's Motion for Summary Judgment, Requiring Further Briefing and Setting Further Hearing, filed and entered on September 25, 2017.

Having considered the papers and pleadings relating to the motion and the arguments of the parties, the court adopts the following Statement of Uncontroverted Facts and Conclusions of Law regarding Plaintiff's Motion for Summary Judgment based on its independent review and substantial modification of the Statement of Uncontroverted Facts and Conclusions of Law submitted by Plaintiff styled "Plaintiff's Findings of Facts and Conclusions of Law," lodged on September 13, 2017. Docket Number 61.

UNCONTROVERTED FACTS

1. On September 4, 2012, Plaintiff filed a Complaint against Defendant Michael Bensimon Mizrachi ("Defendant") and New Future Technology Corporation, dba Apple In Bulk, in the United States District Court for the Eastern District of Michigan, Case No. 2:12-cv-13879-MOB-LJM (the "Michigan Case"). See Declaration of Paul Dillon, Esq. ("Dillon Declaration"), Docket No. 54, ¶ 54, and Exhibit 1 attached thereto, Complaint in Michigan Case.

2. The Complaint in the Michigan Case had only two counts, and the only count against Defendant was a count for fraud. The other count in this complaint was a breach of contract claim against a different defendant, New Future Technology Corporation, dba Apple In Bulk. See Dillon Declaration, ¶ 54, and Exhibit 1 attached thereto. These claims were common law claims under state law which were heard by the United States District Court for the Eastern District of Michigan under its subject matter jurisdiction under 28 U.S.C. § 1332(a) based on diversity of citizenship of the parties to the action. *Id.* As alleged in the Complaint in the Michigan Case, Plaintiff as a Michigan corporation was a citizen of that state, New Future Technology Corporation was a Nevada corporation and a citizen of that state, and Defendant was a resident of California, and thus, a citizen of that state. *Id.* Although the Complaint in the Michigan Case alleges common law claims of breach of contract and fraud, the applicable state law for such claims was not identified in the pleading of those claims in this complaint. *Id.* The court presumes and determines that the applicable common law for the fraud claim is Michigan law since the allegations in the complaint in the Michigan Case made specific references to the representations being made by Defendant by email and telephone communications from California to Plaintiff and its representatives located in Michigan to solicit Plaintiff's business, the orders in question were placed from Plaintiff in Michigan and the goods were to be shipped and delivered to Plaintiff in Michigan, and the forum state in Michigan has an interest in

protecting its citizens, including Plaintiff, from fraudulent conduct from parties doing business in Michigan, such as Defendant and his company, New Future Technology Corporation. *Id.*

3. As set forth in the Docket of the Michigan Case, Defendant vigorously defended the Michigan Case, including a specific challenge to the claim of fraud against him. See Dillon Declaration, ¶ 55 and Exhibit 2 attached thereto. Ultimately, however, on May 4, 2015, a Default Judgment was entered against Defendant in the amount of $771,053. *Id.*

4. In the Michigan Case, the court entered a default judgment against Defendant for committing intentional fraud against Plaintiff based on the allegations of the complaint in the Michigan Case that Defendant knowingly made false representations to Plaintiff in taking an order of goods in which only half of the ordered goods were delivered, that Defendant's company would ship the remaining goods or make a complete refund to Plaintiff, and that the remaining goods would be shipped if Plaintiff paid extra charges for "insurance", that Defendant intended that Plaintiff would rely on such representations, inducing Plaintiff to make these payments, and that Plaintiff made these payments in reliance on these representations to its detriment in that it suffered damages from the fact that the remaining goods were never delivered, nor a complete refund for the unshipped goods was made to Plaintiff. Complaint in Michigan Case, Case Docket for Michigan Case and Default Judgment in Michigan Case, Exhibits 1-3 to Motion.

5. Defendant filed his petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C., in this bankruptcy case on January 26, 2016. See Dillon Declaration, ¶ 56. On May 2, 2016, Plaintiff commenced this adversary proceeding by filing its Complaint to Determine Dischargeability of Debt under 11 U.S.C. Section 523(a)(2)(A), (4) and (6) against Defendant. *Id.;* Docket Number 1, Complaint.

6. Defendant appeared in this adversary proceeding by filing and serving his motion to dismiss the complaint, which was heard and orally granted on August 2, 2016. Docket Number

11, Defendant's Motion to Dismiss Adversary Proceeding, filed on June 15, 2016. Plaintiff filed and served an amended complaint on or about August 22, 2016. Docket Number 23, First Amended Complaint. Defendant filed and served an Answer to the First Amended Complaint on October 4, 2016. Docket Number 28.

