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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-16-1195-CTaF  
 )  
 AZIZOLAH JAVAHERY, ) Bk. No. 2:14-bk-33249-DS  
 )  
 Debtor. ) Adv. No. 2:15-ap-01056-DS  
 )  
 )  
 AZIZOLAH JAVAHERY, )  
 )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 )  
 SORAYA JAVAHERI-LEITNER; )  
 SIMIN JAVAHERY-KHOJASTEGAN, )  
 )  
 Appellees. )  
 )

Argued and Submitted on February 23, 2017  
at Pasadena, California

Filed - March 14, 2017

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Deborah J. Saltzman, Bankruptcy Judge Presiding

Appearances: Michael L. Poole argued for Appellant Azizolah  
 Javahery; M. Jonathan Hayes of Simon Resnik Hayes  
 LLP argued for Appellees Soraya Javaheri-Leitner  
 and Simin Javahery-Khojastegan

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\* This disposition is not appropriate for publication.  
 Although it may be cited for whatever persuasive value it may  
 have, see Fed. R. App. P. 32.1, it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 Before: CLEMENT\*\*, TAYLOR, and FARIS, Bankruptcy Judges.

2 This case arises out of treachery practiced over years by a  
3 brother against his two younger sisters. Lest one think our  
4 characterization of the brother's actions to be unfairly harsh,  
5 we quote the state court who passed on this dispute before it  
6 landed in bankruptcy court. The siblings are members of a  
7 "conservative and male-dominated Jewish Iranian family[,] " in  
8 which the eldest male was "the most respected and dominating  
9 member of the family." Guided by less than noble motives, the  
10 brother had convinced his sisters to turn over antiques, jewelry  
11 and money to him for safekeeping and for investment, and had  
12 promised that he would return those assets to the sisters on  
13 request. And they did so. The state court found that the  
14 brother "waged a systematic campaign of fraud" against his  
15 sisters and "long planned to claim ownership" of the "fruits of  
16 their difficult labor." It also stated that he "took every  
17 possible step to ensure their financial ruin."

18 When the brother refused to return the sisters' money and  
19 other valuables, they brought suit in the California Superior  
20 Court. After trial, the state court found for the sisters on  
21 each of ten different common law causes of action, including  
22 fraud and conversion and awarded compensatory damages of  
23 approximately \$500,000 as well as punitive damages of \$350,000 to  
24 each sister.

25 The brother filed bankruptcy, and the sisters brought an  
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27  
28 \*\* Hon. Fredrick E. Clement, United States Bankruptcy Judge  
for the Eastern District of California, sitting by designation.

1 adversary proceeding to except from discharge the state court  
2 judgment entered in their favor. 11 U.S.C. § 523(a)(2), (6).<sup>1</sup>  
3 Armed with the state court judgment and asserting issue  
4 preclusion, the sisters obtained a summary judgment excepting  
5 their debt from discharge.

6 The brother appeals the order granting summary judgment and  
7 appeals the order denying his motion to vacate the summary  
8 judgment order. He argues that the state court did not make  
9 sufficient findings from which the bankruptcy court could apply  
10 issue preclusion. He also argues that his post-summary judgment  
11 appeal of an amended judgment correcting a clerical error in the  
12 underlying judgment, which had been otherwise long since final,  
13 precluded the bankruptcy court from applying issue preclusion.  
14 We disagree and AFFIRM.

#### 15 **FACTS**

16 The appellant is Azizolah Javahery ("Azizolah"); appellees  
17 are his younger sisters, Soraya Javaheri-Leitner ("Soraya") and  
18 Simin Javahery-Khojastegan ("Simin") (collectively "the  
19 sisters").<sup>2</sup>

#### 20 **A. The Sisters' State Court Action**

21 Starting with Azizolah, the siblings immigrated to the  
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23  
24 <sup>1</sup> Unless specified otherwise, all chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
26 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil" references are to the  
Federal Rules of Civil Procedure, Rules 1-86.

27 <sup>2</sup> Because the parties share a common surname, the panel  
28 refers to the parties by their given names. No disrespect is  
intended.

1 United States from Iran. Because of Azizolah's greater  
2 familiarity with business affairs in the United States and his  
3 culturally assigned role as head of the family, the sisters  
4 deposited with Azizolah personal property and hundreds of  
5 thousands of dollars for investment on their behalf and for  
6 safekeeping. By way of example, Simin deposited with Azizolah  
7 \$300,000, which she had earned by working as a dentist in Iran.  
8 Soraya entrusted Azizolah with antiques, gold and silver jewelry  
9 and eight years' earnings.

10 When Azizolah refused to return the sisters' personal  
11 property and money, the sisters brought an action against him in  
12 state court. Their complaint alleged causes of action for breach  
13 of contract, conversion (two counts), fraud (two counts),  
14 accounting, breach of fiduciary duty, constructive trust,  
15 interference with contractual relations, and fraudulent  
16 transfers.

