UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: George Gordon Strong, III, Debtor.	Case No.: 2:22-bk-13069-NB Chapter: 7
David Vosicher, Plaintiff, v. George Gordon Strong, III, Defendant.	Adv. No.: 2:24-ap-01189-NB **MEMORANDUM DECISION AFTER TRIAL** Trial: Dates: September 24–25 Time: 9:00 a.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (or via Zoomgov per posted procedures)

1. INTRODUCTION

Financial advisor George Gordon Strong, III ("Mr. Strong") believed that the turmoil affecting financial markets in March 2020 was the beginning of a generational event that would ultimately lead to widespread and long-lasting asset impairment. Relying upon that belief, he embarked on an aggressive leveraged options strategy on behalf of his client, David Vosicher ("Mr. Vosicher").

Mr. Strong and Mr. Vosicher were friends, having first met at the University of Southern California's Marshall School of Business. But Mr. Vosicher's career involves the sale and support of medical devices to hospitals, not financial markets. His testimony at trial showed that although his understanding of financial markets was greater than that of someone lacking an MBA, his understanding of the elaborate options strategies that Mr. Strong was employing on his behalf was rudimentary at best.

The possible outcomes of the strategy that Mr. Strong used to manage Mr. Vosicher's account were binary: If Mr. Strong had been correct that the financial market volatility during March 2020 was only the beginning of a long-lasting financial catastrophe, the profits might have been substantial. But, as turned out to be the case, because Mr. Strong's prediction was wrong, the strategy decimated the value of Mr. Vosicher's portfolio.

Investment advisors are not oracles. They cannot predict the future. But they can – and have an obligation to – weigh potential risks and benefits on behalf of their clients, and clearly communicate what those risks and benefits are.

Mr. Strong did not clearly and meaningfully communicate these potential risks and benefits to his client, Mr. Vosicher. As a result, Mr. Vosicher was deprived of the opportunity to make an informed decision regarding whether he wished to pursue the strategy that Mr. Strong was implementing on his behalf. By embarking on such a risky strategy without obtaining the informed consent of his client, Mr. Strong engaged in "defalcation" while acting in a fiduciary capacity within the meaning of § 523(a)(4).[1] The damages that Mr. Vosicher suffered as a result of Mr. Strong's defalcation, in the amount of approximately $160,502.50,[2] are non-dischargeable in Mr. Strong's bankruptcy.

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[1] Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, and the parties' filed papers.

[2] *See* part "3.e." of this Memorandum Decision, below, for a complete discussion of Mr. Vosicher's damages.

Mr. Vosicher also asserts that the damages he suffered are non-dischargeable on the grounds of embezzlement pursuant to § 523(a)(4) and "willful and malicious injury" pursuant to § 523(a)(6). These claims fail. Although Mr. Strong lacked reasonable grounds to believe that the investments he made on Mr. Vosicher's behalf were suitable given Mr. Vosicher's investment objectives, his conduct was not sufficiently fraudulent to constitute embezzlement for purposes of § 523(a)(4). And because Mr. Strong did not intend to lose the funds that Mr. Vosicher had invested with him (apart from expected fluctuations), Mr. Vosicher's "willful and malicious injury" claim under § 523(a)(6) likewise fails.

2. FINDINGS OF FACT[3]

a. The parties' education and background

Mr. Vosicher met Mr. Strong while pursuing a Master of Business Administration ("MBA") degree at the University of Southern California's Marshall School of Business. Near the end of 2015, when his employer was purchased by another company, Mr. Vosicher decided to consolidate his investment accounts with Mr. Strong, who at the time owned and operated an investment advisory firm, Strong Wealth Management.[4] Mr. Vosicher chose Mr. Strong as his financial advisor because they were friends.[5] Mr. Strong became a California licensed investment advisor (CRD No. 4908604) in 2004, and worked at Morgan Stanley, Inc. and Merrill Lynch Pierce Fenner & Smith, Inc. before organizing Strong Wealth Management in 2009.[6] At all relevant times, Strong

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[3] This Memorandum Decision constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52 (Fed. R. Civ. P., made applicable by Rule 7052, Fed. R. Bankr. P.). To the extent any findings of fact should more properly be considered conclusions of law, they shall be deemed as such, and to the extent any conclusions of law should more properly be considered findings of fact, they shall be deemed as such.

[4] The paperwork signed by Mr. Vosicher retaining Mr. Strong as his financial advisor is dated December 18, 2015. Plaintiff Ex. 1.

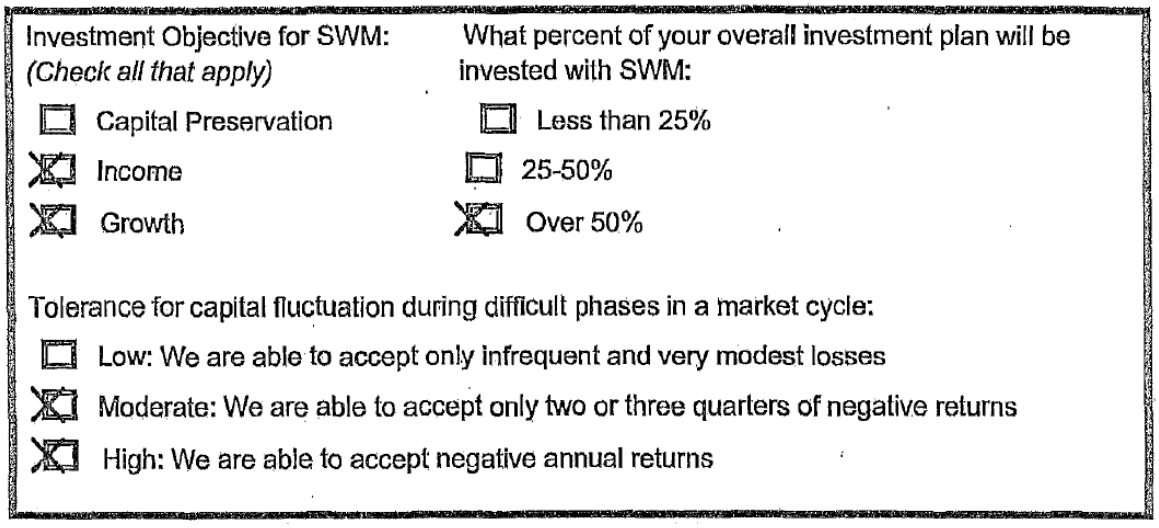
[5] To reduce costs, this Court did not require the parties to obtain and submit transcripts of the trial proceedings. Findings of fact that are not supported by a footnote reference are based upon testimony introduced at trial.

