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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	CC-05-1148-KPaB
)		
7	SHAHZAD KHALIGH,)	Bk. No.	LA 02-45357-BB
)		
8)	Adv. No.	LA 03-01368-BB
	Debtor.)		
9	_____)		
)		
10	SHAHZAD KHALIGH,)		
)		
11)		
	Appellant,)		
12)	OPINION	
	v.)		
13)		
	FRED HADAEGH,)		
14)		
	Appellee.)		
15	_____)		

Argued and Submitted on November 17, 2005
at Los Angeles, California

Filed - February 2, 2006

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS, and BRANDT, Bankruptcy Judges.

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1 KLEIN, Bankruptcy Judge:
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3 The question is whether the issue preclusive effect of a
4 confirmed private arbitration award warranted summary judgment
5 holding a debt nondischargeable per 11 U.S.C. § 523(a)(6) as
6 based on "willful and malicious" injury. The arbitration
7 satisfied the state law requirement that it have been conducted
8 using basic elements of adjudicatory procedure, and the confirmed
9 award otherwise qualifies for issue preclusion. Hence, we
10 AFFIRM.

11 FACTS

12 The employment of debtor-appellant, Shahzad Khaligh, by Jet
13 Propulsion Laboratory ("JPL"), a division of California Institute
14 of Technology ("Cal Tech"), under the supervision of appellee,
15 Fred Hadaegh, ended in 1994.

16 As part of the termination, Khaligh and Cal Tech executed a
17 mutual Settlement Agreement and General Release to resolve all
18 possible issues regarding her employment and termination. The
19 Settlement Agreement provided for arbitration of disputes.

20 In 1998, Khaligh nevertheless sued JPL and Hadaegh in a
21 California court on account of matters alleged to have occurred
22 during her employment, including infliction of emotional
23 distress, harassment, discrimination, and constructive discharge.

24 The state court compelled arbitration under the arbitration
25 provision of the Settlement Agreement, which order survived
26 Khaligh's mandamus challenge in the state appeals court.

27 The arbitration proceeded with retired California Superior
28 Court Judge Richard Byrne acting as arbitrator. Proceedings

1 spanned sixteen months, from initial status conference in April
2 2000 through final award in August 2001, during which there was
3 discovery and some seventeen days of hearings and testimony. The
4 defense ultimately prevailed. The award was backed by findings
5 detailed in sixty-two numbered paragraphs, accompanied by the
6 legal analysis characteristic of a seasoned jurist.

7 The arbitrator also awarded Hadaegh \$100,000 in damages on
8 his "cross-complaint" (a counterclaim in federal civil procedure)
9 for defamation resulting from what Khaligh told the press in 1999
10 regarding his conduct as her JPL supervisor. It is that aspect
11 of the award that is the nub of the dispute in this appeal.

12 Khaligh did not accept the arbitrator's invitation to test
13 arbitrability by way of summary judgment and permitted the
14 defamation issue to be tried on the merits in the arbitration.

15 The arbitrator ultimately ruled that the defamation claim
16 was arbitrable as deriving from facts surrounding the Settlement
17 Agreement and being inextricably linked with arbitrable claims.¹

18 On the merits, the arbitrator found that Khaligh made false
19

20 ¹ The pertinent portion of the ruling was:

21 I have considered the matter and find that, pursuant to
22 the Settlement Agreement, Dr. Hadaegh's defamation claim is
23 properly subject to arbitration in these proceedings. His
24 claim derives from the same facts and circumstances
25 surrounding claimant's employment at JPL that resulted from
26 the Settlement Agreement. I believe that this inextricable
27 nexus between claimant's arbitrable claims against Dr.
Hadaegh and JPL, on the one hand, and Dr. Hadaegh's related
defamation claim against claimant, on the other, supports my
conclusion that the defamation claim is subject to
arbitration.

28 Statement of Essential Factual Findings and Legal Conclusions in
Support of Award, at p. 12.

1 and defamatory statements to the press, with intent to publish,
2 which were republished in newspapers and internet news media, and
3 awarded Hadaegh \$100,000, including \$25,000 in punitive damages.

4 Khaligh filed a chapter 7 bankruptcy case on December 16,
5 2002, in which Hadaegh commenced a timely adversary proceeding to
6 except his defamation claim from discharge under § 523(a)(6).

7 Khaligh answered, asserting that the award lacked preclusive
8 effect because it had not yet been judicially confirmed.

9 After Khaligh received a chapter 7 discharge, Hadaegh sought
10 stay relief to permit the state court to confirm the award. The
11 bankruptcy court ruled that the automatic stay had automatically
12 expired pursuant to 11 U.S.C. § 362(c)(2)(C) when Khaligh
13 received her discharge and, in view of the pending adversary
14 proceeding, clarified that Hadaegh was free to attempt to have
15 the arbitration award confirmed.

16 The state court granted the ensuing Petition to Confirm
17 Arbitration Award and confirmed the award over Khaligh's
18 opposition. It ruled that the arbitrator had authority to decide
19 the defamation claim because there was an "inextricable nexus"
20 between Khaligh's claims and Hadaegh's defamation claim.