17 After trial, the state court issued a lengthy Statement of  
18 Decision, which contained three main parts: (1) determining  
19 Azizolah's liability; (2) fixing compensatory damages; and  
20 (3) deciding whether punitive damages should be awarded and the  
21 amount of those damages. As to the liability component of the  
22 action, as pertinent here, the state court found for the sisters  
23 on each of their causes of action, including conversion and  
24 fraud. As to conversion, the state court found:

25 Defendant [Azizolah] wrongfully converted certain items  
26 of antiques, silver and gold jewelry that were brought  
27 by Soraya to the United States for her own use and  
28 ownership. Soraya brought \$3500 that she had saved as  
well as antiques including a handmade rung [sic],  
sterling silver and handmade artwork from the City of  
Esfahan. Plaintiff Soraya estimated the weight of the

1 silver to be 30 to 40 kilograms. Besides the silver,  
2 Plaintiff Soraya also brought gold jewelry, including  
3 18 karat gold earrings, bracelet, necklace and rings  
4 estimated to be valued at \$50,000-\$60,000.<sup>3</sup>

5 With respect to fraud,<sup>4</sup> the court stated, "Because Defendant  
6 [Azizolah] took various actions to affirm his trustworthiness to  
7 his younger sisters, Defendant was able to perpetrate the fraud  
8 upon them until 2006."

9 As to the amount of compensatory damages, the state court  
10 made findings rooted in the conversion causes of action. It  
11 awarded Soraya \$459,959 and Simin \$571,570. The state court's  
12 treatment of the damages issue was confined to four paragraphs:

13 Plaintiff Soraya testified that Defendant had  
14 wrongfully converted antiques, gold, and silver which  
15 belonged to her and were valued at \$50,000-\$60,000.00.  
16 The Court finds that the Plaintiff's testimony was  
17 credible.

18 California Civil Code Section 3336 states in  
19 pertinent part that a plaintiff may receive as damages  
20 for conversion, "[t]he value of the property at the  
21 time of the conversion, with the interest from that  
22 time [. . .] and [s]econd - [a] fair compensation for  
23 the time and money properly expended in pursuit of that  
24 property."

25 Plaintiff's expert forensic account [sic] Mr. Jack  
26 Zuckerman testified that using the legal interest rate  
27 of 10 percent, Plaintiff Soraya suffered damages of  
28 approximately \$346,123.00 through September 20, 2009  
for the cash damages. This does not include damages  
through the date of the adjudication of the matter, nor

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3 The record is unclear whether the court's findings  
regarding conversion arose from the second cause of action  
(conversion) or the tenth cause of action (theft/conversion/  
embezzlement of plaintiff's inheritance).

4 The Statement of Decision addresses only the third cause  
of action for fraud. For reasons not clear, the fourth cause of  
action, also for fraud, was not addressed in the Statement of  
Decision.

1 does it include the value of the antiques and silver  
2 jewelry through the date of the adjudication of this  
3 matter. The amount of damages for the antiques and  
4 silver that Plaintiff Soraya brought from Iran, at a  
5 legal rate of interest, would be \$113,836.00. Thus, in  
6 terms of actual damages alone, the Court finds that  
7 Plaintiff Soraya suffered actual [damages] in the  
8 amount of \$459,959.00.

9 As to Plaintiff Simin, the Court finds that using  
10 a legal interest rate of 10 percent, Plaintiff Simin  
11 has suffered \$571,570.00 in actual damages.

12 As to the punitive damages, the Statement of Decision also  
13 made findings of malice, oppression and fraud, as required by  
14 Cal. Civ. Code § 3294, to support the imposition of punitive  
15 damages. It stated, "The Court found by clear and convincing  
16 force that punitive damages are warranted in this matter finding  
17 that Defendant Azizolah Javahery acted with **'malice, oppression  
18 and fraud'** given all his actions to wrongfully take the assets of  
19 his two sisters . . . ." (emphasis added). The state court  
20 explained, "Defendant knew that these funds and items of personal  
21 property were the livelihood of his sisters, and the fruits of  
22 their difficult labor. Despite that, he waged a systematic  
23 campaign of fraud against his sisters, in order to deprive them  
24 of their hard earned assets."

25 The court's findings as to the amount of punitive damages  
26 were cursory. It stated: "As punitive damages are to be awarded  
27 in an amount that will deter and punish the Defendant, punitive  
28 damages are awarded by this Court in the amount of \$350,000.00  
for each Plaintiff."

Thereafter, the state court entered judgment for the  
sisters. As relevant here, the judgment stated:

AS TO PLAINTIFF SIMIN JAVAHERY AND SORAYA JAVAHERY'S

1 SECOND CAUSE OF ACTION FOR CONVERSION:

2 The Court rules that Plaintiffs should prevail on their  
3 second cause of action for conversion.

4 **AS TO PLAINTIFF SIMIN JAVAHERY AND SORAYA JAVAHERY'S  
5 THIRD AND FOURTH CAUSE OF ACTION FOR FRAUD:**

6 **The Court rules that Plaintiffs should prevail on their  
7 second cause of action for conversion [sic].**

8 **The Court rules that punitive damages are warranted . . .**

9 **AS TO PLAINTIFF SIMIN JAVAHERY AND SORAYA JAVAHERY'S  
10 TENTH CAUSE OF ACTION FOR THEFT/CONVERSION/EMBEZZLEMENT  
11 OF PLAINTIFF'S INHERITANCE:**

12 The Court rules that Plaintiffs should prevail on their  
13 tenth cause of action for theft/conversion/embezzlement  
14 of Plaintiff's inheritance.