7. On February 17, 2017, Plaintiff propounded on Defendant Requests for Admissions ("RFA"). See Dillon Declaration, ¶ 57 and Exhibit 5 attached thereto (Exhibit 5 was attached to a Notice of Errata, filed on or about July 7, 2017). (These Requests for Admission were "propounded" on Defendant at his address of record in Beverly Hills, California, although Federal Rule of Civil Procedure 36 requires service of Requests for Admission on the responding party, and apparently, Attorney Dillon did not say in his declaration that he served these Requests for Admission on Defendant, but apparently meant to say, and the court may infer, that he served them by mail as indicated on the cover letter to the Requests for Admission which is part of Exhibit 5 attached to the Motion and attested to by him. *But see,* Webster-Merriam Online Dictionary definition of "propound" as a transitive verb meaning "to offer for discussion or consideration," www.merriam-webster.com/dictionary/propound (accessed online on April 10, 2018)). In Plaintiff's Requests for Admission, Plaintiff requested that Defendant admit that Defendant knowingly made false representations to Plaintiff in taking an order of goods in which only half of the ordered goods were delivered, that Defendant's company would ship the remaining goods or make a complete refund to Plaintiff, and that the remaining goods would be shipped if Plaintiff paid extra charges for "insurance", that Defendant intended that Plaintiff would rely on such representations, inducing Plaintiff to make these payments, that Plaintiff made these payments in reliance on these representations to its detriment in that it suffered damages from the fact that the remaining goods were never delivered, nor a complete refund for the unshipped goods was made to Plaintiff, and that Defendant kept Plaintiff's money for the unshipped goods and the extra charges paid by Plaintiff for his personal benefit and use. *Id.*

The RFAs go to the heart of the allegations in the Complaint. *Id.* Defendant never responded to the RFAs, nor communicated with Plaintiff at all during this entire case. *Id.* Pursuant to Federal Rule of Civil Procedure 36 and Federal Rule of Bankruptcy Procedure 7036, the RFAs are automatically admitted. *Id.*

8. Accordingly, based on the deemed admissions from Plaintiff's Requests for Admission, Defendant has admitted all of the allegations in the Complaint, as well as all of the elements for the fraud cause of action pursuant to 11 U.S.C. § 523(a)(2)(A) and the willful and malicious cause of action pursuant to 11 U.S.C. § 523(a)(6). See Dillon Declaration, ¶ 58.

CONCLUSIONS OF LAW

A. SUMMARY JUDGMENT STANDARD

9. Plaintiff as the moving party must make a showing that there is no triable issue of material fact and that the moving party is thus entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56; Federal Rule of Bankruptcy Procedure 7056; *see also, Celotex Corp. v. Catrett,* 477 U.S. 317, 321-323 (1986). Since Plaintiff has the burden of proving its claims by a preponderance of the evidence, it must offer evidence to support its claims for which there is no genuine issue of material fact and that shows that it is entitled to judgment as a matter of law. *Id.*

B. REQUESTS FOR ADMISSIONS

10. In this adversary proceeding, Plaintiff propounded Defendant with Requests for Admissions on February 17, 2017. Those Requests go to the heart of the material allegations in the Complaint and to the elements of the causes of actions in the Complaint. Defendant has never responded and therefore the requests for admissions are admitted. Federal Rule of Civil Procedure 36(b); Federal Rule of Bankruptcy Procedure 7036; *see also, Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007). The Requests for Admissions were propounded (assuming

this meant service), Defendant never responded, and as such, the Requests are conclusively admitted under Rule 36(b) of the Federal Rules of Civil Procedure.

C. FULL FAITH AND CREDIT

11. This court must give full faith and credit to the Michigan Judgment. Under the federal full faith and credit statute, 28 U.S.C. § 1738, federal courts must give state court judgments the same preclusive effect that those judgments would receive from another court of the same state. *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 993 (9th Cir. 2001). The state where the judgment was rendered determines any preclusive effect of the default judgment entered in this case. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995). The bankruptcy court has an obligation to afford "full faith and credit" to state judicial proceedings. 28 U.S.C. § 1738.

12. The Full Faith and Credit Act requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged. 28 U.S.C. § 1738. State law governs the preclusive effect given to state court judgments in federal court. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-233 (1998)(citations omitted). Here, the applicable state law is Michigan law since that would have been the law applied by the federal district court in the Michigan Case on Plaintiff's fraud claim against Defendant in that case. *See* Complaint in Michigan Case, Case Docket for Michigan Case and Default Judgment in Michigan Case, Exhibits 1-3 to Motion.

