United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

9:30 AM
1: - **Chapter**

#0.00 **All hearings on this calendar will be conducted in Courtroom 301 at 21041 Burbank Boulevard, Woodland Hills, California, 91367. All parties in interest, members of the public and the press may attend the hearings on this calendar in person.**

Additionally, (except with respect to evidentiary hearings, or as otherwise ordered by the Court) parties in interest (and their counsel) may connect by ZoomGov audio and video free of charge, using the connection information provided below. Members of the public and the press may only connect to the zoom audio feed, and only by telephone. Access to the video feed by these individuals is prohibited.

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United States Bankruptcy Court
Central District of California
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9:30 AM
CONT... **Chapter**

Password: 182368

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Docket 0

Tentative Ruling:

- NONE LISTED -

9:30 AM
1:23-11440 Mark Phillip Garris **Chapter 13**

#1.00 Motion for relief from stay [RP]

U.S. BANK NATIONAL ASSOCIATION
VS
DEBTOR

Docket 23

Tentative Ruling:

This chapter 13 case was filed on October 9, 2023. The plan has not yet been confirmed. Per the motion, the monthly payment is $1,809.35 and three payments have come due but not been received and there is an additional amount of $1,249 for attorney's fees making a total post-petition arrears of $6,646.98. The payments are due on the 25th of each month, so four payments are due as of the date of the hearing on this motion.

In response the Debtor sets forth a list of payments that were made, but not reflected in the motion:
11/13/23 $1,779.29
12/8/23 $1,809.35
1/20/23 $1,839.41

If there is anything missing, the Debtor requests an adequate protection order to come current post-petition.

tentative ruling: There is some confusion on the due date of the payments. The Declaration of pre-confirmation payments [dkt. 28] shows that the payments to Provident Funding are due on the 25th of the month and those to U.S. Bank are due on the first of the month. U.S. Bank is the movant here. The actual loan agreement, which is exhibit 1 to the motion, has a payment date of the 10th of the month with a 10 day grace period. Assuming that his is correct, the first post-petition payment due to U.S. Bank is for November 2023, not October 2023. Therefore Mr. Garis is current post-petition except for the February payment, which became late on 2/21 (the day of this hearing) and may have been made.

9:30 AM
CONT... Mark Phillip Garris **Chapter 13**

U.S. Bank is to account for the three payments that are attached to the opposition. Mr. Garis is to show that he made the February payment on or before February 20. If so, the motion will be denied. Post-petition attorney's fees are not a default that can support this motion or an adequate protection order. Particularly since it appears that this motion should never have been filed.

The parties are to appear by Zoom so that we can straighten this out.

Party Information

Debtor(s):

Mark Phillip Garris	Represented By Kevin T Simon

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
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Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM

1:17-10673 Hermann Muennichow **Chapter 7**

Adv#: 1:23-01027 Seror, Chapter 7 Trustee v. Muennichow

#2.00 Status conference re: Complaint For Turnover of Property of the Estate and for Related Injunctive Relief

fr. 9/27/23; 11/1/23; 12/6/23; 1/24/24(stip)

STIP TO CONTINUE FILED 1/30/24

Docket 1

***** VACATED *** REASON: Hearing Continued to 4/3/24 at 1:30 p.m. per Order entered on 2/2/24. [Dkt #18]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Hermann Muennichow	Represented By Stuart R Simone Nicholas A West

Defendant(s):

Helayne Muennichow	Pro Se

Plaintiff(s):

David Seror, Chapter 7 Trustee	Represented By Jessica L Bagdanov

Trustee(s):

David Seror (TR)	Represented By Richard Burstein Jessica L Bagdanov

United States Bankruptcy Court
Central District of California
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Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM
1:21-10179 Alex Foxman **Chapter 11**
Adv#: 1:21-01014 Foxman et al v. Frandsen et al

#3.00 Status Conference re: First Amended Complaint

fr. 6/23/21(stip); 12/15/21(stip); 3/16/22; 7/14/22; 9/21/22; 11/23/22; 2/15/23; 6/14/23; 12/6/23

Docket 3
***** VACATED *** REASON: Order dismissing adversary case entered 1/23/24. [Dkt. 31]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Alex Foxman	Represented By Stella A Havkin

Defendant(s):

Russell Frandsen	Represented By Stella A Havkin
Christie Frandsen	Pro Se
Andre Berger	Represented By Howard Camhi Alan W Forsley
Tracy Berger	Represented By Howard Camhi Alan W Forsley
NATIONAL ACO, LLC, a	Represented By Howard Camhi
NACO MSO, LLC, a California	Represented By

1:30 PM
CONT... Alex Foxman **Chapter 11**

	Howard Camhi
CCM Tenn, LLC, a Tennessee	Represented By Howard Camhi
NATIONAL CCM, LLC, a	Represented By Howard Camhi

Joint Debtor(s):

Michal J Morey	Represented By Stella A Havkin

Plaintiff(s):

Alex Foxman	Represented By Steven A Morris Stella A Havkin
Michal J Morey	Represented By Steven A Morris Stella A Havkin

Trustee(s):

Susan K Seflin (TR)	Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM

1:23-10565 John W. Scheuplein, IV **Chapter 7**

Adv#: 1:23-01042 Copy Solutions Inc. v. Scheuplein, IV

#4.00 Status conference re: complaint objecting to dischargeability of certain debt under 11 U.S.C.§§523(a)(4), 523(a)(6), 523(a)(11)

fr. 1/10/24

Docket 1

Tentative Ruling:

Parties should be prepared to discuss the following:

Deadline to complete discovery: 6/14/24.

Deadline to file pretrial motions: 7/1/24.

Deadline to complete and submit pretrial stipulation in accordance with Local Bankruptcy Rule 7016-1: 7/24/24.

Pretrial: 8/7/24 at 1:30 p.m.

In accordance with Local Bankruptcy Rule 7016-1(a)(4), within seven (7) days after this status conference, the plaintiff must submit a Scheduling Order. If any of these deadlines are not satisfied, the Court will consider imposing sanctions against the party at fault pursuant to Local Bankruptcy Rule 7016-1(f) and (g).

Party Information

Debtor(s):

John W. Scheuplein IV — Represented By James D. Hornbuckle

Defendant(s):

John W. Scheuplein IV — Represented By

1:30 PM
CONT... John W. Scheuplein, IV **Chapter 7**

James D. Hornbuckle

Plaintiff(s):

Copy Solutions Inc.

Represented By
Robert Schiller Crowder
Jason M Torf

Trustee(s):

David Seror (TR)

Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM

1:23-10848 Margarita Orosco Robles **Chapter 7**

Adv#: 1:23-01038 Sanchez v. Robles

#5.00 Status conference re: first amended complaint

fr. 12/6/23

Docket 4

***** VACATED *** REASON: Second amended complaint filed 2/1/24. Status conference set for 4/3/24 at 1:30 PM.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Margarita Orosco Robles	Represented By Joel M Feinstein

Defendant(s):

Margarita Orosco Robles	Pro Se

Plaintiff(s):

Margarita Sanchez	Pro Se

Trustee(s):

Diane C Weil (TR)	Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM

1:23-11082 Philip M. Lawrence, II **Chapter 7**

Adv#: 1:23-01050 Lawrence v. Lawrence, II

#6.00 Status conference re: complaint to determine debt non-dischargeable under 11 U.S.C. §523

Stip to continue filed 2/1/24

Docket 1

***** VACATED *** REASON: Hearing continued to 2/28/24 at 2:00 PM per Order entered 2/2/24 [Dkt. 10]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Defendant(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Plaintiff(s):

Urbana Chapa Lawrence	Represented By David L Oberg Madison B Oberg

Trustee(s):

David Keith Gottlieb (TR)	Represented By Ron Bender Jeffrey S Kwong

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM
1:23-11082 Philip M. Lawrence, II **Chapter 7**
Adv#: 1:23-01051 Everett v. Lawrence, II

#7.00 Status conference re: complaint to determine debt non-dischargeable under 11 U.S.C. §523

Docket 1

Tentative Ruling:

In light of the *Motion of Defendant Philip M. Lawrence, II, to Dismiss for Failure to State a Claim* [doc. 4], the Court will continue the status conference to **2:00 p.m. on February 28, 2024**.

Appearances on February 21, 2024 are excused.

Party Information

Debtor(s):

Philip M. Lawrence II — Represented By
Robert M Yaspan

Defendant(s):

Philip M. Lawrence II — Represented By
Robert M Yaspan

Plaintiff(s):

Ashley Everett — Represented By
Herlinda Rebeca Vasquez

Trustee(s):

David Keith Gottlieb (TR) — Represented By
Ron Bender
Jeffrey S Kwong

United States Bankruptcy Court
Central District of California
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Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM
1:23-11082 Philip M. Lawrence, II **Chapter 7**
Adv#: 1:23-01052 Diskint v. Lawrence, II

#8.00 Status conference re: complaint for nondischargeability of debt

Docket 1

Tentative Ruling:

In light of the *Motion of Defendant Philip M. Lawrence, II, to Dismiss for Failure to State a Claim* [doc. 4], the Court will continue the status conference to **2:00 p.m. on February 28, 2024**.

Appearances on February 21, 2022 are excused.