15 **AS TO DAMAGES, PLAINTIFFS SHALL TAKE THE FOLLOWING:**

16 **AS TO SORAYA JAVAHERI:**

17 \$346,123.00 (Cash Damages At Legal Interest of 10%)

18 \$113,836 (Damages for Antiques and Silver at Legal  
19 Interest Rate of 10%)

20 \$350,000.00 (Punitive Damages)

21 **AS TO SIMIN SORAYA JAVAHERY:**

22 \$571,570.00 (Cash Damages at Legal Interest Rate of  
23 10%)

24 \$350,000.00 (Punitive Damages)

25 (emphases added).

26 After this judgment was entered, neither side appealed.

27 **B. Azizolah's Bankruptcy and the Sisters' Adversary Proceeding**

28 Almost three years after the state court entered judgment,  
Azizolah filed a Chapter 7 bankruptcy, and the sisters responded  
by filing this adversary proceeding to except from discharge  
Azizolah's debt to them. 11 U.S.C. § 523(a)(2), (6).

The sisters then filed a motion for summary judgment,

1 arguing that the state court judgment together with the doctrine  
2 of issue preclusion entitled them to judgment. Azizolah opposed,  
3 arguing that the state court did not find that he committed  
4 fraud. Believing that the state court judgment contained a  
5 clerical error and that the Statement of Decision demonstrated a  
6 clear intent to find fraud, the bankruptcy court applied the  
7 doctrine of issue preclusion and granted summary judgment for  
8 (1) Soraya in the amount of \$113,836 as arising from  
9 nondischargeable conversion and (2) each sister in the amount of  
10 \$350,000 arising from a finding of fraud for purposes of punitive  
11 damages under Cal. Civ. Code § 3294. The bankruptcy court found  
12 the record inadequate to award further damages and denied the  
13 remainder of the motion for summary judgment.

14 **C. Azizolah's Motion to Amend the State Court Judgment**

15 After the bankruptcy court granted summary judgment and  
16 three years after the entry of judgment by the state court,  
17 Azizolah moved the state court to correct clerical mistakes in  
18 the judgment, noting that the judgment incorrectly memorialized  
19 the findings in the Statement of Decision, describing erroneously  
20 the third and fourth causes of action as for conversion and  
21 stating that the punitive damages award arose from "the entire  
22 complaint," rather than the third and fourth causes of action for  
23 fraud (mischaracterized as conversion in the judgment). The  
24 sisters opposed Azizolah's efforts. Consistent with the  
25 bankruptcy court's interpretation of the original judgment, the  
26 state court granted the motion to correct the judgment as to the  
27 third and fourth causes of action to add fraud, but otherwise  
28 denied the motion. As in the original judgment, however, the

1 amended judgment appended the sisters' entitlement to punitive  
2 damages to the fraud cause of action.

3 An amended judgment was entered. As corrected, in the  
4 pertinent part the judgment now reads:

5 AS TO PLAINTIFF SIMIN JAVAHERY AND SORAYA JAVAHERY'S  
6 THIRD AND FOURTH CAUSE OF ACTION FOR FRAUD:

7 The Court rules that Plaintiffs should prevail on their  
8 second cause of action for fraud.

9 The Court rules that punitive damages are warranted . .  
10 . .

11 Azizolah's appeal to the California Court of Appeals  
12 followed. That appeal remains unresolved.

13 **D. The Sisters' Motion for Judgment under Civil Rule 54(b) and**  
14 **Azizolah's Motion to Vacate the Order Granting Summary**  
15 **Judgment**

16 Before Azizolah's appeal could be resolved, the sisters  
17 moved to dismiss the remainder of their adversary complaint and  
18 to enter judgment in their favor based on the bankruptcy court's  
19 order (partially) granting summary judgment. See Fed. R. Civ. P.  
20 54(b), incorporated by Fed. R. Bankr. P. 7054. The court granted  
21 the sisters' motion, dismissed their remaining claims and entered  
22 judgment for them excepting their judgment from discharge.

23 Armed with the unresolved appeal from the state court order  
24 correcting the judgment, Azizolah requested the bankruptcy court  
25 to vacate the order granting the summary judgment, arguing that  
26 issue preclusion may not be applied where an appeal is pending of  
27 the prior judgment for which preclusive effect is sought. The  
28 sisters opposed, and the court denied the motion.

This appeal followed.



1 Corp. v. Executive Risk Indem., Inc., 312 F.3d 976, 980 (9th Cir.  
2 2002).

3 Issue preclusion requires a two-step review. First, whether  
4 issue preclusion is available is reviewed de novo. Krishnamurthy  
5 v. Nimmagadda (In re Krishnamurthy), 209 B.R. 714, 718 (9th Cir.  
6 BAP 1997), aff'd, 125 F.3d 858 (9th Cir. 1997). Second, “[i]f  
7 issue preclusion is available, the decision to apply it is  
8 reviewed for abuse of discretion.” Lopez v. Emergency  
9 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP  
10 2007); Dias v. Elique, 436 F.3d 1125, 1128 (9th Cir. 2006).

