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CLERK U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

FARIDA A. ZAIDI, aka Farida Arifa Zaidi,
aka Farida Zaidi,

Debtor.

WARREN P. FELGER,

Plaintiff,

vs.

FARIDA A. ZAIDI,

Defendant.

Case No. 2:12-bk-15808-RK

Chapter 7

Adv. No. 2:12-ap-01234-RK

MEMORANDUM DECISION RE:
ADVERSARY COMPLAINT TO
DETERMINE DISCHARGEABILITY OF
DEBT

This adversary proceeding came on for trial before the undersigned United States Bankruptcy Judge on November 18, 2011 on the complaint of plaintiff Warren P. Felger ("plaintiff" or "Felger") for determination of dischargeability of debt against defendant Farida Zaidi ("defendant" or "Zaidi") pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. Plaintiff Warren P. Felger, Felger & Associates, appeared for himself. Paul A. Moses, Law Offices of Paul A. Moses, appeared for defendant.

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1 On February 1, 2010, Zaidi filed a voluntary petition for relief under Chapter 7 of
2 the Bankruptcy Code. A discharge was entered on June 10, 2010.

3 On May 14, 2010, Felger commenced this adversary proceeding by filing his
4 complaint against Zaidi, seeking recovery of the amount of \$62,292.28, which includes
5 interest, based on a judgment in a prior case in state court that Zaidi was indebted to
6 Felger for unpaid legal fees, and further seeking a declaration that this judgment debt is
7 non-dischargeable. *Complaint to Determine Dischargeability of Debt*, filed on May 14,
8 2010. On June 16, 2010, Zaidi served and filed an answer denying the substantive
9 allegations of the complaint. *Answer to Complaint*, filed on June 16, 2010.

10 On November 18, 2011, the court conducted the trial in this adversary proceeding.
11 Having considered the evidence admitted at trial and the oral and written arguments of
12 the parties, the court now issues this memorandum decision.

13 The court has jurisdiction over this adversary proceeding under 28 U.S.C.
14 §§ 157(a) and (b)(1) and (2)(I) and 1334. Venue is proper in this judicial district. This
15 adversary proceeding is a core matter.

16 Iyad Sabbah ("Sabbah"), Zaidi's former boyfriend, engaged Felger and his law
17 office to assist Sabbah in collecting a state court default judgment in the amount of
18 \$40,926.00 against Galeb Jaber ("Jaber"). *Trial Declaration of Farida A. Zaidi* at 2.
19 Sabbah and Felger had entered into a written attorney client fee agreement dated June
20 14, 2006 whereby Felger was to represent Sabbah in a judgment debtor's examination of
21 Jaber, which examination was estimated to take four hours. *Id.*; *Defendant's Trial Exhibit*
22 *A, Representation Letter of June 14, 2006 from Felger & Associates to Mr. Sabbah*. The
23 written fee statement stated that it constitutes a written attorney client fee agreement as
24 required by Section 6148 of the California Business and Professions Code. *Defendant's*
25 *Trial Exhibit A*. Zaidi was not a party to the written fee agreement pursuant to Section
26 6148 of the Business and Professions Code. *Zaidi Trial Declaration* at 2; *Defendant's*
27 *Trial Exhibit A*. While Zaidi did not sign the written attorney client fee agreement to pay
28 the legal fees to Felger, shortly thereafter, she sent Felger an email message stating that

1 she would pay Sabbah's legal fees. In an email message to Felger of June 28, 2006
2 regarding "Sabbah v. Jaber June 29th debtor's exam," Zaidi stated: "I am the party
3 responsible for court reporting costs. Please note that I will be paying any and all legal
4 fees and costs. Your office has the correct billing address." *Plaintiff's Trial Exhibit 3,*
5 *Email from Defendant to Plaintiff dated June 28, 2006.*

6 Jaber subsequently filed for bankruptcy, and as reflected in an exchange of email
7 messages in October 2006 between Zaidi on behalf of Sabbah and Felger and his
8 associate, Jennifer Reisz, the legal strategy for Sabbah to recover the money from Jaber
9 was changed, whereby Felger would file an adversary complaint to determine the
10 nondischargeability of Sabbah's state court default judgment against Jaber. *Plaintiff's*
11 *Trial Exhibit 4, Email string dated October 19-20, 2006; Zaidi Trial Declaration* at 3-6. In
12 these email messages, Felger and his associate outlined the options to Zaidi for Sabbah
13 as to how to collect the judgment debt against Jaber in light of Jaber's bankruptcy case,
14 which including filing an adversary proceeding to determine the debt to be
15 nondischargeable, writing a letter to Jaber's attorney regarding nondischargeability, or
16 doing nothing. *Id.* In one email message to Zaidi on October 19, 2006, Felger provided
17 an estimate of the costs of bringing the adversary proceeding, which would be \$1,000-
18 \$2,000 in attorneys' fees, plus a filing fee of \$150, for filing a complaint and obtaining a
19 default judgment, and an additional \$4,000-\$5,000 if the complaint were contested,
20 including filing a motion for summary judgment ("MSJ"). *Id.*

21 In response to Felger's email messages, including the cost estimate, Zaidi sent
22 him an email message on October 20, 2006, stating that Sabbah would like Felger to
23 proceed and that "[t]his will also confirm that I [Zaidi] will be solely responsible, on behalf
24 of lyad [Sabbah], for paying your legal fees and costs. If, however, this proceeds to a
25 MSJ, I am not sure at this time if I will be able to pay the legal fees in its entirety when
26 due and owing." *Id.* (emphasis in original). Later that afternoon, Zaidi wrote in an email
27 message to Felger to clarify her position on payment of his fees: "Warren: With respect
28 to what I wrote earlier about my uncertainty of paying legal fees promptly during the MSJ

1 phase—please disregard that. I now feel secure that I will be able to pay any and all
2 legal fees in its entirety when due.” *Id.*

3 In his email message of October 19, 2006, Felger advised Zaidi that the filing of
4 an adversary complaint would be “simple and direct,” and if the complaint was contested,
5 Felger could proceed with a summary judgment motion. *Id.* In this same email message
6 to Zaidi, Felger estimated that the filing of an adversary complaint would cost \$1,000 to
7 \$2,000 in attorneys’ fees and the filing of a potential summary judgment motion would be
8 \$4,000 to \$5,000. *Id.* In this email message, Felger also stated “we can accommodate
9 your finances,” and “we know you are cost sensitive and we would strive to achieve a
10 favorable result as inexpensively as possible.” *Id.* In his email message of October 20,
11 2006 to Zaidi, Felger advised Zaidi: “We will try to keep you abreast of the fee situation
12 so, at any given time, we can accommodate your finances. If need be, we can accept a
13 payment schedule that meets your needs. Do not worry too much about that. Warren.”
14 *Id.*

