UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 1, 2021 at 11:00 a.m.

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1. **20-20726-E-7** **LISA SAHAR** **MOTION FOR SUMMARY JUDGMENT**
20-2123 **USA-1 Mary Ellen Terranella** **5-27-21 [26]**
SAHAR V. U.S. DEPARTMENT OF EDUCATION, FEDLOAN SERVICING

No Tentative Ruling: The Motion For Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 21 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 27, 2021. By the court's calculation, 35 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Summary Judgment is xxxxx.

Lisa Sahar ("Plaintiff" or "Plaintiff-Debtor") filed the instant adversary proceeding on June 24, 2020, against United States Department of Education and Federal Loan Servicing ("Defendant").

Before the court is Defendant's Motion for Summary Judgment requesting a determination that is Defendant's student loan debt is nondischargeable pursuant to 11 U.S.C. §528(a)(8), on the basis that Plaintiff has failed to meet her burden of proof to rebut the presumption that the student loans are not dischargeable and is unable to show undue hardship to discharge the student loans. Dckt. 26.

REVIEW OF THE MOTION

United States Department of Education alleges the following grounds for summary judgment:

A. Defendant argues that Debtor cannot show by preponderance of the evidence that she is entitled to a discharge under the *Brunner* Test.

B To determine if excepting student loans from discharge will create an undue hardship on a debtor, the Ninth Circuit has adopted the three-part test established by the Second Circuit in *Brunner*. *See Pena*, 155 F.3d at 1112; *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1086 (9th Cir. 2001). To obtain a discharge of a student loan obligation, the debtor must prove:

> (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
>
> (3) the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396.

C. Under this test, the burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted. *Nys v. Educ. Credit Mgmt. Corp. (In re Nys)*, 308 B.R. 436, 441–42 (9th Cir. BAP 2004), aff'd, 446 F.3d 938 (9th Cir. 2006). If the debtor fails to prove any one of the three prongs then the debt will not be discharged. *Id.*; *Shells v. U.S. Dept. Education*, 530 B.R. 758 (Bankr. E.D. Cal. 2015).

D. Plaintiff-Debtor cannot prove the first prong of the *Brunner* test, i.e., that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself if forced to repay her student loans. *Rifino*, 245 F.3d at 1088. Debtor must show more than simply tight finances. *Id.* Plaintiff is 49, well-educated with a Doctor of Chiropractics degree, and currently employed as a teacher. Per Family Court order, Debtor must make reasonable efforts to find gainful employment and has been imputed $4,831 in monthly income, plus she received child support of approximately $4,600, which means Debtor has a potential of $9,431 in income to apply against her expenses as stated in Schedule J in the amount of $5,121.

E. Plaintiff-Debtor has no medical conditions that affect her ability to work. Although she claims to have medical issues, Debtor has failed to support these claims with expert medical evidence.

F. Debtor is unable to prove the second prong of the *Brunner* test that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans. *Rifino,* 245 F.3d at 1088. Prior to filing bankruptcy, she participated in an Income Based Repayment plan but refuses to do so now. As a teacher, she may also be eligible for Public Service Loan Forgiveness. Debtor must take advantage of a reasonable opportunity to improve her financial situation; the law does not allow her to choose not to make such an improvement. *Nys*, 446 F.3d at 946; *see Rifino*, 245 F.3d at 1089.

G. Plaintiff-Debtor has a reasonable opportunity to improve her financial condition. She is 49 and has a Doctorate degree and as stated above, she has been imputed and is receiving income as a teacher and through spousal support. Her children are at or nearing the age of majority which will decrease her expenses. Debtor fails to show that her current financial affairs, to the extent that they may be negative, will persist for a significant portion of the repayment period of the student loans.

H. Finally, Plaintiff-Debtor cannot show that she has made good faith efforts to repay the student loans. *Brunner*, 831 F.2d at 396. Debtor borrowed funds from Education in 1995--1999 and stopped paying on them and allowed the debt to balloon. Sahar Depo., 72:1-73:5. She was in a flexible repayment plan prior to filing bankruptcy but failed to re-certify and dropped out of the program. *Id.* at 70:16-71:7. In the Ninth Circuit, good faith requires significantly better efforts to pay than those exhibited by Debtor.

I. Under these circumstances, Plaintiff-Debtor is unable to show undue hardship to discharge her student loans under 11 U.S.C. § 523(a)(8) and there are no triable issues of fact.

Review of the Complaint

Plaintiff seeks a determination that Plaintiff's debts to Defendant are dischargeable pursuant to 11 U.S.C. § 523 (a)(8), where Plaintiff-Debtor and her dependents will suffer undue hardship if the debt is not discharged. Dckt. 1. The grounds upon which these claims are based are as follows:

A. Plaintiff-Debtor filed a voluntary Chapter 7 case on February 9, 2020. The First Meeting of Creditors was concluded on March 18, 2020.

The court notes that the file for Plaintiff-Debtor's Chapter 7 Case, 20-20726, discloses that Plaintiff-Debtor was granted a discharge on July 13, 2020.

B. Plaintiff-Debtor has, as of the filing of the bankruptcy petition, $174,985.11 in student loan debt.

C. Since she began paying on the student loan debt in 2011, the Plaintiff-Debtor has paid $49,527.72 in principal and $22,710.97 in interest on the student loan debt.

D. Plaintiff-Debtor alleges physical injuries, the amount of her income, and the alimony and child support payments she receives.

E. Given Plaintiff-Debtor's age, being a single parent of three children, physical limitations, and her demonstrated efforts to pay the student loan debt obligations, Plaintiff-Debtor asserts that the obligation may properly be discharged as placing an undue burden on her.

Prayer for Relief

A. For an order determining Plaintiff's debts to Defendant as alleged above are discharged under 11 U.S.C. § 523(a)(8);

B. For an award of attorney's fees and costs; and

C. For such other and further relief as the court deems just and proper.

Review of the Answer

The U.S. Department of Education filed its Answer (Dckt. 15), admitting and denying specific allegations in the Complaint. These admissions and denials include that the Defendant is without sufficient information or belief at this time to admit or deny the factual allegations and thereon denies them.

As to the cause of action, Defendant states that student loans are presumed not dischargeable and denies that Plaintiff can satisfy the applicable legal standard.

In the Answer, the Defendant asserts the following Affirmative Defenses:

A. First Affirmative Defense - Failure to State a Claim asserting that the complaint

does not satisfy the pleading requirements of Rule 8 or the plausibility requirements of Rule 12(b).

B. Second Affirmative Defense - Failure to Exhaust Administratively; asserting that there are various non-judicial options available to Plaintiff-Debtor.

C. Third Affirmative Defense - Additional Defense asserting that Education reserves the right to assert additional defenses as their applicability if discovered throughout the case.

In the response to the First Cause of Action, the U.S. Department of Education affirmatively states only that "Education denies that the plaintiff can satisfy the applicable legal standard," but does not deny that the grounds stated do not establish dischargeability, and thereby, the U.S. Department of Education admits that the student loan debt is dischargeable.

REVIEW OF PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on June 7, 2021. Dckt. 32. Plaintiff-Debtor opposes the granting of summary judgment. Plaintiff-Debtor asserts having debilitating physical conditions. Her testimony under penalty of perjury opposing the Motion includes (identified by page and line numbers in the Declaration):

> All of my student loans were taken out between 1996 and 1999 and were used to pay for chiropractic school. I do have a Doctor of Chiropractic degree, although I worked only a short time for a chiropractor. P. 2:13-15.
>
> [Defendant] assumes I could be a chiropractor again and make more money. However, I would have to go back to school to get recertified. More importantly, I could not physically do chiropractic work anymore. P. 2:17-20.
>
> [Plaintiff-Debtor] have had a degenerative vertebrae condition for years, which has caused me chronic pain in my neck and shoulder, radiating down my arm and numbing my fingers. I was diagnosed in 2017. I have seen a neurosurgeon at UC Davis; surgery is not recommended. I have seen a pain management doctor at Dignity Health and do physical therapy on my own for the pain, as I cannot afford the co-pays and deductibles for the physical therapy sessions. P. 2:10-25.
>
> I also have [a condition] which makes it difficult for me to stand more that 3-4 hours per day. P. 2:27, 3:1.
>
> [Plaintiff-Debtor recounts the medication that she has been taking over the past four years for her medical condition.] P.3:1-3.
>
> The physical pain associated with degenerative disease of the C5 and C6 vertebrae would make it impossible for me to do the physical manipulations required of a chiropractor. I am 5 feet tall, 100 pounds and have limited use of my right arm. Chiropractic work is an impossibility for me. P. 3:3-6.

Declaration, Dckt. 33.

The Declaration continues, discussing her former marriage and her ex-husband's insistence that she stop paying on her student loans. She testifies she now has her teaching credential (obtained in 2019), and obtained a full time teaching job in 2020, but that position has been terminated as part of the post-COVID restructuring of classes. She discusses her current financial state and what she believes is her inability to continue forward with this debt as part of her bankruptcy "fresh start."