Party Information

Debtor(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Defendant(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Plaintiff(s):

Michael Diskint	Represented By Gregory A Rougeau

Trustee(s):

David Keith Gottlieb (TR)	Represented By Ron Bender Jeffrey S Kwong

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

1:30 PM
1:23-11082 Philip M. Lawrence, II **Chapter 7**
Adv#: 1:23-01053 Moi et al v. Lawrence, II

#9.00 Status conference re: complaint to determine dischargeability of debt 11 U.S.C. §523(a)(2)(A), (4)and (6)

Stipulation to continue filed 2/8/24

Docket 1
***** VACATED *** REASON: Hearing is continued to 4/17/24 at 1:30 PM per order entered 2/13/24. [Dkt. 9]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Defendant(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Plaintiff(s):

Patrizio Moi	Represented By Matthew D. Resnik
Moi Productions, Inc., a Delaware	Represented By Matthew D. Resnik
The Record Plant, Inc., a Delaware	Represented By Matthew D. Resnik

Trustee(s):

David Keith Gottlieb (TR)	Represented By Ron Bender Jeffrey S Kwong

1:30 PM
CONT... Philip M. Lawrence, II **Chapter 7**

2:00 PM
1:22-11019 Steven Louis Miller **Chapter 7**
Adv#: 1:22-01062 Miller et al v. Miller

#10.00 Defendant's Motion For Continuance Of Deposition

Docket 39

Tentative Ruling:

If the defendant will not be producing additional documents, do the plaintiffs seek to take the defendant's deposition again?

If they do, then the parties should be prepared to discuss a continued date for the defendant's second deposition, to take place **before March 13, 2024**, and whether the defendant's second deposition may take place by videoconference.

BACKGROUND

On August 31, 2022, Steven Louis Miller ("Defendant") filed a chapter 7 petition. On December 12, 2022, Keri Miller and Michael Miller (together, "Plaintiffs") filed a complaint [doc. 1], initiating the adversary proceeding no. 1:22-ap-01062-VK. On November 14, 2023, based on the parties' stipulation, the Court entered an order extending the last day of discovery to March 13, 2024 and the mediation cut off to April 30, 2024; this order also continued the pretrial conference to June 12, 2024 at 1:30 p.m. [doc. 33].

Regarding third party discovery, Plaintiffs have issued and then served subpoenas to Bank of America, Citibank and the California Contractors State Labor Board for documents in support of Plaintiffs' complaint. Plaintiffs received a response to the Bank of America subpoena on May 24, 2023, to the Citibank subpoena on May 5, 2023, and the CLSB subpoena on May 30, 2023. Declaration of Daren M. Schlecter, filed on August 1, 2023, ¶¶ 2-3 [doc. 13].

On August 1, 2023, Plaintiffs filed a motion to compel Defendant to produce discovery responses (the "Motion to Compel") [doc. 13]. Defendant did not file or serve a response to the Motion to Compel.

2:00 PM

CONT... Steven Louis Miller **Chapter 7**

On August 28, 2023, the Court entered an order granting the Motion to Compel (the "Order") [doc. 27]. Among other things, the Order required that Defendant respond to Plaintiffs' Interrogatories, Set One and Request for Production of Documents, Set One, without objections, by October 2, 2023. Order, p. 2. In addition, the Order set Defendant's deposition for October 25, 2023, at 9:00 a.m., at Plaintiffs' counsel's office. *Id*.

On October 4, 2023, Plaintiff's counsel received Defendant's responses to Plaintiffs' Interrogatories, Set One and Request for Production of Documents, Set One (the "Discovery Responses"). Declaration of Darren M. Schlecter (the "January 2024 Schlecter Declaration"), ¶ 4 [doc. 36]. On October 5, 2023, Mr. Schlecter advised Defendant that the Discovery Responses did not comply with the Order. *See* January 2024 Schlecter Declaration, ¶¶ 5-6 and Exh. A thereto; *see also* Order, p. 2.

On or about October 23, 2023, Mr. Schlecter received amended discovery responses and documents from Defendant. *Id*., ¶ 7. On December 17, 2023, the parties agreed to reschedule Defendant's deposition for 9:00 a.m. on January 17, 2024, at Mr. Schlecter's office (the "January 2024 Deposition"). *Id*., ¶ 9 and Exh. B thereto. On January 4, 2024, Mr. Schlecter served Defendant with a notice of deposition relating to the January 2024 Deposition and requested additional categories of documents to produce at the January 2024 Deposition (the "Additional Document Requests"). January 2024 Schlecter Declaration, ¶ 10.

On January 17, 2024, Defendant attended the January 2024 Deposition. Declaration of Daren M. Schlecter (the "February 2024 Schlecter Declaration"), ¶ 2 [doc. 40]. During the January 2024 Deposition, Defendant stated that he would search for and produce any additional documents pertaining to the Additional Document Requests. *See* Exh. A to the February 2024 Schlecter Declaration, pp. 10-12, 16-27, 29. Defendant also advised that he had either produced all documents that he had, or that there were no documents to be produced because he did not keep such documents, pertaining to certain requests. *See id*., pp. 13-17, 20, 24-25, 28. The parties agreed to continue the deposition to February 1, 2024, at 9:00 a.m. (the "February 2024 Deposition").

On January 31, 2024, Defendant filed a *Motion for Continuance of Deposition* (the "Motion to Continue") [doc. 39], requesting that the Court continue the February 2024 Deposition to May 1, 2024. To the Motion to Continue, Defendant attached the

2:00 PM

CONT... Steven Louis Miller **Chapter 7**

Declaration of Joan DiMartino [doc. 39]. On February 2, 2024, the Court issued an order setting a hearing on the Motion to Continue [doc. 41].

Party Information

Debtor(s):

Steven Louis Miller	Pro Se

Defendant(s):

Steven Louis Miller	Pro Se

Movant(s):

Steven Louis Miller	Pro Se

Plaintiff(s):

Keri Miller	Represented By Daren M Schlecter
Michael Miller	Represented By Daren M Schlecter

Trustee(s):

David Seror (TR)	Pro Se

2:00 PM
1:23-10270 Linda Ezor Swarzman **Chapter 11**
Adv#: 1:23-01018 Morris v. Swarzman

#11.00 Motion for Default Judgment

fr. 1/10/24

Docket 30

Tentative Ruling:

Based on the facts and analysis set forth below, the Court will grant the plaintiff's request for attorney's fees and prejudgment interest and will deny the plaintiff's request for costs.

I. BACKGROUND

On December 1, 2023, April C. Morris ("Plaintiff") filed *Plaintiff's Motion for Default Judgment Under LBR 7055-1* (the "Motion") [doc. 30]. At the hearing on the Motion on January 10, 2024, the Court granted the Motion for a nondischargeable debt in favor of Plaintiff against the defendant Linda Ezor Swarzman ("Defendant"). *See* doc. 35, p. 2. The Court subsequently Court entered an order continuing the hearing (the "Order") [doc. 35]. The Order provided that if Plaintiff seeks the inclusion of attorney's fees in the amount of the default judgment, she must file and serve on Defendant evidence demonstrating the amount of attorney's fees which Plaintiff incurred and payable or paid by Plaintiff, including invoices from the attorney(s) and a supporting declaration of Plaintiff, executed under penalty of perjury, by no later than January 31, 2024. Order, p. 2.

On January 31, 2024, Plaintiff filed the following documents: (1) *Plaintiff's Request for Attorneys' Fees and Costs* (the "Request for Fees and Costs") [doc. 38]; (2) the declaration of Plaintiff's attorney Anthony DiPietra (the "DiPietra Declaration") [doc. 39] [**FN 1**]; (3) Plaintiff's declaration (the "Morris Declaration") [doc. 40]; and (4) *Plaintiff's Request for Prejudgment Interest* (the "Request for Prejudgment Interest") [doc. 41]. In the Request for Fees and Costs, Plaintiff asserts that she may recover reasonable attorney's fees and costs pursuant to the promissory note dated May 9, 2022 (the "Note") and the amended promissory note dated June 9, 2022 (the

"Amended Note") and section 38.001 of the Texas Civil Practice & Remedies Code ("TCPR").

Plaintiff attached copies of the Note and the Amended Note to the original complaint (the "Complaint") [doc. 1], as Exhs. 3 and 4, respectively. In both the Note and the Amended Note, the "Borrower" is defined as including Redfish Properties LLC and Defendant. Exhs. 3 and 4 to the Complaint. In addition, both the Note and the Amended Note state, in relevant part:

> The Borrower shall be liable for all costs, expenses and expenditures incurred including, without limitation, the complete legal costs of the Lender incurred by enforcing this Note as a result of any default by the Borrower and such costs will be added to the principal then outstanding and shall be due and payable by the Borrower to the Lender immediately upon demand of the Lender.
> …
> This Note will be construed in accordance with and governed by the laws of the State of Texas.

Id.

In the Request for Prejudgment Interest, Plaintiff contends that she is entitled to prejudgment interest under Tex. Fin. Code §§ 304.003 and 304.104.

In his declaration, Mr. DiPietra stated that his firm "sent a demand for repayment to [Defendant] on July 18, 2022." DiPietra Declaration, ¶ 4. In addition, to his declaration, Mr. DiPietra attached a printout of his firm's time records "reflecting the amount of billable time the firm has spent trying to recover from [Defendant] through [January 31, 2024]." *Id*., ¶ 6 and Exh. A thereto. Mr. DiPietra also attached a copy of a printout of "all costs and expenses incurred in connection with our efforts to collect from [Defendant]" (the "Costs Breakdown"). *Id*., ¶ 7 and Exh. B thereto. In According to Mr. DiPietra, Plaintiff owes attorney's fees in the amount of $19,450, and costs and expenses in the amount of $1,245.22. *Id*., ¶¶ 5-7 and Exhs. A and B thereto.