15 In an email message of November 27, 2006 to Zaidi, Felger’s associate, Reisz,
16 acknowledged that research on dischargeability actions concluded that the adversary
17 proceeding could not be resolved with a summary judgment motion. *Defendant’s Trial*
18 *Exhibit F, Email from Reisz to Zaidi of November 27, 2006.* Zaidi was given a trial
19 estimate cost of \$10,000 around January 2007 during a telephone call with Felger. *Trial*
20 *Testimony of Farida Zaidi at 9:50–9:51 a.m.; Zaidi Trial Declaration at 6.*

21 In an email message of March 14, 2007, Felger told Zaidi that a mediation
22 program “free of charge” was available in the bankruptcy court in Jaber’s bankruptcy
23 case, but he also estimated attorneys’ fees for a summary judgment motion and/or trial in
24 the case would be approximately \$15,000 to \$20,000. *Defendant’s Trial Exhibit G, Email*
25 *from Felger to Zaidi of March 14, 2007.*

26 In email messages to Felger in April 2007, Zaidi repeated her concerns regarding
27 the legal fees and explained that she was planning on borrowing funds from her
28 retirement plan to pay for a portion of the legal fees. *Zaidi Trial Declaration at 7;*

1 *Defendant's Trial Exhibit I, Two emails, first from Zaidi to Felger then from Felger to Zaidi*
2 *on April 11, 2007.* On May 30, 2007, Felger's associate. Reisz, indicated that it would
3 cost \$10,000 to \$15,000 to take the case to trial. *Plaintiff's Trial Exhibit 17, Email string*
4 *dated May 30, 2007.* In an email message in response to Reisz, Zaidi wrote that "if it
5 were up to me I don't think it's worth going to trial given that atty's fees and costs are not
6 recoverable [-] if I had the money, i would have spared no expense. However, it's lyad
7 case and not mine." *Id.*

8 Settlement efforts between Sabbah and Jaber were unsuccessful. *Defendant's*
9 *Trial Exhibit J, Email from Zaidi to Reisz and Felger of June 5, 2007.* On June 5, 2007,
10 after Sabbah and Jaber failed to reach a settlement agreement, Zaidi wrote in an email
11 message to Felger and his associate that she understood that Sabbah wanted to proceed
12 to trial, but asked if it was possible to postpone the trial date. *Id.* In his email message of
13 June 5, 2007 to Zaidi, Felger did not respond to Zaidi's inquiry about a trial
14 postponement. *Id.*

15 In an email message of June 6, 2007, Zaidi wrote Felger: "Hello, Warren: Given
16 that the case is now set for trial, I would like to discuss a plan to pay your legal fees and
17 costs. I have a proposal: 1. I believe I can take out a loan (as discussed before) to pay
18 off the current balance in full. It will take approximately 2 weeks to receive funds from
19 Charles Schwab. 2. A payment for all fees and costs associated with trial preparation,
20 including discovery. Warren, I'll be candid—I cannot afford to pay for trial and that is why
21 I am requesting a payment plan" *Plaintiff's Trial Exhibit 7, Email string dated June 6,*
22 *2007.* In response to this email message from Zaidi, Felger wrote an email message to
23 Zaidi that day, stating: "Farida, We too are concerned about the fees since, as you know,
24 litigation is quite expensive and uncertain. We do not relish the prospect of lyad (or
25 rather you) spending half of the judgment on attorneys only to have the court rule the
26 judgment is dischargeable. On the other hand, given Jaber's measly settlement offer, the
27 only alternative is to walk away, which seems ill advised." *Plaintiff's Trial Exhibit 8,*
28 *Plaintiff's email to Defendant with payment proposal dated June 6, 2007.* In this email

1 message, Felger further wrote Zaidi, stating: "That said, your proposal to pay the current
2 fees, which will be almost \$11,000 through May is fine. We will not require payment of
3 our fees from June 1 forward until the trial is complete. However, we will want to be paid
4 for all disbursements on a monthly basis, in accordance with our existing fee agreement.
5 Interest will accrue on the unpaid fees. After the trial, we will agree to a monthly payment
6 plan from 12-24 months, depending on the amount of the accrued fees and your financial
7 ability. We will want you to sign a promissory note at that time. Let me know if you have
8 any questions or a specific proposal in mind." *Id.* Zaidi contends she did not agree to
9 Felger's entire proposal. *Zaidi Trial Declaration* at 9; *Trial Testimony of Farida Zaidi* at
10 10:16–10:23 a.m.

11 As alleged by Felger in the state court complaint, Zaidi paid \$21,600.41 in legal
12 fees and had a remaining balance of \$49,227.69. *Plaintiff's Trial Exhibit 12, Second*
13 *Amended Complaint* at 5, ¶¶ 21 and 22. The parties have stipulated in the joint pretrial
14 order that "Farida Zaidi promised to pay all of the legal fees incurred by Iyad Sabbah in
15 litigating an adversary proceeding against Galeb Jaber in the Bankruptcy Court for the
16 Eastern District of California." *Joint Pretrial Order* at 2 (Undisputed Fact No. 2). The
17 parties also have stipulated in the joint pretrial order that "[i]n accordance with a written
18 agreement between Mr. Felger and Mr. Sabbah, Farida Zaidi paid all of plaintiff's legal
19 fees through May 31, 2007, and all costs and disbursements through January 31, 2008."
20 *Joint Pretrial Order* at 2 (Undisputed Fact No. 3).

21 In an exchange of email messages on August 16, 2007, Zaidi requested that the
22 trial be delayed for six months due to financial reasons; in response, Felger proposed
23 they continue with the trial and worry about attorneys fees after the trial was over.
24 *Defendant's Trial Exhibit M, Four emails amongst the parties of April 16, 2007.*

25 After the Jaber trial proceedings concluded, in an email message of February 28,
26 2008 to Felger, Zaidi offered to pay \$150.00 per month and turn over the money Felger
27 collected from Jaber. *Defendant's Trial Exhibit O, Email from Zaidi of February 28, 2008*
28 *with Felger response of March 2, 2008.* Felger rejected the offer and proposed that Zaidi

1 and Sabbah sign a promissory note for fees, have Sabbah assign his judgment to Felger,
2 have Felger control the process to collect the judgment by setting up a separate
3 collection matter for that judgment, and Felger would bill legal fees accordingly. *Id.*

4 A stipulation was signed by Felger's law firm on behalf of Sabbah and the Chapter
5 7 trustee in Jaber's bankruptcy case to settle Sabbah's objection to the trustee's final
6 report and proposed distribution. *Trial Testimony of Warren Felger* at 11:11–11:17 a.m.;
7 *see also, Plaintiff's Trial Exhibit 9, Felger & Associates' account receivable schedule;*
8 *Defendant's Exhibit B, Summary sheet and billing statements from Felger to Zaidi.*

