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2 **F O R P U B L I C A T I O N**

3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5 SACRAMENTO DIVISION  
6

7 In re: )  
8 DEBORAH LOUISE STARZER, ) Case No. 04-34413-B-7  
9 Debtor(s). ) Chapter 7.  
10 \_\_\_\_\_ )  
11 LINDA SELINE SWIHART, )  
12 Plaintiff(s), ) Adv. No. 05-2110-B  
13 vs. )  
14 ) Date:  
15 DEBORAH LOUISE STARZER, ) Time:  
16 Defendant(s). ) Place:  
17 )  
18 )  
19 \_\_\_\_\_ )

20 **MEMORANDUM DECISION**

21 This adversary proceeding was submitted on a Stipulation of  
22 Facts filed June 28, 2005 (Docket 13). The facts stated in the  
23 Stipulation of Facts are adopted as the findings of the court.  
24 In a nutshell, in July, 2001, Defendant petitioned the Butte  
25 County Superior Court for appointment as the conservator of the  
26 person and estate of Plaintiff, Defendant's mother. On September  
27

1 26, 2001, Defendant was appointed conservator of the person and  
2 estate of Plaintiff pursuant to the California Guardianship-  
3 Conservatorship Law, Cal. Probate Code § 1400, et seq. (the  
4 "CGCL"). One of the assets of the conservatorship estate was a  
5 margin securities account known as the "E-Trade Account."

6 After Defendant's appointment as conservator, she took no  
7 action with regard to the E-Trade Account. During the  
8 conservatorship, the value of the E-Trade Account declined as a  
9 result of sales of securities in the account to satisfy "margin  
10 calls."

11 In November, 2002, Defendant filed her first account and  
12 report of conservator. Plaintiff objected to the first account,  
13 requesting, inter alia, that Defendant be surcharged for the loss  
14 of value of the E-Trade Account. After trial, the Butte County  
15 Superior Court found that Defendant ignored the E-Trade Account  
16 and managed only other parts of the conservatorship estate. The  
17 Superior Court further found that Defendant "did not act with  
18 ordinary care and diligence as is required by law, nor did she  
19 act prudently to conserve or protect the E-trade account from  
20 losses."

21 Pursuant to the Superior Court's ruling, on March 5, 2004, a  
22 judgment after trial (the "Judgment") was filed surcharging  
23 Defendant in the amount of \$82,143.20, plus costs of suit.  
24 Plaintiff's costs of suit in the surcharge action were \$9,555.10.

25 After the Stipulation of Facts was filed, the parties  
26 submitted briefs, and the matter was deemed submitted on August  
27 29, 2005, the last date for filing Plaintiff's reply brief.

1 For the reasons stated in this memorandum decision,  
2 Defendant's debt to Plaintiff pursuant to the Judgment (in the  
3 amount of \$82,143.20, plus costs of \$9,555.10, for a total of  
4 \$91,698.30), is non-dischargeable in this chapter 7 case pursuant  
5 to 11 U.S.C. § 523(a)(4). In addition, Plaintiff shall recover  
6 costs in this adversary proceeding in the amount of \$150.00, and  
7 that amount is also non-dischargeable in this chapter 7 case  
8 pursuant to 11 U.S.C. § 523(a)(4).

9 As the parties recognize, this case turns on the resolution  
10 two issues: (1) whether Defendant's status as conservator of the  
11 person and estate of Plaintiff created a fiduciary relationship  
12 within the meaning of 11 U.S.C. § 523(a)(4), and (2) if so,  
13 whether Defendant's conduct in "ignoring the E-trade account and  
14 managing only other parts of the Conservatorship estate," thereby  
15 creating damage to Plaintiff in the amount set forth in the  
16 Judgment, constituted defalcation while acting in a fiduciary  
17 capacity within the meaning of 11 U.S.C. § 523(a)(4).

### 18 19 **Fiduciary Relationship**

20 Whether a particular relationship involves a fiduciary  
21 capacity under 11 U.S.C. § 523(a)(4) is a question of federal  
22 law. Blyler, et al. v. Hemmeter (In re Hemmeter), 242 F.3d 1186,  
23 1189 (9<sup>th</sup> Cir. 2001); Woodworking Ent., Inc. v. Baird (In re  
24 Baird), 114 B.R. 198, 202 (9<sup>th</sup> Cir. BAP 1990). The term  
25 "fiduciary" in the bankruptcy discharge context includes  
26 technical and express trusts, but excludes trusts ex maleficio,  
27 i.e., trusts that arise by operation of law upon a wrongful act.

1 In re Cantrell, 329 F.3d 1119 (9<sup>th</sup> Cir. 2003), *citing* Lewis v.  
2 Scott (In re Lewis), 97 F.3d 1182, 1185 (9<sup>th</sup> Cir. 1996).

3 A fiduciary relationship imposed by statute may cause a  
4 person to be considered a fiduciary under 11 U.S.C. § 523(a)(4):

5 In general, a statutory fiduciary is considered a  
6 fiduciary for the purposes of § 523(a)(4) if the  
7 statute: (1) defines the trust res; (2) identifies  
8 the fiduciary's fund management duties; and (3)  
9 imposes obligations on the fiduciary prior to the  
10 alleged wrongdoing.

11 Hemmeter, 242 F.3d at 1190.

12 The CGCL meets the foregoing requirements. First, the CGCL  
13 defines the trust res. The analysis on this point begins with  
14 Cal. Probate Code § 2100 which states:

15 Guardianships and conservatorships are governed by  
16 Division 3 (commencing with Section 1000) except to the  
17 extent otherwise expressly provided by statute, and by  
18 this division. If no specific provision of this  
19 division is applicable, the provisions applicable to  
20 administration of estates of decedents govern so far as  
21 they are applicable to like situations.