[6] Strong Decl. (adv. dkt. 26) ¶¶ 3–7 (p. 2:7–19).

Wealth Management was registered as an investment advisory firm with the California Secretary of State (Registration No. 152229).[7]

b. Mr. Vosicher's self-described risk tolerance

In a "Risk Assessment Questionnaire" that he completed at the outset of his business relationship with Mr. Strong, Mr. Vosicher stated that his investment objective was "[t]o generally keep pace with the stock market" and that his "[i]nvestment [r]isk [f]actor" was "moderately aggressive," but also indicated that "[i]f I suffered a loss of greater than 10% [over the next three months], I'd get concerned."[8] On December 12, 2018, Mr. Vosicher completed an updated "Risk Assessment Questionnaire" in which he made minor changes to his investment objectives. Between 2015 and 2018, Mr. Strong modified the form of his risk assessment questionnaires, so the 2015 and 2018 questionnaires cannot be compared on a question-by-question basis. The 2015 questionnaire contained seven questions intended to assess risk tolerance and was far more detailed than the 2018 version. By contrast, the 2018 questionnaire was far less nuanced: it inquired about marital status, employment status, annual income, and the schedule of planned withdrawals, but its section on risk tolerance was limited to the following (the image below has been extracted from the actual form that Mr. Vosicher executed)[9]:



Investment Objective for SWM: *(Check all that apply)*

- ☐ Capital Preservation
- ☒ Income
- ☒ Growth

What percent of your overall investment plan will be invested with SWM:

- ☐ Less than 25%
- ☐ 25-50%
- ☒ Over 50%

Tolerance for capital fluctuation during difficult phases in a market cycle:

- ☐ Low: We are able to accept only infrequent and very modest losses
- ☒ Moderate: We are able to accept only two or three quarters of negative returns
- ☒ High: We are able to accept negative annual returns

[7] *Id.* at ¶ 6 (p. 2:13–17).
[8] Plaintiff Ex. 1, Bates pp. 2 & 4.
[9] Plaintiff Ex. 2, Bates p. 7.

c. Mr. Strong's investment views

Between the commencement of their business relationship in late 2015 until roughly the onset of the COVID-19 pandemic, Mr. Vosicher's investments with Mr. Strong fell short of the performance of the S&P 500 index, but still produced moderate gains.[10] All of that changed beginning in approximately March 2020, when Mr. Strong began implementing an aggressive leveraged options trading strategy on Mr. Vosicher's behalf that ultimately led to substantial losses. As Mr. Strong explained to his investment clients in a quarterly letter issued in April 2020, he believed that the financial market volatility occurring during March 2020 was likely only the beginning of a much more severe asset drawdown:

> At the beginning of [2020], I found my favorite quote about the market at the time: "it's a dumpster fire looking for a match". What I meant by this is that everything about the markets were ripe for a correction (extreme valuations, huge debt levels, stagnant earnings growth, the longest bull market in history, entering a recession, among others) and just looking for an excuse or catalyst to set it off. Well, it looks like the market finally found that match.
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> However, while the Coronavirus may have touched off this firestorm in the market, it is still only an exogenous threat and not the primary impetus for the market[']s rapid descent into a bear market. For that, we have only to look at what has euphemistically been called the "Everything Bubble" where a decade of the Fed's "easy money" policies allowed multiple asset classes to become inflated to extreme valuations over the past ten years from equities to debt to real estate to private equity and beyond….
>
> The Fed's policy of maintaining "easy money" by keeping rates suppressed (as well as "QE" fiscal stimulus programs) for the better part of the past decade enabled may corporations to issue cheap debt taking advantage of historically low interest rates and then turn around and use the money from those bond issuances to buy back their own stock, often at ludicrous valuations. In effect, this had the compound effect of swelling the corporate debt bubble while simultaneously driving equity valuations to all-time highs on the back of declining fundamentals. All told, corporate stock buybacks contributed $5.1 trillion to the stock markets since 2009 and were largely responsible for driving them to extreme valuations not seen since the Tech Bubble in 2000….
>
> For a better idea of how inflated stock market valuations have been, we should look at Warren Buffet's favorite indicator, the stock

[10] Vosicher Decl. (adv. dkt. 27) ¶ 26 (PDF p. 8:10–14).

> market capitalization-to-GDP ratio …. As of January 31st, 2020, the ratio was 151.10%, which was already significantly higher than the value of 139.50% posted on March 30th, 2000 during one of the most overvalued stock markets in history, the Tech Bubble…. Take that with the fact that the stock market only measures the publicly-traded companies in the US … as well as the historical average for these ratios of roughly 80% and it suggests that, despite the 34% drop and subsequent bear market rally/dead cat bounce, this market is still extremely richly valued at current levels….
>
> In one of the few times I can remember Wall Street analysts ever agreeing on anything, they all recently concurred that there is a 100% chance we are headed for a recession (if we're not already in one)…. While this may be disquieting to hear, a depression is a very real possibility …. [Recent unemployment and GDP projections] make the Great Recession's 4.3% drop in real domestic product ... from its peak in 2007Q4 to its trough in 2009Q2 look like a cake walk even though it was the largest decline in the postwar era at the time. Given the demand destruction and supply chain disruptions, it is unlikely that there will be a V-shaped recovery for the economy….
>
> Many of you have asked me if we already experienced the bottom and should be buying stocks…. [T]he evidence suggests that while this was *a* bottom it was unlikely that it was *the* bottom as we are still in a pervasive down-trend, volatility is still extremely elevated, we have record unemployment, we're heading into a recession as evidenced by analysts' dismissal GDP forecasts, the economic damage from the shut-down has not yet been fully digested/processed/assimilated/appreciated and, last but not least, it's still behaving like a bear market in terms of the volatile market movements which means we're not out of the woods yet.[11]

Mr. Strong's belief that the markets remained "extremely richly valued" even after the declines of March 2020 led him to conclude that any subsequent market rebound would be temporary, to be followed by further declines – market behavior that financial advisors refer to as a "bear market rally" or, more colloquially, a "sucker's rally" or "dead cat bounce." Mr. Strong explained that belief to his clients in his 2020 quarterly letter as follows:

> A bear market rally off of a short-term bottom can usually be identified by declining volume and momentum as it wears on as well as a rough retracement of 50% - 61.8% of the drop. These factors coupled with comments in the press suggesting that the market is in the process of

[11] Strong Wealth Management First Quarter 2020 Investor Letter (Plaintiff Ex. 15) Bates pp. 2–5 & 9–10 (emphasis in original).