II. DISCUSSION

2:00 PM
CONT... Linda Ezor Swarzman **Chapter 11**

A. Recoverable Attorney's Fees

TCPR 38.001 provides, in relevant part:

> (b) A person may recover reasonable attorney's fees from an individual…in addition to the amount of a valid claim and costs, if the claim is for:
>
> …
>
> (8) an oral or written contract.

TCPR 38.001(b)(8). *See also In re Arnette*, 2011 WL 3651294, at *2 n.7 (Bankr. N.D. Tex. 2011).

"Section 523(a)(2)(A) does not provide for an award of attorney fees[.]" *In re Russell*, 203 B.R. 303, 317 (Bankr. S.D. Cal. 1996). However, the Supreme Court has held that, "[o]nce it is established that specific money or property has been obtained by fraud,…'any debt' arising therefrom is excepted from discharge." *Cohen v. de la Cruz*, 523 U.S. 213, 218, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). "In nondischargeability litigation, an award of attorney's fees to a successful creditor may only occur if such fees are recoverable for a similar tort claim under state or federal law." *In re Del Valle*, 577 B.R. 789, 815 (Bankr. C.D. Cal. 2017).

> Under the "American Rule," each party pays its own attorney's fees arising out of litigation. An exception exists, however, when specific authority granted by statute or contract—a so-called "fee-shifting" provision—states otherwise. Since the Bankruptcy Code does not address whether creditors can recover attorney's fees in nondischargeability cases, they can only do so if allowed by another statute or by contract.

In re Kirk, 525 B.R. 325, 330 (Bankr. W.D. Tex. 2015). In general, under Texas law, litigants may recover attorney's fees only if specifically provided for by statute or contract. *Windmill Investments, LLC v. RedHill Realty Investors, LP*, 2017 WL 3713471 at *1 (W.D. Tex. June 13, 2017) (citing *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011)).

In *Arnette*, 2011 WL 3651294, at *3, pursuant to the terms of the promissory notes at issue and under TCPR 38.001, the court held that the plaintiff was entitled to recover its reasonable attorney's fees and expenses in connection with its claims under 11 U.S.C. § 523(a)(2) . There, the promissory notes provided that, in the event of a default, "[borrower] shall pay [lender] all costs of collection and enforcement, including reasonable attorneys' fees and court costs," and "borrower…promises to pay reasonable attorney's fees and court and other costs if this note is placed in the hands of an attorney to collect or enforce the note." *Id*. at *2 n.7. The *Arnette* court reasoned that the fees which the plaintiff incurred, in furtherance of its section 523(a)(2) claim, contributed directly to the plaintiff's efforts to collect and enforce the notes. The court further reasoned that those efforts fell within the ambit of recoverable fees under the notes.

Here, Plaintiff may recover attorney's fees if specifically provided for by statute or contract. Both the Note and the Amended Note provide that "[t]he Borrower [including Defendant] shall be liable for all costs, expenses and expenditures incurred including, without limitation, the complete legal costs of the Lender incurred by enforcing this Note as a result of any default by the Borrower...." Exhs. 3 and 4 to the Complaint. Prepetition, as a result of Defendant's default, Plaintiff incurred attorney's fees while attempting to enforce the Amended Note. Postpetition, Plaintiff incurred attorney's fees to obtain a determination that the debt from which Defendant's breach arose was nondischargeable.

Attorney's fees incurred by Plaintiff in furtherance of her section 523 claims were part and parcel of her efforts to collect and enforce Defendant's breach of the Amended Note. Thus, Plaintiff's postpetition efforts fall within the ambit of the recoverable fees under the Amended Note. Consequently, the Court will award Plaintiff reasonable attorney's fees.

B. Reasonableness of Fees and Costs

Plaintiff bears the burden of proving that the fees sought are reasonable. *In re Atwood*, 293 B.R. 227, 233 (9th Cir. BAP 2003).The reasonableness of attorneys' fees commonly is assessed utilizing the "lodestar" approach, where the number of hours reasonably expended is multiplied by a reasonable hourly rate. *In re Eliapo*, 468 F.3d 592, 598 (9th Cir. 2006).

"A district court should exclude from the lodestar amount hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary.'" *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

As an attorney with bankruptcy experience, Mr. DiPietra's hourly rate of $500 per hour appears reasonable, based on other attorneys' hourly rates in the area. In addition, Defendant did not respond to the Motion, and she has not objected to Mr. DiPietra's hourly rate. The Court still must consider whether Plaintiff's counsel spent a reasonable amount of time to enforce the Amended Note and whether the services provided by Plaintiff's counsel were appropriate.

The Court holds that the majority of the time entries of Plaintiff's counsel are reasonable and appropriate; the Court will address certain unreasonable entries below:

1. October 26, 2022

On this date, Mr. DiPietra billed 0.6 hours to "[r]eview and analyze writ of attachment issues against R. Larson." Exh. B to the DiPietra Declaration, p. 1. TCPR 38.001 provides that a person may recover reasonable attorney's fees from an individual if the claim is for a written contract. Because R. Larson is not a party to the Note or the Amended Note, the Court will deny the fee for this entry.

2. January 25, 2023

On this date, Mr. DiPietra billed 0.3 hours to "[f]ollow up on status of motion for default judgment; telephone call to the court clerk re: setting the motion for default judgment for hearing." *Id*., p. 3. This entry appears to be duplicative of another entry on the same date, for the same task and for the same amount of time. Based on this, the Court will deny the fee for this entry.

3. February 17, 2023

On this date, Mr. DiPietra billed 0.4 hours to "[f]ollow up and review all documents

re: preparation for hearing on motion to enter a default judgment; draft email to process servers asking for additional information needed for smae [sic].” *Id*, p. 3. This entry appears to be duplicative of another entry on the same date, for the same task and for the same amount of time. Based on this, the Court will deny the fee for this entry.

4. February 23, 2023

On this date, Mr. DiPietra billed 0.4 hours to “[r]eview Pleadings and prepare for hearing on motion for default judgment.” *Id*. This entry appears to be duplicative of another entry on the same date, for the same task and for the same amount of time. Based on this, the Court will deny the fee for this entry.

5. June 2, 2023

On this date, Mr. DiPietra billed 0.8 hours to "[d]raft notice of submission and dismissal of L. Swarzman and R. Larson." *Id*., p. 5. Because R. Larson is not a party to the Note or the Amended Note, the Court will deny half of the fee for this entry.

6. June 9, 2023

On this date, Mr. DiPietra billed 0.5 hours to "[d]raft notices of dismissal re: L. Swarzman and R. Larson." *Id*., p. 6. This entry appears to be duplicative of the above-mentioned entry from June 2, 2023. Based on this, the Court will deny the fee for this entry.

7. Costs

The Costs Breakdown identifies entries ranging from September 1, 2022 to August 1, 2023 and totaling $1,245.22. *Id*. However, the costs are not itemized beyond a notation that they were either for "Fees" or "Miscellaneous." Exh. B to the DiPietra Declaration. Without additional itemization by Mr. DiPietra, the Court cannot assess the reasonableness of these costs. Consequently, the Court will not allow costs.

C. Prejudgment Interest

Under Tex. Fin. Code § 304.003:

(a) A money judgment of a court of this state to which Section 304.002 does not apply, [**FN 2**] including court costs awarded in the judgment and prejudgment interest, if any, earns postjudgment interest at the rate determined under this section.

(b) On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment rendered during the succeeding calendar month.

(c) The postjudgment interest rate is:

(1) the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation;

(2) five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is less than five percent; or

(3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent.

In accordance with Tex. Fin. Code § 304.104, prejudgment interest is computed as simple interest and does not compound.

"[T]he award of prejudgment interest in a case under federal law is a matter left to the sound discretion of the trial court. Awards of prejudgment interest are governed by considerations of fairness and are awarded when it is necessary to make the wronged party whole." *Russell*, 203 B.R. at 317 (quoting *In re Acequia, Inc.*, 34 F.3d 800, 818 (9th Cir.1994)). "An award of prejudgment interest in a § 523 proceeding in which the creditor prevails ensures the creditor is made whole and has a full recovery." *Del Valle*, 577 B.R. at 810–11 (citing *Cohen*, 523 U.S. at 222–23).

"It is settled that where a debt that is found to be nondischargeable arose under state law, 'the award of prejudgment interest on that debt is also governed by state law.'" *In*

re Weinberg, 410 B.R. 19, 37 (9th Cir. BAP 2009) (quoting *In re Niles*, 106 F.3d 1456, 1463 (9th Cir. 1997)). "Under Texas law, the rate of pre-judgment interest 'accrue[s] at the same rate as postjudgment interest.'" *In re Ritz*, 567 B.R. 715, 768 (S.D. Texas 2017) (quoting *Int'l Turbine Servs., Inc. v. VASP Brazilian Airlines*, 278 F.3d 494, 500 (5th Cir. 2002)). "The post-judgment rate is statutorily set at the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation." *Id*.

"An award of pre-judgment interest will accrue from the 'time demand is made or an adversary proceeding is instituted.'" *Ritz*, 567 B.R. at 768 (quoting *In re Rodriguez*, 209 B.R. 424, 434 (Bankr. S.D. Texas 1997)). *See also Acequia*, 34 F.3d at 818-19.