9 According to the stipulation, the trustee remitted the check representing the settlement
10 payment for Sabbah of \$4,065.94 to Felger's firm, not to Sabbah. *Id.* Felger received the
11 payment for Sabbah of \$4,065.94, but did not turn over the payment to Sabbah on
12 grounds that Sabbah owed Felger for an outstanding balance of legal fees. *Defendant's*
13 *Trial Exhibit Q, Two emails of April 18, 2008 between Iyad Sabbah and Warren Felger.*
14 The check payment was not reflected as a credit on any of Felger's billing statements to
15 Sabbah, and the payment was not applied against the state court judgment against Zaidi.
16 *Trial Testimony of Warren Felger* at 11:11–11:17 a.m.; *Plaintiff's Trial Exhibit 9, Summary*
17 *sheet and billing statements from Felger to Sabbah; Defendant's Exhibit B, Felger &*
18 *Associates' account receivable schedule.*

19 Felger filed a complaint against Zaidi and Sabbah in the Superior Court of
20 California for the County of Fresno to recover his legal fees under the theories of breach
21 of contract, breach of implied contract, promissory estoppel, account stated, open book
22 account, foreclosure of equitable lien, and fraudulent intentional misrepresentation.
23 *Plaintiff's Trial Exhibit 12, Second Amended Complaint*, filed March 17, 2009. The state
24 court judge ruled in Felger's favor and found Zaidi liable for damages in the amount of
25 \$49,227.69 plus interest for a breach of a written contract and account stated. *Plaintiff's*
26 *Trial Exhibit 13, Judgment*, filed on January 7, 2010. Felger, however, did not recover on
27 his fraudulent intentional misrepresentation claim. *Id.*; *Plaintiff's Trial Exhibit 12, Second*
28 *Amended Complaint.*

1 Felger brought the instant adversary action to determine that the judgment debt of
2 Zaidi is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

3 11 U.S.C. 523(a) provides that “[a] discharge under section 727, 1141, 1228(a),
4 1228 (b) or 1328(b) of this title does not discharge an individual debtor from any debt—
5 (2) for money, property, services, or an extension, renewal, or refinancing of credit,
6 to the extent obtained, by--(A) false pretenses, a false representation, or actual fraud,
7 other than a statement respecting the debtor’s or an insider’s financial condition.” See
8 *also Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086 (9th Cir.
9 1996). To render a debt nondischargeable under § 523(a)(2)(A), the following must be
10 shown by a preponderance of the evidence: (1) that the debtor made the representations
11 at issue; (2) that at the time the debtor knew they were false; (3) that the debtor made
12 those representations with the intention and purpose of deceiving the creditor; (4) that the
13 creditor justifiably relied on such representations; and (5) that the creditor sustained the
14 alleged losses as the proximate result of the representations having been made. *In re*
15 *Eashai*, 87 F.3d at 1086; *see also 4 March, Ahart and Shapiro, California Practice Guide:*
16 *Bankruptcy*, ¶ 22:452 (2011). Plaintiff must prove each of these elements of a claim
17 under § 523(a)(2) by a preponderance of the evidence. *In re Eashai*, 87 F.3d at 1086;
18 *see also, Grogan v. Garner*, 498 U.S. 279, 291 (1991).

19 § 523(a)(2)(A) – First Element: Zaidi Made a Representation:

20 Under § 523(a)(2)(A), Felger must prove that Zaidi made the representation or
21 representations at issue. *In re Eashai*, 87 F.3d at 1086. Felger alleges that on or about
22 June 14, 2006, and on multiple occasions thereafter, Zaidi represented to Felger that she
23 and Sabbah would pay Felger’s law firm for all legal services he rendered to Sabbah for
24 the Jaber bankruptcy litigation in the attorney client fee agreement. *Complaint to*
25 *Determine Dischargeability of Debt*, filed on May 14, 2010, at 2, ¶ 11; *Plaintiff’s Trial Brief*
26 *at 4 and n. 9, citing and quoting, Plaintiff’s Trial Exhibits 3 and 4, Email from Defendant to*
27 *Plaintiff dated June 28, 2006 and Email string dated October 19-20, 2006.*

1 While Zaidi did not sign Sabbah's attorney client fee agreement with Felger for the
2 Jaber bankruptcy litigation, as shown in her email messages to Felger of June 28, 2006,
3 October 20, 2006, March 14, 2007 and April 7, 2007, she made the representations that
4 she would pay Felger's legal fees for services rendered to Sabbah. .” *Plaintiff's Trial*
5 *Exhibit 3, Email from Defendant to Plaintiff dated June 28, 2006; Plaintiff's Trial Exhibit 4,*
6 *Email string dated October 19-20, 2006; Plaintiff's Trial Exhibit 5, Email from Defendant*
7 *to Plaintiff dated March 14, 2007; Plaintiff's Trial Exhibit 6, Email string dated April 11,*
8 *2007.*

9 In an email message to Felger of June 28, 2006 regarding “Sabbah v. Jaber June
10 29th debtor's exam,” Zaidi stated: “I am the party responsible for court reporting costs.
11 Please note that I will be paying any and all legal fees and costs. Your office has the
12 correct billing address.” *Plaintiff's Trial Exhibit 3, Email from Defendant to Plaintiff dated*
13 *June 28, 2006.*

14 In response to Felger's email message of October 19, 2006, setting forth his initial
15 cost estimates, Zaidi sent him an email message on October 20, 2006, stating: “This will
16 also confirm that I will be solely responsible, on behalf of Iyad [Sabbah], for paying your
17 legal fees and costs.” *Id.* Zaidi further stated in this email message of October 20, 2006:
18 “If, however, this proceeds to a MSJ, I am not sure at this time if I will be able to pay the
19 legal fees in its entirety when due and owing.” *Id.* Later that day, Zaidi wrote in an email
20 message to Felger on October 20, 2006 to clarify her position on payment of his fees:
21 “Warren: With respect to what I wrote earlier about my uncertainty of paying legal fees
22 promptly during the MSJ phase—please disregard that. I now feel secure that I will be
23 able to pay any and all legal fees in its entirety when due.” *Id.*

24 In an email message of March 14, 2007, Zaidi wrote Felger: “Hello, Warren: I
25 heard the latest news. If Iyad agrees to mediation, how will the mediator's cost be split
26 between the parties? Also, should the case settle in mediation, strictly between us, I am
27 solely responsible for the balance of your fees and costs. And I will pay in full once [I]
28

1 know the final amount.” *Plaintiff’s Trial Exhibit 5, Email from Defendant to Plaintiff dated*
2 *March 14, 2007.*

