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

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

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In re:	)	BAP No.	CC-10-1357-DKiPa
	)		
LEONARD G. GORDON,	)	Bk. No.	LA 09-29930 SB
	)		
Debtor.	)	Adv. No.	LA 09-02495 SB
	)		
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MATTHEW ZUCKERMAN,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
LEONARD G. GORDON,	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
Appellee.	)		
	)		

Argued and Submitted on March 16, 2011  
at Pasadena, California

Filed - April 6, 2011

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

Hon. Samuel L. Bufford, Bankruptcy Judge, Presiding.

Appearances: Sue-Ann Tran of Fraley & Associates for Appellant.  
Arnold M. Johnson for the Appellee.

Before: DUNN, KIRSCHER, and PAPPAS Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.



1 ("Intermountain") in the amount of \$950,000. Intermountain also was  
2 a Nevada corporation wholly owned by Mr. Zuckerman.

3 The documents which comprised the Agreements included an  
4 Assumption of Controls Agreement dated September 30, 2001, an  
5 Agreement dated October 10, 2001 ("October 2001 Agreement"), and a  
6 Power of Attorney and Indemnification ("POA") dated October 10,  
7 2001.

8 The parties to the Assumption of Controls Agreement were  
9 Mr. Zuckerman and Commercial Scientific Corporation ("ComSci"),  
10 which appears to be a company in which Mr. Gordon had an unspecified  
11 interest. The Assumption of Controls Agreement defines ComSci as  
12 the "Contractor," and states that it

13 concerns certain fiduciary, professional services, and  
14 surrogacy required of ComSci's Leonard G. Gordon . . . in  
15 furtherance of the existing and continuing active and  
16 hands-on development of, and the tactical operation of a  
series [sic] projects and business opportunities that may,  
from time to time, involve the capital assets of and the  
professional man-hours of [Mr. Zuckerman].

17 Mr. Zuckerman and his affiliates are collectively referred to as the  
18 "Client." Mr. Gordon signed the Assumption of Controls Agreement on  
19 behalf of ComSci.

20 The Assumption of Controls Agreement was drafted by the parties  
21 without the assistance of counsel. Mr. Zuckerman's purpose in  
22 entering the Assumption of Controls Agreement is set forth in  
23 paragraph II.1., which provides:

24 [The Client] owns, controls, operates and provides  
25 services to certain real properties, cash receivables,  
26 securities and other valuable and potentially valuable  
tangible and intangible assets (collectively hereinafter  
referred to as the "Assets"), all of which are in need of

1 new and more cohesive resident long-term executive  
2 management and of fiduciary an [sic] investment advisory  
3 services. The Client is also desirous of seeing the  
4 subject Assets to be, in-part [sic], proactively deployed  
5 in technology-driven financial markets hedge fund type  
6 trading as a way to realize higher yielding returns. One  
7 of these opportunities uses highly reputed market-timing  
8 technologies that share the objectives of short-term  
9 higher risk oriented "day trader" trading. This system of  
10 technologies and its in-market uses requires specialized  
11 knowledge, and related techniques and know-how that Gordon  
12 is uniquely and specifically qualified to provide.

13 The amorphous arrangement between the parties is identified in  
14 paragraph III of the Assumption of Controls Agreement, which is  
15 entitled "Specific Work Programs." This paragraph provides that  
16 Mr. Gordon had chosen, subject to the continuing mandate of  
17 Mr. Zuckerman, as his first work program "to act immediately to  
18 arrange the refinancing of certain real estate owned by an  
19 affiliated corporation." Paragraph IV.2. required Mr. Gordon to  
20 "proactively take direct possession of the proceeds of the real  
21 estate's refinancing in order to satisfy a number of overdue  
22 financial obligations that presently offer a severe threat to the  
23 financial stability of the Assets." The Assumption of Controls  
24 Agreement contemplates that Mr. Gordon would need to contribute his  
25 own direct capital contributions in addition to his "specialized  
26 expertise and useful and timely assistance." In exchange, he was  
entitled to determine the "earned consideration" for the services  
performed, including the amount of a "Contractor-Discretionary  
success consideration."