Although the nondischargeability of Defendant's debt owed to Plaintiff arises under a federal statute, the debt at issue is a creature of state law - a failure to receive the return of her money. *Del Valle*, 577 B.R. at 811 (awarding prejudgment interest to prevailing creditor in § 523 proceeding at California rate set in California Constitution). Exercising its discretion as the law allows, the Court holds that equity would support an award of prejudgment interest at the rate set forth in Tex. Fin. Code § 304.003(c).

The current prime rate is 8.50%. *Selected Interest Rates (Daily)--H.15*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYS. (February 14, 2024), https://www.federalreserve.gov/releases/h15/. Tex. Fin. Code § 304.003(c) provides that, if the current prime rate is not less than 5.0% or more than 15%, the judgment rate shall be set at the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation. Therefore, pursuant to Tex. Fin. Code § 304.003(c), the Court will award Plaintiff prejudgment interest at a rate of 8.50% per annum. *See Ritz*, 567 B.R. at 768.

The prejudgment interest rate of 8.50% accrues as of July 18, 2022, *i.e.*, the date that Plaintiff, through her attorney, sent a demand for repayment to Defendant [DiPietra Declaration, ¶ 4], until this Court's entry of the judgment. Thereafter, the judgment will carry interest at the federal judgment rate. *Del Valle*, 577 B.R. at 811; *Ritz*, 567 B.R. at 769.

III. CONCLUSION

2:00 PM
CONT... Linda Ezor Swarzman **Chapter 11**

The Court will grant Plaintiff reasonable attorney's fees in the amount of $18,450.

The Court will deny Plaintiff's request for costs.

The Court will grant Plaintiff prejudgment interest in accordance with the above analysis.

The Court will prepare the order.

FOOTNOTES

FN 1: Mr. DiPietra has not entered an appearance on behalf of Plaintiff in this adversary proceeding. However, Mr. DiPietra's time records suggest that he assisted Plaintiff, to some extent, in connection with this adversary proceeding and the underlying bankruptcy case. *See* Exh. A to the DiPietra Declaration, pp. 4-8.

FN 2: Tex. Fin. Code § 304.002 is not applicable here because it involves judgments on contracts.

Party Information

Debtor(s):

Linda Ezor Swarzman Pro Se

Defendant(s):

Linda Ezor Swarzman Pro Se

Movant(s):

April C Morris Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

2:00 PM

CONT... Linda Ezor Swarzman **Chapter 11**

Plaintiff(s):

April C Morris — Pro Se

Trustee(s):

David M Goodrich (TR) — Represented By
Matthew A Lesnick

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 21, 2024 **Hearing Room 301**

2:00 PM

1:23-10270 Linda Ezor Swarzman **Chapter 11**

Adv#: 1:23-01018 Morris v. Swarzman

#12.00 Status conference re: Amended Complaint to determine dischargeability of debt under Code 11 U.S.C. § 523

fr. 9/6/23, 9/13/23,11/15/23, 1/10/24

Docket 23

Tentative Ruling:

See cal. no. 11.

Party Information

Debtor(s):

Linda Ezor Swarzman	Represented By Susan K Seflin Jessica Wellington David Seror

Defendant(s):

Linda Ezor Swarzman	Represented By Jessica Wellington

Plaintiff(s):

April C Morris	Pro Se

2:00 PM
1:23-10828 Dennis Phillip Ayre **Chapter 7**
Adv#: 1:23-01037 Cowan v. Ayre

#13.00 Plaintiff's Motion For Summary Judgment and/or Partial Summary Adjudication

fr. 2/14/24

Docket 15

Tentative Ruling:

The Court will deny the motion.

I. BACKGROUND

A. Prepetition Events

Prepetition, on December 21, 2020, Susan Shapiro Cowan ("Plaintiff") filed a statement of claim (the "Statement of Claim") with the Financial Industry Regulatory Authority ("FINRA"), initiating FINRA arbitration case no. 23-00602 (the "FINRA Action"). Declaration of Susan Shapiro Cowan (the "Cowan Declaration"), ¶¶3-4 and Exh. 1 thereto [doc. 16]. The Statement of Claim was moved to arbitration with FINRA Dispute Resolution Services. Exh. 2 to the Cowan Declaration.

In the Statement of Claim, Plaintiff asserted claims against the debtor Dennis Phillip Ayre ("Debtor" or "Defendant") for: (1) breach of fiduciary duty; and (2) negligence. Exh. 1 to the Cowan Declaration, p. 6. In the Statement of Claim, Plaintiff alleged, in part:

> At all relevant times until his suspension on about June 12, 2023, Debtor was Broker [sic] and Investment Advisor registered and regulated by [FINRA].
>
> In mid-2014, I sold my primary residence, resulting in a net profit of approximately $300,000. These funds were my sole retirement savings, and following the sale of my residence, I became concerned about securing my financial future. After seeking advice from family

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CONT... Dennis Phillip Ayre **Chapter 7**

members, I chose to invest my retirement savings with someone I believed to be a qualified financial professional.

I was referred to Debtor as an investment advisor.

Thereafter, I contacted the Debtor and informed him of my financial situation and concerns regarding my financial future. In particular, I advised the Debtor that the investment funds constituted my entire retirement savings, and that I wanted to invest those funds in a safe and prudent manner to protect my future. The Debtor represented to me that he was a highly qualified, registered stockbroker and investment advisor. The Debtor assured me that, as an experienced investment advisor, he would make sure that my financial future was secure. At this time, the Debtor was an employee of Oppenheimer.

Based on the Debtor's assurances regarding his expertise, on or about September 18, 2014, I transferred $300,000 – all of my savings – to Oppenheimer, though the Debtor as its agent.

If not for the Debtor's assurances, I would not have transferred to [sic] life savings to the Debtor.

From September 29, 2016 through May 2017, the Debtor invested all of my money in Foresight Energy LP ("FELP") stock, including by selling all of my other investments and reinvesting interest earned.

The Debtor represented to me that the FELP stock was underrated, had great potential, substantial equity, stability, reliability and security.

The Debtor assured me that FELP was a great investment for me and that he had extreme confidence in the company and its stock.

Contrary to the Debtor's representations, throughout the period 2014 through 2017, FELP stock experienced significant highs and lows, rendering it extremely unstable and unreliable.

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CONT... Dennis Phillip Ayre **Chapter 7**

Eventually, FELP fell dramatically, staying at a little over $3 per share through 2018 and the beginning of 2019, then dropping to less than $1 per share in May 2019 and never going back up.

The Debtor never informed me of the true status of the FELP stock. The Debtor never told me that the stock was extremely volatile or that it had become completely unstable and unreliable. Debtor never advised me that I should diversify my holdings. To the contrary, Debtor ensured that I stayed fully committed to the FELP investment.

In 2019, I began to have concerns about holding all of my investments in one place, and in July 2019, I instructed Debtor to sell my entire FELP position.

Despite my clear instructions, the order was not executed and Debtor failed to sell my FELP shares.

By November 2019, the price of FELP stock was so low that the New York Stock Exchange began "de-listing" it.

As of December 31, 2019, my holdings were worthless.

At all times herein, I trusted the Debtor as a qualified stockbroker and investment advisor, and reasonably relied upon his investment decisions.

At all times herein, the Debtor was fully informed and aware of my age, my financial status, and financial needs.

The Debtor has acknowledged and affirmatively represented that he failed to make appropriate investment decisions for me, that the FELP stock was not a suitable investment for me, and that he should have invested all or some of my holdings in other ways.

Cowan Declaration, ¶¶ 4(a) – (t) and Exh. 1 thereto.

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CONT... Dennis Phillip Ayre **Chapter 7**

Defendant did not respond to the Statement of Claim. Cowan Declaration, ¶ 5; *Statement of Uncontroverted Facts and Conclusions of Law In Support of Motion for Summary Judgment and/or Partial Summary Adjudication* (the "Rule 56 Statement"), ¶ 6 [doc. 18]. On April 6, 2023, after considering the pleadings, arbitrator Thomas Shuck (the "Arbitrator") issued an award (the "FINRA Award") in favor of Plaintiff. Exh. 2 to the Cowan Declaration. The FINRA Award states:

> Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum - pursuant to rules approved by the SEC - but has no part in deciding the award.
>
> Nature of the Dispute: Customer vs. Associated Person
> This matter proceeded pursuant to Rule 12801 of the Code of Arbitration Procedure ("Code").
>
> **REPRESENTATION OF PARTIES**
>
> For Claimant Susan Shapiro Cowan: Daniel R. Gutenplan, Esq., Enenstein Pham & Glass LLP, Costa Mesa, California.
>
> Respondent Dennis Phillip Ayre did not appear.
>
> **CASE INFORMATION**
>
> Statement of Claim filed on or about: December 21, 2020.
> Claimant did not sign the Submission Agreement.
>
> Respondent did not file a Statement of Answer or sign the Submission Agreement.
>
> **CASE SUMMARY**
>
> In the Statement of Claim, Claimant asserted the following causes of action: breach of fiduciary duties and negligence. The causes of action relate to Foresight Energy LP ("FELP") stock.

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CONT... Dennis Phillip Ayre **Chapter 7**

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Substantial damages in an amount in excess of $300,000.00;
2. Punitive and exemplary damages as allowed by law, to include California Code of Civil Procedure § 3294, in an amount sufficient to punish and make an example of Respondent;
3. Costs;
4. Attorneys' fees;
5. Pre and post judgment interest; and
6. Such other and further relief as the Panel may deem just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

Respondent did not file a Statement of Answer or properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code and is bound by the determination of the Arbitrator on all issues submitted.