3 In an email message of April 11, 2007, Zaidi wrote Felger: “Good morning,
4 Warren: I wanted to let you know in advance that our next payment will be nominal.
5 However, the sooner the dispute is resolved (hopefully fairly and reasonably), the faster I
6 will be able to pay your fees and costs in full. Warren, I don’t mind being candid with
7 you—I plan to take out a loan from my retirement plan with Schwab Financial to pay your
8 legal fees and costs. If I take out a loan right now and it turns out that it’s not enough to
9 cover your future bills, then I will be hosed. To take out another loan, I would have to pay
10 off the first one in full. I hope you understand how it works. Having said that, I am ready
11 and willing to sign a promissory note or guaranty if you prefer. I just wanted to let you
12 know ahead of time. I am open to any suggestions that you may have.” *Plaintiff’s Trial*
13 *Exhibit 6, Email string dated April 11, 2007; see also, Trial Testimony of Farida Zaidi at*
14 *10:13-10:15 a.m.*

15 The court notes that the parties have stipulated in the joint pretrial order that
16 “Farida Zaidi promised to pay all of the legal fees incurred by Iyad Sabbah in litigating an
17 adversary proceeding against Galeb Jaber in the Bankruptcy Court for the Eastern
18 District of California.” *Joint Pretrial Order* at 2 (Undisputed Fact No. 2).

19 Therefore, based on the above-described email messages and the parties’
20 stipulation of fact, the court finds that Felger has shown by a preponderance of the
21 evidence that Zaidi did make representations that she would pay for Felger’s legal fees to
22 handle the Jaber bankruptcy litigation for Sabbah, and as such, Felger has satisfied the
23 first element of § 523(a)(2)(A). *See also, Joint Pretrial Order* at 2, ¶ 2 (Undisputed Fact
24 No. 2).

25 Felger also alleges that on or about June 6, 2007, Zaidi represented to Felger that
26 she would pay all of Felger’s legal fees after the trial in the Jaber bankruptcy litigation
27 was concluded. *Complaint to Determine Dischargeability of Debt*, filed on May 14, 2010,
28 at 2-3, ¶ 12. In an email message of June 6, 2007, Zaidi wrote Felger: “Hello, Warren:

1 Given that the case is now set for trial, I would like to discuss a plan to pay your legal
2 fees and costs. I have a proposal: 1. I believe I can take out a loan (as discussed
3 before) to pay off the current balance in full. It will take approximately 2 weeks to receive
4 funds from Charles Schwab. 2. A payment for all fees and costs associated with trial
5 preparation, including discovery. Warren, I'll be candid—I cannot afford to pay for trial
6 and that is why I am requesting a payment plan” *Plaintiff’s Trial Exhibit 7, Email*
7 *string dated June 6, 2007.*

8 It appears that Felger’s allegation regarding the June 6, 2007 representation
9 referred only to this email message of Zaidi to him on that date. Felger does not offer
10 other evidence of such a representation. See *Trial Declaration of Warren P. Felger* at 3,
11 ¶ 16 (“On June 6, 2007, Defendant requested a modification of the terms for the payment
12 of the law firm’s invoices as set forth in the Fee Agreement. Plaintiff’s Exhibit No. 7:
13 Defendant’s email to Plaintiff dated June 6, 2007.”); *Plaintiff’s Trial Brief* at 3
14 (“Immediately after the mediation, Debtor sought a payment plan on June 6, 2007 for
15 future attorney fees claiming that she, contrary to her prior promises, could not pay the
16 attorney fees for a trial in accordance with Plaintiff’s Engagement Letter.”).

17 Based on this evidence, it does not appear that Zaidi made the representation to
18 Felger on or about June 6, 2007 that she would pay all of Felger’s legal fees after trial.
19 On the contrary, the evidence indicates that Zaidi was representing to Felger in April and
20 June 2007 that she was unable to afford his legal services for trial. *Plaintiff’s Trial Exhibit*
21 *7, Email string dated June 6, 2007; Zaidi Trial Declaration* at 8-9; *Zaidi Trial Testimony* at
22 10:10-10:14 a.m. The court heard and considered Zaidi’s testimony on this point and
23 finds such testimony credible. *Id.* The court also has considered whether Zaidi’s
24 statements in her email messages of August 23 and 24, 2007, *Plaintiff’s Trial Exhibit 22,*
25 *Email messages of August 23 and 24, 2007,* are probative of whether she made the
26 alleged representation on June 6, 2007 and finds that those messages do not show that
27 she made the alleged representation on June 6, 2007. Accordingly, the court finds that
28 Felger has not shown by a preponderance of the evidence that Zaidi made the

1 representation on or about June 6, 2007 that she would pay for all of Felger's legal fees
2 after the trial of the Jaber bankruptcy litigation, and he has not satisfied the first element
3 of § 523(a)(2)(A) based on this alleged representation.

4 § 523(a)(2)(A) – Second Element: Zaidi Did Not Make Representations Known to
5 be False:

6 Second, under § 523(a)(2)(A), Felger must prove that at the time Zaidi made the
7 representations at issue, she knew that they were false. *In re Eashai*, 87 F.3d at 1086.
8 For a debt for money or property obtained through “false pretenses or representations” to
9 be nondischargeable under § 523(a)(2)(A), plaintiff must show by a preponderance of the
10 evidence that “the maker of the statement chose to assert a fact that he has neither
11 knowledge nor belief in its truth “and recognizes that there is a chance, more or less
12 great, that the fact may not be as it is represented.” *Advanta Nat'l Bank v. Kong (In re*
13 *Kong)*, 239 B.R. 815, 826–827 (9th Cir. BAP 1999) (citing *Restatement (Second) of*
14 *Torts*, § 526 cmt. e (1977)).

15 Felger alleges that on or about June 14, 2006, and on multiple occasions
16 thereafter, Zaidi willfully and falsely or with reckless disregard for the truth, represented to
17 Felger that she and Sabbah would pay Felger's law firm for all legal services he rendered
18 to Sabbah for the Jaber bankruptcy litigation in the attorney client fee agreement.
19 *Complaint to Determine Dischargeability of Debt*, filed on May 14, 2010, at 2, ¶ 11;
20 *Plaintiff's Trial Brief* at 4 and n. 9, *citing and quoting, Plaintiff's Trial Exhibits 3 and 4,*
21 *Email from Defendant to Plaintiff dated June 28, 2006 and Email string dated October 19-*
22 *20, 2006.*

23 As Felger acknowledges in his trial brief, “Early in the engagement, on June 28,
24 2006, and on several separate occasions, Debtor represented to Plaintiff that she would
25 pay the invoices on Sabbah's behalf. In fact, all payments were made by Debtor.”
26 *Plaintiff's Trial Brief* at 4 (footnote omitted, which refers to Zaidi's representations to
27 Felger in email messages of June 28, 2006 and October 20, 2006); *see also, Zaidi Trial*
28 *Testimony* at 10:08-10:10 a.m. Moreover, the parties also have stipulated in the joint

1 pretrial order that “[i]n accordance with a written agreement between Mr. Felger and Mr.
2 Sabbah, Farida Zaidi paid all of plaintiff’s legal fees through May 31, 2007, and all costs
3 and disbursements through January 31, 2008.” *Joint Pretrial Order* at 2 (Undisputed Fact
4 No. 3). This evidence indicates that Zaidi lived up to her representations made in June
5 and October 2006 that she would pay Felger’s legal fees, which indicates to the court that
6 she did not falsely or recklessly made representations that she would pay Felger’s fees.