The parties to the October 2001 Agreement were Mr. Gordon,  
personally, and Mr. Zuckerman. The October 2001 Agreement had

1 greater specificity than the Assumption of Controls Agreement.  
2 Under the October 2001 Agreement, Mr. Zuckerman was to transfer or  
3 cause to be transferred to Mr. Gordon all rights, title and interest  
4 in the Colorado Property. Mr. Gordon was to secure a loan in the  
5 amount of \$995,000 on the Colorado Property and to pay Intermountain  
6 \$950,000 from the proceeds ("Refinance Proceeds") for release of its  
7 first position deed of trust. Mr. Zuckerman was to occupy the  
8 Colorado Property, and was responsible for payment of all taxes,  
9 utilities, and maintenance costs with respect to the Colorado  
10 Property. Mr. Zuckerman was to use \$500,000 of the funds paid to  
11 Intermountain to loan (the "Intermountain Loan") to one or more  
12 "business units" Mr. Gordon was to form and operate utilizing  
13 "quantitative financial trading models." The business units were  
14 then to make the payments on the new loan on the Colorado Property  
15 until the later of June 15, 2003 or until Mr. Zuckerman converted  
16 the Intermountain Loan into a 35% equity interest in the business  
17 units, an option available to exercise at Mr. Zuckerman's  
18 discretion. If Mr. Zuckerman did not convert the Intermountain Loan  
19 into an equity interest in the business units by June 15, 2003, the  
20 business units were to repay the Intermountain Loan to Mr. Zuckerman  
21 on that date.

22 In exchange for the Intermountain Loan to the business units,  
23 Mr. Gordon agreed to serve as "custodian of title" to the Colorado  
24 Property and the Refinance Proceeds at no charge to Mr. Zuckerman.  
25 By June 15, 2003, Mr. Gordon was to place the full present value and  
26 title to "the aforementioned property" offshore through the use of

1 deeds of trust and "quick claim deeds" or through any other means  
2 necessary.

3 Finally, the October 2001 Agreement required Mr. Gordon to  
4 maintain \$357,079<sup>3</sup> in an interest bearing account. From this  
5 account, Mr. Gordon was to pay Mr. Zuckerman \$12,500 each month for  
6 twenty months. Each monthly payment was to be made to Mr. Zuckerman  
7 in three installments: 60% on the 1st day of the month, 20% on the  
8 10th, and 20% on the 20th. On June 15, 2003, the remaining  
9 \$107,078 [sic], together with accrued interest, was to be paid to  
10 Mr. Zuckerman.

11 The recitals in the POA set forth the urgency of  
12 Mr. Zuckerman's need for "external assistance" for his current  
13 business affairs. Under the POA, Mr. Zuckerman was to "empower"  
14 Mr. Gordon to "take quasi-unrestricted,<sup>4</sup> outright, and immediate  
15 control over all of [Mr. Zuckerman's] assets and liabilities."  
16 Specifically, Mr. Gordon was empowered to take immediate "fiduciary"  
17 authority and operating control over the Colorado Property,  
18 HyperPanel, and Intermountain. The POA instructed Mr. Gordon to

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19  
20 <sup>3</sup> The October 2001 Agreement also required Mr. Gordon to pay  
21 from the Refinance Proceeds \$137,752 in specified payments  
22 ("Specified Payments"). Refinance Proceeds of \$45,000 were to be  
23 left after the Intermountain deed of trust obligation was paid.  
24 Assuming that the parties used the \$950,000 paid to Intermountain to  
25 (1) make the Specified Payments and (2) fund the Intermountain Loan,  
26 \$312,248 would be left of Intermountain's funds; the addition of the  
\$45,000 remaining Refinance Proceeds equals \$357,248. Thus, the  
October 2001 Agreement appears to provide an approximate full  
allocation for the disposition of the Refinance Proceeds.

<sup>4</sup> The POA does not define the term "quasi-unrestricted."

1 refinance the Colorado Property, the purpose of which was to raise  
2 cash liquidity sufficient to provide a working capital reserve  
3 estimated at \$995,000. Thereafter, Mr. Gordon, through ComSci, was  
4 to organize and implement a "proactive money management portfolio,"  
5 which was expected to be high risk "concomitant with pursuing  
6 returns of such magnitude." The POA states that Mr. Zuckerman  
7 believes the harsh and restrictive measures, i.e., surrendering his  
8 control over his assets, were "the only practicable way available to  
9 enable the two parties to work jointly to get quick control over the  
10 circumstances and then begin to create new income and assets."