"establishing a bottom". Additionally, while a healthy market's movements can be characterized by the saying "the market takes the stairs up and the elevator down", a bear market rally takes the "elevator" back up instead of the "stairs" a healthy recovery would….

We are currently 25% up from the March 23rd short-term bottom, having retraced roughly 50% of the total draw-down from February highs….

One of the primary reasons bear markets can be so devasting to portfolios is that the unofficial purpose of a bear market rally is to bounce off of supremely oversold levels, give investors hope that the worst is over, make them believe the bottom is in and draw them back in to the market before ultimately crushing them yet another time. Chasing these bounces is usually what kills a portfolio in a bear market not the initial drop. It's important not to get emotionally engaged in these cycles as the graphic below showcasing the psychological reactions to the various stages of the market cycle illustrates ….

These "Return to Normal" bear market rallies are usually accompanied by statements similar to ones we are currently hearing: "maybe the Fed will buy everything" or "there is light at the end of the tunnel for the Coronavirus and the lock-down". While these may in fact be true, ***it's important to remember that despite the fact that the Coronavirus was the spark which touched this off, the health of the economy and the depth of the recession we're likely facing is the real conflagration.***

From a purely psychological perspective, when the time comes to buy (the actual bottom), you won't want to have anything to do with the stock market at that point. ***Right now, there are too many people who still want to buy into this market and are calling the March 23rd low "the bottom" for it to have been the true bottom of this bear market.***[12]

d. Communications between Mr. Vosicher and Mr. Strong

Mr. Vosicher directed Mr. Strong to execute some trades on his behalf that would have potentially proved profitable had Mr. Strong's predictions regarding the market been correct. These requests were typically communicated via text message, and were never specific. For example, in a March 14, 2020 group text involving Mr. Strong, Mr. Vosicher, and some other friends, Mr. Strong warned that "yesterday's move in the markets was a dead cat bounce"; that "even if I am wrong, there is not likely to be a V-shaped recovery (meaning that the stock market will not rocket back up the same way it went down)"; and that "I'd rather give you guys a heads up based on what I'm seeing in

[12] *Id.* at Bates pp. 12–13 (emphasis added).

the markets then stay quiet and have you all wiped out."[13] Mr. Vosicher replied: "S&P puts please then ;)."[14] When Mr. Strong followed up warning that "[b]ear markets always find a way to draw you back in before the big drop," Mr. Vosicher texted "Sp [S&P] puts and vix [VIX] calls," and shortly thereafter texted "Double down …. boom."[15]

At this point it is appropriate to note that, even when taking into account that the events at issue occurred approximately five years ago, the evidence proffered by both parties in an attempt to reconstruct their communications was extremely limited. For his part, Mr. Strong attempted to introduce copies of a table and Microsoft Excel spreadsheets purporting to reproduce text messages that he asserted that Mr. Vosicher had sent him during the period between March and May 2020.[16] The table and spreadsheets reproduce only brief, out-of-context excerpts from the alleged text message chains, and Mr. Strong failed to introduce any screenshots to corroborate that the documents accurately reproduce the texts that he claims Mr. Vosicher sent to him. As a result of these deficiencies, the table and spreadsheets have been admitted into evidence, but only as demonstrative aids constituting a written representation of Mr. Strong's memory, not as original source documents.

Mr. Strong testified that he spoke with Mr. Vosicher frequently between March and July 2020, which is the period during which Mr. Vosicher's portfolio experienced the most significant losses. But Mr. Strong's credibility on this issue was severely undercut at trial. On March 19, 2020, Mr. Vosicher sent Mr. Strong an email containing a list of securities that Mr. Vosicher was considering as potential investments, and asking Mr. Strong for his opinion.[17] Mr. Vosicher testified that Mr. Strong never responded to this email. On April 16, 2020, Mr. Vosicher sent Mr. Strong an email with the subject line

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13 Plaintiff Ex. 34.

14 *Id*.

15 *Id.* At trial, Mr. Vosicher claimed that these texts were not directions to Mr. Strong regarding actions to be taken in Mr. Vosicher's investment accounts, but instead were intended as an offer of moral support and encouragement to Mr. Strong regarding Mr. Strong's personal investment choices. Mr. Vosicher's characterization of the texts was not credible.

16 Defendant Exhibits D, E, and F.

17 Plaintiff Exhibit 24.

"Interactive brokers[18] called me about UVX trade – they need to speak with you about it."[19] In that email, Mr. Vosicher asked Mr. Strong to call him; Mr. Vosicher testified at trial that Mr. Strong never followed up with a call.

Most damaging to Mr. Strong's credibility are the facts surrounding a Strong Wealth Management "Client Profile" of Mr. Vosicher dated January 12, 2020.[20] Mr. Strong testified that Mr. Vosicher visited Mr. Strong at his home in Altadena in January 2020, and executed the document after confirming with Mr. Strong that he wanted to pursue a more aggressive strategy. Mr. Vosicher denied that the January 2020 meeting ever occurred, and that testimony is corroborated by a text message that Mr. Vosicher sent to Mr. Strong on February 4, 2020, which reads:

> Hey man happy New Years, we were supposed to touch base on my portfolios mid January and *I never heard from you*. I really need to discuss the portfolios with you. Can you make time tomorrow? I can come to the office.[21]

One day later, Mr. Strong replied: "Yeah, when do you want to chat? Let me know what works for you."[22]

The Client Profile, which was produced by Mr. Strong, sets forth a more aggressive risk profile for Mr. Vosicher's investment accounts, but is incomplete.[23] Mr. Vosicher testified that he never executed the document, and this Court finds by a preponderance of the evidence that it is a forgery created by Mr. Strong for the purpose of justifying the more aggressive trading strategy that he began executing on Mr. Vosicher's behalf in March 2020.