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc*., 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DENIAL OF DISCHARGE LAW

Section 523(a)(8) is the "hardship" provision, which allows the court to discharge an otherwise nondischargeable student loan if excepting the debt from discharge will impose an undue hardship on the debtor or the debtor's dependents. This exemption from the exception to discharge requires the bankruptcy judge to determine whether payment of the debt will cause undue hardship on the debtor and his dependents, thus defeating the "fresh start" concept of the bankruptcy laws. There may well be circumstances that justify failure to repay a student loan, such as illness or incapacity. When the court finds that such circumstances exist, it may order the debt discharged. 4 Collier on Bankruptcy P 523.14 (16th 2021)

The most widely used test for evaluating the dischargeability of a student loan under section 523(a)(8) states that the debt is dischargeable if three conditions are met:

> •The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living if forced to repay the loans;
>
> •There are indications that the state of affairs is likely to persist for a significant portion of the repayment period; and
>
> •The debtor made good faith efforts to repay the loans.

Brunner v. New York State Higher Education Servs. Corp., 831 F.2d 395 (2d Cir. 1987); *see also In re Pena,* 155 F.3d 1108, 40 C.B.C.2d 848 (9th Cir. 1998).

However, the *Brunner* decision was made, and those principles then adopted by the Ninth Circuit when 11 U.S.C. § 523(a)(8) provided that student loan debt was dischargeable after five years, and sooner if the debtor could show undue hardship. Demonstrating the adage that "bad facts make bad law," the facts relating to the contention of "undue hardship" in *Brunner* are stated in the District Court decision, that was affirmed by the First Circuit Court of Appeals are stated to be:

> Appellee received a Bachelor of Arts degree in 1979 and a Master's degree in Social Work in May, 1982. Approximately seven months after receiving her Master's degree appellee filed for personal bankruptcy, and her outstanding debts, exclusive of approximately $9,000 in student loans, were discharged. Two months later, upon expiration of the nine month grace period suspending repayment of the student loans incurred during her undergraduate and graduate education, appellee filed this adversary action seeking discharge of her accumulated student loans.
> . . .
> The debtor's testimony at the hearing below revealed the following. Appellee gained a Bachelor's degree in Psychology in 1979 and a Master's degree in Social Work in 1982. Her age was not specified, but she first entered college in 1972. She has supported herself since that time through a variety of full- and part-time jobs, student loans, and educational stipends. She has no dependents. During the decade prior to the hearing, her greatest annual income was $9,000.
>
> No specific testimony about appellee's annual expenses was elicited other than that her rent is $200 per month. At the time of the hearing she was receiving $258

> per month in public assistance, $49 per month in food stamps, and Medicaid. She had been receiving this aid for approximately four months prior to the hearing. Her testimony as to her source of support prior to that time was vague. At the time of the hearing, she possessed a bank account holding $200, but two months prior to the hearing she withdrew $2,400 from her savings to purchase a used car. Upon her filing for bankruptcy four months prior to the hearing, her student loans constituted 80% of her total indebtedness.
>
> Appellee testified that she had sent out "over a hundred" resumes in search of employment in her chosen field of work but was unsuccessful. She noted that many of her classmates found themselves similarly unable to find such jobs. The extent to which she had attempted to find work outside her field was unclear. In response to her lawyer's inquiry as to whether she had sought clerical or other jobs, she replied, "I don't have secretarial skills, but I have applied for any position that I could find." She did not recount any specific jobs which she had sought and been refused. On cross-examination she conceded that she had done clerical work in the past. Although appellee was seeing a therapist for treatment of anxiety and depression due in part to her unemployment, she testified that she was capable of working.
>
> In short, appellee at most proved that she is currently -- or was at the time of the hearing -- unable both to meet her minimal expenses and pay off her loans. This alone cannot support a finding that the failure to discharge her loans will impose undue hardship. *See, e.g., In re Briscoe, supra,* 16 B.R. at 131; *In re Henry*, 4 B.R. 495 (Bankr.S.D.N.Y.1980); *Panteli v. New York State Higher Education Services Corp.*, 41 B.R. 856, 858 (Bankr.S.D.N.Y. 1984). Nothing in the record supports a finding that it is likely that her current inability to find any work will extend for a significant part of the repayment period of the loan or that she has "a total incapacity now and in the future to pay [her] debts for reasons not within [her] control." *In re Rappaport*, supra, 16 B.R. at 617. She is skilled, apparently capable, well, and without dependents. Nor has she adequately demonstrated good faith in attempting to pay off her loans. She filed for discharge within a month of the date for the first payment of her loans came due. She has made virtually no attempt to repay, nor has she requested a deferment of payment, a remedy open to those unable to pay because of prolonged unemployment. *See, e.g.,* 34 C.F.R. § 674.34(d)(2) (1984). Inasmuch as this is her primary reason for requesting discharge, initial resort to the less drastic remedy of deferment would have been more appropriate than bankruptcy.

In re Brunner, 46 B.R. 752, 753, 756-757, 757-758 (SD NY 1985).

It is not surprising that under the strict *Brunner* standard, when anybody could discharge a student loan after five years, the District Court, as affirmed by the Appellate Court, concluded that debtor Brunner had not provided evidence of an undue hardship. Debtor Brunner pockets her Masters Degree, is ready to start her professional career, makes no effort to pay any of her $9,000 student loan back, the student loan debt being 80% of her total debt, and slipping into bankruptcy a month before her first student loan payment was due is grossly different from the facts, as presented by Plaintiff-Debtor, in this Adversary Proceeding.

DISCUSSION

Here, it is undisputed that Plaintiff has a degree in Doctor of Chiropractics and that she has been employed as a teacher, and hopes to again as we exit the COVID-19 pandemic. Debtor has testified to it through her Deposition, provided by Movant as Exhibit 1. Dckt. 29. Moreover, it is also undisputed that Debtor receives child support and spousal support totaling approximately $4,600. Evidence shown by the moving party states that the Family Court has imputed income to Debtor in the amount of $4,383 per month. Debtor does qualify this statement from the Family Court, stating that this particular imputation was requested by Debtor's ex-husband when he filed a request to decrease his support payments, and indeed such a warning to obtain gainful employment was issued by the court to both parties and not just the Debtor. Opposition, at 3:8-10. Debtor also explains that the Family Court acknowledges that the imputed income to Debtor was higher than her actual income. *Id*., 3:13-16. Even taking into account that the child support will be reduced as each child comes of age and that Debtor's income as a teacher may not be as high as that imputed by the court, Debtor's spousal support which amounts to $1,475 will remain and Debtor has potential for stable income based on her current employment. The fact remains that Debtor is a certified teacher and has a degree in chiropractics, even if she does not choose to practice in that field.

However, Debtor testifies that her spousal support has already been decreased twice, that Debtor's ex-husband is currently on disability, that in December 2020 he unilaterally halted the payment of spousal support, and that in May 2021 his check for child support bounced. Sahar Declaration, Dckt. 33, 4:5-13; *Id*., 3:11. Thus, Debtor argues there is no certainty of her "potential income" as it relates to spousal and child support. Debtor testifies that her monthly income, which includes her take-home pay as a teacher and her receipt of child support funds, totals $5,737, while her monthly expenses are $5,772. *Id*., 4:14-20. Debtor's current salary is $46,000 per year. Opposition, Dckt. 32, 5:11-12. She also lives at home with the children, over whom she has custody. *Id*. Debtor further testifies that she has not yet obtained a contract for the 2021-22 school year, although she has interviewed for a number of positions. Sahar Declaration, 4:17-18. Thus, Debtor argues there is no certainty of her future employment either. Debtor asserts her rent is $2,085 and that she has Covered California for her health insurance because she cannot afford the deductions for the health insurance offered by her current employer. Opposition, 5:20, 5:24-26.

According to Plaintiff-Debtor's transcript and the Responses to specific Interrogatories, though Debtor does have medical conditions that affect her ability to work, first Debtor fails to provide medical evidence that these conditions prevent her from working, and second, the medical conditions as stated may be addressed with reasonable accommodations. For the contention that there are disputed facts regarding her medical condition, Plaintiff-Debtor points the court to a medical report from Cydney Marie Mahoney, M.D., filed as Exhibit A to the Opposition. Dckt. 34. However, this particular medical report is from 2017 and indicates that she has a "mild degenerative disease C5-6" after reviewing x-ray results. *Id*. Debtor has not provided any recent evidence regarding her condition.

Thus it seems that there are disputed facts regarding Debtor's ability to maintain a "minimal" standard of living under her current situation, and it may be that her current situation will persist for a significant portion of the repayment period. There being genuine dispute over these material facts, the court cannot grant Defendant's Motion for Summary Judgment.