11 (Emphasis added.) The POA provided that Mr. Zuckerman agreed to  
12 indemnify Mr. Gordon for his actions under the agreements; the POA  
13 expressly stated that Mr. Gordon was unwilling to undertake to act  
14 on Mr. Zuckerman's behalf without the indemnification agreement.

15 At some point in 2003, the relationship between the parties  
16 came to a contentious end. Mr. Gordon sued Mr. Zuckerman and his  
17 wife in the Pitkin County (Colorado) Court for a quiet title decree  
18 and possession of the Colorado Property ("FED Action"). The FED  
19 Action was removed to the Garfield County (Colorado) District Court  
20 ("Colorado Court") and was consolidated with litigation which  
21 Intermountain and HyperPanel ("Intermountain Claims") had initiated  
22 against Mr. Gordon. The Intermountain Claims ultimately were tried  
23 in the Zuckermans' names. Following a five-day trial, the Colorado  
24 Court in its decision dated September 14, 2005, made numerous  
25 findings with respect to the events that gave rise to  
26 the litigation, which are incorporated in the facts which follow.

1           On November 20, 2001, Mr. Gordon executed a special warranty  
2 deed as president<sup>5</sup> of HyperPanel through which he conveyed the  
3 Colorado Property to himself. On the same date Mr. Gordon executed  
4 a deed of trust to IndyMac Bank ("IndyMac"), securing a debt of  
5 \$985,000 on the Colorado Property. The Refinance Proceeds in the  
6 amount of \$961,875 were in the form of a check made payable by  
7 IndyMac to Intermountain. Mr. Gordon, accompanied by a business  
8 associate, Jane Yang, and by Mr. Zuckerman, deposited the check into  
9 an account in Mr. Gordon's name. Mr. Zuckerman, through  
10 Intermountain, never loaned \$500,000 to the business units  
11 contemplated by the October 2001 Agreement. Mr. Zuckerman received  
12 from Mr. Gordon living expenses and expenses for the Colorado  
13 Property. He also participated in decisions as to which of his  
14 creditors Mr. Gordon was to pay. Mr. Gordon never paid the  
15 Intermountain debt from the Refinance Proceeds, but he recorded a  
16 release of Intermountain's deed of trust which he executed on  
17 January 27, 2003.

18           The Colorado Court found neither Mr. Gordon nor Mr. Zuckerman  
19 to be credible.<sup>6</sup> It also determined that because the parties did

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21           <sup>5</sup> Mr. Gordon never was president of HyperPanel.

22           <sup>6</sup> "In his depositions, [Mr. Zuckerman] referred to Felicia  
23 Ray as a person who signed important documents with HyperPanel, but  
24 later admitted Felicia Ray was not a person, but a house cat.  
25 During his deposition, Mr. Zuckerman testified that Michael Berg  
26 signed corporate documents as Charles Berg, who was in fact a dog.  
At trial, he tried to muddy the waters by saying that Michael Berg  
only signed as Charlie Berg." Colorado Court's Findings of Fact,

(continued...)

1 not follow the Agreements in their use of the Refinance Proceeds,  
2 they had in effect abandoned the Agreements, except for the scheme  
3 to refinance the Colorado Property and pay Mr. Zuckerman and his  
4 creditors. Most importantly for our purposes, the Colorado Court  
5 found that "Mr. Zuckerman has waived any rights he has to compliance  
6 with [the Agreements] concerning the disposition of the [Refinance  
7 Proceeds], except for an accounting of how they were spent."

8 Based on the evidence before it, the Colorado Court determined  
9 that Mr. Gordon had only accounted to Mr. Zuckerman for \$763,737 of  
10 the \$985,000 Refinance Proceeds. Judgment was entered against  
11 Mr. Gordon and in favor of Mr. Zuckerman for the balance: \$221,243.  
12 The Colorado Court specifically held that Mr. Gordon's failure to  
13 account was "the result of breach of contract, and not, under these  
14 circumstances, as a breach of fiduciary duty." The Colorado Court  
15 also stated "Mr. Gordon has not committed fraud or breached any  
16 fiduciary duty to Mr. Zuckerman," reaching this conclusion based on  
17 its finding that Mr. Zuckerman both knew about and participated in  
18 banking the Refinance Proceeds.