D. RES JUDICATA EFFECT OF MICHIGAN JUDGMENT

13. According to Michigan law, there are four elements which must be satisfied to invoke res judicata: (1) the prior action in question was decided on the merits; (2) the decree in the prior decision was a final decision; (3) both actions involved the same parties or their privies; and (4) the matter in the second case was or could have been resolved in the first. *Glaubius v. Glaubius,* 306 Mich.App.157, 173-174 (2014)(citations omitted). All four elements are

applicable in this case. The judgment for fraud against Defendant in the Michigan Case was decided on the merits. The judgment against Defendant in the Michigan Case was a final decision. The two actions involve the same Parties, Plaintiff and Defendant. The matter of fraud in this case was or could have been resolved in the first case. As such, res judicata applies to the judgment in the Michigan Case against Defendant, such that res judicata applies and the judgment of fraud against Defendant in that case has res judicata effect in this case.

14. The doctrine of res judicata precludes parties or their privies from re-litigating in this case Defendant's liability for fraud which was finally determined on the merits by a court of competent jurisdiction by the court in the Michigan Case.

E. COLLATERAL ESTOPPEL EFFECT OF MICHIGAN JUDGMENT

15. Any issue necessarily decided in such litigation is conclusively determined under collateral estoppel as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. In Michigan, collateral estoppel precludes relitigation of an issue in a subsequent, "different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v. Gates*, 434 Mich. 146, 154-155 (1990)(citations omitted); *Topps Toeller, Inc. v. Lansing*, 47 Mich.App. 720, 727 (1973) ("Collateral estoppel bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action."). "Generally, the proponent of the application of collateral estoppel must show 'that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.'" *People v. Trakhtenberg*, 493 Mich. 38, 48 (2012), quoting *Estes v Titus*, 481 Mich. 573, 585 (2008); *see also, Monat v. State Farm Insurance Co.,* 469 Mich. 679, 682-683 (2004)(citations omitted).

16. Under proper circumstances, collateral estoppel, or issue preclusion, may apply in debt dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284-285 and n.11 (1991).

17. Collateral estoppel may be used "offensively" to establish a claim for relief rather than an affirmative defense. C. Klein, et al., "Principles of Preclusion and Estoppel in Bankruptcy Cases", 79 Am. Bankr. L.J. 839, 856-857 and n. 62 (2005). It may be used "to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-336 and n. 4 (1979).

18. For collateral estoppel to apply, this court must look at the elements of fraud under Michigan law, as the Judgment stems from a federal district court determining a claim of Michigan state law under its general diversity jurisdiction. There are four types of fraud and misrepresentation claims in Michigan: (1) False Representation; (2) Silent Fraud; (3) Bad Faith Promise; and (4) Innocent Misrepresentation, and the case law in which these types of fraud and misrepresentation are described, established and/or recognized is found in the Comment Section of each of the Michigan Civil Jury Instructions attached to Plaintiff's Supplemental Brief filed on October 30, 2017, as Docket Number 66, Exhibits 1-4, *citing inter alia, Candler v. Heigho,* 208 Mich. 115, 121 (1919), *overruled on other grounds, United States Fidelity and Guaranty Co. v. Black,* 412 Mich. 99, 114-121 (1981); *Hi-Way Motor Co. v. International Harvester Co.*, 398 Mich. 330, 336 (1976).

19. The elements of fraud based on one of these types of fraud and misrepresentation under Michigan law, false representation, applicable in this case, are substantially the same as the elements of fraud for debt dischargeability purposes under 11 U.S.C. § 523(a)(2)(A):

> 'The general rule is that to constitute actionable fraud it must appear:
> (1) That defendant made a material representation; (2) that it was
> false; (3) that when he made it he knew that it was false, or made it

> recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.'

Hi-Way Motor Co. v. International Harvester Co., 398 Mich. at 336 (citations omitted). Under Michigan law, false representation must be proven by clear and convincing evidence. *Id.* (citations omitted)*; see also, Broaden v. Doncea,* 340 Mich. 564, 571 (1954) (false or fraudulent misrepresentation "must be shown by clear and satisfactory proof.").

20. Under Michigan law, Plaintiff's default judgment against Defendant in the Michigan Case is entitled to res judicata effect. *Reed Estate v. Reed,* 293 Mich. App. 168, 180-181 (2011)("[u]nless it is set aside by the court, a default judgment is absolute and is fully binding, under the doctrines of estoppel and merger of judgment, and res judicata, as one after appearance and contest.")(citations and footnote omitted).