21 The judgment confirming the arbitration award formally
22 adopted the arbitrator's findings and conclusions. With
23 attorneys' fees and costs, the judgment was for \$107,200.10, plus
24 interest. Khaligh did not appeal the state court's judgment.

25 The bankruptcy court granted summary judgment in the
26 adversary proceeding based on the confirmed arbitration award.
27 Applying California law of issue preclusion, the court concluded
28 that all pertinent issues regarding defamation had been actually

1 and necessarily litigated and were essential to the judgment.
2 Applying Ninth Circuit precedent regarding defamation in the
3 context of § 523(a)(6), Jett v. Sicroff (In re Sicroff), 401 F.3d
4 1101, 1106 (9th Cir. 2005), the court held that all the elements
5 of nondischargeability under § 523(a)(6) were satisfied.

6 Judgment was entered excepting from discharge the \$100,000
7 in damages (plus judgment interest) established in the state
8 court judgment, but not the attorneys' fees and costs. This
9 timely appeal ensued. There is no cross-appeal regarding the
10 discharge status of attorneys' fees and costs.

11 JURISDICTION

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
13 We have jurisdiction under 28 U.S.C. § 158(a)(1).

14 STANDARD OF REVIEW

15 We review summary judgment de novo to assess whether there
16 is a genuine issue of material fact and whether the moving party
17 is entitled to judgment as a matter of law. Gertsch v. Johnson &
18 Johnson (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999).

19 We review rulings regarding rules of res judicata, including
20 claim and issue preclusion, de novo as mixed questions of law and
21 fact in which legal questions predominate. Robi v. Five
22 Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v.
23 Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549, 554 (9th
24 Cir. BAP 2002). Once it is determined that preclusion doctrines
25 are available to be applied, the actual decision to apply them is
26 left to the trial court's discretion. Robi, 838 F.2d at 321;
27 George v. City of Morro Bay (In re George), 318 B.R. 729, 733
28 (9th Cir. BAP 2004), aff'd, 144 F. Appx. 636 (9th Cir. 2005),

1 cert. denied, 74 U.S.L.W. 3390 (2006). When state preclusion law
2 controls, such discretion is exercised in accordance with state
3 law. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800-
4 01 (9th Cir. 1995).

5 ISSUE

6 Whether the confirmed private arbitration award was eligible
7 for issue preclusive effect under California law so as to be
8 applied in a bankruptcy nondischargeability action to establish
9 willful and malicious injury.

10 DISCUSSION

11 The narrow question is whether issues that were actually
12 litigated and necessarily decided in the course of obtaining an
13 arbitration award that was confirmed as a judgment by a California
14 court are eligible for issue preclusive effect under California
15 law.

16 If so, then issue preclusion may be applied in subsequent
17 bankruptcy nondischargeability litigation. Grogan v. Garner, 498
18 U.S. 279, 284-85 n.11 (1991).

19 I

20 If a state court would give preclusive effect to a judgment
21 rendered by courts of that state, then the Full Faith and Credit
22 Statute (28 U.S.C. § 1738) imports the same consequence to an
23 action in federal court based on the same award. McDonald v. City
24 of W. Branch, 466 U.S. 284, 287 (1984); Harmon v. Kobrin (In re
25 Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

26 Since the confirmation of a private arbitration award by a
27 state court has the status of a judgment, federal courts must, as
28 a matter of full faith and credit, afford the confirmation the

1 same preclusive consequences as would occur in state court.

2 Caldeira v. County of Kauai, 866 F.2d 1175, 1178 (9th Cir. 1989).²

3 Accordingly, the confirmed arbitration award at issue in this
4 appeal requires that, as a matter of full faith and credit, we
5 focus on California preclusion law in the arbitration setting.

6 II

7 The basic features of California issue preclusion law were
8 restated by the California Supreme Court in Lucido v. Superior
9 Ct., 51 Cal. 3d 335, 341-43, 795 P.2d 1223, 1225-27 (1990), and
10 then qualified with respect to arbitration awards in Vandenberg v.
11 Superior Ct., 21 Cal. 4th 815, 824, 982 P.2d 229, 234 (1999).

12 Six basic elements must be satisfied before issue preclusion
13 will be applied. Five of the elements are described as
14 "threshold" requirements: (1) identical issue; (2) actually
15 litigated in the former proceeding; (3) necessarily decided in the
16 former proceeding; (4) former decision final and on the merits;
17 and (5) party against whom preclusion sought either the same, or
18 in privity with, party in former proceeding.

19 The sixth element is a mandatory "additional" inquiry into
20 whether imposition of issue preclusion in the particular setting
21 would be fair and consistent with sound public policy. Lucido, 51

22

23

24 ² In contrast, preclusion by way of the rules of res
25 judicata based on an unconfirmed arbitration award would have to
26 proceed on a rationale different from full faith and credit. An
27 unconfirmed arbitration award is not subject to the Full Faith
28 and Credit Statute because arbitration is not a "judicial
proceeding" within the meaning of that statute, hence, any rule
of preclusion with respect to an unconfirmed award would
necessarily be judicially fashioned. McDonald, 466 U.S. at 288;
Caldeira, 866 F.2d at 1178 n.2.