19 The Colorado Court declared the Zuckermans to be the owners of  
20

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21 <sup>6</sup>(...continued)

22 Conclusions of Law, and Judgment ("Colorado Court Findings") at  
23 p. 5. Mr. Gordon doesn't fare much better in the Colorado Court's  
24 findings, which note (1) the existence of a fraud judgment against  
25 Mr. Gordon in Texas, (2) Mr. Gordon's decision to sell in China a  
26 food supplement product he had been unable to market in the United  
States because the FDA had declared the product unsafe and not  
salable, and (3) Mr. Gordon's numerous misrepresentations in  
connection with obtaining the IndyMac loan on the Colorado Property.

1 the Colorado Property vis-a-vis Mr. Gordon, subject to the IndyMac  
2 mortgage.

3       The Colorado Court of Appeals thereafter affirmed the Colorado  
4 Court's judgment, except (1) to clarify that as between Mr. Gordon  
5 and the Zuckermans, the latter are liable for repayment of the  
6 IndyMac loan, and (2) that the damages were to be recalculated  
7 because the Refinance Proceeds were \$961,875, not \$985,000 as  
8 determined by the trial court. The judgment amount following remand  
9 was recalculated to be \$198,138. The Colorado Supreme Court denied  
10 Mr. Gordon's Petition for Writ of Certiorari on May 27, 2008. On  
11 May 12, 2009, the Superior Court for the State of California, County  
12 of Los Angeles entered a sister-state judgment in favor of Mr.  
13 Zuckerman and against Mr. Gordon for \$210,083 plus interest based on  
14 the Colorado judgment.

15       Mr. Gordon then filed a voluntary chapter 7 petition on  
16 July 31, 2009. On October 23, 2009, Mr. Zuckerman filed an  
17 adversary proceeding seeking a determination that the debt  
18 represented by the sister-state judgment was nondischargeable  
19 pursuant to § 523(a)(4) for fraud or defalcation while acting in a  
20 fiduciary capacity. The bankruptcy court granted summary judgment  
21 in favor of Mr. Gordon on August 31, 2010, (1) because the  
22 Agreements did not establish an express trust, (2) because the  
23 Colorado Court had previously determined that Mr. Gordon did not  
24 breach any fiduciary duty to Mr. Zuckerman, and (3) because the  
25 Colorado Court's finding that both parties were guilty of unclean  
26 hands bars Mr. Zuckerman from litigating the § 523(a)(4) claim for

1 relief.

2 Mr. Zuckerman appealed.

3  
4 II. JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
6 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

7  
8 III. ISSUE

9 Whether the Colorado Court's finding that Mr. Gordon did not  
10 breach a fiduciary duty to Mr. Zuckerman precludes Mr. Zuckerman  
11 from asserting that Mr. Gordon committed a defalcation while acting  
12 in a fiduciary capacity.

13  
14 IV. STANDARDS OF REVIEW

15 We review the bankruptcy court's decision to grant a motion for  
16 summary judgment de novo. Sigma Micro Corp. v. Healthcentral.com  
17 (In re Healthcentral.com), 504 F.3d 775, 783 (9th Cir. 2007). De  
18 novo means review is independent, with no deference given to the  
19 trial court's conclusion. See First Ave. W. Bldg., LLC v. James (In  
20 re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006); Mwangi  
21 v. Wells Fargo Bank, N.A. (In re Mwangi), 432 B.R. 812, 818 (9th  
22 Cir. BAP 2010). Our de novo review is governed by the same standard  
23 used by the bankruptcy court under Fed. R. Civ. P. 56(c). See  
24 Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110,  
25 1131 (9th Cir. 2003). Viewing the evidence in the light most  
26 favorable to the nonmoving party, we must determine "whether there

1 are any genuine issues of material fact and whether the trial court  
2 correctly applied relevant substantive law.” Tobin v. Sans Souci  
3 Ltd. P’ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001).