21. The Complaint in this adversary proceeding includes a cause of action pursuant to 11 U.S.C. § 523(a)(2)(A), which provides that a debt for money, property or services obtained by fraud or false pretenses is not dischargeable. The elements of false or fraudulent misrepresentation for purposes of debt dischargeability under 11 U.S.C. § 523(a)(2)(A) are (1) the debtor made . . . representations; (2) he knew they were false; (3) he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made. *Britton v. Price (In re Britton),* 950 F.2d 602, 604 (9th Cir. 1991). These requirements are essentially the same as the elements of common law

fraud under Michigan law. *Hi-Way Motor Co. v. International Harvester Co.*, 398 Mich. at 336 (citations omitted).

22. Because Defendant was found liable in the Michigan Case for committing intentional fraud against Plaintiff by clear and convincing evidence under Michigan law, he is collaterally estopped from challenging the fraud determination in the Michigan Case in this bankruptcy court on essentially the same substantive standard under 11 U.S.C. § 523(a)(2)(A) with a preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. at 290-291. The elements under 11 U.S.C. § 523(a)(2)(A) mirror the elements of fraud under Michigan law. Accordingly, since the elements are the essentially the same, the court applies collateral estoppel based on the Judgment in the Michigan Case to Plaintiff's claim under 11 U.S.C. § 523(a)(2)(A) in its favor. As stated earlier, Plaintiff as the proponent of the application of collateral estoppel under Michigan law must show "that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *People v. Trakhtenberg*, 493 Mich. at 48; *Monat v. State Farm Insurance Co.,* 469 Mich. at 682-683. Here, the issue of fraud from false representation was actually and determined by the court in the Michigan Case in a valid and final judgment in its default judgment, the same parties, Plaintiff and Defendant, had a full and fair opportunity to litigate the issue of fraud in the Michigan Case since the case docket showed Defendant's appearance and participation in that case, and mutuality of estoppel exists since both parties in this case were parties in the prior case in the Michigan Case and were bound by the judgment in that case. *See* Complaint in Michigan Case, Case Docket for Michigan Case and Default Judgment in Michigan Case, Exhibits 1-3 to Motion.

23. Alternatively, the deemed admitted facts from Defendant's failure to respond to Plaintiff's Requests for Admission also establish liability under 11 U.S.C. § 523(a)(2)(A) in that

Defendant is deemed to have admitted that he knowingly made false representations to Plaintiff that goods would be shipped to it by his company as ordered, that all of the goods ordered would be delivered or a complete refund would be made for the goods not shipped, that Plaintiff relied upon Defendant's false representations to its detriment, that Plaintiff suffered damages in that it made full payment for the ordered goods, only half of the goods were shipped to Plaintiff and Plaintiff did not receive any refund for the goods ordered but not shipped to it, and that Defendant kept Plaintiff's money for the unshipped goods and the extra charges paid by Plaintiff for his personal benefit and use. See Dillon Declaration, ¶ 57 and Exhibit 5 attached thereto (Exhibit 5 was attached to a Notice of Errata, filed on or about July 7, 2017). These facts reflect the elements of false or fraudulent misrepresentation for purposes of debt dischargeability under 11 U.S.C. § 523(a)(2)(A) that (1) the debtor made . . . representations; (2) he knew they were false; (3) he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made. *In re Britton,* 950 F.2d at 604.

24. The complaint in this adversary proceeding also asserts a claim under 11 U.S.C. § 523(a)(6), which excepts from discharge debts resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity." The Ninth Circuit recognized that "a simple breach of contract is not the type of injury addressed by § 523(a)(6)" and held that "[a]n intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct." *Snoke v. Riso (In re Riso),* 978 F.2d 1151, 1154 (9th Cir. 1992).

25. A debt is nondischargeable by an individual when such debt is for "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). For a debt to be nondischargeable under 11 U.S.C. § 523(a)(6) the bankruptcy court

must find the injury inflicted by the defendant to have been both willful and malicious. *In re Ormsby*, 591 F.3d 1199, 1206 (9th Cir. 2010). A willful injury is not merely recklessness or negligence, but rather requires "a deliberate or intentional *injury*, not merely . . . a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). To prove that injury was "willful" the plaintiff must show that the Defendant had either a subjective intent to cause harm or knowledge that harm was substantially certain to occur as a result of the defendant's conduct. *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001). The standard focuses on the debtor's subjective intent, and not "whether an objective, reasonable person would have known that the actions in question were substantially certain to injure the creditor." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1145-46 (9th Cir. 2002) (citations omitted). The standard requiring the debtor's subjective state of mind "precludes application of § 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain." *Id*. at 1146.