## 11 **DISCUSSION**

### 12 **I. Legal Standards**

13 The court shall grant summary judgment where “there is no  
14 genuine dispute as to any material fact” and the moving party “is  
15 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a),  
16 incorporated by Fed. R. Bankr. P. 7056. “The court views the  
17 evidence in the light most favorable to the non-moving party to  
18 determine if there are any genuine issues of material fact and  
19 whether the moving party is entitled to judgment as a matter of  
20 law.” Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d  
21 1119, 1125 (9th Cir. 2014).

22 In federal courts, the preclusive effect of a state court  
23 judgment is decided by the law of the state in which the judgment  
24 was rendered. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d  
25 798, 800 (9th Cir. 1995). California has five prerequisites to  
26 the availability of issue preclusion:

27 First, the issue sought to be precluded from  
28 relitigation must be identical to that decided in a  
former proceeding. Second, this issue must have been

1 actually litigated in the former proceeding. Third, it  
2 must have been necessarily decided in the former  
3 proceeding. Fourth, the decision in the former  
4 proceeding must be final and on the merits. Finally,  
5 the party against whom preclusion is sought must be the  
6 same as, or in privity with, the party to the former  
7 proceeding.

8 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
9 2001).

10 The party seeking to employ issue preclusion bears the  
11 burden of showing its applicability. Vella v. Hudgins, 20 Cal.  
12 3d 251, 257 (1977). In deciding this issue, the court may  
13 consider the entire record, including the rendering court's  
14 Statement of Decision. Restatement (Second) of Judgments § 27  
15 cmt. f (1982); In re Lopez, 367 B.R. at 105 (statement of  
16 decision); Grenier v. Roback (In re Grenier), BAP No. NC-14-1396-  
17 KiTaD, 2015 WL 3622712, at \*2-3, \*7 (9th Cir. BAP June 10, 2015)  
18 (same).

## 19 **II. Motion to Vacate**

20 Civil Rule 60 allows the bankruptcy court to vacate an order  
21 where "it is based on an earlier judgment that has been reversed  
22 or vacated; or applying it prospectively is no longer equitable,"  
23 or for "any other reason that justifies relief." Fed. R. Civ. P.  
24 60(b)(5), (6), incorporated by Fed. R. Bank. P. 9024.

25 The crux of Azizolah's argument is that the bankruptcy court  
26 abused its discretion in declining to vacate the order granting  
27 summary judgment against him because the state court judgment,  
28 which formed the basis of the bankruptcy court's order, lost its  
29 finality when he later appealed the amended judgment.

30 No known case directly addresses whether issue preclusion  
31 may be applied under this factual circumstance under California

1 law. California law on issue preclusion provides for two kinds  
2 of attacks on a judgment, i.e., direct attacks (appeals) and  
3 collateral proceedings that assail a judgment. And it treats the  
4 two attacks differently when deciding whether a judgment is final  
5 for the purposes of issue preclusion. This disparate treatment  
6 suggests that an appeal from a judgment amended to correct a  
7 clerical error does not impact finality for issue preclusion  
8 purposes.

9 As defined by state law, issue preclusion applies only to  
10 judgments that are final and that are not subject to a direct  
11 attack such as an appeal. People v. Bank of San Luis Obispo,  
12 159 Cal. 65, 82-83 (1910) (noting a "broad difference" between  
13 judgments subject to "direct appeal," which are not final, and  
14 judgments subject to "collateral proceedings," which are final  
15 (quoting Spanagal v. Dellinger, 38 Cal. 278, 284 (1869) (Sawyer,  
16 C.J., concurring))); see also Sandoval v. Super. Ct., 140 Cal.  
17 App. 3d 932, 936-37 (1983); Cal. Code Civ. Proc. § 1049. A  
18 judgment is not final for purposes of issue preclusion while an  
19 appeal remains pending or while the period for filing an appeal  
20 has not yet expired. Kay v. City of Rancho Palos Verdes,  
21 504 F.3d 803 (9th Cir. 2007) (applying California law); Franklin  
22 & Franklin v. 7 Eleven Owners for Fair Franchising, 85 Cal. App.  
23 4th 1168, 1174 (2000); see also Cal. R. of Court 8.104(a)(1)(C)  
24 (ordinarily an appeal must be filed not later than 180 days after  
25 entry of judgment). The deadline to file an appeal is  
26 jurisdictional. Van Beurden Ins. Servs. Inc. v. Customized  
27 Worldwide Weather Ins. Agency, Inc., 15 Cal. 4th 51, 56 (1997).  
28 It cannot be extended or reset by entering a subsequent judgment

1 or appealable order that renders the same result. Laraway v.  
2 Pasadena Unified Sch. Dist., 98 Cal. App. 4th 579, 583 (2002).  
3 Once an appeal has concluded or the time to do so has expired,  
4 the judgment becomes final.

5 In contrast, judgments that are the subject of an unresolved  
6 collateral attack, those "not in the direct line of the  
7 judgment," such as motions for a new trial and actions to annul a  
8 judgment, remain final. Bank of San Luis Obispo, 159 Cal. at  
9 82-83; see also Restatement (Second) of Judgments § 13 cmt. f  
10 (1982). More to the point, an unresolved appeal from an  
11 unsuccessful collateral attack does not bar application of issue  
12 preclusion. In re McNeil's Estate, 155 Cal. 333, 337 (1909)  
13 (finding judgment was final for issue-preclusion notwithstanding  
14 unsuccessful action to annul the judgment and unexpired time for  
15 appeal). It is only if and when a collateral attack actually  
16 succeeds in overthrowing the judgment that the judgment loses  
17 force and issue-preclusive effect. Harris v. Barnhart, 97 Cal.  
18 546, 551 (1893).

19 Juxtaposed, these authorities reveal a clear line of  
20 demarcation. While an appeal remains pending or during the  
21 period in which an appeal might be filed, a judgment is not  
22 final. After that, the judgment is final, and an unresolved  
23 effort to vacate or materially modify the judgment does not  
24 affect finality, unless and until it actually overturns the  
25 judgment.

26 As a result, Azizolah's failure to appeal the original and  
27 underlying judgment and the expiration of his time to do so means  
28 that the judgment is final. Its finality, moreover, is not

1 impacted by the correction of the clerical error in the judgment  
2 and his now pending appeal of the amended judgment.

3 A narrow exception to the finality rule may exist for  
4 amended judgments that substantially change the original  
5 judgment. An amended judgment reopens a party's right to appeal  
6 only if the amended judgment "substantially modifies" the  
7 original judgment. Ellis v. Ellis, 235 Cal. App. 4th 837, 843  
8 (2015). A "substantial modification" is one that "materially  
9 affects the rights of the parties." Sanchez v. Strickland,  
10 200 Cal. App. 4th 758, 765 (2011). A substantially modified  
11 judgment supersedes the original judgment and a new period to  
12 appeal commences. Neff v. Ernst, 48 Cal. 2d 628, 634 (1957). By  
13 contrast, amendments that rectify clerical errors and do not  
14 involve the exercise of judicial discretion do not result in a  
15 new and appealable judgment.<sup>5</sup> Stone v. Regents of Univ. of Cal.,  
16 77 Cal. App. 4th 736, 744-45 (1999). And the aggrieved party's  
17 appeal period runs from the date of entry of the original  
18 judgment, and not the date of entry of the amended judgment. Id.

19 If California law recognizes such an exception, it is not  
20 applicable here. The amended judgment that is the subject of  
21 Azizolah's appeal merely conformed the judgment to the terms of  
22 the state court's Statement of Decision. It did not materially  
23 affect the rights of the parties or substantially modify the  
24 original judgment. Because it rectified only a clerical error in  
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26 <sup>5</sup> Unlike the limited time for filing an appeal, a trial  
27 court may correct a clerical error at any time. Cal. Code Civ.  
28 P. § 473(d); Ames v. Paley, 89 Cal. App. 4th 668, 572 (2001);  
In re Marriage of Kaufman, 101 Cal. App. 3d 147, 151 (1980).

1 the original judgment, the amended judgment does not fall within  
2 this exception to the finality rule for judgments. Therefore,  
3 the amended judgment never restarted the deadline for an appeal  
4 of the original judgment, and did not diminish the preclusive  
5 effect of the original judgment.

6 For these reasons, the original state court judgment was  
7 final for the purposes of issue preclusion, a fact not altered by  
8 Azizolah's later appeal of the order amending the judgment, and  
9 the bankruptcy court did not abuse its discretion in denying the  
10 motion to vacate.

### 11 **III. Motion for Summary Judgment**

#### 12 **A. Availability of Issue Preclusion**

##### 13 **1. Section 523(a) (2) Fraud**

14 Section 523(a) (2) (A) excepts from discharge debts for money,  
15 property, or services "to the extent obtained by false pretenses,  
16 a false representation or actual fraud." 11 U.S.C.

17 § 523(a) (2) (A). The creditor must demonstrate by a preponderance  
18 of the evidence: "(1) the debtor made . . . representations;  
19 (2) that at the time he knew they were false; (3) that he made  
20 them with the intention and purpose of deceiving the creditor;  
21 (4) that the creditor relied on such representations; [and]  
22 (5) that the creditor sustained the alleged loss and damage as  
23 the proximate result of the misrepresentations having been made."  
24 Am. Express v. Hashemi (In re Hashemi), 104 F.3d 1122, 1125 (9th  
25 Cir. 1997).

26 "The elements of fraud under § 523(a) (2) (A) match the  
27 elements of common law fraud and actual fraud under California  
28 law." Lee v. Tcast Commc'n, Inc. (In re Jung Sup Lee), 335 B.R.

1 130, 136 (9th Cir. BAP 2005) (quoting Younie v. Gonya  
2 (In re Younie), 211 B.R. 367, 373-74 (9th Cir. BAP 1997), aff'd  
3 163 F.3d 609 (9th Cir. 1998)). As a result, a proper finding of  
4 fraud by a California state court satisfies the identity-of-issue  
5 requirement under the preclusion doctrine.

6 Azizolah advances four arguments against the finding of  
7 nondischargeable fraud under § 523(a)(2)(A) based on issue  
8 preclusion. First, he argues that the state court judgment did  
9 not render judgment based on fraud. The argument assumes that  
10 the bankruptcy court could not properly consider the state  
11 court's Statement of Decision. This panel disagrees. Resort to  
12 the Statement of Decision is appropriate when applying issue  
13 preclusion. In re Lopez, 367 B.R. at 105; In re Grenier, 2015 WL  
14 3622712, at \*2-3, \*7 (9th Cir. BAP June 10, 2015). Here, the  
15 Statement of Decision specifically found that Azizolah defrauded  
16 his younger sisters. Moreover, though containing a clerical  
17 error, the original judgment fairly considered also found fraud  
18 on Azizolah's part. As a consequence, the bankruptcy court  
19 properly found that the state court judgment did, in fact, make a  
20 finding of fraud.<sup>6</sup>

21 Second, Azizolah argues that the record is insufficient to  
22 support issue preclusion on the element of damages under  
23 § 523(a)(2)(A) because the state court awarded damages only for  
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25 <sup>6</sup> Hindsight strengthens the bankruptcy court's finding.  
26 After the bankruptcy court granted summary judgment, Azizolah  
27 moved to clarify the state court judgment because it contained a  
28 clerical error. Consistent with the bankruptcy court's reading,  
the state court corrected the clerical error and amended the  
judgment to include fraud.

1 conversion and because the judgment did not specify whether it  
2 found entitlement to punitive damages based on malice, oppression  
3 **or** fraud. See, e.g., Plyam v. Precision Dev. LLC (In re Plyam),  
4 530 B.R. 456, 465 (9th Cir. BAP 2015) (under Cal. Civ. Code  
5 § 3294(a), only intentional malice or fraud will support a  
6 finding under § 523(a)(6)). But the record is adequate in this  
7 regard. The state court found that Azizolah acted with “malice,  
8 oppression **and** fraud.” (emphasis added). Therefore, the state  
9 court awarded punitive damages for fraud, and that finding  
10 satisfies the damages elements of § 523(a)(2)(A).

11 Third, Azizolah argues that actual damages are an absolute  
12 predicate to an award of punitive damages. See Kizer v. Cty. of  
13 San Mateo, 53 Cal. 3d 139, 147 (1991); Mother Cobb’s Chicken  
14 Turnovers, Inc. v. Fox, 10 Cal. 2d 203, 206 (1937). And since  
15 the state court did not **expressly** award damages for fraud, an  
16 award of punitive damages based on a finding of fraud was also  
17 not possible.<sup>7</sup>

18 California Civil Code § 3294(a) authorizes punitive damages  
19 “in addition to the actual damages.” Carefully parsed,  
20 California decisional law does not require that there be an  
21 express award of actual damages to support an award of punitive  
22 damages, but rather that the plaintiff has suffered injuries from  
23 a tortious act, even if compensatory damages were not awarded.  
24 Compare Clark v. McClurg, 215 Cal. 279, 282-83, 285 (1932)

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26 <sup>7</sup> One might wonder why punitive damages might not be  
27 sustained under the conversion component of the judgment. The  
28 simple answer is that the state court only awarded punitive  
damages under the fraud portion of the judgment.

1 (upholding \$5,000 award of punitive damages, even though no  
2 general damages were awarded), and Gagnon v. Continental Cas.  
3 Co., 211 Cal. App. 3d 1598, 1603 n.5 (1989) (even though  
4 compensatory damages were not available, the plaintiff was  
5 entitled to a jury instruction that punitive damages bear a  
6 reasonable relationship to the "actual harm or injury," rather  
7 than to "actual damages"), and Wayte v. Rollins Int'l, Inc.,  
8 169 Cal. App. 3d 1, 16 (1985) ("All that is required is proof of  
9 a tort which is of such a nature to warrant imposition of  
10 punitive damages."), with Berkley v. Dowds, 152 Cal. App. 4th 518  
11 (2007) (because compensatory damages were not recoverable,  
12 plaintiff could not pursue punitive damages), and Cheung v.  
13 Daley, 35 Cal. App. 4th 1673 (1995) (punitive damages not  
14 available where jury expressly determined that plaintiffs  
15 entitled to \$0.00 compensatory damages).

16 The case of Topanga Corp. v. Gentile, 249 Cal. App. 2d 681  
17 (1967), is particularly illuminating. In that case, the  
18 plaintiff corporation sought equitable relief in the form of  
19 reformation and cancellation of shares of stock from an allegedly  
20 fraudulent transaction involving defendant stock promoters.  
21 Punitive damages were requested but compensatory damages were not  
22 sought or awarded. The trial court granted equitable relief but  
23 denied punitive damages apparently because compensatory damages  
24 were not sought or awarded. On that ground, the Court of Appeals  
25 remanded the matter for further hearings stating,

26 However, the fact that plaintiffs were not given a  
27 grant of monetary damages of a certain amount is not  
28 determinative. Plaintiff was indeed damaged by  
defendants' fraud for defendants had, as the result of  
the fraud, received stock in an amount not commensurate

1 with the value of their contribution to the  
2 corporation. . . . The requirement of "actual damages"  
3 imposed by section 3294 is simply the requirement that  
a tortious act be proven if punitive damages  
are to be assessed.

4 Id. at 691.

5 Here, there is no question that the state court found  
6 compensable fraud. What the state court did not do was to  
7 articulate its findings artfully or to differentiate compensatory  
8 damages for that fraud from other relief awarded.

9 Fourth, Azizolah argues that the amount of nondischargeable  
10 damages attributable to fraud cannot be ascertained from the  
11 record. To the extent that the bankruptcy court found punitive  
12 damages nondischargeable, this panel disagrees. The bankruptcy  
13 court found that the award of punitive damages of \$350,000 to  
14 each sister was sufficiently tied to fraud and granted summary  
15 judgment as to those damages.

16 An award of punitive damages under California Civil Code  
17 § 3294(a) based on a finding of fraud is nondischargeable under  
18 11 U.S.C. § 523(a)(2). Cohen v. de la Cruz, 523 U.S. 213, 218  
19 (1998) ("The most straightforward reading of § 523(a)(2)(A) is  
20 that it prevents discharge of 'any debt' respecting 'money,  
21 property, services, or . . . credit' that the debtor has  
22 fraudulently obtained, including treble damages, assessed on  
23 account of the fraud."); In re Plyam, 530 B.R. at 465 (only  
24 intentional malice or fraud under Cal. Civ. Code § 3294(a) will  
25 support a finding of nondischargeability under 11 U.S.C.  
26 § 523(a)(6)).

27 Here, the underlying state court judgment awarded punitive  
28 damages based on a finding of "**malice, oppression and fraud.**"

1 (emphasis added). As a result, the bankruptcy court's  
2 application of issue preclusion was not erroneous.

3 **2. Section 523(a) (6) Willful and Malicious Injury**

4 Section 523(a) (6) excepts from discharge debts for "willful  
5 and malicious injury" by the debtor to another. "Willful" means  
6 that the debtor entertained "a subjective motive to inflict the  
7 injury or that the debtor believed that injury was substantially  
8 certain to occur as a result of his conduct." Petralia v.  
9 Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001);  
10 Carrillo v. Su (In re Su), 290 F.3d 1140, 1144 (9th Cir. 2002).  
11 Maliciousness is defined as "(1) a wrongful act, (2) done  
12 intentionally, (3) which necessarily causes injury, and (4) done  
13 without justification or excuse." Jercich, 238 F.3d at 1209;  
14 Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420, 427 (9th  
15 Cir. BAP 2002).

16 Debts incurred by conversion of another's property may be  
17 nondischargeable under § 523(a) (6). Del Bino v. Bailey  
18 (In re Bailey), 197 F.3d 997, 1000 (9th Cir. 1999). The elements  
19 of conversion in California are the creditor's ownership or right  
20 to possession of property at the time of conversion, a wrongful  
21 act or disposition of that property by another, and damages.  
22 In re Thiara, 285 B.R. at 427. Proof of conversion under state  
23 law is a necessary but not sufficient basis to deny discharge  
24 under § 523(a) (6). Id. A creditor must also demonstrate that  
25 the injury was willful and malicious. Id.

26 Azizolah argues that the state court award of conversion  
27 damages to Soraya in the amount of \$113,836 was not supported by  
28 the requisite findings of intent. While the state court did not

1 use the words "willful" or "malicious," the record contains  
2 sufficient findings of intent to support such findings under  
3 § 523(a)(6). The most telling finding as to willfulness was that  
4 Azizolah held the subjective intent to injure:

5 Defendant knew that these funds and items of personal  
6 property were the livelihood of his sisters, and the  
7 fruits of their difficult labor. Despite that, **he**  
8 **waged a systematic campaign of fraud** against his  
9 sisters, in order to deprive them of their hard earned  
10 assets. Defendant never showed any concern or mercy  
11 for the rights of his sisters, but rather **took every**  
12 **possible step to ensure their financial ruin.**

13 (emphases added).

14 Additional findings buttress the conclusion that Azizolah  
15 believed that injury to his sisters was substantially certain to  
16 occur from his actions. First, he used his position of  
17 authority, i.e., his culturally assigned role as head of the  
18 family, to obtain control of his sisters' personal property and  
19 money. He knew that his sisters would not defy him and would  
20 completely believe anything he told them. He engaged in violence  
21 against them.

22 Second, over a period of years he intentionally injured his  
23 sisters by falsely representing that he would invest monies and  
24 hold properties for their behalf, and he would return these  
25 monies and assets when requested. Soraya gave Azizolah antiques,  
26 gold and silver jewelry, as well as large amounts of money, for  
27 investment on her behalf and for safekeeping. The silver weighed  
28 30 to 40 kilograms. The gold jewelry was worth \$50,000 to  
\$60,000. Soraya deposited all of her earnings for 8 years into a  
joint account with Azizolah. He repeatedly told Soraya that he  
would hold and invest these funds on her behalf. But Azizolah

1 never intended to keep his promises and "long planned to claim  
2 ownership" to both his sisters' funds. He exercised "complete  
3 control over his sister's financial affairs." He placed his name  
4 on every bank account holding his sisters' money and retained the  
5 interest paid on those accounts.

6 Third, he took monies that were the sisters' livelihood and  
7 the fruits of their difficult labors, as well as monies earmarked  
8 for them by their parents. For example, when the siblings'  
9 parents died, Azizolah took for himself the inheritance his  
10 parents intended to be jointly divided among the siblings. He  
11 also lied about this fact. He gave some of those funds to a  
12 third party and used some of the funds to pay for his defense of  
13 the sisters' state court action against him. A similar event  
14 occurred when the siblings' father sent Azizolah money for  
15 Soraya's tuition, and Azizolah withheld it from her.