1 Cal. 3d at 341-43, 795 P.2d at 1225-27;³ 1 ANN TAYLOR SCHWING, CAL.
2 AFFIRMATIVE DEFENSES § 15:4 (2005 ed.) ("SCHWING").

3 Although there is an arbitration variation to the fifth
4 element restricting nonmutual applications of issue preclusion
5 that was introduced by Vandenberg, that variation does not apply
6 to this appeal, which involves mutual application of issue
7 preclusion. Vandenberg, 21 Cal. 4th at 836-37, 982 P.2d at 242-
8 43.⁴

9
10 ³ The precise statement by the California Supreme Court in
11 Lucido of its issue preclusion doctrine was:

12 Traditionally, we have applied the [issue preclusion]
13 doctrine only if several threshold requirements are
14 fulfilled. First, the issue sought to be precluded from
15 relitigation must be identical to that decided in a former
16 proceeding. Second, this issue must have been actually
17 litigated in the former proceeding. Third, it must have
18 been necessarily decided in the former proceeding. Fourth,
19 the decision in the former proceeding must be final and on
20 the merits. Finally, the party against whom preclusion is
21 sought must be the same as, or in privity with, the party in
22 the former proceeding. . . .

23 Even assuming all the threshold requirements are
24 satisfied, however, our analysis is not at an end. We have
25 repeatedly looked to the public policies underlying the
26 doctrine before concluding that collateral estoppel should
27 be applied in a particular setting. . . . Accordingly, the
28 public policies underlying collateral estoppel -
preservation of the integrity of the judicial system,
promotion of judicial economy, and protection of litigants
from harassment by vexatious litigation - strongly influence
whether its application in a particular circumstance would
be fair to the parties and constitutes sound judicial
policy.

Lucido, 51 Cal. 3d at 341-43, 795 P.2d at 1225-27 (citations
omitted).

The policy element has been rephrased as "fairness and sound
public policy." Vandenberg, 21 Cal. 4th at 835, 982 P.2d at 241,
citing Lucido, 51 Cal. 3d at 343, 795 P.2d at 1226.

⁴ Under that variation, nonmutual application of issue
preclusion is limited to instances in which the party to be
precluded has agreed to such a consequence. Vandenberg, 21 Cal.

(continued...)

1 Finally, preclusion is an affirmative matter under which the
2 party asserting preclusion bears the burden of establishing the
3 requirements for its imposition. Lucido, 51 Cal. 3d at 341, 795
4 P.2d at 1225. Correlatively, the proponent bears the risk of
5 nonpersuasion. Cf. Camargo v. Cal. Portland Cement Co., 86 Cal.
6 App. 4th. 995, 1018, 103 Cal. Rptr. 841, 855 (Cal. Ct. App.) rev.
7 denied (2001).

8 III

9 California has a comprehensive statutory scheme regulating
10 private arbitration that is codified at title 9 of its Code of
11 Civil Procedure. CAL. CIV. PROC. CODE §§ 1280-1294.2; Vandenberg v.
12 Superior Ct., 21 Cal. 4th at 824, 982 P.2d at 233-34.

13 A

14 When Khaligh filed her bankruptcy case, the arbitration award
15 had been rendered but not confirmed. Under California law, the
16 unconfirmed award had merely the status of a contract in writing
17 between the parties. CAL. CIV. PROC. CODE § 1287.6.⁵

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19 ⁴(...continued)
20 4th at 836-37, 982 P.2d at 242-43 (“[W]e adopt, for California
21 purposes, the rule that a private arbitration award cannot have
22 nonmutual collateral estoppel effect unless the arbitral parties
23 so agree.”).

24 ⁵ The section titled “Effect of Unconfirmed or Unvacated
25 Award” provides:

26 An award that has not been confirmed or vacated has the
27 same force and effect as a contract in writing between the
28 parties to the arbitration.

CAL. CIV. PROC. CODE § 1287.6.

Although, as we note *infra*, unconfirmed arbitration awards
are used as a basis for issue preclusion by California courts in

(continued...)

1 The confirmation of a private arbitration award, which
2 operates to elevate an arbitration award to the status of a
3 judgment, requires a petition to the court. Id. § 1285.⁶

4 The petition to have the state court confirm the arbitration
5 award was not filed until after the bankruptcy court clarified
6 that the automatic stay expired with respect to Khaligh personally
7 upon entry of her discharge and, in light of the pending
8 nondischargeability action, no longer impeded proceeding in state
9 court to complete the confirmation and judicial review process
10 under state law. 11 U.S.C. § 362(c)(2)(C).