26. The "malicious" injury requirement under 11 U.S.C. § 523(a)(6) is separate from the "willful" requirement and both must be present for a claim under § 523(a)(6). *Id*. at 1146. For an injury to be deemed "malicious" the following elements must be met: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) is done without just cause and excuse. *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005)(citations omitted). Within the plain meaning of "malice," "it is the wrongful act that must be committed intentionally rather than the injury itself." *Id*. This definition "does *not* require a showing of biblical malice, i.e., personal hatred, spite, or ill-will." *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) (emphasis in original; citations omitted).

27. Under Michigan law, a false representation, and a bad faith promise, constitute fraud. *See Hi-Way Motor Co. v. International Harvester Co.*, 398 Mich. at 336. As set forth above, a willful injury in § 523(a)(6) requires a "deliberate or intentional injury, not merely a deliberate or

intentional act that leads to injury." *Kawaauhau v. Geiger,* 523 U.S. at 61. Defendant's conduct in making false representations and bad faith promises reflected in the judgment of fraud against Plaintiff reflected in the judgment of the Michigan Case constituted a fraudulent and intentional tort under Michigan law: (1) that support a determination of willfulness because the judgment was based on the allegations of the complaint that Defendant knowingly and intentionally falsely represented to Plaintiff that goods would be shipped and a complete refund would be made for ordered but shipped goods to induce Plaintiff to make payments for the goods and extra charges as requested by Defendant and (2) that support a determination of malice because the judgment for fraud indicated that Defendant committed a wrongful act done intentionally and which caused injury to Plaintiff without just cause or excuse. As stated earlier, Plaintiff as the proponent of the application of collateral estoppel under Michigan law must show "that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *People v. Trakhtenberg*, 493 Mich. at 48; *Monat v. State Farm Insurance Co.,* 469 Mich. at 682-683. Here, the issue of fraud from false representation was actually and determined by the court in the Michigan Case in a valid and final judgment in its default judgment, the same parties, Plaintiff and Defendant, had a full and fair opportunity to litigate the issue of fraud in the Michigan Case since the case docket showed Defendant's appearance and participation in that case, and mutuality of estoppel exists since both parties in this case were parties in the prior case in the Michigan Case and were bound by the judgment in that case. *See* Complaint in Michigan Case, Case Docket for Michigan Case and Default Judgment in Michigan Case, Exhibits 1-3 to Motion.

28. Alternatively, the deemed admitted facts from Defendant's failure to respond to Plaintiff's Requests for Admission also establish liability under 11 U.S.C. § 523(a)(6) in that Defendant is deemed to have admitted that he knowingly made false representations to Plaintiff

that goods would be shipped to it by his company as ordered, that all of the goods ordered would be delivered or a complete refund would be made for the goods not shipped, that Plaintiff relied upon Defendant's false representations to its detriment, that Plaintiff suffered damages in that it made full payment for the ordered goods, only half of the goods were shipped to Plaintiff and Plaintiff did not receive any refund for the goods ordered but not shipped to it, and that Defendant kept Plaintiff's money for the unshipped goods and the extra charges paid by Plaintiff for his personal benefit and use. See Dillon Declaration, ¶ 57 and Exhibit 5 attached thereto (Exhibit 5 was attached to a Notice of Errata, filed on or about July 7, 2017). These facts reflect the elements of willful and malicious injury for purposes of debt dischargeability under 11 U.S.C. § 523(a)(6) that as to willfulness, Defendant had either a subjective intent to cause harm or knowledge that harm was substantially certain to occur as a result of his conduct, *(In re Jercich)*, 238 F.3d at 1208, and that as to malice, he committed (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) is done without just cause and excuse. *In re Sicroff*, 401 F.3d at 1106.

29. Accordingly, for the foregoing reasons, the court determines that summary judgment should be granted in favor of Plaintiff and against Defendant on its claims in its First Amended Complaint pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (6) based on collateral estoppel effect of the judgment in the Michigan Case and based on Defendant's deemed admissions from his failure to respond to Plaintiff's Requests for Admissions. The court will enter a separate form of

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judgment in favor of Plaintiff and against Defendant that the debt by Defendant owed to Plaintiff as determined in the judgment in the Michigan Case is not dischargeable.

IT IS SO ORDERED.

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Date: April 10, 2018

Robert Kwan
United States Bankruptcy Judge