Claimant's claims against Respondent were originally brought in FINRA Arbitration Case 20- 04139 ("Original Case").

On March 6, 2023, Claimant opted to proceed against Respondent pursuant to Rule 12801 of the Code. The claims against Respondent were therefore bifurcated from the Original Case.

The Arbitrator determined that Respondent was served with the Claim Notification letter dated December 31, 2020 by FedEx mail, as evidenced by the tracking information available online, and the Overdue Notice (including the Statement of Claim) dated February 22, 2021 by FedEx mail, as evidenced by the tracking information

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CONT... Dennis Phillip Ayre **Chapter 7**

available online. The Arbitrator also determined that Respondent was served with the Notification of Panel dated March 22, 2021 by FedEx mail, as evidenced by the tracking information available online.

On May 20, 2022, Respondent registered for the DR Portal in the Original Case, providing Respondent Ayre with access to all documents filed in the case, including the Statement of Claim, Overdue Notice, and Notification of Panel.

The Arbitrator determined that Respondent is therefore, bound by the Arbitrator's ruling and determination.

AWARD

After considering the pleadings, the Arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant the sum of $322,648.35 in compensatory damages.

2. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and attorneys' fees, are denied.

FEES

Decision on the papers:	=$ 300.00
Total Hearing Session Fees	=$ 300.00

The Arbitrator has assessed the total hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

Exh. 2 to the Cowan Declaration.

B. The Bankruptcy Case and the Adversary Proceeding

On June 14, 2023, Defendant filed a chapter 7 petition, initiating case no. 1:23-bk-10828-VK. On September 14, 2023, Plaintiff filed a complaint against Defendant (the "Complaint") [doc. 1], requesting a determination that the debt owed to her under the FINRA Award is nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), (a)(6) and (a)(19).

On December 18, 2023, Plaintiff filed a *Motion for Summary Judgment and/or Partial Summary Adjudication* (the "Motion") [doc. 15]. Through the Motion, Plaintiff asserts that the FINRA Award precludes relitigation of Plaintiff's claims under § 523(a)(2)(A), (a)(4), (a)(6) and (a)(19). The same day, Plaintiff filed, among other items, the Rule 56 Statement and the Cowan Declaration.

On February 7, 2024, Defendant, in *pro per*, filed a late opposition to the Motion (the "Opposition") [doc. 23], to which Plaintiff filed a reply (the "Reply") [doc. 24]. Through the Opposition, Defendant contends that the FINRA Award provides no preclusive effect with respect to the parties to this adversary proceeding and the claims alleged in the Complaint. According to Defendant, nothing in the FINRA Award establishes the elements required for a claim under sections 523(a)(2)(A), (a)(4), (a)(6) or (a)(19). Defendant also disputes certain proposed facts set forth in the Rule 56 Statement. In addition, Defendant requests that sanctions be imposed against Plaintiff for filing the Motion without substantive legal grounds. Defendant did not file a declaration in support of the Opposition.

II. LEGAL STANDARDS

A. Authenticating Evidence

Pursuant to Federal Rule of Evidence 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Testimony of a witness with knowledge, "that an item is what it is claimed to be" is an example of evidence that satisfies this requirement. *See*

Fed. R. Evid. 901(b). Under Local Bankruptcy Rule ("LBR") 9013-1(i)(3), "[i]n lieu of oral testimony, a declaration under penalty of perjury will be received into evidence."

Although Defendant attached a number of exhibits to the Opposition, he did not provide an authenticating declaration regarding these documents. Consequently, Defendant's exhibits will not be considered in connection with the Motion.

B. ***Motion to Strike***

LBR 7056-1 provides, in relevant part:

> **(c) Response and Supporting Documents**.
>
> (1) Response. Any party who opposes [a motion for summary judgment] must serve and file a response not later than 21 days before the date of the hearing on the motion.
>
> (2) Statement of Genuine Issues.
>
> (A) The respondent must serve, file…a separate concise statement of genuine issues with the response.
>
> (B) …The respondent's statement must identify each material fact that is disputed and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish the dispute and the existence of a genuine issue precluding summary judgment or adjudication.
>
> (3) Evidence. The respondent is responsible for filing with the court all necessary evidentiary documents cited in the response in accordance with LBR 9013-1(i).
>
> …
>
> **(f) Facts Deemed Admitted**. In determining any motion for summary

judgment or partial summary adjudication, the court may assume that the material facts as claimed and adequately supported by the movant are admitted to exist without controversy, except to the extent that such facts are:

(1) Included in the "statement of genuine issues," and

(2) Adequately controverted by declaration or other evidence filed in opposition to the motion.

(g) Non-Opposition to Summary Judgment is Not Consent. Pursuant to F.R.Civ.P. 56 and FRBP 7056, mere failure to file an opposition to a motion for summary judgment shall not be deemed consent to the granting or denial of the motion for summary judgment.

Pursuant to LBR 9011-2(d), "[a]ny person appearing without counsel must comply with the F.R.Civ.P., F.R.Evid., F.R.App.P., FRBP, and these rules. The failure to comply may be grounds for dismissal, conversion, appointment of a trustee or an examiner, judgment by default, or other appropriate sanctions."

LBR 9013-1(i) states, in pertinent part:

Evidence on Motions, Responses to Motions, or Reply. Factual contentions involved in any motion, opposition or other response to a motion, or reply, must be presented, heard, and determined upon declarations and other written evidence. The verification of a motion is not sufficient to constitute evidence on a motion, unless otherwise ordered by the court.

…

(2) An evidentiary objection may be deemed waived unless it is (A) set forth in a separate document; (B) cites the specific Federal Rule of Evidence upon which the objection is based; and (C) is filed with the response or reply.

In the Reply, Plaintiff asserts that the Opposition should be stricken because it was

untimely and because Defendant did not file a separate concise statement of genuine issues with his response or evidence supporting his position. Thus, Plaintiff requests that the Court enter summary judgment against Defendant pursuant to LBR 9011-2(d). [**FN 1**]

Although Defendant did not file or serve a separate statement of issues pursuant to LBR 7056-1(c)(2)(A), Defendant is acting in *pro per* and asserted objections to the Statement in the Opposition. Moreover, under LBR 7056-1(g), non-opposition to a motion for summary judgment is not consent to the granting of the motion. Finally, pursuant to LBR 9013-1(i)(2), the Court is not required to consider that Defendant's objections are waived. Consequently, the Court will deny Plaintiff's request to strike the Opposition.

C. *Standard for Motion for Summary Judgment*

Pursuant to Federal Rule of Civil Procedure ("Rule") 56, the Court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Rule 56; Federal Rule of Bankruptcy Procedure 7056; *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–48 (emphasis in original).

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted…. [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . .

Id. at 248–50. Additionally, issues of law are appropriate to be decided in a motion for summary judgment. *See Camacho v. Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir.

1997).

The initial burden is on the moving party to show that no genuine issues of material fact exist based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets its initial burden, the nonmoving party bearing "the burden of proof at trial on a dispositive issue" must identify facts beyond what is contained in the pleadings that show genuine issues of fact remain. *Id*. at 324; *see also Anderson*, 477 U.S. at 256 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.").

The nonmoving party meets this burden through the presentation of "evidentiary materials" listed in Rule 56, such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, and interrogatory answers. *Celotex Corp.*, 477 U.S. at 224. To establish a genuine issue, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient."). Rather, the nonmoving party must provide "evidence of such a caliber that 'a fair–minded jury could return a verdict for the [nonmoving party] on the evidence presented.'" *United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson*, 477 U.S. at 266).

"Objections to the dischargeability of a debt are to be literally and strictly construed against the objector and liberally construed in favor of the debtor in order to promote the debtor's fresh start." *In re Montgomery*, 310 B.R. 169, 175 (Bankr. C.D. Cal. 2004) (citing *In re Saylor*, 108 F.3d 219, 221 (9th Cir.1997)). *See also In re Hardwick*, 648 B.R. 175, 179 (E.D. Tex. 2023) ("To further the policy of providing a debtor a fresh start in bankruptcy, exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor.") (internal quotations and citations omitted).

D. *11 U.S.C. § 523(a)(19)*

Pursuant to section 523(a)(19), a discharge under section 727 does not discharge a debtor from any debt that:

> (A) is for—
>
> > (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
> >
> > (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
>
> (B) results, before, on, or after the date on which the petition was filed, from—
>
> > (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
> >
> > (ii) any settlement agreement entered into by the debtor; or
> >
> > (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor[.]

As the Ninth Circuit Court of Appeals noted in *In re Behrends*, 660 Fed.Appx. 696 (9th Cir. 2016): "Section 523(a)(19) was adopted as part of the Sarbanes-Oxley Act in 2002 and serves the broad remedial purpose of holding accountable those who violate securities laws after a government unit or private suit results in a judgment or settlement agreement against the wrongdoer." *Id*. at 700 n.2 (internal citations and quotations omitted). *See also* Coffman, et al., *Section 523(a)(19): Securities Violations*, 2 Bankr. Litig. § 13:67 ("The policy underlying [§ 523(a)(19)] is to hold parties accountable who violate securities laws and to give collateral estoppel effect to judgments **finding the presence of securities fraud**.") (emphasis added) (cited in

Behrends, 660 Fed.Appx. at 700 n.2).