11 In the confirmation proceeding, the state court was
12 authorized to correct or vacate the arbitration award if the
13 arbitrator exceeded his authority by entertaining the defamation
14 issue. CAL. CIV. PROC. CODE §§ 1286.2(a)(4) & 1286.6(b).⁷

16 ⁵(...continued)
17 appropriate circumstances, we are dealing with a confirmed
18 arbitration award and leave to another day the question of
19 whether the bankruptcy court could have applied issue preclusion
20 on the basis of an unconfirmed award. McDonald, 466 U.S. at 288.

20 ⁶ The section titled "Filing Petition for Court Review of
Award" provides:

21 Any party to an arbitration in which an award has been
22 made may petition the court to confirm, correct or vacate
23 the award. The petition shall name as respondents all
24 parties to the arbitration and may name as respondents any
other person bound by the arbitration award.

25 CAL. CIV. PROC. CODE § 1285.

26 ⁷ An award may be vacated if the arbitrator exceeded his
27 powers and the award cannot be corrected without affecting the
28 merits of the decision upon the controversy submitted. CAL. CIV.
PROC. CODE § 1286.2(a)(4). Otherwise, the award may merely be
corrected. Id. § 1286.6(b).

1 When the state court confirmed the arbitration award in favor
2 of Hadaegh, a judgment was entered that had the same force and
3 effect as a judgment entered by that court in a civil action. Id.
4 § 1287.4.⁸ That judgment was in effect when the matter came before
5 the bankruptcy court.

6 B

7 As noted, California decisional law permits an arbitration
8 award to provide the basis for issue preclusion in the mutual
9 context (i.e., between the same parties and those in privity with
10 them), but not in the nonmutual (i.e., third party) context unless
11 the arbitral parties agree to such nonmutual use. Vandenberg, 21
12 Cal. 4th at 824-37, 982 P.2d at 233-43.

13 1

14 The leading California Supreme Court decision regarding
15 arbitral preclusion is Vandenberg, which rejected all nonmutual

16
17 ⁸ The section titled "Judgment Confirming Award" provides:

18 If an award is confirmed, judgment shall be entered in
19 conformity therewith. The judgment so entered has the same
20 force and effect as, and is subject to all the provisions of
21 law relating to, a judgment in a civil action of the same
22 jurisdictional classification; and it may be enforced like
23 any other judgment of the court in which it is entered, in
24 an action of the same jurisdictional classification.

25 CAL. CIV. PROC. CODE § 1287.4.

26 For purposes of clarity, we emphasize that this appeal does
27 not involve the doctrine of claim preclusion and its constituent
28 doctrines of merger and bar under which a judgment forecloses
relitigation of all theories that formed part of the original
"claim," as defined in Restatement (Second) of Judgments § 24,
regardless of whether they were actually litigated. Instead,
because § 523(a)(6) was not part of the original claim, we are
dealing with the doctrine of issue preclusion. See Lucido, 51
Cal. 3d at 341 n.3, 795 P.2d at 1225 n.3, citing RESTATEMENT
(SECOND) OF JUDGMENTS § 27.

1 applications of issue preclusion based on judicially-confirmed
2 arbitration awards to which the party to be precluded has not
3 agreed.

4 Although it early abandoned strict mutuality as a basic
5 requirement of issue preclusion based on a judgment rendered after
6 trial, Bernhard v. Bank of Am., 19 Cal. 2d 807, 811-13, 122 P.2d
7 892, 894-95 (1942), the California Supreme Court in Vandenberg
8 disapproved nonmutual application of issue preclusion based on a
9 private arbitration unless the person to be precluded agrees to
10 the contrary. Hence, it answered in the negative the narrow
11 question whether: "a judicially confirmed award in an arbitration
12 governed by California's private arbitration law is entitled to
13 collateral estoppel, or 'issue preclusion,' effect in favor of a
14 nonparty to the arbitration." Vandenberg, 21 Cal. 4th at 824, 982
15 P.2d at 233-34 (emphasis in original, citation omitted).

16 The California Supreme Court took pains in Vandenberg to
17 cabin its decision by emphasizing that its holding was "narrowly
18 circumscribed" to the nonmutual issue preclusion context of
19 private arbitrations and that it was doing nothing to cast doubt
20 upon the body of intermediate appellate court decisional law that
21 permits arbitration awards to be the basis for claim preclusion
22 and issue preclusion in a mutual context.⁹ Thus, the Vandenberg

23
24 ⁹ It explained:

25 Our holding is narrowly circumscribed. Nothing in our
26 decision imposes or implies any limitations on the strict
27 res judicata, or "claim preclusive," effect of a California
28 law private arbitration award. [Citations omitted.] We
also do not address the circumstances, if any, in which a
private arbitration award may have "issue preclusive" effect
in subsequent litigation between the same parties on
different causes of action.

(continued...)