4 We also review de novo the preclusive effect of a judgment.  
5 Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001);  
6 Bankruptcy Recovery Network v. Garcia (In re Garcia), 313 B.R. 307,  
7 310 (9th Cir. BAP 2004).

8 Both the Ninth Circuit and this Panel have stated that because  
9 the issue of whether a person is a fiduciary for purposes of  
10 § 523(a)(4) is a question of federal law, it is subject to de novo  
11 review on appeal. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir.  
12 1986); T & D Moravits & Co. v. Munton (In re Munton), 352 B.R. 707,  
13 712 (9th Cir. BAP 2006); Cantrell v. Cal-Micro, Inc. (In re  
14 Cantrell), 269 B.R. 413, 418 (9th Cir. BAP 2001); Lovell v.  
15 Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir. BAP 1999);  
16 Abrams v. Sea Palms Assoc., Ltd. (In re Abrams), 229 B.R. 784 (9th  
17 Cir. BAP 1999). While ultimately we agree that de novo review is  
18 appropriate, we view the issue of the existence of a fiduciary  
19 relationship as a mixed question of fact and law. This is because  
20 determination of whether a fiduciary relationship exists requires  
21 that we look to whether an express or technical trust was created  
22 pursuant to state law. Lewis v. Scott (In re Lewis), 97 F.3d 1182,  
23 1185 (9th Cir. 1996). This, in turn, requires an evaluation of the  
24 facts. For example, under California law, applicable in this case  
25 because the Agreements were executed in California and the parties  
26 agreed that California law would apply to enforcement of the

1 Agreements, "[t]he five elements required to create an express trust  
2 are (1) a competent trustor, (2) trust intent, (3) trust property,  
3 (4) trust purpose, and (5) a beneficiary." Keitel v. Heubel, 103  
4 Cal. App. 4th 324, 337, 126 Cal. Rptr. 2d 763 (Cal. Ct. App. 2002).  
5 Intent is a question of fact. See, e.g., Candland v. Ins. Co. of N.  
6 Am. (In re Candland), 90 F.3d 1466 (9th Cir. 1996) (§ 523(a)(2) -  
7 intent to defraud is a factual issue reviewed under the clearly  
8 erroneous standard); Seixas v. Booth (In re Seixas), 239 B.R. 398  
9 (9th Cir. BAP 1999) (§ 523(a)(5) - whether parties intended in their  
10 agreement that the obligation to pay college education expenses was  
11 "in the nature of support" is an issue of fact). "To the extent  
12 that questions of fact cannot be separated from questions of law, we  
13 review these questions as mixed questions of law and fact applying a  
14 de novo standard." Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132,  
15 135 (9th Cir. BAP 1997) (citing Ratanasen v. Cal. Dep't of Health  
16 Servs., 11 F.3d 1467, 1469 (9th Cir.1993)).

## 17 18 V. DISCUSSION

19 Section 523(a)(4) excepts from discharge a debt "for fraud or  
20 defalcation while acting in a fiduciary capacity." Thus, in order  
21 to have the debt represented by the Colorado judgment held  
22 nondischargeable under § 523(a)(4) Mr. Zuckerman was required to  
23 establish (1) that Mr. Gordon was acting in a fiduciary capacity,  
24 and (2) that Mr. Gordon committed a "defalcation" in that capacity.

25 The scope of the term "fiduciary capacity" under § 523(a)(4) is  
26 a question of federal law. See Mills v. Gergely (In re Gergely),

1 110 F.3d 1448, 1450 (9th Cir. 1997). The Ninth Circuit has adopted  
2 a narrow definition of "fiduciary" for purposes of § 523(a)(4),  
3 requiring that the fiduciary relationship arise from an express or  
4 technical trust that was imposed prior to the wrongdoing that caused  
5 the debt. Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th  
6 Cir. 1996).

7 Preclusion principles apply in discharge exception proceedings  
8 pursuant to § 523(a) to preclude relitigation of state court  
9 findings relevant to the dischargeability determination. Grogan v.  
10 Garner, 498 U.S. 279, 284 n.11 (1991). Further, 28 U.S.C. § 1738  
11 requires us, as a matter of full faith and credit, to apply the  
12 relevant state's preclusion principles. Gayden v. Nourbakhsh (In re  
13 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). In this case, we  
14 apply the issue preclusion principles of Colorado, the state from  
15 which the judgment originated. Cal-Micro, Inc. v. Cantrell (In re  
16 Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003).