To establish the exception to discharge under section 523(a)(19), "the debt must (1) be 'for' a securities law violation **or fraud** in connection with a sale of a security, and (2) 'result from' some judicial or administrative proceeding or a settlement agreement. *Tradex Glob. Master Fund SPC LTD v. Chui*, 702 F. App'x 632, 633 (9th Cir. 2017) (emphasis added). *See also In re Fusco*, 641 B.R. 438, 455 (Bankr. EDNY 2022) (to be nondischargeable under § 523(a)(19), "a plaintiff must establish *both* that the debt is for a securities law violation or common law securities fraud, *and* that the debt results from a properly memorialized judgment, agreement, or award") (emphasis in original); *In re Minardi*, 536 B.R. 171, 192 (Bankr. E.D. Tex. 2015) ("once a determination of a securities violation **or related fraud** has been made, and proof of entry of that order or the existence of a settlement of such charges is tendered to the bankruptcy court, the debt is rendered nondischargeable under § 523(a)(19).") (emphasis added). "Plaintiff must establish both parts by a preponderance of evidence." *In re Sato*, 512 B.R. 241, 251 (Bankr. C.D. Cal. 2014).

1. Plaintiff Has Not Satisfied the Provisions of § 523(a)(19)(B)

Because the FINRA Award has not been memorialized in an order entered in a Federal or State judicial or administrative proceeding, the FINRA Award is insufficient to establish the nondischargeability of Plaintiff's claim under section 523(a)(19).

FINRA is a government authorized organization that regulates broker dealers engaging in the buying or selling of securities. *Hardwick*, 648 B.R. at 182-83. As described by the Fifth Circuit Court of Appeals:

> FINRA is a self-regulatory organization . . . registered with the SEC under 15 U.S.C. § 78s. Although FINRA is not a government entity, it is responsible for the self-regulation of member brokerage firms, exchange markets, and individuals associated with those firms and markets. FINRA is empowered to discipline members for violation of their rules by suspension, expulsion, or by barring an individual from associating with a FINRA member. 15 U.S.C. § 78*o*-3(b)(7); *see also Fiero v. FINRA*, 660 F.3d 569, 574 (2nd Cir. 2011).

Wiley v. SEC, 663 F.App'x 353, 356 n.1 (5th Cir. 2016) (cited in *Hardwick*, 648 B.R. at 183).

"Case law makes it clear that FINRA is not a federal administrative body but is instead a self-regulatory organization distinct from a normal administrative agency." *Hardwick*, 648 B.R. at 183 (internal citations omitted). Because the debt created by a FINRA order does not constitute a "judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding," [11 U.S.C. § 523(a)(19)(B)], a FINRA order standing alone cannot support a summary judgment finding of nondischargeability under § 523(a)(19). *Hardwick*, 648 B.R. at 183. *See also In re Hartmann*, 2011 WL 2118870, at *4 (Bankr. D. Colo. 2011) (because FINRA is "not a Federal or State judicial or administrative body," a FINRA award alone, absent confirmation of the award "by a court of competent jurisdiction," cannot provide basis for nondischargeability of debt under § 523(a)(19)).

Plaintiff has not shown that the debt set forth in the FINRA Award was memorialized in a judicial or administrative order or a settlement agreement or that the debt results from "any court or administrative order for damages, fine, penalty, . . . restitutionary payment . . . or other payment owed by the debtor." Consequently, with respect to the application of section 523(a)(19), the Court will deny Plaintiff's motion for summary judgment.

2. Based on the FINRA Award, Plaintiff Has Not Satisfied the Provisions of § 523(a)(19)(A)

Plaintiff does not assert that Defendant violated any Federal securities laws, State securities laws or any regulation or order issued under such Federal or State Securities laws. In addition, Plaintiff has not shown that the FINRA Award establishes the debt owed to Plaintiff is for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security. "[W]ith respect to debts arising from common law securities fraud, courts look to the express findings of the award, as well as the claims asserted by the complainant in the underlying proceeding, to determine if the debt is for common law securities fraud." *Fusco*, 641 B.R. at 455.

"Section 523(a)(19) sets forth an expedited process that accords preclusive effect to

appropriately memorialized judgments that establish liability for securities law violations and securities fraud, without resort to the doctrines of res judicata and collateral estoppel." *Id*. at 458. The court's only function is to determine whether the award has satisfied the requirements set forth in section 523(a)(19). *Id*. "Specifically, the only two considerations are whether 'a determination of a securities violation or related fraud has been made' and whether 'proof of entry of that order' has been tendered." *Id*.

In *Fusco*, the plaintiff commenced an arbitration against the debtor and others by filing a statement of claim with FINRA. In the Statement of Claim, the plaintiff alleged that the debtor and others "committed fraud, breach of fiduciary duty, churning, misrepresentations, non-disclosures, omission of facts, unauthorized trading, violation of state 'blue sky' laws, failure to supervise, negligence, and mark-ups regarding unauthorized securities transactions performed for him by . . . brokers that were not registered in Florida." FINRA held an evidentiary hearing in the arbitration, at which the debtor appeared pro se and testified on his own behalf.

FINRA issued an award in favor of the plaintiff. In the award, the arbitration panel:

> [F]ound, "based on clear and convincing evidence," that [the debtor] and the other respondents **intentionally engaged in misconduct** with respect to [the plaintiff's] securities accounts . . . . This misconduct included "excessively trading and churning" accounts, "improperly recording trades as unsolicited" on account statements, "**fraudulently** misrepresenting or failing to disclose markups and exorbitant commissions," [and] failing to disclose that certain brokers who solicited transactions from [the plaintiff] were not registered brokers[.]

Id. (emphasis added). Subsequently, the bankruptcy court entered an order and judgment confirming the award, and the plaintiff moved for summary judgment on his section 523(a)(19) nondischargeability claim.

The bankruptcy court noted that the award stated that the debtor was liable to the plaintiff for, among other things, "violation of blue sky laws." In addition, the award stated that the measure of compensatory damages was based on, among other things, the debtor's joint and several liability for the "violation of blue sky laws" and that the

award's measure of attorneys' fees was "pursuant to Chapter 517 of the Florida Securities and Investor Protection Act." *Id.* at 462. Consequently, the award "plainly traces the debt imposed upon [the debtor] to his violations of state securities law." *Id.*

As concerns a court's evaluation of whether a FINRA award establishes that the debtor was held liable for common law securities fraud, Plaintiff relies on *In re Fleming*, 637 B.R. 390, 394 (Bankr. D. Conn. 2021). In *Fleming*, the plaintiffs initiated an arbitration proceeding at FINRA by filing a Statement of Claim. Among other allegations, the Statement of Claim stated that the debtor "misrepresented material information about the securities he purchased, failed to disclose material information regarding the riskiness of the securities he purchased and failed to disclose his conflict-of-interest with regard to Walter Energy." *Id*. at 392. The arbitration panel issued an award in favor of the plaintiffs, which identified, among others, the following causes of action, relating to stock, against the debtor: misrepresentations of risk, materiality of omissions, misrepresentations and violation of FINRA's conduct rules. *Id*. at 393. The FINRA award was confirmed by the Connecticut Superior Court.

The bankruptcy court held that, at the very least, the award established that the debtor made material misrepresentations and omissions regarding the securities he purchased and that the debtor's actions rose to the level of common law fraud, deceit or manipulation in connection with the purchase or sale of any security.

Regarding "deceit," the court noted the following definition from Black's Law Dictionary (11th ed. 2019):

> 1. The act of intentionally leading someone to believe something that is not true; an act designed to deceive or trick . . . .. 2. A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone will act on it. See *fraudulent misrepresentation* under MISREPRESENTATION. 3. A tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it. See FRAUD; MISREPRESENTATION.

Here, although the Statement of Claim contains allegations regarding misrepresentation and undisclosed information, Plaintiff's asserted causes of action in the FINRA Action were for breach of fiduciary duty and negligence; Plaintiff did not assert claims of fraud or intentional misrepresentation. Exh. 1 to the Cowan Declaration, pp. 6-7; Exh. 2 to the Cowan Declaration, p. 1. In addition, the FINRA Award does not specify which of Plaintiff's two asserted claims, *i.e.*, negligence and breach of fiduciary duty, is the basis for the determination of Defendant's liability. Exh. 2 to the Cowan Declaration. Moreover, although the FINRA Award provides that Defendant is liable to Plaintiff (Exh. 2 to the Cowan Declaration, p. 2), unlike in *Fusco*, the FINRA Award makes no reference to fraud or material misrepresentations.

Because the FINRA Award does not establish that the debt owed to Plaintiff is for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security, Plaintiff has not met her burden of showing that the elements of section 523(a)(19)(A) are met, based on that award.

E. *Summary Judgment Based on Issue Preclusion*

The Supreme Court has recognized that the doctrine of collateral estoppel applies in dischargeability proceedings. *See Grogan v. Garner*, 498 U.S. 279, 284–85, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of that issue if the party had "a full and fair opportunity to litigate that issue in the earlier case." *See Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). "A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment . . . . In so doing, the bankruptcy court must apply the forum state's law of issue preclusion." *In re Plyam*, 530 B.R. 456, 462 (9th Cir. BAP 2015); *see also* 28 U.S.C. § 1738 (federal courts must give "full faith and credit" to state court judgments).

The Ninth Circuit has held that an "arbitration decision can have res judicata or collateral estoppel effect." *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir.1987)). *See also Lobaito v. Financial Industry Regulatory Authority, Inc.*, 2014 WL 4470423, at *12 (S.D. N.Y. Sept. 9, 2014) (noting collateral estoppel defense may be predicated on arbitration award whether or not the award has been judicially confirmed) (citing cases); *Arora v. TD Ameritrade, Inc.*, 2010 WL

2925178, at *7 (N.D. Cal. July 26, 2010) (holding FINRA arbitration panel reached final judgment on the merits, thus res judicata applied).