16 Fourth, Azizolah utilized deception to hide his acts and  
17 make collection efforts by the sisters more difficult. For  
18 example, with respect to the conversion causes of action, he  
19 denied indebtedness to the sisters. And when the sisters brought  
20 suit against him, he engaged in fraudulent transfers to hide the  
21 assets and prevent the recovery of the assets.

22 The state court also found the underpinnings of malice.  
23 Conversion committed over a period of years and motivated by the  
24 desire to cause financial ruin easily demonstrates a wrongful act  
25 done intentionally. This wrongful act would necessarily cause  
26 injury. And it did cause injury. The factual grounds for the  
27 award of punitive damages eliminate justification or excuse. As  
28 a result, this panel has no difficulty in finding that Azizolah's

1 actions were wrongful, intentional, injurious and unjustified.

2 Accordingly, the bankruptcy court did not err.

3 **B. Decision to Apply Issue Preclusion**

4 If available, the decision to apply issue preclusion falls  
5 within the broad discretion of the trial court. Parklane Hosiery  
6 Co. v. Shore, 439 U.S. 322, 331 & nn. 14-16 (1979); In re Lopez,  
7 367 B.R. at 107 (applying California law). That decision always  
8 involves "a measure of discretion and flexibility." In re Lopez,  
9 367 B.R. at 107 (citing Restatement (Second) of Judgments,  
10 Title E, Introductory Note (1980)); Restatement (Second) Judgment  
11 § 28 (specifying circumstances where application may not be  
12 appropriate).

13 Azizolah argues that even if issue preclusion was available,  
14 the bankruptcy court should have declined to apply issue  
15 preclusion to this case. Stated more specifically, he might  
16 argue that the bankruptcy court should have declined to apply  
17 issue preclusion for two reasons. First, because the state court  
18 judgment was sufficiently nonspecific as to the basis of its  
19 findings or the amount of damages attributable to  
20 nondischargeable causes of action, Azizolah lacked incentive to  
21 prosecute an appeal in the state court.

22 Lack of "an adequate opportunity or incentive to obtain a  
23 full and fair adjudication in the initial action" is a basis for  
24 the bankruptcy court to refuse application of issue preclusion.  
25 Restatement (Second) of Judgments § 28(5)(c). Refusal to give  
26 preclusive effect to a final judgment requires a "compelling  
27 showing of unfairness," and a showing that the first decision was  
28 "patently erroneous" is insufficient. Id. at cmt. j. Examples

1 of such compelling circumstances include a judgment that was the  
2 product of concealed facts, the disability of a party that has  
3 since been resolved, a jury verdict that was the result of  
4 compromise, or a judgment based on a small amount in controversy  
5 compared to the amount in dispute in the action for which issue  
6 preclusion is sought. Id.

7 Here, Azizolah had sufficient incentive to challenge the  
8 adverse judgment to support application of issue preclusion. The  
9 state court awarded the sisters upwards of \$1.7 million against  
10 him. Measured by any standard, Azizolah had a strong incentive  
11 to raise any and all grounds for overturning or reducing the  
12 judgment against him. The mere fact that the state court  
13 judgment was flawed does not preclude the use of issue  
14 preclusion. Samuels v. CMW Joint Venture (In re Samuels),  
15 273 Fed. App'x 691, 693-94 (9th Cir. 2008); Lucido v. Super. Ct.,  
16 51 Cal. 3d 335, 344-45 (1990). Azizolah's decision not to  
17 prosecute an appeal of the original judgment may have been a  
18 calculated decision to leave the original judgment vague or  
19 flawed so as to prevent application of issue preclusion. In  
20 contrast, an appeal of the original judgment might have resulted  
21 in a remand with instruction to correct the judgment, foreclosing  
22 arguments against issue preclusion.

23 Second, Azizolah might argue that as of the date of the  
24 hearing on the motion to vacate, the appeal of the judgment  
25 amended to correct a clerical error changed the complexion of the  
26 case sufficiently that the court should have declined to apply  
27 issue preclusion.

28 An "intervening change in the applicable legal context" is a

1 basis to refuse to apply issue preclusion. An intervening change  
2 in the relative legal climate may justify the court's actions if  
3 that change would "impose on one of the parties a significant  
4 disadvantage or confer on him a significant benefit, with respect  
5 to his competitors." Restatement (Second) of Judgments § 28  
6 cmt. c.

7 Here, the pendency of Azizolah's post-summary judgment  
8 appeal of an amended judgment correcting a clerical error in the  
9 underlying judgment offers neither the sisters, nor Azizolah,  
10 disadvantage or benefit with respect to the other. Rather, it  
11 leaves their comparative positions in the adversary proceeding  
12 unchanged, and the bankruptcy court did not abuse its discretion  
13 in refusing to find an intervening change in the legal context.

14 For these reasons, we find that the bankruptcy court did not  
15 abuse its discretion in deciding to apply issue preclusion.

16 **CONCLUSION**

17 Finding no error in the bankruptcy court's order denying  
18 Azizolah's motion to vacate or its order granting summary  
19 judgment, we AFFIRM.