At the hearing, **xxxxxxx**

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by United States Department of Education ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Summary Judgment is
> **XXXXXXXXXX**

2. **18-25001-E-7** **JOSEPH AKINS** **CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION, MOTION FOR JUDGMENT**
18-2187 **RLF-15 Sheila Nelson**
BLACK V. AKINS
4-14-21 [145]

No Tentative Ruling: The Motion For Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 21 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on April 14, 2021. By the court's calculation, 43 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Summary Judgment is xxxxx.

Dominique Black ("Plaintiff ") commenced this Adversary Proceeding on November 13, 2018, by filing a Complaint naming Joseph H. Akins, identified as the Debtor and Defendant ("Debtor"). Dckt. 1. The Complaint alleged that Debtor commenced a voluntary Chapter 7 bankruptcy case on September 12, 2018. The Complaint sought a determination that the obligation owed to Plaintiff by Defendant-Debtor was nondischargeable and that Debtor should be denied a discharge in his Chapter 7 case. [Fn.1.]

FN. 1. A Notice of Death of Defendant-Debtor in this Adversary Proceeding was filed in the related bankruptcy case on June 23, 2020. 18-25001; Notice, Dckt. 47. The Defendant-Debtor died on January 1, 2020. *Id*.; Civil Minutes, Dckt. 79. Joseph H. Akins, Jr., Debtor-Defendant's son was substituted successor representative on October 21, 2020. *Id*.; Order, Dckt. 81. The Order substituting Joseph Akins, Jr. as the representative for the late Defendant Debtor in this Adversary Proceeding was entered on October 5, 2021. Dckt. 140. The court makes reference to "Defendant-Debtor" for pleadings filed by/for the late Joseph H. Akins, Sr., and "Defendant-Debtor Representative" for pleadings filed by/for Joseph Akins, Jr.

On April 4, 2019, the First Amended Complaint ("Amended Complaint") in this Adversary Proceeding names Joseph H. Akins, an individual, as the Defendant. Dckt. 21. Plaintiff's then counsel (who subsequently was authorized to substitute out, with Plaintiff now prosecuting the Adversary Proceeding *in pro se*) served the summons and complaint on Joseph H. Akins, 1319 East Tennessee St., Fairfield, California. Cert. of Serv.; Dckt. 226.

On October 5, 2020, the court entered an order substituting in Joseph H. Akins, Jr. ("Defendant-Debtor Representative"), the son of the Debtor, as the representative for all of Defendant-Debtor's Interest. A Notice of Death stating that the Debtor had passed away on January 1, 2020 was filed with the court. Dckt. 48.

Status of Pleadings

In response to the First Amended Complaint, Debtor filed a Motion to Dismiss. Dckt. 37. The Motion to Dismiss was denied without prejudice (Order, Dckt. 51) due to "procedural and substantive issues" (Civil Minutes, Dckt. 50).

A second Motion to Dismiss was filed on July 19, 2019. Dckt. 54. On September 12, 2019, Defendant-Debtor filed an Answer.

Review of the First Amended Complaint

Plaintiff seeks a determination that Plaintiff's claim(s) are nondischargeable pursuant to 11 U.S.C. §§ 523 (a)(2)(A) for fraud, 523 (a)(4) for embezzlement, 523 (a)(4) for larceny, and 523 (a)(6) for willful and malicious injury. Dckt. 21. The First Amended Complaint states four causes of action over sixty-nine (69) paragraphs.

In reviewing the First Amended Complaint the court is cognizant of the pleading requirements stated by the Supreme Court that the complaint must provide more than labels and conclusions, or a formulaic recitation of a cause of action; it must plead factual allegations sufficient to raise more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Federal Rule of Civil Procedure 8, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell Atlantic*, the pleading standard under Rule 8 does not require "detailed factual allegations," but it does demand more than an unadorned accusation or conclusion of a cause of action. *Bell Atlantic*, 550 U.S. at 555.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8 also requires that allegations be "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

While this is not a motion to dismiss, Defendant-Debtor Representative's Summary Judgment Motion is based on there not being sufficient "evidence" to support the allegations. As discussed below, no answer to the First Amended Complaint has been filed and the various factual allegations are uncontested.

The uncontested factual allegations include the following:

a. "Plaintiff was the owner of a 1977 Classic GMC Motorhome (the 'Vehicle')." First Amd. Complaint, ¶ 8.

b. Defendant-Debtor conspired with several other individuals to deprive Plaintiff of the Vehicle and:

   (1) Kept monies advanced for restoration and customization services; and

   (2) Dismantled the Vehicle and absconded with any remaining parts of value.

   Id.

c. Plaintiff relief on Defendant-Debtor's representation that "they" possessed all the necessary licensing and expertise to complete the restoration and customization project. *Id*.

d. Defendant-Debtor charged Plaintiff for restoration work not performed on the Vehicle and took the remaining parts from the Vehicle for Defendant-Debtor's own benefit. *Id*.

e. Plaintiff purchased the Vehicle in 1999. *Id*., ¶ 9.

f. Plaintiff approached David Tirpak and Anthony Sarganis, who represented that they, along with Defendant-Debtor, were owners and operators of Nor-Cal Classic GMC Motorhome ("NORCAL"). *Id*., ¶ 11.

g. Defendant-Debtor and his "associates" represented that NORCAL was a GMC licensed facility specializing in such restoration. *Id*., ¶ 12.

h. During all relevant times to the First Amended Complaint, neither Defendant-Debtor, his "associates," nor NORCAL possessed such GMC license or certification. *Id*., ¶ 13.

i. Defendant-Debtor and his "associates" in NORCAL represented to Plaintiff that NORCAL could perform all necessary restoration services on the Vehicle. *Id*., ¶ 14.

j. Defendant-Debtor and his "associates" in NORCAL represented that they had a California Bureau of Auto Repair license. *Id*., ¶ 15.

k. In July 1999 Plaintiff, Defendant-Debtor, and NORCAL entered into an oral agreement to conduct an official California inspection of the out of state Vehicle for California licensing prior to commencing the restoration and customization work. *Id*., ¶ 16.

l. Following the inspection, Plaintiff, Defendant-Debtor, and NORCAL entered into an oral agreement to perform restoration and customization of the Vehicle. *Id*., ¶ 17.

m. Between November 2000 and January 2006, Plaintiff, Defendant-Debtor entered into a series of oral amendments to the oral agreement due to changes and delays on the part of NORCAL. *Id*., ¶ 18.

n. Between November 2000 and January 2006, Defendant-Debtor and NORCAL represented to Plaintiff that they would be purchasing various parts and materials for the restoration and customization of the Vehicle. *Id*., ¶ 19.

o. Plaintiff advanced $147,622.75 to Defendant-Debtor and NORCAL based on their invoices for restoration and customization alleged to have been carried out by Defendant-Debtor and NORCAL. *Id*., ¶ 20.

    i. Exhibit 1 to the First Amended Complaint are a series of spread sheets, each titled "Norcal GMC Restoration Audit." Each line item is identified by an Invoice Date.

p. In January 2006 Tirpak, on behalf of NORCAL, admitted to Plaintiff that "They" had created fraudulent invoices for the Vehicle project and they had "embezzled advanced funds" received from Plaintiff. *Id*., ¶ 23.

q. With respect to the Defendant-Debtor, the First Amended Complaint alleges:

    i. In 2002 Tirpak informed Plaintiff that Defendant-Debtor was associated with NORCAL and Defendant-Debtor was primarily responsible for "finish work" on NORCAL restorations. *Id*., ¶ 24.

    ii. Defendant-Debtor was an associate of Tirpak and an owner or associate of NORCAL. *Id*., ¶ 25.

iii. Plaintiff met Defendant-Debtor for the first time in late 2005 or early 2006 at the NORCAL facility. *Id*., ¶ 26.

iv. Defendant-Debtor represented to Plaintiff that Debtor has a Bureau of Automotive Repair license and would perform the specialized body and paint customization as part of the Vehicle project. *Id*., ¶ 27.

v. Defendant-Debtor also represented to Plaintiff that Debtor has a GMAC license and was under contract to GMC through Hilltop Buick. *Id*., ¶ 28.

vi. In or about June 2006, Defendant-Debtor and NORCAL represented to Plaintiff that the project was substantially complete and only wiring and paint work by Defendant-Debtor remained to be done. *Id*., ¶ 29.

vii. Defendant-Debtor and NORCAL demanded Plaintiff provide them with releases from any liability for the work performed or payments advanced before they would release the Vehicle to Plaintiff. *Id*., ¶ 30.

viii. In or about June 2006, Plaintiff was informed, from an unidentified source, that Defendant-Debtor's brother was using the Vehicle for drug manufacturing. *Id*., ¶ 31.

ix. Defendant-Debtor and NORCAL made false representations that they would return the Vehicle to Plaintiff for the purpose of retaining the Vehicle for their own benefit and criminal activity. *Id*., ¶ 32.

x. On or about September 22, 2006, Defendant-Debtor and Tirpak executed an Assignment Agreement whereby Defendant-Debtor assumed Tirpak's interest in the lease of the NORCAL business and facilities. *Id*., ¶ 34.