The requirements for issue preclusion in California are:

(1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;
(2) the issue to be precluded must have been actually litigated in the former proceeding;
(3) the issue to be precluded must have been necessarily decided in the former proceeding;
(4) the decision in the former proceeding musts be final and on the merits;
(5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding; and
(6) application of issue preclusion must be consistent with the public policies of preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.

White v. City of Pasadena, 671 F.3d. 918, 927 (9th Cir. 2012) (citing *Lucido v. Superior Court*, 51 Cal.3d 335, 341-43 (1990). "The burden is on the party seeking to rely upon issue preclusion to prove each of the elements have been met." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050–51 (9th Cir. 2008). "This means providing 'a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.'" *Plyam*, 530 B.R. at 462 (quoting *In re Kelly*, 182 B.R. 255, 258 (9th Cir. BAP 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)). "Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect." *Kelly*, 182 B.R. at 258.

"The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost." *DKN Holdings LLC v. Faerber*, 61 Cal.4th 813, 826–27 (2015). "The point is that, once an issue has been finally decided against such a party, that party should not be allowed to relitigate the same issue in a new lawsuit." *Id*.

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CONT... Dennis Phillip Ayre **Chapter 7**

1. Issues Identical to Those Decided in Former Proceeding

a. 11 U.S.C. § 523(a)(2)(A)

i. Actual Fraud

Pursuant to 11 U.S.C. § 523(a)(2)(A), a bankruptcy discharge does not discharge an individual debtor from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – false pretenses, a false representation, or actual fraud, other than a statement respecting a debtor's or an insider's financial condition."

In *Husky Intern. Electronics, Inc. v. Ritz*, 578 U.S. 355, 136 S.Ct. 1581, 194 L.Ed.2d 655 (2016), the Supreme Court clarified that misrepresentation is not an element of actual fraud under section 523(a)(2)(A), and that actual fraud may include a wider array of misconduct. *In re Phillips*, 2016 WL 7383964, at *5 (9th Cir. BAP Dec. 16, 2016). "The term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud…that can be effected without a false representation." *Husky*, 578 U.S. at 359.

"The word 'actual' has a simple meaning in the context of common-law fraud: It denotes any fraud that 'involv[es] moral turpitude or intentional wrong.'" *Id*. at 360 (quoting *Neal v. Clark*, 95 U.S. 704, 709, 5 Otto 704 (1877)). "'Actual' fraud stands in contrast to 'implied' fraud or fraud 'in law,' which describe acts of deception that 'may exist without the imputation of bad faith or immorality.'" *Id*.

ii. False Pretenses and False Representation

A false representation is an express misrepresentation, while a false pretense refers to an implied misrepresentation or conduct intended to create and foster a false impression. *In re Reingold*, 2013 Bankr. LEXIS 1660, *8-10 n. 4 (9th Cir. BAP Mar. 19, 2013). To prevail on a § 523(a)(2)(A) claim concerning false pretenses or false representation, plaintiffs must prove by a preponderance of the evidence the following five elements:

(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
(2) knowledge of the falsity or deceptiveness of his statement or

conduct;
(3) an intent to deceive;
(4) justifiable reliance by the creditor on the debtor's statement or conduct; and
(5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.

In re Weinberg, 410 B.R. 19, 35 (9th Cir. BAP 2009) (citing *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000)). The plaintiff bears the burden of proof to establish each of these elements by a preponderance of the evidence. *In re Deitz*, 760 F.3d 1038, 1050 (9th Cir. 2014).

In the Statement of Claim, Plaintiff asserted two causes of action: breach of fiduciary duty and negligence. However, as discussed below, neither of these claims necessarily involve fraud or misrepresentation. In addition, even if Plaintiff's allegations in the Statement of Claim presented identical elements to Plaintiff's claim under section 523(a)(2)(A), Plaintiff has not met her burden of showing the Arbitrator decided any of those elements in the FINRA Action.

As discussed above, although the FINRA Award references Plaintiff's causes of action and determines that Defendant is liable for one or more of those causes of action, it does not specify the claims on which Defendant's liability is based, and Plaintiff did not assert a claim for fraud. Exh. 2 to the Cowan Declaration. Consequently, Plaintiff has not met her burden of showing that, based on the FINRA Award, the elements of section 523(a)(2)(A) were decided in the former proceeding.

b. *11 U.S.C. § 523(a)(4) – Fraud or Defalcation While Acting in a Fiduciary Capacity*

Pursuant to 11 U.S.C. § 523(a)(4), a bankruptcy discharge does not discharge an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." A debt is nondischargeable for fraud or defalcation while acting in a fiduciary capacity "where (1) an express trust existed, (2) the debt was caused by fraud or defalcation, and (3) the debtor acted as a fiduciary to the creditor at the time the debt was created." *In re Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997); *In re Peltier*, 643 B.R. 349, 359 (9th Cir. BAP 2022).

i. Fraud or Defalcation

"Fraud within the meaning of section 523(a)(4) means actual fraud." *In re Chui*, 538 B.R. 793, 800 (Bankr. N.D. Cal. 2015) (citing *In re Roussos*, 251 B.R. 86 (9th Cir. BAP 2000)). Apart from the fiduciary capacity requirement, the elements of fraud under section 523(a)(4) do not differ from those under section 523(a)(2)(A). *In re Dakota Steel, Inc.*, 284 B.R. 711 (Bankr. N.D. Cal. 2002).

"Defalcation is the misappropriation of trust funds or money held in a fiduciary capacity, or the failure to properly account for such funds." *Chui*, 538 B.R. at 803 (citing *In re Utnehmer*, 499 B.R. 705, 712 (9th Cir. BAP 2013) (reversed on other grounds)). "Defalcation requires more than just negligence. The Supreme Court has found that defalcation under section 523(a)(4) includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary's behavior." *Id*. (citing *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013)).

As noted above, based on the FINRA Award, Plaintiff has not established that Defendant was found liable for fraud or defalcation. The FINRA Award does not demonstrate that Defendant was found to have had intent to deceive Plaintiff or a culpable state of mind as to the improper nature of his behavior. The FINRA Award does not specify which of Plaintiff's claims is the basis for Defendant's liability; it could be based on negligence. If the FINRA Award is based on Plaintiff's stated claim for negligence, it does not establish fraud or defalcation under section 523(a)(4). Consequently, Plaintiff has not met her burden to establish fraud or defalcation under section 523(a)(4).

ii. Fiduciary Relationship Arising From an Express Trust

Whether a relationship is a fiduciary one within the meaning of § 523(a)(4) is a question of federal law. *Ragsdale v. Haller*, 780 F.2d 794, 795 (9th Cir. 1986); *see also In re Cantrell*, 269 B.R. 413, 420 (9th Cir. BAP 2001) ("The definition of 'fiduciary capacity' under § 523(a)(4) is governed by federal law."). In the context of dischargeability, the fiduciary relationship must arise from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the

debt. *Ragsdale*, 780 F.2d at 796; *see also Cantrell*, 269 B.R. at 420 ("Only relationships arising from express or technical trusts qualify as fiduciary relationships under § 523(a)(4).").

Under § 523(a)(4), to ascertain whether there is the required express or technical trust, a court must consider state law. *In re Honkanen*, 446 B.R. 373, 379 (9th Cir. BAP 2011). "A trust under California law may be formed by express agreement, by statute, or by case law." *Cantrell*, 269 B.R. at 420.

An express trust under California law requires the following five elements: (1) present intent to create a trust; (2) a trustee; (3) trust property; (4) a proper legal purpose; and (5) a beneficiary. *Honkanen*, at 379 n.6 (citing California Probate Code §§ 15201–15205). A technical trust under California law is one "arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like." *Id*., at n.7 (quoting *Royal Indemnity Co. v. Sherman*, 124 Cal. App.2d 512, 515 (1954)).

"[S]tate law fiduciary duties alone are insufficient to establish the fiduciary capacity required under section 523(a)(4)." *Chui*, 538 B.R. at 805 (citing *Honkanen*, 446 B.R. at 379). "For a trust relationship under section 523(a)(4) to be established, the applicable state law must clearly define fiduciary duties *and* identify trust property." *Id*. (emphasis in original). "Accordingly, the fact a defendant may be an investment advisor with fiduciary duties to its client is insufficient to establish liability under section 523(a)(4) unless a plaintiff can also identify the existence of an express or technical trust." *Id*.

Plaintiff asserts that Defendant owed her fiduciary duties as an investment advisor. According to Plaintiff, Defendant misrepresented the stability of the FELP stock and failed to diversify Plaintiff's holdings, which allegedly resulted in a complete loss of the funds that she transferred to a brokerage account, through Defendant. Moreover, Plaintiff contends that Defendant disregarded the risks arising from how her funds were invested.

Assuming Defendant acted in a fiduciary capacity of the type required by section 523(a)(4), the FINRA Award does not state that Defendant's liability is based on Plaintiff's claim for breach of fiduciary duty. Exh. 2 to the Cowan Declaration.