7 The court notes that Zaidi made her representations in June and October 2006
8 that she would pay Felger’s legal fees incurred for Sabbah when the cost estimates were
9 in the range of \$10,000. *Plaintiff’s Trial Exhibit 4, Email string dated October 19-20,*
10 *2006; Zaidi Trial Declaration* at 3-6.

11 The evidence indicates that as the time progressed, the nature of the services
12 needed to pursue the judgment against Jaber had changed, due to his filing bankruptcy,
13 which resulted in much increased fees and costs. *Zaidi Trial Declaration* at 2-13;
14 *Plaintiff’s Trial Exhibits 3 and 4, Email from Defendant to Plaintiff dated June 28, 2006*
15 *and Email string dated October 19-20, 2006.* When Felger was initially contacted by
16 Sabbah and Zaidi for his attorney services, it was for a debtor’s examination that was
17 expected to take four hours to conduct, but the approach to recover the state court
18 judgment changed due to Jaber’s bankruptcy filing. *Id.*

19 As reflected in the email exchange between Zaidi and Felger in October 2006,
20 Zaidi told Felger that she was the party that was solely responsible for Sabbah’s legal
21 fees when Felger estimated that the legal fees for filing an adversary complaint in Jaber’s
22 bankruptcy case would be \$1,000 to \$2,000, and \$4,000 to \$5,000 for a summary
23 judgment motion. *Plaintiff’s Trial Exhibit 4.* From the beginning of the engagement, as
24 reflected in the email exchanges between Felger and Zaidi in October 2006, for example,
25 Felger was aware of Zaidi’s concerns regarding the costliness of legal fees. *Id.*

26 Zaidi was given a trial estimate cost of \$10,000 around January 2007 during a
27 telephone call with Felger. *Zaidi Trial Testimony* at 9:50–9:51 a.m.; *Zaidi Trial*
28 *Declaration* at 6. In March 2007, Felger told Zaidi that estimated attorneys’ fees for a

1 summary judgment motion and/or trial in the Jaber bankruptcy case would be
2 approximately \$15,000 to \$20,000. *Defendant's Trial Exhibit G, Email from Felger to*
3 *Zaidi of March 14, 2007*. In March 2007, when Sabbah and Jaber were considering
4 mediation, Zaidi repeated her previous statement that she was the party responsible for
5 paying the legal fees and costs, and said that she "will pay in full once [I] know the final
6 amount." *Plaintiff's Trial Exhibit 5, Email from Defendant to Plaintiff dated March 14,*
7 *2007*. At this time, as noted previously, Zaidi paid all of Felger's legal fees through May
8 31, 2007. *Joint Pretrial Order* at 2 (Undisputed Fact No. 3). This evidence indicates that
9 Zaidi did not make a false statement in her March 14, 2007 email message that she was
10 responsible for the legal fees and costs and that she would pay when she knew the final
11 amount because she was still making payments of all legal fees then to date, but was
12 increasingly concerned about the cost as shown by her request for information about the
13 final cost amount, and in this regard, the court finds that Zaidi's testimony about her cost
14 concerns and her sincere efforts to pay for Felger's legal fees to be credible, which
15 indicate an honest attempt to meet her contractual obligations. *Zaidi Trial Declaration* at
16 2-13; 4 *Resnick and Sommer, Collier on Bankruptcy*, ¶ 523.08[1]d] at 523-46 (16th ed.
17 2011)("A debtor's honest belief that a debt would be repaid in the future, even if in
18 hindsight found to have been very unrealistic, negates any fraudulent intent.")(footnote
19 and citations omitted). Shortly thereafter, when it became evident that Sabbah's dispute
20 in Jaber's bankruptcy case was going to trial, Zaidi expressly stated to Felger that she
21 "cannot afford to pay for trial" and requested a payment plan for the legal fees incurred
22 for trial preparation. *Plaintiff's Trial Exhibit 7, Email string dated June 6, 2007*.

23 At the time Zaidi originally made the representations to Felger that she would pay
24 his legal fees for his work as Sabbah's attorney in June and October 2006, implying that
25 she had the financial means to pay these fees, she was not making representations that
26 she knew to be false. She made these representations at this time based on the cost
27 estimates given to her by Felger in the \$10,000 range, and the evidence indicates that
28 she made good on these representations based on this information as she paid Felger's

1 fees through May 2007. Here, the estimated costs associated with collecting Sabbah's
2 judgment from Jaber changed and continuously escalated. These changed
3 circumstances after Zaidi made the subject representations made it difficult for her to pay
4 all of the legal fees as originally represented. In June 2007, at about the time Zaidi
5 stopped making payments, she told Felger point blank that she could not afford to pay for
6 trial, or in other words, all of the costs needed to litigate the case to the end.

7 "A misrepresentation by a debtor of his or her intention to perform contractual
8 duties, however, may be a false representation under section 523(a)(2)(A). Thus, section
9 523(a)(2)(A) may make a creditor's claim nondischargeable if the debtor had no intention
10 of performing any of the obligations under the contract, This intent may be inferred from
11 the fact that the debtor failed to take any steps to perform under the contract." 4 *Resnick*
12 *and Sommer, Collier on Bankruptcy*, ¶ 523.08[1]d] at 523-46. This is not a case where
13 the debtor had failed to take any steps to perform under the contract. Here, the debtor,
14 Zaidi, made payments of the legal fees she agreed to pay Felger through May 2007, and
15 in an amount twice the original estimated fees of \$10,000. The costs of litigation kept
16 going up, and Zaidi became increasingly concerned about her ability to pay the legal fees
17 charged by Felger and had to tell him that she could not afford to pay for trial and needed
18 a payment plan. "A debtor's statement of future intention is not necessarily a
19 misrepresentation if intervening events cause the debtor's future actions to deviate from
20 previously expressed intentions." 4 *Resnick and Sommer, Collier on Bankruptcy*, ¶
21 523.08[1]d] at 523-46 (footnote and citations omitted). This statement aptly describes
22 Zaidi's situation here.

23 Accordingly, the court finds that the Felger has not shown by a preponderance of
24 the evidence that Zaidi knowingly made false representations to Felger that she would
25 pay for all of the legal fees for Felger's services when she agreed to do so.