(1) Attached as Exhibit 2 to the First Amended Complaint is a copy of the alleged Assignment Agreement.

xi. Following execution of the Assignment, Defendant-Debtor took sole possession of the NORCAL facility and the Vehicle. *Id*., ¶ 35.

xii. Plaintiff made multiple demands on Defendant-Debtor and NORCAL to return the Vehicle, but they refused. *Id*., ¶ 37.

xiii. After the lease of the NORCAL property to Defendant-Debtor expired, Plaintiff made arrangements with the owner of the property to obtain possession of the Vehicle. *Id*., ¶ 41.

(1) It is alleged that up Defendant-Debtor learning of the arrangement for Plaintiff to obtain the Vehicle, Defendant-Debtor "dismantled and vandalized the Vehicle and absconded with all remaining parts before abandoning it and the NORCAL facility." *Id*., ¶ 42.

xiv. Plaintiff alleges that Defendant-Debtor abandoned the Vehicle on a public roadway, where it had been rendered completely inoperable and dismantled beyond economic repair. *Id*., ¶ 43.

xv. Plaintiff alleges that Defendant-Debtor vandalized the Vehicle by pouring paint on it, leaving waste in it, and manufacturing narcotics in the Vehicle. *Id*., ¶ 44.

r. In February 2009, Plaintiff commenced litigation in the Marin County Superior Court ("Marin Litigation") against Defendant-Debtor, David Tirpak, NORCAL, Kazuko Tirpak, Anthony Sarganis, and Albert Akins. *Id*., ¶ 45.

s. Judgment was entered in the amount of $323,804.85 in favor of Plaintiff and against Defendant-Debtor and the other defendants in the Marin Litigation, jointly and severally. *Id*., ¶ 46. A copy of the Marin Litigation judgment is not attached to the First Amended Complaint.

t. As of the April 9, 2018 filing of bankruptcy, Plaintiff computes the Marin Litigation judgment balance to be $187,450.97, there to be $6,162.00 interest for the period from April 11, 2018 to August 8, 2018, and that the per diem interest accrual is $51.35. *Id*., ¶ 49.

1st Cause of Action - Nondischargeability of Debt Based on Fraud - 11 U.S.C. § 523(a)(2)(A)

For the First Cause of Action for relief pursuant to 11 U.S.C. § 523(a)(2)(A)Plaintiff alleges that false representations were made by Defendant, directly or through his associates, about being a registered, licensed GMC repair facility to do restoration and customization work as requested by Plaintiff. Defendant, and his associates, falsely represented that they possessed all of the licenses required under California law to do the work on the Vehicle. These false representations occurred over a period running from 1999 through 2006. Defendant and NORCAL misrepresented that they ordered parts and made restoration work when such did not occur.

The misrepresentations were made to induce Plaintiff to make additional payments and advances to Defendant and NORCAL for work not actually done and parts not actually purchased. Defendant and NORCAL misrepresented that work was being done to retain possession of the Vehicle so that Defendant's brother could continue to use it for living accommodations and a drug manufacturing laboratory.

Plaintiff relied upon those misrepresentations, allowing Defendant and NORCAL to retain possession of the Vehicle and made payments of money to Defendant and NORCAL. Plaintiff has been damaged by such misrepresentations and reliance thereon in an amount of not less than $193,612.97.

2nd Cause of Action - Nondischargeability of Debt Based on Embezzlement - 11 U.S.C. § 523(a)(4)

The Second Cause of alleges that Plaintiff, as the owner of the Vehicle, entrusted the vehicle to Defendant, NORCAL, and associates. This was under an oral contract for Defendant and NORCAL to do restoration and customization work on the Vehicle owned by Plaintiff. In 2006, Plaintiff demanded that Defendant return the Vehicle to Plaintiff. Defendant failed to return the Vehicle,

retaining it for Defendant's personal use, including as a residence and drug manufacturing laboratory.

In addition to the unauthorized use, Defendant also removed parts from the Vehicle entrusted to him by Plaintiff. Defendant then took and used those parts for Defendant's own benefit. Plaintiff also paid Defendant and NORCAL for additional parts to be used in the restoration and customization of the Vehicle. When purchased with the monies provided by Plaintiff, the parts were taken by Defendant and NORCAL and used for their own personal benefit. The damages flowing from this alleged conduct are not less than $193,612.97.

3rd Cause of Action - Nondischargeability of Debt Based on Larceny - 11 U.S.C. § 523(a)(4)

In the Third Cause of Action, Plaintiff alleges an alternative theory of liability in the event that Defendant was not an owner of NORCAL and not involved in the business such that he was entrusted with the Vehicle and the parts purchased with monies advanced by Plaintiff. It is alleged that Defendant took possession of the Vehicle when he had no right to so do (it not being entrusted to him for the restoration and customization) and used, without authorization, the vehicle with his brother as alleged above. Further, that Defendant then dismantled the vehicle, took and sold the dismantled parts, and took and sold the parts purchased with the monies advanced by Plaintiff. Defendant's taking of the vehicle, dismantling, taking of parts, and selling of parts were unauthorized and Defendant was not entitled to possession of the vehicle or parts taken. The damages arising from the alleged larceny is $193,612.97.

4th and Second "4th" (misnumber as a second "4th cause of action) Causes of Action - Nondischargeability of Debtor Based on Intentional Injury/Conversion, 11 U.S.C. § 523(a)(6) and Intentional Injury/Damage to Property

For these two Causes of Action asserted under 11 U.S.C. § 523(a)(6) Plaintiff asserts that the Vehicle, while entrusted to Defendant for the restoration and customization work was vandalized by Defendant as alleged above. This included: (1) intentionally spilling paint on the Vehicle, (2) intentionally removing parts from the Vehicle, (3) intentionally and improperly taking possession of parts purchased with monies advanced by Plaintiff for the Vehicle and disposing of those parts for Defendant's own benefit, (4) Defendant improperly took and retained possession of the Vehicle without authorization from Plaintiff, and (5) manufacturing drugs in the Vehicle, which damaged the Vehicle. These were intentional acts with Defendant knew would necessarily cause damage to Plaintiff and Plaintiff's property (the Vehicle). Defendant had no just cause or excuse to cause such damage to Plaintiff and Plaintiff's property. Defendant's knowledge of the wrongfulness of his conduct is manifested by Defendant demanding releases from Plaintiff in advance as a condition of any return of the Vehicle to Plaintiff. The damages caused by Defendant are at least $193,612.97.

Prayer for Relief

A. Defendant's obligations and debts to Plaintiff in an amount not less than $193,612.97 are excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2); 523(a)(4); and 523(a)(6).

B. Plaintiff's costs incurred herein; and

C. For such other relief as the Court deems just and appropriate.

Review of the Answer

On September 12, 2019, Defendant-Debtor filed his Answer. Dckt. 75. In it he admits and denies specific allegations in the First Amended Complaint.

REVIEW OF MOTION FOR SUMMARY JUDGMENT

Defendant-Debtor Representative requests summary judgment as to each cause of action, or partial for that which is not in genuine dispute. Dckt. 145. The Factual Allegations stated in the Motion for Summary Judgment are (identified by paragraph number used in the Motion, pp 2-3):

1. Plaintiff alleges to have purchased the Vehicle and made an agreement with Tirpak and Sarganis, and their business known as NORCAL in 1999 to customize the Vehicle. Plaintiff alleges that the Defendant-Debtor was an associate of Tirpak, Sarganis, and NORCAL.

   Defendant then alleges that no "admissible evidence" to support that allegation has been produced. The court notes that as of the filing of the Motion, the allegations in the First Amended Complaint had not been denied by Defendant-Debtor Representative. [Fn.2.]

FN. 2. As discussed in 2 Moore's Federal Practice - Civil § 8.07[1]:

> [1] Averments to Which Responsive Pleading Required Deemed Admitted If Not Denied
>
> Failure to deny an averment in a pleading to which a responsive pleading is required, other than as to the amount of damages, is deemed an admission. Responsive pleadings are required to the complaint, a counterclaim denominated as such, an answer containing a crossclaim, and a third-party complaint. The court may order a reply to an answer or a third-party answer (see Ch. 7, Pleadings Allowed; Form of Motions and Other Papers).

The court addresses this in the discussion below.

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2. Plaintiff alleges that Defendant-Debtor was an associate of Tirpak, Sarganis, and NORCAL, but has not presented admissible evidence of such.

   Further, that Plaintiff has alleged meeting Defendant-Debtor in 2002, that Defendant-Debtor was an associate of Tirpak, Sarganis, and NORCAL, and that Defendant-Debtor took over the NORCAL business in 2006.

3. It is asserted that the allegations in a State Court First Amended Complaint "identified only representations by Tirpak to Plaintiff," all of which preceded any meeting between Plaintiff and Defendant-Debtor.

4. Further, the State Court First Amended Complaint asserted claims against Defendant-Debtor as they relate to wrongfully asserted storage lien and a claim of vandalism.