Mr. Strong's credibility is further damaged by actions he took after Interactive Brokers[24] contacted Mr. Vosicher regarding trades Mr. Strong had been executing in Mr.

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[18] Interactive Brokers was the custodian for all securities held by Mr. Strong's clients and was also the investment trading platform that Mr. Strong used to manage his clients' accounts. Strong Decl. (adv. dkt. 26) ¶ 9 (p. 2:23–25).

[19] Plaintiff Exhibit 25.

[20] Plaintiff Exhibit 33.

[21] Defendant Exhibit R (emphasis added).

[22] *Id*.

[23] Plaintiff Exhibit 33.

[24] See footnote 18, *supra*, for a description of Interactive Brokers.

Vosicher's accounts. On July 30, 2020, Interactive Brokers sent Mr. Vosicher an email bearing the subject line "Day Trader Restriction Notice" and advising Mr. Vosicher that one of his accounts "falls under the regulatory designation of a Pattern Day Trader (PDT) ***and*** your account equity is below USD 25,000, or its equivalent."[25] The email further stated that the account was "restricted from entering opening transactions" until "equity of at least USD 25,000 or its equivalent is maintained" or certain other conditions had been satisfied.[26] On that same day, Mr. Vosicher forwarded the Interactive Brokers email to Mr. Strong with the question "What is this about?"[27] Mr. Strong falsely replied "I was attempting to trade your account after hours and it wouldn't allow me."[28] On its face, the Interactive Brokers email clearly has nothing to do with after-hours trading; it was sent because the account's balance had fallen below $25,000.00 after Mr. Strong had executed a number of unprofitable options trades in the account over the prior five months.[29]

Although the record provides an incomplete picture of the communications occurring between Mr. Strong and Mr. Vosicher during the first half of 2020,[30] it does show that that Mr. Vosicher asked Mr. Strong to execute a certain number of more aggressive trades on his behalf. Like Mr. Vosicher's request for "Sp [S&P] puts and vix [VIX] calls" that was texted on March 14, 2020,[31] all the requests lacked specificity and were made in a casual, off-handed manner. For example, Mr. Strong testified that on April 6, 2020, Mr. Vosicher texted "Checking in. Thought about a put spread on spy [SPY; a reference to the S&P 500 equity market index]"; that on May 1, 2020, Mr. Vosicher texted "What about more S and P puts"; that on June 2, 2020, Mr. Vosicher texted inquiring about initiating positions in McDonald's, Capital One Financial, General

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25 Plaintiff Exhibit 26, Bates p. 1.
26 *Id.*
27 *Id.*
28 *Id.* at p. 2.
29 A more detailed discussion of these unprofitable trades, which were related to the UVXY exchange traded fund, is set forth below in parts "2.e." and "2.f." of this Memorandum Decision, below.
30 As noted previously, Mr. Vosicher's investment accounts sustained their most significant losses between March 2020 and July 2020.
31 Plaintiff Exhibit 34.

Dynamics, IBM, and Google; and that on June 15, 2020, Mr. Vosicher texted "Short FVRR [a reference to Fiverr International]."[32]

Completely lacking from the record is any persuasive evidence that Mr. Strong ever communicated to Mr. Vosicher the serious risks that a more aggressive strategy would entail. That omission is particularly glaring because Mr. Vosicher's career is in medical sales and support, not financial markets, which meant that Mr. Vosicher lacked the ability to fully appreciate the risks.

e. Mr. Strong's very aggressive investment strategy

But even if this Court were to disregard Mr. Strong's obligation as a financial advisor to select investments that were suitable for Mr. Vosicher, the strategy that Mr. Strong actually executed on Mr. Vosicher's behalf was far more aggressive than anything that could have reasonably been inferred from Mr. Vosicher's text messages. Beginning in March 2020, Mr. Strong began deploying a substantial portion of Mr. Vosicher's portfolio to either direct purchases of the ProShares Ultra VIX Short-Term Futures exchange traded fund (ticker "UVXY"), or to options trades using UVXY as the underlying asset. The Form S-1 Registration Statement filed with the Securities and Exchange Commission by UVXY's sponsors warns of the substantial risks associated with the fund:

> Unlike certain other asset classes that, in general, have historically increased in price over long periods of time, the volatility of the S&P 500 as measured by the VIX has historically reverted to a long-term average level over time. This means ***that the potential upside of an investment in the VIX Futures Fund may be limited.*** In addition, gains of the VIX Futures Fund, if any, may be subject to ***significant and unexpected reversals.*** Investors holding Shares of the VIX Futures Fund beyond short-term periods ***have an increased risk of losing all or a substantial portion of their investment.***[33]

The risks taken by Mr. Strong using Mr. Vosicher's portfolios were even greater than as suggested by the registration statement, because most of the UVXY-related

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[32] Defendant Exhibit F. (As discussed earlier in the text, this exhibit is admitted only as a demonstrative aid constituting a written representation of Mr. Strong's memory, not as an original source document.)

[33] Plaintiff Exhibit 6, Bates p. 11 (emphasis added).

trades involved options purchases, rather than purchases of UVXY itself. That is, by concentrating most UVXY-related trades on options purchases, Mr. Strong was adding yet another layer of leverage on top of a product that was already leveraged.[34]

The vast majority of Mr. Strong's UVXY-related trades, as well as the vast majority of losses incurred in connection with those trades, occurred between March and July 2020. Mr. Strong executed so many UVXY-related options trades during that five-month time period that it would require the expert testimony of a forensic accountant to accurately describe the actual mechanics of the trades. No such expert testimony was presented at trial, and Mr. Strong's testimony regarding the UVXY options trades was cursory at best. A series of trades executed on March 13, 2020 is representative.[35] On that date, Mr. Strong purchased thirteen different tranches of UVXY options, with varying strike prices and varying expiration dates.[36] The options purchased initiated a combination of long call positions, short call positions, long put positions, and short put positions.[37] Mr. Strong made a similar series of UVXY options trades on March 16, 2020, purchasing seven tranches of call and put options, again with varying expiration dates.[38] He continued to heavily trade UVXY options through July 2020, after which the trades continued but decreased somewhat in frequency.