1 decision cites, with apparent approval, leading California
2 intermediate appellate court decisions in those contexts. Id., at
3 824 n.2, citing with approval, Kelly v. Vons Cos., 67 Cal. App.
4 4th 1329, 1339-41, 79 Cal. Rptr. 2d 763, 769-70 (Cal. Ct. App.
5 1998) (issue preclusion), Thibodeau v. Crum, 4 Cal. App. 4th 749,
6 756-61, 6 Cal. Rptr. 2d 27, 30-34 (Cal. Ct. App. 1992) (claim
7 preclusion), and Sartor v. Superior Ct., 136 Cal. App. 3d 322,
8 327-28, 187 Cal. Rptr. 247, 249-50 (Cal. Ct. App. 1982) (claim
9 preclusion).

10 The state supreme court explained in Vandenberg that
11 California issue preclusion "is not an inflexible, universally
12 applicable principle" and that, "even where the minimal
13 prerequisites for invocation of the doctrine are present," its use
14 may be limited where the "underpinnings of the doctrine are
15 outweighed by other factors." Vandenberg, 21 Cal. 4th at 829, 982
16 P.2d at 237 quoting with approval Lucido, 51 Cal. 3d at 341, 795
17 P.2d at 1226-27, and Jackson v. City of Sacramento, 117 Cal. App.
18 3d 596, 172 Cal. Rptr. 826 (Cal. Ct. App. 1981); see generally 1
19 SCHWING § 15:4.

20 In response to the concerns of its two dissenting justices
21 about the potential breadth of the decision, the Vandenberg court
22 emphasized the importance of the limiting principle that issue
23 preclusion is available "in any setting only where such
24 application comports with fairness and sound public policy."
25 Vandenberg, 21 Cal. 4th at 835, 982 P.2d at 241 (emphasis in
26 original). It added that the "fairness and sound public policy"

27
28 ⁹(...continued)
Vandenberg, 21 Cal. 4th at 824 n.2, 982 P.2d at 234 n.2 (emphasis
in original).

1 analysis under California preclusion law depends in part upon the
2 character of the forum that first decided the issue, in which
3 "courts consider the judicial nature of the prior forum, i.e. its
4 legal formality, the scope of its jurisdiction, and its procedural
5 safeguards, particularly including the opportunity for judicial
6 review of adverse rulings." Id., 21 Cal. 4th at 829, 982 P.2d at
7 237. Under that principle, small claims court judgments are
8 denied issue preclusive effect. Id., 21 Cal. 4th at 829 & 835,
9 982 P.2d at 237 & 241, citing Sanderson v. Niemann, 17 Cal. 2d
10 563, 573-75, 110 P.2d 1025, 1030-31 (1941).

11 Since the Vandenberg majority emphasized these points as a
12 limiting principle that is applicable to all cases in order to
13 rebut the concerns of the dissenters, it follows that the
14 "fairness-and-sound-public-policy" analysis that takes into
15 account the judicial nature of the underlying proceeding is
16 applicable to arbitral issue preclusion, as with any other
17 California issue preclusion. In other words, in the wake of
18 Vandenberg, any application of issue preclusion based upon an
19 arbitration must clear the "fairness-and-sound-public-policy"
20 hurdle that takes into account the judicial nature of the
21 underlying proceeding.

22 2

23 When California courts assess the "fairness-and-sound-public-
24 policy" prerequisite for imposing issue preclusion based upon an
25 arbitration award, they take into account the considerations
26 articulated in Restatement (Second) of Judgments, which emphasize
27 the importance of the question whether the underlying arbitration
28 followed basic elements of adjudicatory procedure and was, thus,

1 "adjudicatory in nature." Kelly v. Vons Cos., 67 Cal. App. 4th at
2 1336, 79 Cal. Rptr. 2d at 767, citing Restatement (Second) of
3 Judgments § 84; Jacobs v. CBS Broad. Inc., 291 F.3d 1173, 1177-79
4 (9th Cir. 2002) (California law), citing Restatement (Second) of
5 Judgments §§ 83-84.¹⁰

6 One could also construe this aspect of the policy requirement
7 as amounting to a rule that, in the context of arbitration, the
8 prerequisites for issue preclusion that the pertinent issue have

10 ¹⁰ The Ninth Circuit in Jacobs was dealing with an
11 unconfirmed private arbitration award in a diversity case and
12 applying, by way of diversity rules, the California state-law
13 doctrine that issue preclusion may be premised on an unconfirmed
14 award. We, in contrast, confront a confirmed award as to which
15 the strictures of the Full Faith and Credit Statute apply. The
16 adjudicatory procedure analysis, however, applies to all
17 California arbitration awards, confirmed and unconfirmed.

18 The consensus within the California appellate courts is that
19 an unconfirmed arbitration award may be "sufficiently firm" as to
20 warrant issue preclusion with respect to matters actually and
21 necessarily litigated and determined in the course of the
22 arbitration so long as the proceeding was sufficiently
23 adjudicatory in nature. E.g., Kelly, 67 Cal. App. 4th at 1336,
24 79 Cal. Rptr. 2d at 767 (issue preclusion imposed on unconfirmed
25 award); Lehto v. Underground Constr. Co., 69 Cal. App. 3d 933,
26 939, 138 Cal. Rptr. 419, 422 (Cal. Ct. App. 1977) (same); 1
27 SCHWING §§ 14:41 & 15:4; CAL. PRACTICE GUIDE: ALTERNATIVE DISPUTE
28 RESOLUTION ¶ 5:542 (Rutter Group 2004).