17 Under Colorado law, issue preclusion bars re-litigation of an  
18 issue if:

- 19 (1) the issue is identical to an issue actually litigated  
20 and necessarily adjudicated in the prior proceeding; (2)  
21 the party against whom estoppel was sought was a party to  
22 or was in privity with a party to the prior proceeding;  
23 (3) there was a final judgment on the merits in the prior  
24 proceeding; and (4) the party against whom the doctrine is  
25 asserted had a full and fair opportunity to litigate the  
26 issues in the prior proceeding.

24 Rantz v. Kaufman, 109 P.3d 132, 139 (Colo. 2005); Bebo Constr. Co.  
25 v. Mattox & O'Brien, P.C., 990 P.2d 78, 84-85 (Colo. 1999).

26 Generally, under Colorado law the application of defensive

1 preclusion is mandatory. Central Bank Denver, N.A. v. Mehaffy,  
2 Rider, Windholz & Wilson, 940 P.2d 1097, 1103 (Colo. App. 1997)  
3 (citing Kairys v. Immigration & Naturalization Service, 981 F.2d  
4 937, 940 (7th Cir. 1992)). In the context of defensive nonmutual  
5 preclusion, the court in Central Bank Denver held that "when the  
6 requirements for [preclusion] have been met, and the plaintiff had a  
7 full and fair opportunity to litigate the issue, 'the application of  
8 defensive [preclusion] is mandatory.'" Central Bank Denver 940 P.2d  
9 at 1103 (quoting Ackerman v. Am. Airlines, Inc., 924 F.Supp. 749,  
10 753 (N.D. Tex. 1995)). Here, the preclusion is asserted  
11 defensively, but it is mutual in the sense that both Mr. Zuckerman  
12 and Mr. Gordon were the parties to the findings to which Mr. Gordon  
13 sought application of the preclusion doctrine. If nonmutual  
14 defensive preclusion is mandatory, so must be mutual defensive  
15 preclusion.

16 In the Colorado Court litigation, Mr. Zuckerman alleged that  
17 Mr. Gordon's actions constituted a breach of fiduciary duty.  
18 Following a five-day trial, during which Mr. Zuckerman had a "full  
19 and fair opportunity to litigate" the issue that Mr. Gordon was  
20 acting as Mr. Zuckerman's fiduciary, the Colorado Court rejected  
21 that allegation:

22 In failing to account [for the Refinance Proceeds],  
23 Mr. Gordon has not breached a fiduciary duty to  
24 Mr. Zuckerman. He has failed to provide the necessary  
25 numerical data concerning the funds remaining out of the  
26 refinancing to the extent of \$221,243. However, there is  
no credible evidence that Mr. Gordon shut out  
Mr. Zuckerman from the expenditures made out of the  
refinance proceeds. Mr. Gordon and Mr. Zuckerman mixed  
their various corporate ventures with their personal

1 moneys, and Mr. Zuckerman knowingly participated in this  
2 way of doing business. The Court concludes that  
3 Mr. Gordon had a contractual obligation under the  
4 [Agreements] to account for the IndyMac loan proceeds, and  
5 he has breached that agreement. He owes the unaccounted  
6 for funds in the amount of \$221,243 to Mr. Zuckerman.  
7 This is the result of breach of contract, and not, under  
8 these circumstances, as a breach of fiduciary duty.

9 Colorado Court Findings at p. 9. (Emphasis added.)

10 Mr. Zuckerman contends that the Colorado Court decided only  
11 that Mr. Gordon did not breach a fiduciary duty. Mr. Zuckerman  
12 points out that breach of fiduciary duty is just one of several  
13 claims for relief available under § 523(a)(4). He asserts that a  
14 claim for defalcation, being separate and distinct from a breach of  
15 fiduciary duty, remains a viable claim for relief not precluded by  
16 the Colorado Court's limited finding that Mr. Gordon did not breach  
17 a fiduciary duty when he failed to account to Mr. Zuckerman for the  
18 Refinance Proceeds.