All told, between March and July 2020, Mr. Strong executed more than 155 UVXY-related trades in Mr. Vosicher's taxable account,[39] most of which were options trades (as opposed to outright purchases of the underlying UVXY security). The total cost of the UVXY options was $1,017,673.00, but total proceeds were only

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[34] *See* UVXY Registration Statement (Plaintiff Exhibit 6, Bates p. 24) (UVXY "utilizes leverage in seeking to achieve its investment objective and will lose more money in market environments adverse to [its] respective daily investment objectives than funds that do not employ leverage. The use of leveraged and/or inverse leveraged positions could result in the total loss of an investor's investment, even within a single day.").

[35] Plaintiff Exhibit 22, Bates p. 2.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] This figure reflects UVXY-related trades made in Mr. Vosicher's taxable #4929 account. (A description of Mr. Vosicher's three accounts is set forth below.) Mr. Strong also executed UVXY-related trades in Mr. Vosicher's #4932 and #4933 accounts, although the losses from those trades were only $4,298.00. Plaintiff Exhibit 22, Bates pp. 2–5 & 7.

$848,646.00, leading to a loss of $169,027.00.[40] Mr. Strong also made purchases of the underlying UVXY security in the amount of $83,583.00, which generated proceeds of $90,788.00, for a small profit of $7,205.00.[41] The net loss from the UVXY-related trades in the taxable account was therefore $161,822.00 (the $169,027.00 in losses from the UVXY options trades being slightly offset by the small gain of $7,205.00 from trades in the underlying UVXY security).[42]

f. Losses in Mr. Vosicher's accounts

For tax purposes, Mr. Vosicher had three different accounts managed by Mr. Strong – a taxable account (Account No. 4929) in which most of the UVXY-related trades occurred, and two tax-deferred Individual Retirement Accounts (Account Nos. 4932 and 4933).[43] Mr. Vosicher's accounts reached a peak monthly ending value of $429,295.00 at the conclusion of July 2019.[44] At the end of February 2020, which was shortly before Mr. Strong's UVXY-related trades ramped up, Mr. Vosicher's accounts had a balance of $415,638.00.[45] The accounts sustained losses of $138,996.00 during March 2020 and losses of $48,570.00 during April 2020.[46] Losses continued in May, June, and July 2020, albeit in lesser amounts (a $6,293.00 loss in May 2020; a $37,144.00 loss in June 2020; and a $21,901.00 loss in July 2020).[47] Cumulative losses between March and July 2020 were $252,904.00.[48] A significant portion of these losses were attributable to UVXY-related trades.

f. Termination of professional relationship, and arbitration award

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[40] These figures are based upon trades conducted between May 16, 2019 and February 10, 2021; however, as discussed, most of the losses were incurred between March and July 2020. *See generally* Plaintiff Exhibit 22.

[41] These figures cover the same time period described in footnote 40, above.

[42] Plaintiff Exhibit 22, Bates p. 7. As noted in footnote 39, above, Mr. Strong also conducted some UVXY-related trades in Mr. Vosicher's tax-deferred individual retirement accounts, Account Nos. 4932 and 4933. However, total losses for UVXY-related trades in the IRAs amounted to only $4,298.00 for the period between May 16, 2019 and February 10, 2021. *See generally* Plaintiff Exhibit 22.

[43] Plaintiff Exhibit 14, Bates p. 5 (forensic analysis of Mr. Vosicher's portfolios).

[44] *Id.* at Bates p. 7.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id.*

Mr. Vosicher terminated his professional relationship with Mr. Strong, and transferred the assets remaining in his accounts to a different brokerage, in February 2021.[49] On November 23, 2021, Mr. Vosicher filed an arbitration claim against Mr. Strong and Strong Wealth Management before the Financial Industry Regulatory Authority ("FINRA").[50] In his arbitration claim, Mr. Vosicher asserted *inter alia* causes of action for breach of fiduciary duty,[51] including unsuitable recommendations and unsuitable portfolio construction; violations of industry rules and standards; and violation of California Corp. Code § 25401.[52]

On September 18, 2023, three public arbitrators affiliated with FINRA Dispute Resolution Services issued and served a final arbitration award in favor of Mr. Vosicher (Arbitration No. 21-02839).[53] That award found Mr. Strong and Strong Wealth Management jointly and severally liable to Mr. Vosicher for compensatory damages of $150,000.00, with such damages to bear interest "at the rate of 4% per annum from 30 days after service of the Award through and including the date the award is paid in full."[54] The award also assessed (A) total hearing fees of $11,925.00 (with $7,287.50 of those fees charged to Mr. Vosicher and $4,637.50 charged to Mr. Strong); (B) total contested motion for issuance of subpoena fees of $200.00 (with $150.00 of those fees charged to Mr. Vosicher and $50.00 charged to Strong Wealth Management); (C) a member surcharge of $2,625.00 and a member process fee of $5,225.00 (all charged to Strong Wealth Management); (D) a $1,325.00 postponement fee charged to Mr. Vosicher, and (E) a partially-refundable filing fee of $1,740.00 (while not clear from the Arbitration Award, presumably this fee was charged to Mr. Vosicher).[55]

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49 *Id.*

50 Pretrial Order (adv. dkt. 20) p. 3:22–26.

51 Neither party argued, and this Court is not persuaded, that any express or implicit determination by FINRA regarding Mr. Strong's fiduciary duties has any preclusive effect with respect to whether Mr. Strong was "acting in a fiduciary capacity" for purposes of § 523(a)(4). (For the reasons set forth in Part "3.b.i." of this Memorandum Decision, below, this Court finds that Mr. Strong *was* "acting in a fiduciary capacity" within the meaning of § 523(a)(4).)

52 Plaintiff Exhibit 3, Bates p. 2.

53 Plaintiff Exhibit 3.

54 Plaintiff Exhibit 3, Bates p. 3.

55 *Id*.