5. Both the State Court First Amended Complaint and the Federal Court First Amended Complaint now before this court contain assertions for which there is no admissible evidence.

6. Defendant-Debtor sublet the 541 Irwin property in or about August 2005 through August 31, 2006.

7. Plaintiff alleges that the customization proceeded from about 1999 on the Vehicle, which he claims as his property, but ownership of the Vehicle is unclear.

8. No evidence has been presented that Defendant-Debtor was an associate of Tirpak, Sarganis, and NORCAL, or as to the vandalism to the Vehicle.

9. Plaintiff pursued insurance claims relating to the Vehicle, was sued by his insurance carrier, and some litigation may still be pending.

Recitation of Facts in Motion

Defendant-Debtor Representative then lists Facts and Judicially Noticed information in the Motion, identified by the paragraph number used in the Motion, as follows:

10. The Default Judgment obtained by Plaintiff against Defendant-Debtor on February 19, 2010 was for contract damages only. Reference is made to the "RJN Marin Docket highlighted."

11. The court in the Marin Litigation did not enter an award for attorney's fees or punitive damages.

12. Defendant-Debtor Representative computes the balance on the Marin Litigation judgment to be $9,637.46 using the "San Diego Judgment Calculator."

19. The Marin Litigation judgment was obtained only for a breach of contract claim and not other claims asserted.

20. Defendant-Debtor Representative cites the court to California Code of Civil Procedure § 425.115, asserting that it "requires a statement of reservation of damages to be served by the same process as that required for service of a summons to support entry of a default judgement for torn claims. . . ."[1]

[1] A review of California Code of Civil Procedure § 425.115 discloses that it relates to a situation where a plaintiff obtaining a default judgment wants to preserve a right to punitive

21. The Marin Litigation judgment is not one for fraud, which is what Plaintiff sought in the Marin Litigation complaint.

27. The Marin Litigation judgment, being limited to the breach of contract claim relief is preclusive and bars Plaintiff from seeking to relitigate tort claims in this Adversary Proceeding.

30. Alternatively, judgment should be granted Defendant-Debtor Representative because it is asserted that Plaintiff can offer no evidence to support the allegations in the First Amended Complaint (which allegations Defendant-Debtor Representative has not disputed).

34. With respect to a claim for embezzlement, California State Law (statute not identified in the Motion) requires that a civil action must be brought within three years of the alleged embezzlement.

48. With respect to a claim for larceny, it is asserted that the California Statute of Limitations is three years (statute not identified in the Motion) and the federal common law has a five year statue of limitations.

Review of Evidence in Support of Motion for Summary Judgment

Testimony is first provided by Sheila Gropper Nelson, counsel for Defendant-Debtor Representative and Defendant Dckt. 149. She states that the testimony given is either that based on her personal knowledge (as is required by Federal Rules of Evidence 601, 602) or based only on information and belief and counsel believes it to be true, the latter not being permitted personal knowledge testimony under the Federal Rules of Evidence.

Counsel first testifies that she is attaching an Index of Exhibits that are filed in support of the Motion. Declaration, ¶ 3; Dckt. 149. Counsel then authenticates exhibits:

Exhibit A - Counsel states that it includes the complaints filed in this Adversary Proceeding

A-1 is the Complaint filed by Plaintiff in *Pro Se* on November 13, 2018.

A-2 is the First Amended Complaint filed on April 3, 2019 that is now before the court.

A-3 is a document titled First Amended Complaint dated February 5, 2019 that is signed by Plaintiff in *Pro Se* but was never filed with the Court.

Exhibit B - Counsel states are documents relating to the Marin Litigation. Counsel does not state what personal knowledge basis she has to authenticate these documents. See Fed. R. Evid. 901 et seq.

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damages (Cal. Civ. 3294) a notice must be given to the defendant that punitive damages are sought, not merely that a tort claim is the subject of the potential default judgment. It does not appear that

B-1 Marin Litigation first amended complaint filed February 2, 2009.

B-2 Marin Litigation Court Docket indicating that the Marin Litigation was Disposed in Entirety February 19, 2010.

B-3 First page of the original complaint filed by Plaintiff in the Marin Litigation.

B-4 The Entry of Judgment in the Marin Litigation.

Counsel then testifies that Plaintiff claimed in the Marin Litigation a personal claim for damages, which is the same as in this Adversary Proceeding. Declaration ¶ 5.

Counsel then states that she is only informed and believes, but will state under penalty of perjury, for which she does not have personal knowledge (Fed. R. Evid. 601, 602) that the State Court did not scrutinize Plaintiff's state court pleadings, the damages were also not scrutinized.

Exhibit C - Interrogatories propounded by Defendant-Debtor Representative and Responses thereto by Plaintiff

Exhibit D - Documents produced by Plaintiff in response to a production request for identification of the accounts from which monies were transferred that were the source of the damages for what is not a final judgment in the Marin Litigation.

Exhibit E - A declaration of James Turano in the Marin Litigation. Counsel again states that she is information and believes, but has no personal knowledge, that these relate to representations made by Plaintiff in prosecuting an insurance claim.

Exhibit F - A screen shot of the San Diego Superior Court Judgment Calculator through August 9, 2018, the date Defendant-Debtor commenced his bankruptcy case. This picture is to show what the Calculator calculated the judgment to be based on information placed in it by an unidentified person.

Exhibit G - Counsel identifies that as a July 31, 2007 letter to Defendant-Debtor from Plaintiff in which Counsel states that she reads (hears) it to say that Plaintiff has no contract with Defendant-Debtor.

Exhibit H - Counsel states this to be the Lease Assignment.

Exhibit I - Counsel states that this is a declaration of Plaintiff seeking to continue the trial in the "FFIC litigation." Counsel states that she is informed and believes, but has no personal knowledge, that this was because Plaintiff's counsel was seeking to withdraw from that "FFIC litigation."

Exhibit J - Counsel states that these are communications to or about Plaintiff concerning the Vehicle.

Exhibit K - Counsel states that this is a transfer document from 1999 stating that it is from the seller to "D. Black for IIT Pro."

Exhibit L - Counsel identifies this as the 3rd Amended Notice of Deposition. She states that the deposition of Plaintiff was interrupted multiple times by Plaintiff.

Exhibit M - Counsel identifies these as documents produced by Defendant-Debtor Representative in response to Plaintiff's production demand.

Exhibit N - Counsel identifies these as excerpts from a deposition in the Marin Litigation. She is informed and believes, and states her conclusion based on such information and belief, that Plaintiff is barred from pursing any claims against Defendant-Debtor.

Exhibit O - Counsel identifies this as a transfer document from 1999 for the Vehicle, which Plaintiff signed on behalf of IIT Pros.

OPPOSITION

Plaintiff has filed his Opposition, asserting that Issue Preclusion applies in Plaintiff's favor, or does not apply at all. Plaintiff files his Declaration attesting to various facts, including the granting of the Marin Litigation Judgment for his fraud and embezzlement claims. Declaration, Dckt. 168. He also provides testimony as to the alleged underlying facts upon which he asserts his claims for fraud and embezzlement - to the extent that they have not already been adjudicated in the Marin Litigation.

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing

Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

Issue Preclusion and State Court Judgment

The bankruptcy court may give preclusive effect to a state court judgment as the basis for excepting a debt from discharge. *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir. 2001). The court applies the forum state's law of issue preclusion. *Id.* Here, as was the case in *Harmon*, California is the relevant state law, and under California law issue preclusion is only appropriate when five threshold factors are met: (1) the judgment is final; (2) the issue(s) are identical; (3) the proceeding was actually litigated; (4) the issue was necessarily decided in the former proceeding; and (5) the parties are the same or were in privity. *Id.,* at 1245; *see also In re Riley*, 2016 WL 3351397, at *4 (B.A.P. 9th Cir. June 8, 2016) (*citing DNK Holdings, LLC v. Faerber,* 61 Cal.4th 813, 825 (2015)).

Moreover, the court is not required to apply issue preclusion even if the five threshold factors are met because the court is also charged with determining whether issue preclusion "furthers the public policies underlying the doctrine." *In re Harmon*, 250 F.3d at 1245 (citing *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342–42 (1990)). In short, the decision to apply issue preclusion is discretionary.

The party asserting issue preclusion "carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007).

Claim Preclusion to a State Court Judgement

Because in the pleadings before the court the terms claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) are used, the court separately addresses given that they are substantially different doctrines.

The doctrine of *res judicata* claim preclusion prevents the subsequent filing of an action if it has been tried before a competent court. When determining dischargeability under § 523(a), res judicata claim preclusion is "besides the point" because "claim preclusion d[oes] not prevent the Bankruptcy Court from looking beyond the record of the state-court proceeding and the documents that terminated that proceeding in order to decide whether the debt at issue was a debt for money obtained by fraud. *Archer v. Warner*, 538 U.S. 314, 320, 123 S. Ct. 1462, 1466 (2003) (citing *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205). In *Brown v. Felsen*, the court found that res judicata is not applicable in

nondischargeability actions because:

> (1) Refusing to apply res judicata here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion;
>
> (2) These questions are now, for the first time, squarely in issue;
>
> (3) They are the type of question Congress intended that the bankruptcy court would resolve.

In making its determination, the "court can weigh all the evidence, and it can also take into account whether or not petitioner's failure to press these allegations at an earlier time betrays a weakness in his case on the merits." *Id*., at 2212.

Moreover, Courts have found that the language of 11 U.S.C. § 523(a) reflects an intent by Congress to "allow the relevant determinations (whether a debt arises out of fraud) to take place in bankruptcy court, not to force it to occur earlier in state court at a time when nondischargeability concerns are 'not directly in issue and neither party has the full incentive to litigate them.'" *Archer v. Warner*, 538 U.S. 314, 321, 123 S. Ct. 1462, 1467 (2003).

Here, Defendant-Debtor asserts Plaintiff is barred from raising fraud, embezzlement, larceny, willful and malicious injury, or any other claim when seeking a determination of nondischargeability under § 523(a) because:

> (1) The state court judgement does not include a specific finding of fraud although fraud was a cause of action in the suit; and
>
> (2) The Plaintiff did not allege embezzlement, larceny, or willful and malicious injury in his state court cause of action.

Defendant-Debtor's assertion that Plaintiff is barred from raising the above issues in a § 523(a) determination is mistaken and incorrect. First, Defendant-Debtor's assertion that the default judgement is in the amount of the contract claim, that a 10% interest rate on the judgement is what the state court typically assigns to contract judgments, and that there is no specific finding of fraud on the default judgement suggest the judgement arises solely out of a contract claim is misguided. As articulated in *Archer*, even if the judgement is based solely on a contract cause of action, the fact that dischargeability was not at issue at the state level allows this court to review the matter of fraud when determining dischargeability under § 523(a). Thus, Plaintiff is not barred from raising fraud as a reason for nondischargeability under § 523(a)(2).

Next, Defendant-Debtor's assertion that Plaintiff is barred from raising embezzlement, larceny, and willful and malicious injury because they did not raise these causes of action at the state court level is also misguided. Defendant-Debtor asserts Plaintiff was required to raise these claims as part of his state cause of action, and that claim preclusion applies to them now. Moreover, Defendant-Debtor asserts that the state law statute of limitation under California Penal Code § 801 and California Code of Civil Procedure § 338(d) have long since elapsed and thus prevent these causes of action from being heard.

Unfortunately, Defendant-Debtor is mistaken in the belief this court is making a determination as to Defendant-Debtor's tort liability. What is before this court is whether or not Defendant-Debtor's debt is nondischargeable under § 523(a) of the Bankruptcy Code. Thus, the state law statute of limitations is not applicable in this instance. As articulated in *Archer,* this court can review these claims because this is the first time dischargeability is at issue. This allows the Bankruptcy Court to look beyond the record of the state-court proceeding to determine an action under § 523(a). Thus, the fact that Plaintiff's claims for larceny, embezzlement, or willful and malicious injury were not raised in the state level cause of action, does not mean they are barred from being raised in the present § 523(a) determination of nondischargeability.

Collateral Estoppel Issue Preclusion

For the related doctrine of collateral estoppel it is well established in the Ninth Circuit Court of Appeals that the doctrine of issue preclusion arising under California law prevents a party from attempting to litigate issues which were determined or must have necessarily determined in a prior proceeding applies in federal court. This specifically applies to factual issues which go to a determination if non-dischargeable grounds exist under 11 U.S.C. §523. *See Khaligh v. Hadaegh (In re Khaligh)* 338 B.R. 817, 824 (B.A.P. 9th Cir. 2006), explaining the application of collateral estoppel issue preclusion in federal courts applying California law:

> The narrow question is whether issues that were actually litigated and necessarily decided in the course of obtaining an arbitration award that was confirmed as a judgment by a California court are eligible for issue preclusive effect under California law.
>
> If so, then issue preclusion may be applied in subsequent bankruptcy nondischargeability litigation. *Grogan v. Garner*, 498 U.S. 279, 284-85 n.11, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).
>
> If a state court would give preclusive effect to a judgment rendered by courts of that state, then the Full Faith and Credit Statute (28 U.S.C. § 1738) imports the same consequence to an action in federal court based on the same award. *McDonald v. City of W. Branch*, 466 U.S. 284, 287, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984); *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001).
> . . .
>
> The basic features of California issue preclusion law were restated by the California Supreme Court in *Lucido v. Superior Ct.*, 51 Cal. 3d 335, 341-43, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225-27 (1990), and then qualified with respect to arbitration awards in *Vandenberg v. Superior Ct.*, 21 Cal. 4th 815, 824, 88 Cal. Rptr. 2d 366, 982 P.2d 229, 234 (1999).
>
> Six basic elements must be satisfied before issue preclusion will be applied. Five of the elements are described as "threshold" requirements: (1) identical issue; (2) actually litigated in the former proceeding; (3) necessarily decided in the

> former proceeding; (4) former decision final and on the merits; and (5) party against whom preclusion sought either the same, or in privity with, party in former proceeding.
>
> The sixth element is a mandatory "additional" inquiry into whether imposition of issue preclusion in the particular setting would be fair and consistent with sound public policy. Lucido, 51 Cal. 3d at 341-43, 795 P.2d at 1225-27; [3] 1 ANN TAYLOR SCHWING, CAL. AFFIRMATIVE DEFENSES § 15:4 (2005 ed.) ("SCHWING").

For this Adversary Proceeding, the court unfortunately has not been provided with what issues were actually litigated or necessarily determined in the Marin Action.

The court now proceeds to whether there is a dispute of material facts regarding the claims Plaintiff has made.

Nondischargeability Under 11 U.S.C. § 523(a)(2)(A): Fraud

11 U.S.C. § 523(a)(2)(A) provides that debts "arising out of fraud" are excepted from discharge. In order to exempt the debts from discharge, creditor must establish the elements of fraud by a preponderance of the evidence. *See In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). To establish "traditional fraud" Plaintiff must establish that:

> (1) the debtor made ... representations;
>
> (2) that at the time he knew were false;
>
> (3) that he made them with the intention and purpose of deceiving the creditor;
>
> (4) that the creditor relied on such representations; and
>
> (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentation having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010) (quoting *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996). Plaintiff's default judgement does not specifically contain findings or conclusions as to whether Defendant-Debtor committed fraud, so Plaintiff bears the burden of proving each element listed above by a preponderance of the evidence.

Here, Plaintiff asserts that the Defendant-Debtor's debt is non-dischargeable on the grounds of fraud, pursuant to 11 U.S.C. § 523(a)(2)(A). Amended Complaint, Dckt. 21. Plaintiff alleges that Defendant-Debtor made fraudulent representations to Plaintiff regarding the status of the customization project in order to obtain additional payments from him. *Id*. Contrary to Defendant-Debtor's argument, Plaintiff's complaint alleges sufficient facts to satisfy each element of fraud. Therefore, a genuine dispute of material fact exists and Defendant-Debtor's Motion for Summary Judgment should be denied.

Defendant-Debtor Made Representations

Plaintiff asserts Defendant-Debtor was a partner or joint venturer in NORCAL. Plaintiff testifies that in this role Defendant-Debtor represented that he and NORCAL held a GMC repair license. Black Declaration, Dckt. 168. Defendant-Debtor also made several representations regarding the status of the vehicle restoration, parts used in restoration, and project completion time. Exhibits 1 and 2, Dckt. 165 and 166. In contrast, Defendant-Debtor disputes the material facts and asserts there is no evidence that Defendant-Debtor has any business relationship with NORCAL and that Debtor made no representations to Plaintiff. Successor Declaration; Exhibit G, Dckt. 156. Thus, a material dispute exists as to whether Defendant-Debtor made representations to Plaintiff.

Defendant-Debtor Knew Representations Were False

Plaintiff asserts Defendant-Debtor and NORCAL never possessed a GMC repair license as they represented to Plaintiff. Plaintiff further testifies that NORCAL made representations about the ordering of vehicle parts and work performed on the vehicle, going so far as to fabricate false invoices. Black Declaration, Dckt. 168. The fact that Defendant-Debtor never had a GMC repair license would imply Defendant-Debtor knew the representation of being a licensed body shop was false at the time the representation was made. In addition, Plaintiff testifies that Defendant-Debtor admitted to having falsified invoices, which would establish his awareness that work had not been done on the vehicle. Black Declaration, Dckt. 168. Thus, Plaintiff can likely establish this element of fraud.

With Purpose of Deceiving Creditor

Plaintiff asserts that the false invoices and representations of progress on the modifications to the vehicle were made with the intention of deceiving Plaintiff into providing further funds to NORCAL. Black Declaration, Dckt. 168; Exhibits 1 and 2, Dckt. 165 and 166. The creditor disputes this claim by asserting Defendant-Debtor was not involved with NORCAL until 2006 years after representations were made to Plaintiff. The parties have a genuine dispute as to whether Defendant-Debtor was a partner in NORCAL and thus liable for the alleged fraudulent representations made to Plaintiff.