Furthermore, the FINRA Award does not mention the existence of an express trust, nor has Plaintiff otherwise demonstrated that the assets which were held in her brokerage accounts were held in an express or technical trust. Consequently, the FINRA Award does not preclude litigation of Plaintiff's claim under section 523(a)(4).

c. *11 U.S.C. § 523(a)(6)*

11 U.S.C. § 523(a)(6) states that a discharge under 11 U.S.C. § 727 does not discharge an individual debtor from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

i. Willfulness

Demonstrating willfulness requires a showing that defendant intended to cause the injury, *not* merely the acts leading to the injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S.Ct. 974, 140 L.Ed. 2d 90 (1998). In the Ninth Circuit, "§ 523(a)(6)'s willful injury requirement 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." *In re Ormsby*, 591 F.3d 1199, 1206 (9th Cir. 2010); *see also In re Su*, 290 F.3d 1140, 1146 (9th Cir. 2002) ("[t]he subjective standard correctly focuses on the debtor's state of mind and precludes application of § 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain."); *In re Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001) ("the willful injury requirement of § 523(a)(6) is met when it is shown either that debtor had *subjective* motive to inflict injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct") (emphasis in original).

In *Kawaauhu*, 523 U.S. at 61, the Supreme Court of the United States (the "Supreme Court") "confront[ed] th[e] pivotal question concerning the scope of the 'willful and malicious injury' exception: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury,…or only acts done with the actual intent to cause injury…?" In considering this, the Supreme Court noted:

> The word "willful" in (a)(6) modifies the word "injury," indicating that

> nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself."

Id. at 57 (emphasis in original). The Supreme Court then suggested:

> The [creditors'] more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the wheel of an automobile to make a left–hand turn without first checking oncoming traffic—could fit the description.

Id. at 62 (emphasis in original). Partially because "[a] construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed,'" the Supreme Court held that "debts arising from recklessly or negligently inflicted injuries [did] not fall within the compass of § 523(a)(6)." *Id*. at 62-63.

ii. Maliciousness

Under § 523(a)(6), the injury must also be the result of maliciousness. *Su*, 290 F.3d at 1146. Maliciousness requires (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury; (4) without just cause or excuse. *Id*. at 1147. Maliciousness does not require "personal hatred, spite, or ill-will." *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997).

As discussed above, the Arbitrator did not make any factual findings in the FINRA

Award. Exh. 2 to the Cowan Declaration. On this record, the Court cannot determine which of Plaintiff's causes of action is the basis of the FINRA Award. Moreover, the elements of Plaintiff's causes of action asserted in the FINRA Action do not include mandatory elements of a claim under section 523(a)(6).

d. Breach of Fiduciary Duty

"In California, the elements for a breach of fiduciary duty are the existence of a fiduciary relationship, breach of that fiduciary duty, and damages." *Plyam*, 530 B.R. at 470–71 (citing *Oasis W. Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011)). "There is no particular scienter requirement, let alone a requirement of a subjective intent to injure." *Id*. "As a result, without more, a judgment for breach of fiduciary duty under California law cannot support a willfulness determination under § 523(a)(6)." *Id*.

Unlike a claim under section 523(a)(6), a breach of fiduciary duty does not require subjective intent to injure under California law. *See Plyam*, 530 B.R. at 470–71; *Kawaauhau*, 523 U.S. at 63. Consequently, even if the FINRA Award is based on Plaintiff's claim for breach of fiduciary duty, the FINRA Award would not establish that Defendant's conduct was willful and malicious.

e. Negligence

In California, "[t]he elements of any negligence cause of action are duty, breach of duty, proximate cause, and damages." *Peredia v. HR Mobile Services, Inc.*, 25 Cal.App.5th 680, 687 (2018) (citing *Artiglio v. Corning Inc.*, 18 Cal.4th 604, 614 (1998)). "In the negligence context…the alleged tortfeasor either knew the risk of harm, meaning the harm was subjectively and actually foreseen, or…should have known the risk of harm, meaning the harm was foreseeable under the objective reasonable person standard." *AIU Insurance Company v. McKesson Corporation*, 598 F.Supp.3d 774, 794 (N.D. Cal. 2022).

> A negligent person has no desire to cause the harm that results from his carelessness. Rest.Torts, sec. 282(c). And he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. Prosser, Torts, p. 261. Willfulness and negligence are contradictory terms…. If conduct is negligent, it is not

willful; if it is willful, it is not negligent.

Donnelly v. Southern Pac. Co., 18 Cal.2d 863, 869 (1941). "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Kawaauhau*, 523 U.S. at 64.

The Arbitrator's reference to Plaintiff's two causes of action in the FINRA Award does not sufficiently establish the elements required to set forth a claim under section 523(a)(6). Negligence can be based on a finding that a defendant should have foreseen that his conduct would cause harm, rather than a finding that the defendant *intended* to cause harm or that the defendant *knew his conduct was substantially certain* to cause harm. *AIU Insurance Company*, 598 F.Supp.3d at 794; *Donnelly*, 18 Cal.2d at 869. To the extent that the Arbitrator based Defendant's liability on Plaintiff's claim for negligence, Plaintiff has not established that the Arbitrator determined that Defendant acted with willfulness and maliciousness, as is necessary to establish a claim under section 523(a)(6). *Kawaauhau*, 523 U.S. at 64. Consequently, based on the findings in the FINRA Award, Plaintiff has not met her burden of showing that the elements of section 523(a)(6) were decided.

2. Issues Actually Litigated

Under California law, an issue is "actually litigated" when it is "properly raised by a party's pleadings or otherwise, when it is submitted to the court for determination, and when the court actually determines the issue." *In re Harmon*, 250 F.3d 1240, 1247 (9th Cir. 2001). In the alternative, "if an issue was necessarily decided in a prior proceeding, it was actually litigated." *Id*. at 1248.

Plaintiff has not established that the Arbitrator actually determined the issues of fraud, breach of fiduciary duty, willfulness or maliciousness in the FINRA Action, or that those issues were necessarily decided.

Moreover, the FINRA Award explicitly denies Plaintiff's request for punitive damages. *Id*. A plaintiff may recover for punitive damages, in addition to actual damages, where it is proven that the defendant has been guilty of oppression, fraud, or malice. California Code of Civil Procedure § 3294). Given that punitive damages were excluded from the FINRA Award, it appears that the Arbitrator did not decide

that Defendant was liable for fraud or that Defendant acted with malice.

3. Issues Necessarily Decided

"In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment." *Creative Venture, LLC v. Jim Ward & Assocs.*, 195 Cal.App.4th 1430, 1451 (2011). This prevents "the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Id*.

As discussed above, in the FINRA Award, the Arbitrator did not state whether the determination is based on Plaintiff's stated claims for breach of fiduciary duty, negligence or both. Exh. 2 of the Cowan Declaration. In addition, the Arbitrator did not make any findings regarding fraud, willfulness or maliciousness. *Id*. Consequently, this element of issue preclusion is not satisfied.

4. Prior Decision is Final and on the Merits

"Under California law, a judgment is not final for the purposes of collateral estoppel until it is free from the potential of a direct attack, i.e. until no further direct appeal can be taken." *Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010). Defendant does not dispute that this element is met; the FINRA Award is final and on the merits.

5. Privity

"[T]he party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Lucido*, 51 Cal.3d at 341. The FINRA Award was against Defendant. Plaintiff was the claimant in the FINRA Action and is the plaintiff in this adversary proceeding. As such, this element is satisfied.

6. Consistent with the Public Policies Underlying Collateral Estoppel

Courts will apply collateral estoppel only if application of preclusion furthers the public policies underlying the doctrine. *In re Baldwin*, 249 F.3d 912, 917 (9th Cir. 2001). The three polices underlying the doctrine of collateral estoppel include: "preservation of the integrity of the judicial system, promotion of judicial economy,

and protection of litigants from harassment by vexatious litigation." *Id.* at 919–20; *see also Lucido*, 51 Cal. 3d at 343. With respect to preservation of the judicial system's integrity, courts evaluate "whether eliminating the possibility of inconsistent verdicts-which would follow from the application of collateral estoppel-would undermine or enhance the public's confidence in the judicial system." *Baldwin*, 249 F.3d at 920.

Because Plaintiff has not shown that the issues of fraud, willfulness or maliciousness were previously decided in the FINRA Action, litigating these issues in this adversary proceeding would not undermine the public's confidence in the judicial system or jeopardize principles of federalism under the Full Faith and Credit Act. Similarly, there is no need to conserve judicial resources where, as here, an issue was not previously adjudicated. Lastly, it is not unfair to require Plaintiff to litigate the issues in the Complaint before this Court when she has not shown that the Arbitrator previously decided those issues. Thus, the public policies underlying the doctrine of collateral estoppel would not be furthered by the application of preclusion in this case.

F. Sanctions

Federal Rule of Bankruptcy Procedure ("FRBP") 9011 provides, in relevant part:

> (b) Representations to the court
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated

(A) By motion

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in [FRBP] 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

Because Defendant has not shown that he adhered to the safe harbor provision set

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forth in FRBP 9011(c)(1)(A), his request for sanctions will be denied.

III. CONCLUSION

The Court will deny the Motion.

The Court will prepare the order.

FOOTNOTES

FN 1: In the Reply, Plaintiffs refer to LBR 9011-**3**(d). This appears to be a typographical error.

Party Information

Debtor(s):

Dennis Phillip Ayre	Represented By Navid Kohan

Defendant(s):

Dennis Phillip Ayre	Pro Se

Plaintiff(s):

Susan Shapiro Cowan	Represented By Leslie A Cohen

Trustee(s):

Nancy J Zamora (TR)	Pro Se