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1 § 523(a)(2)(A) – Third Element: Zaidi Did Not Make the Representation with Intent
2 to Deceive:

3 Third, under § 523(a)(2)(A), Felger must prove that Zaidi made the representations
4 with the intention and purpose of deceiving Felger as a creditor. *In re Eashai*, 87 F.3d at
5 1086. The third element of § 523(a)(2)(A)—the intent to deceive—is a question of fact.
6 *Rubin v. West (In re Rubin)*, 875 F.2d 755, 758 (9th Cir. 1989). Since a debtor will rarely
7 admit to his fraudulent intentions, the creditor must rely on circumstantial evidence to
8 infer an intention to deceive. *In re Eashai*, 87 F.3d at 1090. The court may infer an intent
9 to deceive from a false representation. *In re Rubin*, 875 F.2d at 759 (citation omitted).

10 The evidence discussed above that shows that Zaidi did not knowingly made false
11 misrepresentations to Felger that she would pay for all of his legal fees also shows that
12 she did not make the representations with the intent to deceive. As discussed above,
13 Zaidi made the representations that she would pay for Felger's legal fees for Sabbah in
14 June and October 2006 based on cost estimates given by Felger that the total fees would
15 be about \$10,000. As indicated above, the evidence establishes that Zaidi made good
16 on her representations that she would pay Felger's legal fees as shown by her payment
17 history in that she paid all of the fees through May 2007, which payments were made
18 after she made the subject representations that she would pay the legal fees. The lack of
19 intent is also shown by the changed circumstances that resulted in much increased legal
20 fees based on Jaber's filing a bankruptcy case. The evidentiary record in this case
21 indicates that Zaidi made payments of Felger's legal fees through May 2007 and shortly
22 thereafter, she told Felger of her difficulty in making future payments by notifying that she
23 could not afford paying for trial and was requesting a payment plan.

24 Zaidi contends that Felger cannot establish a claim under § 523(a)(2)(A) based on
25 doctrines of res judicata and collateral estoppel. *Defendant's Trial Brief* at 7-8; *Debtor's*
26 *Motion for Sanctions Pursuant to Rule 9011(b) [of the Federal Rules of Bankruptcy*
27 *Procedure]*, filed on August 11, 2010. This court agrees with this contention.

1 “Res judicata, or claim preclusion, prevents the relitigation of a claim previously
2 tried and decided.” *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir.
3 1992). Collateral estoppel, or issue preclusion, bars the relitigation of issues actually
4 adjudicated in previous litigation between the same parties.” *Id.*

5 “Res judicata bars all grounds for recovery which could have been asserted,
6 whether they were or not, in a prior suit between the same parties on the same cause of
7 action.” *Id.*, citing *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986). In *Clark v.*
8 *Bear Stearns*, the Ninth Circuit stated: “In determining whether successive lawsuits
9 involve the same cause of action, we consider: (1) whether rights or interests established
10 in the prior judgment would be destroyed or impaired by prosecution of the second
11 action; (2) whether substantially the same evidence is presented in the two actions; (3)
12 whether the two suits involve the infringement of the same right; and (4) whether the two
13 suits arise out of the same transactional nucleus of facts.” *Id.*, citing *Constantini v.*
14 *TransWorld Airlines*, 681 F.2d 1199, 1201-1202 (9th Cir. 1982).

15 In this case, Felger is seeking to enforce a debt based on the judgment in the prior
16 state court action. *Complaint to Determine Dischargeability of Debt*, filed on May 14,
17 2010, at 1-3. While Felger was successful in obtaining a judgment in the prior state court
18 action against Zaidi for breach of contract and account stated, he litigated and lost his
19 claim against her for intentional fraudulent misrepresentation. *Plaintiff's Trial Exhibits 12*
20 *and 13, Second Amended Complaint for Breach of Contract, Breach of Implied Contract,*
21 *Promissory Estoppel, Account Stated, Open Book Account, Foreclosure of Equitable*
22 *Lien, and Fraudulent Intentional Misrepresentation, and Notice of Entry of Judgment*, filed
23 on January 19, 2010. In his tentative decision as part of the notice of entry of judgment,
24 the state court judge stated on Felger's eighth cause of action for intentional fraudulent
25 misrepresentation: “The Court finds in favor of Defendants on this cause of action.
26 Plaintiff did not satisfy its burden to show that there were intentional misrepresentations
27 by Defendant Sabbah or Defendant Zaidi. Because Plaintiff does not prevail on this
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1 cause of action, he is not entitled to punitive damages. . . .” *Plaintiff’s Trial Exhibit 13*,
2 *Notice of Entry of Judgment, Tentative Decision* at 8.

3 The state court’s judgment on the fraudulent misrepresentation claim in favor of
4 Zaidi is a bar to any further action by Felger on the same cause of action. 7 Witkin,
5 California Procedure, § 407 at 1042 (5th ed. 2008 and 2012 Supp.), *citing inter alia*,
6 *Restatement (Second) of Judgments*, §§ 17 and 19; *Slater v. Blackwood*, 15 Cal.3d 791,
7 795 (1975); *see also*, *McClain v. Apodaca*, 793 F.2d at 1033; *Constantini v. TransWorld*
8 *Airlines*, 681 F.2d at 1201-1202. Felger’s cause of action in this adversary proceeding
9 based on fraudulent misrepresentation is the same cause of action as in the prior state
10 court action involving the same parties, and thus, res judicata, or claim preclusion,
11 applies. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320. Felger contends that he
12 may litigate the claim in this case because he now bases his claim based on reckless
13 misrepresentation as opposed to intentional misrepresentation. However, Felger’s
14 argument is erroneous because the claim is the same, though the theory may differ, and
15 he was free to assert both theories in the prior action. *Yellow Creek Logging Corp. v.*
16 *Dare*, 216 Cal.App.2d 50, 55 (1963)(“false representations made recklessly and without
17 regard for their truth in order to induce action by another are the equivalent of
18 mispresentations knowingly and intentionally uttered”), *quoted in* 5 Witkin, *Summary of*
19 *California Law, Torts*, § 801 at 1158 (10th ed. 2005 and 2010 Supp.), *citing inter alia*,
20 *California Civil Code*, § 1572(1) (“Actual fraud . . . consists in any of the following acts . . .
21 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to
22 be true . . .”).

23 The various factors in *Clark v. Bear Stearns* in determining whether successive
24 lawsuits involve the same cause of action exist to apply the doctrine of res judicata, or
25 claim preclusion: (1) the first factor of whether rights or interests established in the prior
26 judgment would be destroyed or impaired by prosecution of the second action applies
27 because prior judgment holding Zaidi not liable for fraudulent misrepresentation would be
28 destroyed or impaired in this action; (2) the second factor of whether substantially the

1 same evidence is presented in the two actions applies because Felger is relying on the
2 evidence and judgment in the prior case to obtain relief in this case; (3) the third factor of
3 whether the two suits involve the infringement of the same right applies because the
4 same cause of action of fraudulent misrepresentation is involved in both cases; and (4)
5 the fourth factor of whether the two suits arise out of the same transactional nucleus of
6 facts applies because Felger is relying on the same facts of Zaidi's breach of contract in
7 paying his legal fees to assert her liability in this case. 966 F.2d at 1320.