21 The status of an unconfirmed arbitration award as a mere
22 contract under California Code of Civil Procedure § 1287.6 does
23 not compel a contrary result. California law distinguishes
24 finality for purposes of rules of res judicata (including issue
25 preclusion) from finality for other purposes and applies the rule
26 stated in Restatement (Second) of Judgments § 13 ("The rules of
27 res judicata are applicable only when a final judgment is
28 rendered. However, for purposes of issue preclusion (as
distinguished from merger and bar [claim preclusion]), 'final
judgment' includes any prior adjudication of an issue in another
action that is determined to be sufficiently firm to be accorded
conclusive effect."). George Arkalian Farms, Inc. v. Agric.
Labor Relations Bd., 49 Cal. 3d 1279, 1290-91, 783 P.2d 749, 755-
56 (Cal. 1989) ("finality for purposes of appellate review is not
the same as finality for purposes of res judicata."), citing with
approval, RESTATEMENT (SECOND) OF JUDGMENTS § 13 ("Arkalian"). The
Ninth Circuit recognized this California consensus in Jacobs.

1 been "actually litigated and determined" and have been "essential"
2 to the outcome before issue preclusion may be imposed, Arkalian,
3 49 Cal.3d at 1289-90, 783 P.2d at 754-55, are to be assessed
4 through the prism of whether the specific arbitration was
5 adjudicatory in nature. Cf. Camargo, 86 Cal. App. 4th. at 1018,
6 103 Cal. Rptr. 2d at 855 (issue preclusion based on confirmed
7 arbitration award reversed for lack of proof that there was "full
8 litigation and fair adjudication" of precluded issue).

9 The essential point is that, while confirmation of an
10 arbitration award under California law does not turn on whether
11 the arbitration proceeding was conducted in an adjudicatory
12 manner, California makes the adjudicatory nature of the underlying
13 arbitration a prerequisite for using the award as a basis to
14 impose issue preclusion in other litigation.

15 The crucial inquiry regarding adjudicatory nature is whether
16 the arbitration hearing possessed a judicial character. As with
17 administrative proceedings, if there was the requisite judicial
18 character, then relitigation may be precluded:

19 Parties to an arbitration, like parties to administrative
20 hearings, are often afforded the opportunity for a hearing
21 before an impartial and qualified officer, at which they may
22 give formal recorded testimony under oath, cross-examine and
23 compel the testimony of witnesses, and obtain a written
24 statement of decision. When an arbitration has these
25 attributes, it is not unjust to bind the parties to
26 determinations made during the proceeding.

27 Kelly, 67 Cal. App. 4th at 1336-37, 79 Cal. Rptr. 2d at 767.

28 The arbitration provision of the Restatement (Second) of
29 Judgments specifically incorporates the standards for preclusive
30 administration adjudications. RESTATEMENT (SECOND) OF JUDGMENTS § 84,

1 incorporating id. § 83.¹¹ Thus, whether any particular arbitration
2 is eligible for preclusion depends upon whether adjudicatory
3 standards for administrative tribunals were satisfied.

4 Under Restatement (Second) of Judgments § 83, an adjudicative
5 determination by an administrative tribunal is preclusive only
6 insofar as the proceeding entailed the essential elements of
7 adjudication, including:

8 (a) Adequate notice to persons who are to be bound by
9 the adjudication, as stated in § 2;

10 ¹¹ The Restatement rule regarding arbitral preclusion is:

11 § 84. Arbitration Award

12 (1) Except as stated in Subsections (2), (3), and (4), a
13 valid and final award by arbitration has the same effects
14 under the rules of res judicata, subject to the same
15 exceptions and qualifications, as a judgment of a court.

16 (2) An award by arbitration with respect to a claim does not
17 preclude relitigation of the same or a related claim based
18 on the same transaction if a scheme of remedies permits
19 assertion of the second claim notwithstanding the award
20 regarding the first claim.

21 (3) A determination of an issue in arbitration does not
22 preclude relitigation of that issue if:

23 (a) According preclusive effect to determination of the
24 issue would be incompatible with a legal policy or
25 contractual provision that the tribunal in which the issue
26 subsequently arises be free to make an independent
27 determination of the issue in question, or with a purpose of
28 the arbitration agreement that the arbitration be specially
expeditious; or

(b) The procedure leading to the award lacked the
elements of adjudicatory procedure prescribed in § 83(2).

(4) If the terms of an agreement to arbitrate limit the
binding effect of the award in another adjudication or
arbitration proceeding, the extent to which the award has
conclusive effect is determined in accordance with that
limitation.