19 Mr. Zuckerman asserts that under Ninth Circuit law, he need  
20 prove only three elements to prevail on his claim for relief:  
21 (1) that an express trust existed, (2) that the debt arose from a  
22 defalcation, and (3) that Mr. Gordon acted as his fiduciary at the  
23 time the debt arose. Banks v. Gill Distrib. Ctrs, Inc. (In re  
24 Banks), 263 F.3d 862, 870 (2001). Mr. Zuckerman stresses that  
25 because the Agreements were expressly intended to grant Mr. Gordon  
26 fiduciary authority over all of Mr. Zuckerman's assets for  
Mr. Zuckerman's benefit, all he needed to prove to prevail on his  
claim for defalcation is that Mr. Gordon failed to account for the  
proceeds. Id. ("This court has defined defalcation as the

1 'misappropriation of trust funds or money held in any fiduciary  
2 capacity; [the] failure to properly account for such funds.'");  
3 Woodworking Enterprises, Inc. v. Baird (In re Baird), 114 B.R. 198,  
4 204 (9th Cir. BAP 1990) ("A defalcation is a failure of a party to  
5 account for money or property that has been entrusted to them.").  
6 He concludes that the Colorado Court's finding that Mr. Gordon  
7 failed to account for the Refinance Proceeds is sufficient to  
8 establish a defalcation.

9 We do not view the Colorado Court's findings as limited to the  
10 extent argued by Mr. Zuckerman. The Colorado Court did not just  
11 find that Mr. Gordon did not breach a fiduciary duty to  
12 Mr. Zuckerman when he failed to account for the Refinance Proceeds.  
13 While it is true that the Colorado Court did not expressly find that  
14 no fiduciary relationship existed between the parties, it did so  
15 implicitly. "[W]hile it is the better practice to make express  
16 findings, they may be implicit in a court's ruling." Valentine v.  
17 Mountain States Mut. Cas. Co., \_\_\_ P.3d \_\_\_, 2011 WL 32473, at \*6  
18 (Colo. App., Jan. 6, 2011), quoting Foster v. Phillips, 6 P.3d 791,  
19 796 (Colo. App. 1999).

20 The Colorado Court found that because the parties did not  
21 follow the Agreements in the manner they used the Refinance  
22 Proceeds, they had abandoned the Agreements, except for the  
23 obligation of Mr. Gordon to refinance the Colorado Property and to  
24 pay Mr. Zuckerman and his creditors out of the Refinance Proceeds.  
25 Implicit in this finding is a determination that any fiduciary  
26 obligation Mr. Zuckerman alleges was created by the Agreements did

1 not survive that abandonment. This implicit finding is reinforced  
2 by the Colorado Court's explicit finding that Mr. Zuckerman had  
3 waived any rights under the Agreements except with respect to an  
4 accounting of how the Refinance Proceeds were spent. The Colorado  
5 Court further found, explicitly, that the right to an accounting  
6 arose from contract, and, implicitly, that it did not arise from a  
7 fiduciary relationship. Importantly, these findings are based on  
8 the Colorado Court's determination that Mr. Zuckerman himself  
9 participated in banking the Refinance Proceeds. Accordingly, taken  
10 as a whole, we interpret the Colorado Court's findings as a  
11 determination that no fiduciary relationship existed between  
12 Mr. Gordon and Mr. Zuckerman.

13       Because the Agreements did not operate to create a fiduciary  
14 relationship/express trust, Mr. Gordon could not have been operating  
15 in a fiduciary capacity in his relationship with Mr. Zuckerman.  
16 Thus, a necessary element in Mr. Zuckerman's § 523(a)(4) claim for  
17 relief already was decided against Mr. Zuckerman by the Colorado  
18 Court.

19       The issue of the existence of an express trust and/or whether  
20 Mr. Gordon was acting as Mr. Zuckerman's fiduciary is identical to  
21 an issue actually litigated and necessarily adjudicated by the  
22 Colorado Court. Mr. Zuckerman was a party to the litigation in the  
23 Colorado Court. The Colorado Court issued a judgment on the merits.  
24 Following an appeal to the Colorado Court of Appeals, the Colorado  
25 Court recalculated the judgment amount, and issued an amended  
26 judgment, from which no further appeal was taken. Mr. Zuckerman