3. CONCLUSIONS OF LAW

a. Jurisdiction, Authority, and Venue

Although the parties have stipulated to this Court's jurisdiction and authority to decide the issues presented,[56] this Court has an independent obligation to examine its own jurisdiction and authority. *See In re Rosson,* 545 F.3d 764, 769 n. 5 (9th Cir. 2008) (overruled on other grounds) (subject matter jurisdiction); *In re Pringle*, 495 B.R. 447, 455 (9th Cir. BAP 2013) (authority under *Stern v. Marshall*, 564 U.S. 2 (2011)). This Court has no difficulty concluding that it has jurisdiction over this dischargeability action (28 U.S.C. § 1334(b)), that the matters at issue are statutorily "core" (28 U.S.C. § 157(a)), and that this Court has authority under the U.S. Constitution to determine both the amount of debt owed and whether that debt dischargeable. *In re Deitz,* 760 F.3d 1038 (9th Cir. 2014) (authority to adjudicate nondischargeability encompasses authority to liquidate debt and enter final judgment). *See generally In re AWTR Liquidation, Inc.*, 548 B.R. 300 (Bankr. C.D. Cal. 2016).

b. Section 523(a)(4) – Defalcation

Section 523(a)(4) excepts from discharge "any debt for fraud or defalcation while acting in a fiduciary capacity." "To prevail on a nondischargeability claim under § 523(a)(4) the plaintiff must prove not only the debtor's fraud or defalcation, but also that the debtor was acting in a fiduciary capacity when the debtor committed the fraud or defalcation." *In re Honkanen*, 446 B.R. 373, 378 (9th Cir. BAP 2011); *see also Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269 (2013) (defining defalcation). To except Mr. Strong's debt from discharge, Mr. Vosicher has the burden of proof under the preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

i. Fiduciary capacity

Federal bankruptcy law determines whether a fiduciary relationship exists within the meaning of § 523(a)(4). *In re Cantrell*, 329 F.3d 1119, 1125 (9th Cir. 2003). For

[56] Pretrial Order (adv. dkt. 20) p. 2:10–17.

purposes of § 523(a)(4), the fiduciary relationship "must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." *In re Lewis*, 97 F.3d 1182, 1185 (9th Cir. 1996). Nonbankruptcy law determines whether the requisite trust relationship exists. *In re Mele*, 501 B.R. 357, 363 (9th Cir. BAP 2013). "For a trust relationship under section 523(a)(4) to be established, the applicable state law must clearly define fiduciary duties *and* identify trust property." *In re Chui*, 538 B.R. 793, 805 (Bankr. N.D. Cal. 2015), *aff'd sub nom. Tradex Glob. Master Fund Spc Ltd. v. Chui*, 559 B.R. 520 (N.D. Cal. 2016), *aff'd sub nom. Tradex Glob. Master Fund SPC LTD v. Chui*, 702 F. App'x 632 (9th Cir. 2017).

As a California-licensed investment advisor, Mr. Strong was a fiduciary to Mr. Vosicher for purposes of § 523(a)(4).[57] In California, "'[f]iduciary duties are imposed by law in certain technical, legal relationships such as those between partners or joint venturers [citation], ... trustees and beneficiaries, principals and agents, and attorneys and clients [citation].' The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." *Hasso v. Hapke*, 173 Cal. Rptr. 3d 356, 384 (2014), *as modified on denial of reh'g* (July 15, 2014) (citations omitted). In his capacity as an investment advisor, Mr. Strong also held specific assets in trust on Mr. Vosicher's behalf (the securities within Mr. Vosicher's investment accounts). Accordingly, both requirements to establish a trust relationship for purposes of § 523(a)(4) – fiduciary obligations and trust property – are met here.

[57] This Court notes that Mr. Strong was conducting business through Strong Wealth Management, which was also registered as an investment advisory firm with the California Secretary State. However, for purposes of determining Mr. Strong's fiduciary obligations to Mr. Vosicher under § 523(a)(4), the status of Strong Wealth Management as an investment advisory firm is not relevant, for several reasons. First, it is Mr. Strong, not Strong Wealth Management, that Mr. Vosicher has sued in this action. Second, whether Strong Wealth Management had fiduciary duties to Mr. Vosicher does not necessarily resolve the question of whether Mr. Strong also had fiduciary duties. The reason is that under Cal. Corp. Code § 25009, officers or employees of entity investment advisors such as Strong Wealth Management do not automatically qualify as investment advisors themselves. "The obvious import of the statute is to hold liable entity registered investment advisers, but not their officers," *Hasso v. Hapke*, 173 Cal. Rptr. 3d 356, 386 (2014), *as modified on denial of reh'g* (July 15, 2014) – unless those officers independently qualify as investment advisors.

Cal. Corp. Code § 25238 imposes upon all investment advisors a fiduciary obligation to refrain from engaging in "investment advisory activities … in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles." Title 10 of the California Code of Regulations § 260.238 provides that the following activities ***do not*** promote the "fair, equitable or ethical principles" that the California Corporations Code obligates investment advisors to adhere to:

> (a) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security ***without reasonable grounds*** to believe that the recommendation is ***suitable*** for the client on the basis of information furnished by the client ***after reasonable inquiry concerning the client's investment objectives, financial situation and needs***, and any other information known or acquired by the adviser after reasonable examination of such of the client's records as may be provided to the adviser….
> (e) Inducing trading in a client's account ***that is excessive in size and frequency*** in view of the financial resources, investment objectives and character of the account.[58]

ii. Breach of fiduciary duty: Mr. Strong had no reasonable grounds to believe the investments were "suitable" for Mr. Vosicher

The UVXY-related trades that Mr. Strong executed in Mr. Vosicher's accounts failed to comply with the foregoing regulations, and consequently Mr. Strong's execution of those trades violated his fiduciary obligations to Mr. Vosicher. Mr. Strong has not introduced sufficient evidence establishing that he had "reasonable grounds to believe" that the investments were "suitable" for Mr. Vosicher based upon a "reasonable inquiry concerning [Mr. Vosicher's] investment objectives, financial situation and needs …."[59] To the contrary, the evidence presented showed that the UVXY-related trades Mr. Strong executed were nearly the opposite of what would have been suitable given Mr. Vosicher's investment objectives. In the "Risk Assessment Questionnaire" that he