1 (b) The right on behalf of a party to present evidence
2 and legal argument in support of the party's contentions
3 and fair opportunity to rebut evidence and argument by
opposing parties;

4 (c) A formulation of issues of law and fact in terms of
5 the application of rules with respect to specified
6 parties concerning a specific transaction, situation, or
status, or a specific series thereof;

7 (d) A rule of finality, specifying a point in the
8 proceeding when presentations are terminated and a final
decision is rendered; and

9 (e) Such other procedural elements as may be necessary
10 to constitute the proceeding a sufficient means of
11 conclusively determining the matter in question, having
12 regard for the magnitude and complexity of the matter in
question, the urgency with which the matter must be
resolved, and the opportunity of the parties to obtain
evidence and formulate legal contentions.

13 RESTATEMENT (SECOND) OF JUDGMENTS § 83(2).

14 With those considerations in mind, we return to the specifics
15 of the Khaligh-Hadaegh arbitration.

16 C

17 Beginning with the question of adjudicatory standards, which
18 we discussed as an additional or sixth element of California issue
19 preclusion, we note that the arbitrator was a retired California
20 Superior Court judge who was by definition experienced in the
21 adjudicatory process. There is no dispute that the parties had
22 adequate notice. Both appellant and appellee were represented by
23 counsel throughout the arbitration. The arbitration spanned
24 sixteen months. The parties engaged in extensive discovery,
25 formulated issues, and had seventeen days of hearings that enabled
26 the parties to present evidence, rebuttal evidence, and argument.

27 The record indicates that the arbitrator considered all of
28 the evidence, the arguments advanced by the parties, both orally

1 and in writing, and the law applicable to the parties' claims.
2 The Arbitration Award is a twenty-three page written decision
3 plainly prepared by a jurist, which award reflects that the
4 arbitrator reviewed the pertinent legal authorities on the issue,
5 the applicable facts and evidence, and concluded that Khaligh
6 defamed Hadaegh. In other words, the proceeding was conducted in
7 an inherently adjudicatory fashion.

8 It follows that the arbitration award meets the adjudicatory
9 standards in a manner that satisfies the California law
10 requirement that application of issue preclusion be fair as
11 between the parties and comport with public policy.

12 D

13 Turning to the threshold requirements for California issue
14 preclusion previously described: (1) the defamation issue sought
15 to be precluded from litigation in the adversary proceeding was
16 identical to that litigated in the former proceeding; (2) the
17 issue was actually litigated in the former proceeding; (3) the
18 issue was necessarily decided in the former proceeding; (4) the
19 decision in the arbitration was final and on the merits; and (5)
20 the party against whom preclusion would be applied - Khaligh - is
21 the same party as in the arbitration. Lucido, 51 Cal.3d at 341,
22 795 P.2d at 1225; Harmon, 250 F.3d at 1245 (California law);
23 Wright v. Turner (In re Turner), 204 B.R. 988, 992 (9th Cir. BAP
24 1997) (California law); 1 SCHWING §§ 15:2 - 15:5.

25 In the context of the specific bankruptcy nondischargeability
26 issue under § 523(a)(6), the issues litigated in the defamation
27 action would need to equate with "willful and malicious" injury.

28 The first step of the § 523(a)(6) inquiry is whether there

1 was a "willful" injury, which is construed to entail a deliberate
2 or intentional injury. Kawaauhau v. Geiger, 523 U.S. 57, 61-62
3 (1998). In this circuit, the intent required in order to be
4 "willful" is either the subjective intent of the actor to cause
5 harm or the subjective knowledge of the actor that harm is
6 substantially certain to occur. Carrillo v. Su (In re Su), 290
7 F.3d 1140, 1144-45 (9th Cir. 2002), aff'g 259 B.R. 909, 912 (9th
8 Cir. BAP 2001).

9 The arbitrator found that Khaligh's false and defamatory
10 statements were made with the intent to harm Hadaegh. This
11 determination of subjective intent means that the "willful"
12 requirement is met. Moreover, the decision of the arbitrator to
13 award punitive damages tends to reinforce the nature of the
14 arbitrator's finding. Cruz v. Homebase, 83 Cal. App. 4th 160, 167
15 83 Cal. Rptr. 2d 435, 440 (Cal. Ct. App. 2000).

16 The second step of the § 523(a)(6) inquiry is whether
17 appellant's conduct is "malicious." The relevant test for such
18 "malicious" conduct is: (1) a wrongful act; (2) done
19 intentionally; (3) which necessarily causes injury; and (4)
20 without just cause and excuse. Sicroff, 401 F.3d at 1105-06.

21 In this instance, the result is largely controlled by the
22 Ninth Circuit's decision in Sicroff regarding the nondischargeable
23 status of a California defamation claim.¹² In that decision, the
24 court of appeals treated the first three elements of "malicious"
25 as easily satisfied by a defamation directed against a university

27 ¹² The nondischargeability action was decided before the
28 actual trial of the state court defamation action, which action
likely would have been mooted if § 523(a)(6) did not save the
plaintiff's claim from discharge. Sicroff, 401 F.3d at 1103 n.3.

1 professor as self-evidently wrongful, committed by an intentional
2 act of publication that was directed at, and necessarily caused
3 harm to, the target's professional reputation. Id. at 1106. The
4 court of appeals paused in Sicroff only as to the fourth element -
5 lack of just cause or excuse - in light of an asserted aim of
6 saving an academic department in a university from elimination.
7 The pause was only brief because the Ninth Circuit concluded that
8 evidence in the record of specific intent to injure the individual
9 professor negated just cause or excuse. Id. at 1107.

10 In this instance, there is no assertion that the defamation
11 by Khaligh was directed towards a goal that might implicate just
12 cause or excuse. Hence, Sicroff, obliges us to conclude that the
13 requirements for California issue preclusion are satisfied.

14 Having concluded that it was permissible for the court to
15 apply issue preclusion to establish willful and malicious injury
16 for purposes of § 523(a)(6), the question becomes whether the
17 court's actual choice to do so nevertheless was an abuse of
18 discretion.

19 As Khaligh has offered nothing to support her appellate
20 burden of persuading us that the court applied an incorrect
21 standard of law, a clearly erroneous view of the facts, or
22 otherwise did something that leaves us with the definite and firm
23 conviction that there was a clear error of judgment, we do not
24 perceive an abuse of discretion in the choice of the court to
25 impose issue preclusion as a basis for summary judgment.

26 * * *

27 Imposition of issue preclusion as between the parties to the
28 confirmed arbitration award was permissible under applicable

1 California law. The bankruptcy court did not abuse its discretion
2 when it entered summary judgment without relitigating the issue of
3 willful and malicious injury. AFFIRMED.

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5

6 PAPPAS, Bankruptcy Judge, CONCURRING.

7

8 I write separately because I am concerned that the Panel's
9 opinion, which broadly examines the preclusive effect of
10 arbitration awards rendered in a variety of factual and procedural
11 scenarios, could be read to apply outside the context of the
12 narrow issue we are asked to decide in this appeal.

13 Appellee's arbitration award was confirmed by the California
14 state court in a statutory proceeding in which Appellant was
15 represented and actively participated. Indeed, Appellant's
16 opposition in state court to the petition to confirm the award
17 specifically raised her contention that the arbitrator exceeded
18 his jurisdiction and authority when he entertained Appellee's
19 defamation claim, which is also the most important reason she
20 offers us to overturn the bankruptcy court's decision. The state
21 court expressly rejected that challenge. It ruled that:

22

23 "[T]he Arbitrator did not exceed the scope of
24 his authority in deciding Respondent's
25 [Khaligh's] claims against Petitioner or
26 Petitioner's claims against Respondent, which
27 were encompassed within the arbitration terms
28 of the Settlement Agreement. The fact that
certain of Respondent's post-settlement
employment at JPL had been terminated does not
break the "inextricable nexus" as described by
the Arbitrator between Respondent's claims of
discriminatory treatment by JPL and
Petitioner, and Petitioner's defamation claims

1 against Respondent arising from Respondent's
2 own conduct toward Petitioner. . . . The
3 Court finds that Petitioner properly raised
4 his defamation claims in this proceeding, and
5 that the Arbitrator properly considered and
6 determined them."

7 Statement of Decision and Order on Petition to Confirm Arbitration
8 Award at p. 2, Los Angeles Superior Court, Case No. BC 198189
9 (March 29, 2004). The result of the state court proceeding was a
10 money judgment in Appellee's favor confirming the arbitration
11 award, which judgment Appellant did not appeal. That final state
12 court judgment has "the same force and effect as . . . a judgment
13 in a civil action . . ." CAL. CIV. PROC. CODE § 1287.4. Given this
14 record, there is no need to decide whether the arbitration award
15 is entitled to issue preclusive effect in the bankruptcy case. It
16 is the state court's judgment, not the arbitrator's decision, that
17 is entitled to Full Faith and Credit.

18 In its analysis of the California cases, the primary opinion
19 explores in depth the "fairness" of the arbitration proceeding. I
20 agree with the conclusion that the arbitration process encompassed
21 all the critical attributes of a full-blown judicial proceeding,
22 and that it was undoubtedly a fair one. But Appellant does not
23 indict the procedures employed during the arbitration; her
24 objection focuses on the scope of the arbitration. And while
25 Appellant's scope argument was first offered to and rejected by
26 the arbitrator in a cogent, persuasive analysis, more importantly,
27 her contention was later submitted to the state court and
28 judicially resolved. To me, that judicial resolution embodies all
29 the fairness I think the California courts would require to afford
30 preclusive effect to the state court's final judgment. And

1 because Appellant had her day in court, I think it of is no moment
2 whether the California courts would give preclusive effect to
3 arbitration awards, confirmed or unconfirmed, mutual or nonmutual,
4 under different facts, such as when a challenge to the general
5 "fairness" of the underlying arbitration process is advanced.

6 The state court judgment satisfies all the requirements to be
7 afforded preclusive effect. For this reason, I concur, but only in
8 the disposition.

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