22 Cal. Prob. Code § 2100 (West 2002 & Supp 2005).

23 There is no specific statute in Division 3 that expressly  
24 addresses the res of a conservatorship estate<sup>1</sup>. There are  
25 specific statutes which state what is NOT part of a  
26 conservatorship estate. Those statutes will be addressed further  
27 below.

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28 <sup>1</sup> Under Cal. Probate Code § 1801(b), a conservator of the  
estate may be appointed for a person who is substantially unable  
to manage his or her own financial resources. That section  
further the legislative purpose stated in Cal. Probate Code §  
1800(g) to provide for the proper management and protection of  
the conservatee's real and personal property. However, neither  
of these sections expressly defines the res of a conservatorship  
estate.

1       Because no statute in Division 3 specifically defines the  
2 res of a conservatorship estate, Probate Code § 2100 directs  
3 attention to the provisions governing administration of  
4 decedents' estates. Those provisions are located in Division 7  
5 beginning at Probate Code Section 7000. Probate Code Section  
6 7001 states:

7       The decedent's property is subject to administration  
8       under this code, except as otherwise provided by law,  
9       and is subject to the rights of beneficiaries,  
10       creditors, and other persons as provided by law.

11 Cal. Prob. Code § 7001 (West 1991 & Supp 2005). "Property" is  
12 defined in Probate Code Section 62 to mean "anything that may be  
13 the subject of ownership and includes both real and personal  
14 property and any interest therein." Cal. Prob. Code § 62 (West  
15 2002 & Supp 2005). That definition of property is generally  
16 applicable under the Probate code. Cal. Prob. Code § 20 (West  
17 2002 & Supp 2005).

18       Applying Probate Code Section 7001 to the present case  
19 produces a starting point that all of the conservatee's property,  
20 both real and personal, tangible and intangible, is part of the  
21 conservatorship estate. As noted above, there are specific  
22 provisions in Division 3 regarding what is NOT part of the  
23 estate. See e.g. Cal. Prob. Code § 1828.5 (limited  
24 conservatorships) and Cal. Prob. Code § 2601 (wages or salaries  
25 for employment are not part of the estate). Section 2100  
26 provides that these specific excluding provisions serve as  
27 limitations on the general rule. The details of the specific  
28 sections are not relevant to this case, because none of them

1 applies. They merely reinforce the conclusion that the Probate  
2 Code includes a comprehensive statutory scheme defining the res  
3 of the conservatorship estate. That statutory scheme is  
4 sufficient to satisfy the first prong of the Hemmeter test.

5 Second, the Probate Code identifies the fiduciary's fund  
6 management duties. Probate Code Section 2101 states: "The  
7 relationship of...conservator and conservatee is a fiduciary  
8 relationship that is governed by the law of trusts, except as  
9 provided in this division." Probate Code Section 2401(a) states,  
10 in relevant part:

11 The...conservator...has the management and control of  
12 the estate and, in managing and controlling the estate,  
13 shall use ordinary care and diligence. What  
14 constitutes use of ordinary care and diligence is  
determined by all the circumstances of the particular  
estate."

15 Cal. Prob. Code §§ 2101 and 2401(a) (West 1991 & Supp 2005).

16 The foregoing provisions of the CGCL identify the  
17 fiduciary's fund management duties. Those provisions satisfy the  
18 second prong of the Hemmeter test.

19 The provisions of the CGCL were invoked by Defendant's  
20 appointment as conservator on September 26, 2001, prior to any  
21 wrongdoing that resulted in the Judgment. Accordingly, the third  
22 prong of the Hemmeter test is satisfied.

23 Based on the foregoing, the court concludes that Defendant  
24 acted at all relevant times in a fiduciary capacity within the  
25 meaning of 11 U.S.C. § 523(a)(4).  
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A defalcation is a failure of a party to account for money or property that has been entrusted to them. E.g., In re Cowley, 35 B.R. 526, 529 (Bankr. D. Kan. 1983). In the context of section 523(a)(4), the term "defalcation" includes innocent, as well as intentional or negligent defaults so as to reach the conduct of all fiduciaries who were short in their accounts.

The Judgment establishes that Defendant breached her fiduciary duties and was surcharged as a result. The surcharge compensates Plaintiff for a shortage in Defendant's account as conservator. Therefore, the court concludes that Defendant's conduct that resulted in the Judgment constituted a defalcation while acting in a fiduciary capacity within the meaning of 11 U.S.C. § 523(a)(4).

1 the plans in question<sup>2</sup> specifically authorized investment in  
2 Morrison Knudsen stock, and therefore simply investing in and  
3 holding that stock could not constitute a "defalcation" within  
4 the meaning of 11 U.S.C. § 523(a)(4). Hemmeter, 242 F.3d at  
5 1191. Here, Defendant enjoys no similar specific authorization  
6 to invest in or hold the contents of the E-Trade Account.

7  
8 **Conclusion**

9 Because Defendant acted at all relevant times in a fiduciary  
10 capacity within the meaning of 11 U.S.C. § 523(a)(4) and because  
11 Defendant's conduct that resulted in the Judgment constituted a  
12 defalcation while acting in a fiduciary capacity within the  
13 meaning of 11 U.S.C. § 523(a)(4), Plaintiff is entitled to  
14 judgment as set forth above. The court will issue a separate  
15 judgment that complies with Bankruptcy Rule 9021.

16 Dated:

17 /s/ Thomas C. Holman  
18 Thomas C. Holman  
19 United States Bankruptcy Judge  
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26 <sup>2</sup> In the case of the ESOP, the court also noted that ERISA  
27 recognizes that such plans are designed to invest primarily in  
28 qualifying employer securities. Hemmeter, 242 F.3d at 1191, n.2.