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[58] Title 10, California Code of Regulations § 260.238 (emphasis added).
[59] *Id.* at § 260.238(a).

completed in 2015, Mr. Vosicher specified that his investment objective was "[t]o generally keep pace with the stock market" and that he would become concerned if he suffered a loss of more than 10% over the next three months.[60] But investors holding shares of the UVXY fund "beyond short-term periods ***have an increased risk of losing all or a substantial portion of their investment***."[61] And as discussed, most of Mr. Strong's UVXY-related trades involved purchases of options, which pose an even greater risk of loss than purchases of the underlying UVXY security. In short, even if he had tried, it would have been difficult for Mr. Strong to select securities more ***unsuitable*** for Mr. Vosicher than UVXY and UVXY options.

It is true that, in casual text message chats, Mr. Vosicher expressed a desire for <u>*some*</u> exposure to securities comparable to UVXY (or to options on such securities). The best example is the group text message that Mr. Vosicher sent to Mr. Strong requesting "Sp [S&P] puts and vix [VIX] calls," which he followed up shortly with the statement "Double down …. boom."[62] To a certain extent, both UVXY – and options in which UVXY is the underlying security – can be fairly characterized in this manner. A Fact Sheet for UVXY states that the fund "provides leveraged exposure to the S&P 500 VIX Short-Term Futures Index, which measures the returns of a portfolio of monthly VIX futures contracts with a weighted average of one month to expiration," and is designed "for knowledgeable investors who seek to [p]rofit from increases in the expected volatility of the S&P 500, as measured by the prices of VIX futures contracts."[63] But such a characterization is imprecise at best: that same Fact Sheet also explains that UVXY "[d]oes ***not*** track the performance of the Cboe Volatility Index (VIX) ***and can be expected to perform very differently from the VIX***."[64] In other words, at an absolute minimum, Mr. Strong had a fiduciary obligation to clearly explain to Mr. Vosicher that

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60 Plaintiff Exhibit 1, Bates p. 2.
61 UVXY Fund S-1 Registration Statement (Plaintiff Exhibit 6), Bates p. 11 (emphasis added).
62 Plaintiff Exhibit 34.
63 Fact Sheet dated 9/30/22 for ProShares Ultra VIX Short-Term Futures ETF (Plaintiff Exhibit 6), Bates p. 1.
64 *Id*.

purchasing UVXY and UVXY options was ***not*** the same thing as purchasing the "[S&P puts and vix [VIX] calls"[65] that Mr. Vosicher had requested. No credible evidence was introduced at trial establishing that Mr. Strong satisfied even this minimum threshold.

Given that Mr. Vosicher lacked a sophisticated understanding either of the VIX, or of the various ways in which trades could be structured to gain exposure to changes in the VIX, Mr. Strong's fiduciary obligations extended far beyond the minimum described above. Under the circumstances, Mr. Strong had a fiduciary duty to carefully explain to Mr. Vosicher the material risks of UVXY-related trades – including the very real possibility of permanent impairment – before committing a substantial portion of Mr. Vosicher's portfolio to those trades. Once again, Mr. Strong failed to present any credible evidence establishing that he communicated this information. The result was that Mr. Vosicher was deprived of the opportunity to make an informed decision as to whether he wished to embrace the significant risks that Mr. Strong was taking on his behalf. The handful of casual text message from Mr. Vosicher, which on their face show that Mr. Vosicher did not fully appreciate the consequences of the trades he was requesting, did not create a safe harbor allowing Mr. Strong to commit substantial portions of Mr. Vosicher's portfolio to trades bearing exceptional risks.

iii. Breach of fiduciary duty: excessive size and frequency of trades

In addition, the UVXY-related trading engaged in by Mr. Strong was "***excessive in size and frequency*** in view of [Mr. Vosicher's] financial resources, investment objectives and character of [Mr. Vosicher's] account[s]."[66] In February 2020, the month before Mr. Strong's UVXY-related trading began in earnest, Mr. Vosicher's accounts had a balance of $415,638.00.[67] In the five month period between March and July 2020, Mr. Strong managed to lose $161,822.00 by trading UVXY and UVXY options – 38.93% of the value of Mr. Vosicher's accounts.[68] The excessive size and frequency of this trading is perhaps best illustrated by the fact that in Mr. Vosicher's taxable account,

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65 Plaintiff Exhibit 34.
66 Title 10, California Code of Regulations § 260.238(a) (emphasis added).
67 Plaintiff Exhibit 14, Bates p. 7.
68 Plaintiff Exhibit 22, Bates p. 7.

which had a value of $221,868.00 before the March to July 2020 UVXY trading spree,[69] Mr. Strong bought ***$1,017,673.00*** worth of UVXY options – an amount equal to almost ***five times*** the face value of the taxable account.[70]

iv. Culpable state of mind

Liability for "defalcation" under § 523(a)(4) requires a "culpable state of mind" involving "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock*, 569 U.S. 267, 269. The Supreme Court has explained this "culpable state of mind" requirement as follows:

> [W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, [defalcation] requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. ALI, Model Penal Code § 2.02(2)(c), p. 226 (1985). *See id.,* § 2.02 Comment 9, at 248 (explaining that the Model Penal Code's definition of "knowledge" was designed to include "'wilful blindness'"). That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.,* § 2.02(2)(c), at 226 (emphasis added). [*Bullock*, 569 U.S. 267, 273–74 (2013).]

This Court finds that Mr. Strong knew that the manner in which he managed Mr. Vosicher's portfolio subsequent to March 2020 violated his fiduciary duties. First, that is apparent from the trades themselves, which had become patently unsuitable given Mr. Vosicher's risk tolerance and the relatively modest dollar amounts in his accounts, and excessively large and frequent, even manic. Second, why else would Mr. Strong

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[69] Plaintiff Exhibit 14, Bates p. 41 (forensic analysis showing the value of Mr. Vosicher's #4929 taxable account as of the conclusion of February 2020).

[70] The $1,017,673.00 figure includes all UVXY-related trades conducted between May 16, 2019 and February 10, 2021; but the vast majority of those trades occurred between March and July 2020. *See generally* Plaintiff Exhibit 22.

generate the fake January 2020 Client Profile[71] and mislead Mr. Vosicher about the Day Trader Restriction Notice sent by Interactive Brokers?[72]

Alternatively, even if Mr. Strong did not know his conduct was improper (which he did), his actions easily qualify as the type of "reckless conduct" described in *Bullock*, quoted above. Specifically, by embarking on risky UVXY-related trades without obtaining the informed consent of Mr. Vosicher, Mr. Strong grossly deviated from the fiduciary obligations imposed upon him as an investment advisor. As discussed, the trades he executed were not suitable for Mr. Vosicher, and the size and frequency of those trades was excessive in relation to Mr. Vosicher's investment objectives. Mr. Strong consciously disregarded the substantial and unjustifiable risks that he was taking. In so doing, he committed "defalcation" within the meaning of § 523(a)(4).

c. Section 523(a)(4) – Embezzlement

Section 523(a)(4) excepts from discharge debts arising from embezzlement. In the context of nondischargeability, embezzlement is

> "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." Embezzlement, thus, requires three elements: "(1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." [*In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991) (citations omitted)].

It could be argued that by investing Mr. Vosicher's portfolios in assets that were not suitable, Mr. Strong engaged in "appropriation" of Mr. Vosicher's property to a use other than that for which it was entrusted. But Mr. Vosicher has not cited, and this Court is unaware of, any authority holding that an investment advisor's failure to adhere to his client's investment objectives constitutes "embezzlement" for purposes of § 523(a)(4). This Court determines that Mr. Strong's conduct, while sufficiently culpable to constitute

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[71] *See* part "2.d." of this Memorandum Decision, above.

[72] *See id.*

"defalcation," did not involve the level of fraud necessary to amount to embezzlement. Mr. Vosicher's embezzlement claim thus fails.

d. Section 523(a)(6) – Willful and Malicious Injury

"Section 523(a)(6) excepts from discharge debts arising from a debtor's 'willful and malicious' injury to another person or to the property of another. The 'willful' and "malicious' requirements are conjunctive and subject to separate analysis." *In re Plyam)*, 530 B.R. 456, 463 (9th Cir. BAP 2015) (citations omitted).

An injury is "willful" when "a debtor harbors 'either subjective intent to harm, or a subjective belief that harm is substantially certain.' The injury must be deliberate or intentional, 'not merely a deliberate or intentional act that leads to injury.'" *Id.* at 463 (internal citations omitted). An injury is "malicious" if it "involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" *In re Su*, 290 F.3d 1140, 1146–47 (9th Cir. 2002) (internal citations omitted).

In addition, the injury-producing conduct must be tortious in order to be excepted from discharge under §523(a)(6). *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008). "[C]onduct is not tortious under § 523(a)(6) simply because injury is intended or 'substantially likely to occur,' but rather is only tortious if it constitutes a tort under state law." *Id.* at 1041.

Although Mr. Strong's UVXY-related trading activity amounted to defalcation, he did not ***intend*** to lose substantial amounts of Mr. Vosicher's money. At trial Mr. Strong testified that he also lost substantial amounts of other investors' funds by employing strategies similar to those employed on behalf of Mr. Vosicher. The investor letter that Mr. Strong sent his clients in the first quarter of 2020 shows that Mr. Strong genuinely (but mistakenly) believed that the financial market volatility of March 2020 was only the beginning of a much more significant drawdown. Mr. Strong decided to gamble a substantial portion of Mr. Vosicher's portfolio on a prediction he hoped would come true.

Since Mr. Strong did not subjectively intend to cause harm to Mr. Vosicher's assets, Mr. Vosicher's § 523(a)(6) claim fails.

e. Mr. Vosicher's Damages

Under the reasoning of *Cohen v. de la Cruz*, 523 U.S. 213 (1998), all damages arising from Mr. Strong's defalcation are excepted from his discharge. That means that Mr. Strong is liable for the $150,000.00 Arbitration Award as well as all fees, costs, and charges that the FINRA arbitrators assessed to Mr. Vosicher. Mr. Strong's total liability is therefore approximately $160,502.50 ($150,000.00 for the Arbitration Award plus $7,287.50 in hearing fees charged to Mr. Vosicher, $150.00 in contested motion for issuance of subpoena fees charged to Mr. Vosicher, a $1,325.00 postponement fee charged to Mr. Vosicher, and a $1,740.00 partially-refundable filing fee presumably charged to Mr. Vosicher). In accordance with the ruling of the Arbitration Panel, the $150,000.00 Arbitration Award bears interest at the rate of 4% per annum from October 18, 2023 until paid in full.

f. Judgment of nondischargeability

No later than **14 days after this Memorandum Decision is entered on the docket**, Mr. Vosicher is directed to lodge a proposed judgment implementing this Memorandum Decision. To the extent the figures set forth above do not reflect any refunds Mr. Vosicher may have received from the arbitrators, or to the extent that Mr. Vosicher incurred any additional charges associated with the arbitration not set forth above, he is directed to submit a declaration setting forth the calculations supporting his damages at the same time that he lodges a proposed judgment. If Mr. Strong objects to that declaration, he must file papers articulating his objections no later than **seven days** after the filing of Mr. Vosicher's declaration. This Court will then determine whether any further proceedings are necessary to establish the amount of Mr. Vosicher's damages.

4. CONCLUSION

For all the reasons set forth above, Mr. Strong's failure to adhere to his fiduciary obligations with respect to his management of Mr. Vosicher's investment accounts

constituted "defalcation" for purposes of § 523(a)(4), and damages suffered by Mr. Vosicher resulting from such defalcation, in the approximate amount of $160,502.50, are non-dischargeable. Mr. Vosicher's claim for embezzlement under § 523(a)(4) fails, as does his claim for "willful and malicious injury" under § 523(a)(6). Mr. Vosicher is directed to lodge a proposed judgment as set forth in Part "3.f.," above.

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Date: December 16, 2025

Neil W. Bason
United States Bankruptcy Judge