8 "To foreclose relitigation of an issue under collateral estoppel: (1) the issue at
9 stake must be identical to the one alleged in the prior litigation; (2) the issue must have
10 been actually litigated in the prior litigation; and (3) the determination of the issue must
11 have been a critical and necessary part of the judgment in the earlier action." *Clark v.*
12 *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320-1321. These factors are met here. In
13 both cases, Felger seeks a determination of Zaidi's liability for the unpaid legal fees
14 based on a false or fraudulent misrepresentation. *Plaintiff's Trial Exhibits 12 and 13,*
15 *Second Amended Complaint for Breach of Contract, Breach of Implied Contract,*
16 *Promissory Estoppel, Account Stated, Open Book Account, Foreclosure of Equitable*
17 *Lien, and Fraudulent Intentional Misrepresentation, and Notice of Entry of Judgment,* filed
18 on January 19, 2010; *Complaint to Determine Dischargeability of Debt*, filed on May 14,
19 2010, at 1-3; *see also, California Civil Code, § 1572(1); Yellow Creek Logging Corp. v.*
20 *Dare*, 216 Cal.App.2d at 55 ; 5 *Witkin, Summary of California Law, Torts, § 801* at 1158
21 (10th ed. 2005 and 2010 Supp.), *citing inter alia, California Civil Code, § 1572(1);* 11
22 U.S.C. § 523(a)(2)(A); *In re Eashai*, 87 F.3d at 1086. The issue of fraudulent
23 representation was actually litigated in the prior litigation and decided adversely to Felger.
24 *Id.* The determination of the issue of fraudulent misrepresentation was a critical and
25 necessary part of the judgment in the prior action because it determined that Zaidi was
26 not liable to Felger for punitive damages which he may have been entitled to if she made
27 fraudulent misrepresentations to him. *Id.*

1 Accordingly, based on the evidence at trial and on the doctrines of res judicata and
2 collateral estoppel, or claim and issue preclusion, the court finds that Felger has not
3 shown by a preponderance of evidence that Zaidi made a representation, or
4 representations, with intent to deceive. Thus, the court finds that the Felger has not
5 satisfied the third element of § 523(a)(2)(A).

6 § 523(a)(2)(A) – Fourth Element: Felger Did Not Justifiably Rely on Any Alleged
7 Representation:

8 Fourth, under § 523(a)(2)(A), Felger must prove that he justifiably relied on Zaidi's
9 representations. *In re Eashai*, 87 F.3d at 1086. In regards to the fourth element of
10 § 523(a)(2)(A), Felger must show that his reliance on Zaidi's promises to pay for all legal
11 fees was "justified." *Field v. Mans*, 516 U.S. 59, 73-76 (1995) (holding that reliance need
12 not reach a level of "reasonableness" to establish nondischargeability under
13 § 523(a)(2)(A) but must still be justifiable).

14 When Zaidi made the representations to Felger in June and October 2006 that she
15 would pay his fees for Sabbah, Felger's original reliance on these representations were
16 probably justifiable, though Zaidi had indicated that cost was an issue for her. In October
17 2006, the estimated fees and costs of the litigation against Jaber were estimated by
18 Felger to be about \$10,000, and payment of these expenses is not really an issue
19 because Zaidi initially paid these expenses. However, Felger's reliance on these
20 representations became unjustifiable in light of the escalating costs of litigation and
21 Zaidi's statements to him in early 2007 that she could not afford to pay for litigation costs.
22 *Zaidi Trial Testimony* at 10:10-10:15 a.m.

23 In this case, Felger's reliance on Zaidi's alleged representations that she would
24 pay his legal fees in full is unjustified because a reasonable lawyer would not have
25 charged attorneys' fees that exceed the maximum recovery amount when the client has
26 clearly expressed concern about her ability to pay. More importantly, Felger was aware
27 early on in the representation, and frequently notified of, Zaidi's financial concerns
28 regarding her ability to afford trial costs. In an email message of May 30, 2007 to Zaidi,

1 Felger's associate, Reisz, estimated trial costs to be \$10,000 to \$15,000, and in
2 response, Zaidi suggested that "I don't think it's worth going to trial given that atty's fees
3 and costs are not recoverable" and that if she "had the money," implying that she did not,
4 she would have "spared no expense." *Plaintiff's Trial Exhibit 17; Felger Trial Testimony* at
5 10:58-11:00 a.m. These sentiments indicated that the continuation of litigation was not
6 worth the money, which Zaidi really did not have. Approximately a week later, on in her
7 email message of June 6, 2007 to Felger and Reisz, Zaidi told them point blank that
8 "[she] cannot afford to pay for trial and that is why [she is] requesting a payment plan [for
9 fees associated with trial preparation]." *Defendant's Trial Exhibit K, Email from Zaidi to*
10 *Felger of June 6, 2007*. Zaidi paid Felger's legal fees and costs through this time, the end
11 of May 2007, and was not current on the legal fees thereafter. Felger did not heed these
12 warning signs and plowed ahead with the litigation without Zaidi making further payments.
13 Felger's billing records indicate that by October 31, 2007, the total amount billed,
14 \$41,561.77, had exceeded the maximum recovery amount of \$40,926.00. *Defendant's*
15 *Trial Exhibit B*. Additionally, Felger's billing records show that for January 2008, his firm
16 billed Sabbah and Zaldi \$17,389.37, an amount that surpassed the estimated cost of trial.
17 *Id.* The court finds that Felger cannot claim that he justifiably relied on Zaidi's alleged
18 representation to pay legal fees, such as his January 2008 bill of \$17,389.37, when Zaidi
19 indicated to him in June 2007 that she could not pay for trial previously estimated to cost
20 \$10,000 to \$15,000. The court also finds that Felger could not have justifiably relied on
21 Zaidi's alleged representation to pay \$71,692.10 in legal fees associated with recovering
22 a \$40,926.00 judgment when there were express concerns about Zaidi's financial ability
23 to pay for all of the fees. The court also finds that Felger could not have justifiably relied
24 on Zaidi's alleged representation to pay \$71,692.10 in legal fees associated with
25 recovering a \$40,926.00 judgment only worth about half of the billed fees.

26 Accordingly, the court finds that Felger has not shown by a preponderance of the
27 evidence that he justifiably relied upon Zaidi's representations that she would pay for all of
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1 his legal fees and costs as of April 2007 to establish the fourth element of § 523(a)(2)(A)
2 of justifiable reliance..