Creditor Relied on Such Representations

Plaintiff asserts that the vehicle was entrusted to NORCAL because he believed that they were a licensed GMC body shop capable of making of the modifications Plaintiff contracted for. Black Declaration, Dckt. 168. Moreover, Plaintiff states in his declaration that he relied on the false invoices, false part ordering, and false progress reports in providing further funds to NORCAL. *Id*. Defendant-Debtor's only defense to Plaintiff's contention here is that he himself was not a part of NORCAL at the time, and thus there was no nexus to connect him to the representations in question. If Plaintiff establishes that Defendant-Debtor was indeed a partner at NORCAL, it is possible for Defendant-Debtor to establish this element of fraud.

Creditor Sustained Loss and Damage as a Result

Here, the loss in question was the loss of the vehicle and payments made by Plaintiff to Defendant-Debtor under the contract. Plaintiff would not have given possession of the vehicle to NORCAL but for the misrepresentation that they were a licensed GMC repair shop. Moreover, the continued payments to NORCAL were made based on the misrepresentation that progress on the

modifications were being made. Exhibit 3, Dckt. 167; Black Declaration, ¶ 9. Defendant-Debtor contends that outreach attempts were made to Plaintiff in order to get Plaintiff to remove the vehicle from Defendant-Debtor's possession. Plaintiff contends such offers were contingent on Plaintiff releasing Defendant-Debtor from all liability associated with the vehicle. Black Declaration, Dckt. 168. Thus, it is possible for Defendant-Debtor to establish this element of fraud.

There are material issues of fact as to whether fraud underlies the default judgement against Defendant-Debtor. Plaintiff alleged sufficient facts from which a determination of fraud could be made. Thus, Defendant-Debtor's motion for summary judgement with regards to nondischargeability under 11 U.S.C. § 523(a)(2)(A) is denied.

Nondischargeability Under 11 U.S.C. § 523(a)(4): Embezzlement

The Ninth Circuit Court of Appeals laid out the elements for nondischargeability based on embezzlement in *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551 (9th Cir. 1991).

> Under federal law, embezzlement in the context of nondischargeability has often been defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Moore v. United States*, 160 U.S. 268, 269, 40 L. Ed. 422, 16 S. Ct. 294 (1885). Embezzlement, thus, requires three elements: "(1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." *In re Hoffman,* 70 Bankr. 155, 162 (Bankr. W.D. Ark. 1986); *In re Schultz*, 46 Bankr. 880, 889 (Bankr. D. Nev. 1985).

Littleton v. Transamerica Com. Fin, 942 F.2d at 555.

As discussed in COLLIER ON BANKRUPTCY, a nondischargeable larceny is the wrongful taking of the property of another with the intent to convert the property to the taker's use without the consent of the owner of the property. 4 COLLIER ON BANKRUPTCY (SIXTEENTH EDITION) P 523.10[2]. The main difference between a larceny and an embezzlement is that the initial taking is wrongful for the larceny, while with the embezzlement the taker does not improperly obtain possession, but the wrongful act subsequently occurs. *Id.* As stated by the Ninth Circuit Court of Appeals in *Ormsby v. First America Title Company (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010), a court is not bound by state law on what constitutes larceny, but *may* follow state law.

> Section 523(a)(4) prevents discharge "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). "For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a 'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.' " 4 Collier on Bankruptcy P 523.10[2] (15th ed. rev. 2008).

Here, Plaintiff asserts that the Defendant-Debtor's debt are nondischargeable on the grounds of embezzlement. Amended Complaint, Dckt. 21. Contrary to Defendant-Debtor's argument, Plaintiff's complaint satisfactorily alleges each element of embezzlement and therefore, properly pleads

embezzlement as a grounds for nondischargeability. Thus, a genuine dispute of material fact exists and Defendant-Debtor's Motion for Summary Judgment should be denied.

Plaintiff's Property Was Rightfully in the Possession of a Nonowner

Here, Plaintiff asserts that he entrusted the vehicle in question to Defendant-Debtor for certain repairs and modifications stated in an oral contract. Amended Complaint, Dckt. 21. Plaintiff testifies that he relied on NORCAL's representations that it was a licensed facility when he made the 1999 decision to allow NORCAL to repair and restore his vehicle. Black Declaration, ¶ 13. In 2002, Tirpak informed Plaintiff that Defendant-Debtor was a partner associated with NORCAL, which Plaintiff understood to mean Defendant-Debtor had an ownership interest in NORCAL or some form of profit sharing with Tirpak and Sarganis. *Id.*, at ¶ 21. Plaintiff has properly alleged that Defendant-Debtor had rightful possession of the vehicle.

Nonowner's Appropriation of the Property to a Use Other Than Which It Was Entrusted

Despite Plaintiff's requests, Defendant-Debtor refused to release his vehicle back to him. Black Declaration, ¶ 26. Instead, Defendant-Debtor and Tirpak asserted they would release the vehicle only if Plaintiff signed a document waiving any claims against them for the missing funds and incomplete work. *Id.*, ¶ 168. Plaintiff refused to sign the waiver. *Id.*

Furthermore, Defendant-Debtor put the property to a use other than which it was entrusted when they used it to store personal effects and act as a temporary residence and a drug manufacturing laboratory. Amended Complaint, ¶ 70; Black Declaration, ¶ 47. Moreover, Plaintiff asserts that Tirpak admitted that NORCAL was selling the vehicle's parts to other customers. Black Declaration, ¶ 24.

In January 2006, Plaintiff asserts that Tirpak, on behalf of NORCAL, admitted to creating fraudulent invoices for the repair work on the vehicle and embezzled advanced funds received from Plaintiff. *Id*., ¶ 23. Plaintiff continues to bolster this element of embezzlement by stating that they were notified in 2007 that the vehicle had been removed from the NORCAL facility and found in "an abysmal state." *Id*., ¶ 35-37.

Circumstances Indicating Fraud

Plaintiff establishes circumstances indicating fraud in the first cause of action above. Moreover, Plaintiff states he is able to prove he made discoveries of fraud during the initial discovery period. Black Declaration, ¶ 53.

By alleging facts under each element of embezzlement, Plaintiff sufficiently alleges a cause of action for nondischargeability pursuant to 11 U.S.C. § 523(a)(4).

Plaintiff does provide evidence to substantiate their claims of embezzlement in their declaration and by providing a copy of the invoices for what Plaintiff alleges was non-existent work on his vehicle in Exhibit 1. Therefore, a genuine dispute of material fact exists as to whether the Defendant-Debtor was authorized to receive and retain the vehicle, parts, and funds from Plaintiff, or whether the takings were wrongful; what funds Defendant-Debtor received from Plaintiff; damages caused to Plaintiff by Defendant-Debtor's failure to return the vehicle and wrongful attempt to seize

title; and what parts and other items paid for by Plaintiff were removed from the vehicle or the NORCAL facility and used for Defendant-Debtor's personal benefit. Dckt. 162.

A genuine dispute of material fact regarding an element of embezzlement, specifically as to circumstances involving fraud exists. Thus, Defendant-Debtor's motion for summary judgement with regards to nondischargeability under 11 U.S.C. § 523(a)(4) as to embezzlement is denied.

Nondischargeability Under 11 U.S.C. § 523(a)(4): Larceny

As discussed in COLLIER ON BANKRUPTCY, a nondischargeable larceny is the wrongful taking of the property of another with the intent to convert the property to the taker's use without the consent of the owner of the property. 4 COLLIER ON BANKRUPTCY (SIXTEENTH EDITION) P 523.10[2]. As stated by the Ninth Circuit Court of Appeals in *Ormsby*, a court is not bound by state law on what constitutes larceny, but *may* follow state law. *Ormsby v. First America Title Company (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010). The Ninth Circuit then stated that it was not determining that there is a "fraudulent intent" requirement for a larceny to be nondischargeable, which is what the debtor in that case was arguing. The Ninth Circuit concluded:

> We make no determination concerning whether federal law requires a finding of fraudulent intent for larceny as Ormsby contends. Were we to find that larceny required fraudulent intent, the state court judgment would provide enough information to determine that the court found that his actions amounted to fraud, because "[i]ntent may properly be inferred from the totality of the circumstances and the conduct of the person accused." *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 904 (7th Cir. 1991). The totality of the circumstances as described in the state court's findings of fact make clear that Ormsby acted with fraudulent intent. . . .

The elements of theft (larceny) are stated in the RUTTER GROUP-CALIFORNIA CRIMINAL LAW treatise as follows:

> § 8:2. Larceny—Essential elements of larceny
>
> There are four essential elements of the crime of larceny:
>
> 1. A taking;
>
> 2. Of the personal property of another;
>
> 3. Asportation of the property taken; and
>
> 4. The taking was done, without claim of right, to deprive the owner of his or her property permanently.

In the alternative, if Defendant-Debtor was not a partner or joint venturer with Tirpak in NORCAL, then the claim of larceny applies. In his Declaration, Plaintiff asserts that in 2002, Tirpak informed him that Defendant-Debtor was a partner associated with NORCAL. Black Declaration, ¶ 21. Under this cause of action, Plaintiff then alleges that Defendant-Debtor was a friend of Tirpak and not actually an owner of Tirpak's business, nor a party to the contract Tirpak and Plaintiff had. Amended

Complaint, Dckt. 21. Therefore, Plaintiff argues, Defendant-Debtor came into possession of the vehicle without the permission or consent of Plaintiff. This satisfies elements 1, 2, and 4 of larceny.

Furthermore, Plaintiff alleges that Defendant-Debtor, while in wrongful possession of the vehicle, dismantled and removed parts and materials for the purposes of Defendant-Debtor's own personal benefit. Amended Complaint, ¶ 85; Black Declaration, ¶ ¶ 33-36.

Therefore, a genuine dispute of facts exists as to Defendant-Debtor's actual role or association with NORCAL and whether Defendant-Debtor came into possession of the vehicle rightfully or wrongfully. There are material issues of fact as to whether Defendant-Debtor's debt was for embezzlement or larceny. Plaintiff alleged sufficient facts from which a determination of either cause of action could be made. Thus, Defendant-Debtor's motion for summary judgement with regards to nondischargeability under 11 U.S.C. § 523(a)(4) as to larceny is denied.

Nondischargeability under 11 U.S.C. § 523(a)(6): Willful and Malicious Injury

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby*, 591 F.3d at 1206. The willful injury standard in this Circuit is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury "involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted).

For a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the "ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Here, Plaintiff asserts that the Defendant-Debtor's debt is nondischargeable on the grounds of willful and malicious injury, pursuant to 11 U.S.C. § 523(a)(6). Amended Complaint, Dckt. 21. Plaintiff alleges that Defendant-Debtor caused intentional damage to Plaintiff and his property both through a conversion of the property and by vandalizing it. *Id*. Contrary to Defendant-Debtor's argument, Plaintiff's complaint alleges sufficient facts to satisfy each element of willful and malicious injury. Therefore, a genuine dispute of material fact exists and Defendant-Debtor's Motion for Summary Judgment should be denied.

Conversion

The conversion of another's property without the owner's knowledge or consent, done intentionally and without justification and excuse, is a willful and malicious injury within the meaning of the exception. *In re Lampi*, 152 B.R. 543 (C.D. Ill. 1993); *Security Bank of Nevada v. Singleton*, 10 C.B.C.2d 429, 37 B.R. 787 (Bankr. D. Nev. 1984); *Bombadier Corp. v. Penning (In re Penning)*, 22 B.R. 616 (Bankr. E.D. Mich. 1982).

In *Lockerby*, the Ninth Circuit Court of Appeals stated that the court looks to applicable state law in defining what is a "conversion." *Lockerby v. Sierra*, 535 F.3d 1038, 1041-1042 (9th Cir. 2008). Under California law, the basic elements of the tort of conversion are (a) plaintiff's ownership or right to

possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages. *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 C.A.4th 97, 119, 55 C.R.3d 621, infra, § 814. The property need not be appropriated to the use of the defendant; it may be destroyed, or merely damaged. *Staley v. McClurken* (1939) 35 C.A.2d 622, 628, 96 P.2d 805.

Plaintiff testifies that Tirpak left NORCAL in June 2006, leaving Defendant-Debtor in sole charge of the business and the facility. Black Declaration, ¶ 26. On June 8, 2007, Defendant-Debtor filed a Fictitious Business Name Statement that registered him as the owner of NORCAL. Exhibit 4, Dckt. 174. Plaintiff also asserts that after demanding return of the vehicle, Defendant-Debtor attempted to seize title by filing an improper mechanic's lien. Exhibit 4, Dckt. 167. On December 18, 2006, Defendant-Debtor filed a Notice of Pending Lien Sale for the Vehicle for storage charges accumulating at the rate of $20 per day. *Id.* The Lien Notice marked the date that the vehicle came into Defendant-Debtor's possession as February 1, 2006. *Id*. Plaintiff successfully opposed the lien, although Defendant-Debtor continued to retain possession of the vehicle. Black Declaration, ¶ 31-32.

In September 2007, Plaintiff was notified by the landlord of the NORCAL facility that the vehicle was abandoned on the street outside. *Id*., ¶ 33, 39. In 2009, Defendant-Debtor's brother Joseph Akins informed Plaintiff that Defendant-Debtor had allowed him to sleep in the vehicle while it was stored at the NORCAL facility and that some parts, including seats and the electrical inverter system, were removed by Defendant-Debtor and either sold or used by him in his boat or other vehicles. *Id*., ¶ 45, 46. Defendant-Debtor's brother further admitted that he "cooked" methamphetamines inside of the vehicle while he was occupying it. *Id*., ¶ 47.

Viewing the facts in the light most favorable to the nonmoving party, it appears that a genuine dispute exists as to whether a conversion occurred. If the court accepts Plaintiff's testimony, then Plaintiff is the rightful owner of the vehicle; Defendant-Debtor disposed of the property in a manner inconsistent with Plaintiff's rights; and Defendant-Debtor's actions resulted in damages.

Plaintiff also demonstrates that a genuine dispute exists as to whether Defendant-Debtor meets the willful and malicious injury standard under § 523(a)(6). In the jurisprudence of the Ninth Circuit, willful injury occurs "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su*, 290 F.3d at 1142. Here, the court accepts Plaintiff's argument that Defendant-Debtor's attempt to extort a liability waiver in exchange for returning the vehicle to Plaintiff evidences knowledge that injury was substantially certain to result from his own conduct. Opposition, 25:5-7.

The malicious injury standard is also satisfied. Plaintiff testifies Defendant-Debtor committed a number of wrongful acts, done intentionally, which necessarily caused injury, and were done without just cause or excuse. Black Declaration. Such wrongs include allowing his brother, a drug addict, to sleep in the vehicle, retaining possession of the vehicle against Plaintiff's demands, and stripping it of parts to use for his personal benefit. *Id*. Plaintiff also argues that Defendant-Debtor had no just cause or excuse for his intentional acts of harm against Plaintiff. Opposition, 25:9.

Plaintiff asserts that triable issues of fact exist as to the extent to which Defendant-Debtor received funds from Plaintiff, took parts from the vehicle, or ordered for it, for personal use, and his and brother Albert's use of the vehicle for sleeping and for the manufacture of illegal substances. *Id*., 162, 25:10-13.

Vandalism

Plaintiff alleges that Defendant-Debtor vandalized the vehicle by intentionally spilling paint on it, removing parts, and manufacturing drugs inside. Amended Complaint, ¶ 110-113. Plaintiff furthermore alleges that Defendant-Debtor's conduct was willful because he was made aware by Plaintiff that his acts were causing injury to Plaintiff and his property, but refused to cease them and attempted to extort a liability waiver. Amended Complaint, ¶ 115. Plaintiff also alleges that Defendant-Debtor's conduct was malicious in that his acts were wrongful and intentional, that such acts caused injury to Plaintiff and the vehicle, and that Defendant-Debtor had no just cause or excuse. *Id.*, ¶ 116.

Plaintiff testifies that when he found the vehicle abandoned on the road outside the NORCAL facility, he observed white paint haphazardly sprayed on the body and wheel well, seats removed, wire braiding ripped down from the RV headliner, custom cabinetry removed, dashboard components missing, radio removed, heating and air conditioning components removed, headlights ripped from the vehicle, and other parts missing. Black Declaration, ¶ 73.

Plaintiff argues that the damage to the Vehicle occurred after it came into the possession – whether rightfully or wrongfully – of Defendant-Debtor. Opposition, 25:28-29. Plaintiff also argues that Defendant-Debtor either caused the damage to the Vehicle or allowed the damage to occur with substantial certainty of the harm to Plaintiff. *Id*., 26:1-2. Plaintiff points to the fact that some of the parts removed from the vehicle were later used on boats and motor vehicles owned by Defendant-Debtor as evidence that he acted intentionally. *Id*., 26:4-5. Plaintiff lastly pleads that Defendant-Debtor has provided no just cause or excuse for his actions. *Id*., 26:5-7.

Triable issues of fact exist as to Defendant-Debtor's responsibility for the stripping of the Vehicle while it was in Defendant-Debtor's possession, as well as intentional acts of vandalism such as spraying paint on the sides of the Vehicle. *Id*., 26:8-10.

There are material issues of fact as to whether Defendant-Debtor's debt was for malicious and willful injury. Plaintiff alleged sufficient facts from which a determination of malicious and willful injury could be made. Thus, Defendant-Debtor's motion for summary judgement with regards to nondischargeability under 11 U.S.C. § 523(a)(6) is denied.

At the hearing, **xxxxxxx**

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Joseph Akins ("Defendant-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Summary Judgment is **xxxxxxxxxx**