3 §523(a)(2)(A) – Fifth Element: Felger’s Losses Proximately Resulted From an
4 Alleged Representation:

5 Fifth, under § 523(a)(2)(A), Felger must prove that he sustained the alleged losses
6 as the proximate result of Zaidi’s alleged representation. *In re Eashai*, 87 F.3d at 1086.
7 In regards to the fifth element of § 523(a)(2)(A), Felger has shown he suffered damages
8 based on an alleged representation that Zaidi would pay for all legal fees. This fact is
9 established by the judgment of the state court holding that Zaidi is liable to Felger for
10 failure to pay legal fees in the amount of \$49,227.69, representing Felger’s damages for a
11 breach of contract and accounts stated. *Plaintiff’s Trial Exhibit 13, Notice of Entry of*
12 *Judgment in Felger v. Sabbah et al., Fresno County Superior Court Case No.*
13 *08CECG03584; Joint Pretrial Order* at 2, ¶ 1 (Undisputed Fact No. 1). Accordingly, the
14 court finds that Felger did prove by the preponderance of the evidence that he sustained
15 losses as the proximate result of representations made by Zaidi.

16 For the foregoing reasons, the court finds that Felger has proven by a
17 preponderance of the evidence two of the five elements to establish a claim under
18 § 523(a)(2)(A) that (1) Zaidi made representations to Felger that she would pay for the
19 legal fees associated with recovering money from Jaber, and (5) Felger sustained the
20 alleged losses as the proximate result of the representations having been made. The
21 court does not find that Felger has proven by a preponderance of the evidence three of
22 the five elements of a claim under § 523(a)(2)(A) that (2) the representations were false
23 at the time Zaidi made them, (3) Zaidi made the representations with the intention and
24 purpose of deceiving Felger, and (4) Felger justifiably relied on such representations.

25 Accordingly, the court hereby holds in favor of Zaidi on Felger’s adversary
26 complaint and concludes that the debt owed to Felger by Zaidi is not excepted from
27 discharge under 11 U.S.C. § 523(a)(2)(A) and that Felger is not entitled to recover on his
28 claim against Zaidi. Because the court finds it necessary to determine the credibility of

1 the testimony of the witnesses and the documentary evidence, the court denies the
2 motion of Zaidi for a judgment on partial findings pursuant to Rule 7052 of the Federal
3 Rules of Bankruptcy Procedure, incorporating by reference, Rule 52(c) of the Federal
4 Rules of Civil Procedure.

5 Zaidi has a pending motion for sanctions under Rule 9011 of the Federal Rules of
6 Bankruptcy Procedure. While the parties have submitted extensive briefing for and
7 against the motion, the court deferred ruling on the motion until the merits of the
8 complaint were resolved at trial. Because the court rules in favor of Zaidi on the merits of
9 the adversary complaint based in part on the doctrines of claim or issue preclusion (res
10 judicata or collateral estoppel) and thus the claim is not warranted under existing law, the
11 court is of the opinion that her sanctions motion should be granted under Rule 9011(b).

12 As discussed previously, the state court's judgment on the fraudulent
13 misrepresentation claim in favor of Zaidi is a bar to any further action by Felger on the
14 same cause of action and his cause of action based on fraudulent misrepresentation is
15 the same one as in the prior state court action. *See, e.g., 7 Witkin, California Procedure,*
16 *§ 407 at 1042, citing inter alia, Restatement (Second) of Judgments, §§ 17 and 19; Slater*
17 *v. Blackwood, 15 Cal.3d at 795; Yellow Creek Logging Corp. v. Dare, 216 Cal.App.2d at*
18 *55; 5 Witkin, Summary of California Law, Torts, § 801 at 1158; California Civil Code, §*
19 *1572(1).* Felger was thus not free to assert a new theory based on the same cause of
20 action. *Id.* Accordingly, the court determines that it is appropriate to grant Zaidi's Rule
21 9011 motion against Felger because there was no reasonable basis in fact or law to
22 relitigate the fraudulent misrepresentation claim, and as shown by the declaration of Paul
23 A. Moses, Felger was afforded an opportunity to withdraw the offending adversary
24 complaint under the safe harbor provisions of Rule 9011(c) and failed to do so.

25 Rule 9011(b) expressly provides that if there is a violation under the rule,
26 sanctions are discretionary as the court may, but is not required, to impose sanctions.
27 Fed. R. Bankr. P. 9011(b). In considering whether sanctions should be imposed and
28 what sanction to impose, the 1997 Advisory Committee note suggests various factors for

1 a court to consider: (1) whether the improper conduct was willful or negligent; (2) whether
2 it was part of a pattern of activity or an isolated event; (3) whether it infected the entire
3 pleading or only one particular count or defense; (4) whether the person has engaged in
4 similar conduct; (5) whether the person has engaged in similar conduct or other litigation;
5 (6) whether it was intended to injure; (6) the effect it had on the litigation process in time
6 or expense; (7) whether the responsible person is trained in the law; (8) that amount,
7 given the financial resources of the responsible person, is needed to deter that person
8 from repetition in the same case; and (9) the amount needed to deter similar activity by
9 other litigants. 1997 Advisory Committee Note to Fed. R. Bankr. P. 9011, *reprinted in* 10
10 *Resnick and Sommer, Collier on Bankruptcy*, ¶ 9011.RH[4] at 9011-29 – 9011-30. While
11 the parties extensively briefed Rule 9011 in their papers in support and in opposition to
12 Zaidi's motion for sanctions, their briefing focused on whether there was a Rule 9011
13 violation and not on the appropriateness of sanctions under Rule 9011. In order for the
14 court to consider the appropriateness of Rule 9011 sanctions against Felger, the court
15 orders the parties to file supplemental briefing addressing the propriety of sanctions and
16 the type of sanctions which should be imposed. The parties are ordered to file
17 supplemental briefing within 30 days of entry of this memorandum decision and may file
18 replies to each other's supplemental brief within 14 days thereafter. A further hearing on
19 Zaidi's motion for sanctions is scheduled for June 26, 2012 at 3:00 p.m. in Courtroom
20 1675, Roybal Federal Building, 255 East Temple Street, Los Angeles, California.

21 This memorandum decision constitutes the court's findings of fact and conclusions
22 of law. By separate order filed concurrently herewith, the court is entering a judgment in

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2 favor of defendant and against plaintiff on the merits of the complaint in this adversary
3 proceeding with a reservation of jurisdiction over defendant's motion for sanctions.

4 IT IS SO ORDERED.

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25 DATED: April 23, 2012
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United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM DECISION ON ADVERSARY COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **April 23, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

James J Joseph (TR) bts@dgdk.com, jjoseph@ecf.epiqsystems.com

Paul A. Moses on behalf of Defendant Farida Zaidi pamoses@aol.com

United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Warren P Felger
726 W Barstow Ave Ste 106
Fresno, CA 93704

Farida A Zaidi
6213 Balcom
Encino, CA 91316

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: