

**FEB 28 2007**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

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

6	In re:	)	BAP No.	CC-06-1202-KMoD
		)		
7	SHANEL ANN STASZ,	)	Bk. No.	LA 05-43980-AA
		)		
8	Debtor.	)	Adv. No.	LA 06-01305-AA
		)		
9	_____	)		
		)		
10	SHANEL ANN STASZ,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM*</b>	
		)		
13	HUGO W. QUACKENBUSH.	)		
		)		
14	Appellee.	)		
		)		
15	_____	)		

Submitted without oral argument  
on February 22, 2007

Filed - February 28, 2007

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: KLEIN, MONTALI, and DUNN, Bankruptcy Judges.

\_\_\_\_\_  
\*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 Appellant/debtor, Shanel Stasz, challenges the bankruptcy  
2 court's decision to give preclusive effect to a confirmed final  
3 arbitration award and grant summary judgment in favor of  
4 appellee, Hugo Quackenbush, on his complaint for  
5 nondischargeability of debt under 11 U.S.C. § 523(a)(6). We  
6 AFFIRM.

7 FACTS

8 Appellee, a wealthy businessman and longtime employee of a  
9 prominent securities firm, and appellant were involved in a  
10 romantic relationship from 1997-2000. In 2000 their relationship  
11 soured and came to a bitter end.

12 Appellee filed an action in state court against appellant  
13 and obtained a temporary restraining order against her  
14 (Quackenbush v. Stasz, Super. Ct. San Francisco County, 2000, No.  
15 FL 036974). Appellant threatened to file a countersuit against  
16 appellee to publicly embarrass him by making public statements  
17 concerning him, his employer, his friends, and his colleagues  
18 based on information she gained during their relationship and  
19 from information she found while going through his personal  
20 papers and effects.

21 Appellant further threatened to contact the District  
22 Attorney's Office to have appellee investigated and criminally  
23 prosecuted.

24 In an effort to avoid such public humiliation and further  
25 distress, and to bring their acrimonious relationship to an end,  
26 appellee entered into a detailed written Confidential Settlement  
27 Agreement and General Release ("Agreement") with appellant on May  
28 1, 2000. The Agreement was intensively negotiated in April 2000

1 with several drafts being exchanged between the parties.  
2 Appellee was represented by counsel, and appellant, who herself  
3 holds a law degree, was also represented by counsel of her  
4 choosing.

5 Pursuant to the Agreement, both appellant and appellee were  
6 to keep confidential the existence and terms of the Agreement and  
7 the nature of their disputes. Neither party was to contact or  
8 directly communicate with each other in any way, other than  
9 through counsel.

10 Pursuant to the Agreement, appellee was to pay appellant a  
11 total of \$3,175,000, secured by a deed of trust ("DOT") on an  
12 apartment building owned by appellee. Appellee made an initial  
13 payment of \$2.5 million, and additional payments of \$225,000 were  
14 to be made on the first, second, and third anniversaries of the  
15 Agreement's effective date, provided appellant complied with all  
16 the provisions of the Agreement.

17 The Agreement also contained an arbitration provision. Id.  
18 That provision states:

19 12. Dispute Resolution. Any and all disputes of any  
20 kind between the parties, including but not limited to  
21 ones arising out of or related to interpretation or  
22 enforcement of any provision of this Agreement, shall  
23 be resolved by confidential binding arbitration before  
24 the American Arbitration Association Large, Complex  
25 Commercial Dispute Panel in San Francisco, California  
26 before a single neutral arbitrator under the AAA Large,  
27 Complex Commercial Dispute Rules and Rules for  
28 Emergency Measures of Protection and California law.  
All aspects of the arbitration (including but not  
limited to pre-hearing, discovery (if any) and hearing  
procedures) shall be kept strictly confidential and  
sealed. The arbitrator shall have the power to award  
provisional, ancillary, temporary, preliminary and  
permanent equitable remedies, including but not limited  
to injunctive relief, but either party may at its  
option without waiving its right to arbitration  
hereunder seek injunctive relief from a court with

1 jurisdiction over the parties and the subject matter.  
2 The arbitrator's award or awards shall be final and  
3 binding, and judgment on any award may be entered by  
4 any court having jurisdiction over the parties and the  
5 subject matter. Without waiving or limiting the  
6 generality of the foregoing agreement to arbitrate  
7 disputes, the parties agree that any court proceedings  
8 between them shall be brought and conducted in the  
9 Superior Court in and for the City and County of San  
10 Francisco, and each party agrees to be subject to the  
11 personal jurisdiction of that court and that it is and  
12 will be a proper venue. All pleadings and other  
13 documents in any court proceedings between the parties  
14 shall be filed to the extent legally permitted under  
15 seal.

16 A little more than one month after the parties voluntarily  
17 and knowingly entered into the Agreement, appellant personally  
18 and directly contacted appellee by telephone on several  
19 occasions. During some of those calls, appellant told appellee  
20 that she would make embarrassing statements to third parties  
21 about him, his colleagues, and his employer unless he gave her  
22 more money. Appellant also sent letters to appellee's place of  
23 employment that discussed appellee and their confidential  
24 Agreement.

25 In July 2000, appellee initiated arbitration proceedings  
26 against appellant by filing a claim with the American Arbitration  
27 Association ("AAA") alleging violations of the no-contact and  
28 confidentiality provisions of their Agreement. Appellant refused  
to pay her share of the AAA filing fee. Due to appellant's  
refusal to pay, appellee paid the entire filing fee. Appellant  
filed a counterclaim seeking specific performance of their  
Agreement.

After appellant's harassing phone calls continued, appellee  
initiated proceedings with the AAA for an interim restraining  
order against appellant to stop her from continuing to violate

1 their Agreement. The AAA appointed a retired California superior  
2 court judge to serve as arbitrator and hear the restraining order  
3 request. Appellant filed two written oppositions to appellee's  
4 request for a restraining order.

5 While appellee's restraining order request was pending,  
6 appellant sent appellee's counsel a letter in which she  
7 threatened to file a lawsuit in the Los Angeles Superior Court  
8 unless she was paid \$50 million. A copy of the draft complaint  
9 was attached to the letter. Appellant also telephoned appellee  
10 and threatened him directly.

11 On November 30, 2000, appellant stipulated to the entry of  
12 an interim restraining order. Over appellant's objection, the  
13 arbitrator made findings that the claims asserted in appellant's  
14 draft complaint must be resolved through arbitration, not in  
15 state court, and some of the allegations, if made public, would  
16 violate the terms of the confidentiality provisions of the  
17 Agreement.

18 After appellant stipulated to entry of a restraining order,  
19 and after the arbitrator announced at a hearing on the  
20 restraining order request that he intended to enter detailed  
21 findings over appellant's objection, appellant filed an action in  
22 Los Angeles Superior Court (Stasz v. Quackenbush, (Super. Ct.  
23 L.A. County 2000, No. BS066549) ("Stasz I"). Appellant  
24 challenged the arbitration provision in the Agreement as  
25 "unconscionable", and brought a motion to have the arbitration  
26 provision excised.

27 On January 17, 2001, the Superior Court in Stasz I denied  
28 appellant's motion to "excise" and found the arbitration

1 provision to be fully enforceable and not unconscionable.  
2 Appellant appealed, and the California Court of Appeal for the  
3 Second Appellate District affirmed the Order in an unpublished  
4 decision (Stasz v. Quackenbush (Nov. 19, 2002, B147388)).

5 On June 25, 2001, appellant filed a second suit against  
6 appellee in state court alleging invasion of privacy, breach of  
7 fiduciary duty, intentional infliction of emotional distress,  
8 fraud, and deceit. (Stasz v. Quackenbush, (Super. Ct. L.A. Co.  
9 2001, No. BC252954) ("Stasz II"). Appellant also sought  
10 injunctive relief. The complaint filed in Stasz II was based on  
11 the same claims and allegations contained in the draft complaint  
12 appellant had threatened to file against appellee. Pursuant to  
13 the arbitrator's interim restraining order, those claims were to  
14 be pursued in arbitration, not in state court.

15 Appellant also had the Stasz II complaint delivered to  
16 appellee's place of employment in a concentrated effort to  
17 embarrass and humiliate appellee.<sup>1</sup>

18 In August 2001, appellee filed a Motion to Compel  
19 Arbitration in Stasz II. Appellant opposed the motion.<sup>2</sup>

20 In September and October 2001, appellee filed and served an  
21 Application and Supplemental Application for Remedies with the  
22

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23 <sup>1</sup>Appellant had the complaint delivered to the guard station  
24 at appellee's office. The guard on duty delivered the complaint  
25 to the legal department. Appellee's friends and colleagues in  
management were notified of the complaint and the matters  
contained therein.

26 <sup>2</sup>Appellant's opposition repeated several of the factual  
27 allegations contained in her state court complaint. She also  
28 attached, as a matter of public record, a document that contained  
approximately 200 pages of exhibits that had been kept  
confidential in the arbitration or under seal in Stasz I.

1 arbitrator, for appellant's repeated violations of the  
2 restraining order.

3 On October 12, 2001, the Superior Court granted appellee's  
4 Motion to Compel Arbitration in Stasz II and stayed Stasz II  
5 pending the outcome of the arbitration.

6 A few days before the arbitration hearing on appellant's  
7 Application for Remedies, appellant informed the AAA and the  
8 arbitrator by faxed letter that she would not participate in the  
9 hearing.<sup>3</sup>

10 The arbitrator proceeded with the duly noticed hearing  
11 without the appellant.

12 In late 2001, the arbitrator issued an interim award of  
13 damages in favor of appellee based on appellant's violations of  
14 the Agreement and restraining order. The arbitrator found the  
15 appellant's violations to be "willful" and had caused appellee  
16 "real and significant injuries and damages." Appellee was  
17 awarded \$369,553.40 in compensatory damages, and \$28,000 in  
18 arbitration costs, for a total interim award of \$397,553.40.<sup>4</sup>

19 The same day that the arbitrator issued his first interim  
20 award order, appellant faxed a letter to upper management and  
21 general counsel at appellee's place of employment that contained  
22 statements about appellee, their disputes and the pending  
23 arbitration.

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24  
25 <sup>3</sup>Appellant requested that a letter and 50 pages of  
26 "exhibits" included with that letter be considered as her  
27 opposition to appellee's Application for Remedies. This "letter"  
was a personal letter sent to appellee's counsel stating why her  
conduct was justified.

28 <sup>4</sup>The arbitrator denied appellee's request for punitive  
damages "without prejudice to proof of continued violations  
should they actually occur."

1 In January 2002, appellee sought further remedies for  
2 appellant's further violations of their Agreement. The following  
3 week, appellant filed a third lawsuit in Los Angeles Superior  
4 Court alleging causes of action against appellee's attorneys, his  
5 employer, and the AAA (Stasz v. [appellee's firm] (Super. Ct.  
6 L.A. Co. 2002, No. BC266691)) ("Stasz III").

7 With respect to appellee's second request for remedies,  
8 notice was duly served on all parties, and the arbitrator held  
9 two telephonic hearings in February and March 2002. Appellant  
10 again informed the AAA and the arbitrator by faxed letter that  
11 she would not participate in either hearing. Appellant did not  
12 appear for the February hearing. However, at the March hearing,  
13 appellant initially appeared via telephone, but when she was  
14 informed that any participation on her part would be "on the  
15 record", appellant hung up the phone and did not participate  
16 further.

17 The arbitrator later issued his second interim remedies  
18 award order in which he awarded appellee an additional \$150,000  
19 in compensatory damages, and \$250,000 "in recognition of the  
20 willful and repetitive nature of [appellant's] violations, and to  
21 deter her from any further violations." The arbitrator found  
22 that appellant violated the Agreement and restraining order  
23 "willfully and with the intent to injure" appellee.

24 Despite the increased damage award against her, appellant  
25 continued to violate the Agreement and restraining order.

26 Because of appellant's continued violations, appellee filed  
27 a Motion for Judgment on All Claims and Counterclaims in the  
28 arbitration ("Motion for Judgment"). The Motion for Judgment was



1 heard on June 4, 2002, at the AAA offices in Los Angeles. Both  
2 parties were duly notified of the hearing, date, time, and  
3 location. Appellee attended through his counsel. Appellant,  
4 however, notified the arbitrator through written letter that she  
5 elected not to attend the hearing "on advice of counsel."  
6 Appellant did not submit any evidence in opposition to appellee's  
7 motion, other than a letter stating her position that the  
8 arbitration was automatically stayed pending her appeal of Stasz  
9 I.

10 In appellant's voluntary absence, the arbitrator requested  
11 appellee to present evidence in support of his claim.

12 On July 31, 2002, the arbitrator issued a Final Award in  
13 appellee's favor on all claims. The arbitrator also reaffirmed  
14 and incorporated the factual findings, legal conclusions, and  
15 remedies of the interim awards into the Final Award.

16 The arbitrator found that appellant breached the Agreement  
17 by:

18 (1) directly contacting [appellee] and threatening to  
19 make embarrassing statements about him to third  
20 parties; (2) filing suit against [appellee] (Stasz II)  
21 instead of pursuing her claims through arbitration; (3)  
22 making allegations in the Stasz II complaint that  
23 violated the confidentiality provisions of the  
24 agreement and that were unnecessary to plead her causes  
25 of action; (4) sending a letter to the [appellee's]  
26 firm on December 21, 2001, that contained inaccurate  
27 and disparaging assertions about [appellee]; and (5)  
28 filing another suit related to the agreement (Stasz  
III) in which she made unnecessary, disparaging remarks  
about [appellee], the [appellee's] firm, and some of  
the firm's officers.

26 The Final Award further stated,

27 The Arbitrator finds that [appellant] knew clearly from  
28 the Arbitrator's prior interim awards that the various  
statements in the complaint and opposition . . . were

1 unnecessary, improper, violative of the parties'  
2 Agreement and the Arbitrator's orders, and were  
3 undertaken with specific intent to injure [appellee]  
4 emotionally, embarrass him at his place of work, and  
5 undermine the value to [appellee] of the Agreement into  
6 which she had entered. . . .

7  
8 41. [Appellee] has been embarrassed before his  
9 colleagues at work, one of whom is a lifelong personal  
10 friend. He provided evidence that he has suffered  
11 personal humiliation, emotional anguish and anxiety in  
12 his personal and professional life, with accompanying  
13 sleeplessness and occasional bouts of nausea. . . .

14  
15 43. The Arbitrator's First Interim Remedies Award  
16 denied damages for willfulness and deterrence without  
17 prejudice to proof of further violations. The  
18 Arbitrator found the willful violations shown in  
19 [appellee's] second application to support \$250,000 in  
20 recognition of the willful and repetitive nature of  
21 [appellant's] intentional and tortious acts, and to  
22 deter her from any further violations. The deterrent  
23 effect of this award apparently was not sufficient.  
24 [Appellant] has continued - in fact, has escalated -  
25 conduct that since the entry of the Interim Restraining  
26 Order can only be considered intentionally tortious,  
27 and malicious and oppressive within the meaning [of]  
28 California Civil Code Section 3294(c). Upon  
[appellee's] motion, the Arbitrator awards an  
additional \$350,000 for the most recent violations in  
recognition of the recalcitrantly malicious,  
oppressive, willful and repetitive nature of  
[appellant's] violations, and to deter her more  
forcefully from any further violations.

19 The Final Award also excused appellee from making any  
20 further payments to appellant under the Agreement and imposed an  
21 injunction enforcing the Agreement's noncontact and  
22 confidentiality provisions against appellant.

23 The damages awarded to appellee totaled approximately \$1.5  
24 million.<sup>5</sup>

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25		
26	<sup>5</sup>	
27	First Interim Award:	\$369,553.40
28	Second Interim Award:	\$400,000
	<u>Additional damages:</u>	<u>\$700,000</u>
	Total damages:	\$1,469,553.40

1 After the Final Award was issued, appellant and appellee  
2 returned to state court in Stasz II, which had been stayed  
3 pending the arbitration of appellant's claims. Appellee moved to  
4 confirm the Final Award, and appellant moved to vacate the Final  
5 Award.

6 On September 30, 2002, the state court confirmed the Final  
7 Award in its entirety and entered judgment against appellant.  
8 Appellant appealed.<sup>6</sup>

9 On August 5, 2004, the California Court of Appeal for the  
10 Second Appellate District affirmed the judgment of the state  
11 court that confirmed the Final Award. The California Supreme  
12 Court denied review on November 17, 2004.

13 Appellant filed a chapter 7 bankruptcy case on October 13,  
14 2005.

15 On February 3, 2006, appellee filed an adversary proceeding  
16 against appellant to except the confirmed Final Award from  
17 discharge under 11 U.S.C. § 523(a)(6).

18 Appellee made, and the bankruptcy court granted, a Motion  
19 for Summary Judgment ("MSJ") in the adversary proceeding based  
20 upon the confirmed Final Award. The bankruptcy court concluded  
21 that the issues litigated before the arbitrator and the state  
22 court were done so in an adjudicatory manner, and that the  
23 "detailed findings of the judicially confirmed Arbitration Award  
24 conclusively and preclusively establish that the monetary relief  
25 awarded in favor of [appellee] . . . is based on [appellant's]

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26  
27 <sup>6</sup>Appellant appealed portions of Stasz III and Stasz II. The  
28 Second Appellate District of the California Court of Appeal  
consolidated the three appeals.

1 willful and malicious injury to [appellee] within the meaning” of  
2 § 523(a)(6).

3 The bankruptcy court entered judgment in favor of appellee  
4 excepting from discharge \$1,984,778.18 in damages (plus judgment  
5 interest) established in the judicially confirmed Final Award.<sup>7</sup>

6 This timely appeal ensued.

7  
8 JURISDICTION

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

11  
12 ISSUE

13 Whether the judicially confirmed arbitration award was  
14 eligible for issue preclusive effect under California law so as  
15 to be applied in a bankruptcy nondischargeability action to  
16 establish willful and malicious injury under § 523(a)(6).

17  
18 STANDARD OF REVIEW

19 We review summary judgment de novo to assess whether there  
20 is a genuine issue of material fact and whether the moving party  
21 is entitled to judgment as a matter of law. Khaligh v. Hadaegh  
22 (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006).

23 We review rulings regarding rules of res judicata, including  
24 issue and claim preclusion, de novo as mixed questions of law and

25  
26 <sup>7</sup>The court also concluded that the non-monetary obligations  
27 under the Agreement and the permanent injunction issued by the  
28 Superior Court did not give rise to a “claim” by appellant within  
the meaning of 11 U.S.C. § 105(5), and thus the enforceability of  
those obligations were not affected by any discharge appellant  
may have received.

1 fact in which legal questions predominate. Robi v. Five  
2 Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v.  
3 Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549, 554 (9th  
4 Cir. BAP 2002); Khaligh, 338 B.R. at 823. Once it is determined  
5 that preclusion doctrines are available to be applied, the actual  
6 decision to apply them is left to the trial court's discretion.  
7 Robi, 838 F.2d at 321; George v. City of Morro Bay (In re  
8 George), 318 B.R. 729, 733 (9th Cir. BAP 2004), aff'd, 144 Fed.  
9 Appx. 636 (9th Cir. 2005), cert. denied, \_\_\_ U.S. \_\_\_, 126 S.Ct.  
10 1068, 163 L.Ed.2d 861 (2006); Khaligh, 338 B.R. at 823. When  
11 state preclusion law controls, such discretion is exercised in  
12 accordance with state law. Gayden v. Nourbakhsh (In re  
13 Nourbakhsh), 67 F.3d 798, 800-01 (9th Cir. 1995).

#### 14 15 DISCUSSION

16 The question is whether, as a matter of California law, a  
17 California court would be permitted to give issue preclusive  
18 effect to the confirmed arbitration award that was entered as  
19 between the parties. If so, then the bankruptcy court was also  
20 entitled to give issue preclusive effect. McDonald v. City of  
21 West Branch, Mich., 466 U.S. 284, 287 (1984); Harmon v. Kobrin  
22 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Khaligh, 338  
23 B.R. at 824.

24 California law prescribes that a confirmed arbitration award  
25 has the status of a judgment in a civil action. Cal. Civ. Proc.  
26 Code § 1287.4; Khaligh, 338 B.R. at 826.

27 Under California preclusion law, there are six elements that  
28 must be satisfied before issue preclusion will be applied in the

1 context of mutuality. Lucido v. Super. Ct., 795 P.2d 1223, 1225-  
2 27 (Cal. 1990); Khaligh, 338 B.R. at 825. The first five  
3 "threshold" elements are: (1) identical issue; (2) actually  
4 litigated in the former proceeding; (3) necessarily decided in  
5 the former proceeding; (4) former decision final and on the  
6 merits; and (5) party against whom preclusion sought either the  
7 same, or in privity with, party in former proceeding. Khaligh,  
8 338 B.R. at 824. The sixth element is an additional inquiry into  
9 whether it would be fair and consistent with sound public policy  
10 to impose issue preclusion in the particular setting. Id. at  
11 824-25.

12 Under the sixth element, when applying issue preclusion  
13 based on a confirmed arbitration award, the court must examine  
14 "whether the underlying arbitration followed basic elements of  
15 adjudicatory procedure and was, thus, 'adjudicatory in nature.'" Id.  
16 at 828 quoting Kelly v. Vons Cos., 67 Cal. App. 4th 1329,  
17 1336 (1998).

18 Whether an underlying arbitration is "adjudicatory in  
19 nature" and thus eligible for preclusion depends, in California  
20 courts, on whether the proceeding entailed the "essential  
21 elements of adjudication" as outlined by Restatement (Second) of  
22 Judgments § 83. Khaligh, 338 B.R. at 828-30. Those essential  
23 elements include:

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

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

28 (c) A formulation of issues of law and fact in terms of  
the application of rules with respect to specified

1 parties concerning a specific transaction, situation,  
2 or status, or a specific series thereof;

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

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

13 Restatement (Second) of Judgments § 83(2); Khaligh, 338 B.R. at  
14 830.

15 Appellant's opening brief sets forth several arguments why  
16 the underlying arbitration was not adjudicatory in nature. She  
17 first argues that the arbitrator, who was a seasoned California  
18 Superior Court judge, was chosen by the AAA on an emergency basis  
19 and not by the parties as required by their Agreement.

20 Our review of the arbitration provision in the Agreement  
21 does not reveal a requirement that the parties agree to a  
22 mutually acceptable arbitrator. The arbitrator was designated  
23 pursuant to AAA rules. Furthermore, had the chosen arbitrator  
24 exceeded his authority when he presided over the Motion for  
25 Judgment and thereafter entered his Final Award, the state court  
26 was authorized to vacate the Final Award. Cal. Civ. Proc. Code  
27 § 1286.2(a)(4); Khaligh, 338 B.R. at 826.

28 The state court order confirming the Final Award in its  
entirety was affirmed by the California Court of Appeal, and the  
California Supreme Court denied review. It follows that the  
validity of the arbitration, including the status of the  
arbitrator, was necessarily approved and does not affect the

1 adjudicatory nature of the arbitration.

2 Appellant also argues that she did not participate in the  
3 final arbitration hearing because of her contention that the  
4 arbitration was stayed pending resolution of Stasz I (whether the  
5 arbitrator provision was unconscionable and should be removed  
6 from their Agreement). When appellant voluntarily chose not to  
7 participate in arbitration, and she refused to pay her share of  
8 the arbitration fee, appellee paid the arbitration fee in total  
9 and proceeded without her.

10 Appellant does not dispute that she had adequate notice of  
11 all the arbitration hearings and she admits that she voluntarily  
12 chose not to participate or to submit evidence on her behalf.  
13 Further, the arbitrator expressly found that appellant had  
14 actively participated at various stages of the arbitration and  
15 subsequent judicial proceedings.

16 In the Final Award, the arbitrator expressly noted that  
17 despite being duly notified of the hearing, the appellant  
18 voluntarily chose not to appear and not to submit evidence or  
19 argument on her behalf. Faced with appellant's deliberate  
20 absence, the arbitrator invoked AAA Rule R-31, which provides:

21 **Arbitration in the Absence of a Party or**  
22 **Representative.** Unless the law provides to the  
23 contrary, the arbitration may proceed in the absence of  
24 any party or representative who, after due notice,  
25 fails to be present or fails to obtain a postponement.  
An award shall not be made solely on the default of a  
party. The arbitrator shall require the party who is  
present to submit such evidence as the arbitrator may  
require for the making of an award.

26 In its Final Award, the arbitrator expressly found that "no  
27 aspect of this Final Award has been entered solely on the basis  
28 of [appellant's] failure to appear or submit evidence." Id.



1           Because the appellant was adequately notified, her voluntary  
2 absence does not dictate a finding that the arbitration was not  
3 "adjudicatory in nature." See Papadakis v. Zelis (In re Zelis),  
4 66 F.3d 205, 208-09 (9th Cir. 1995) (debtor's voluntary decision  
5 not to appear at various hearings or file any opposition does not  
6 preclude a finding that an issue was litigated.)

7           Further, appellant's contention that the arbitration  
8 proceeding was stayed pending her appeal of Stasz I was rejected  
9 by the arbitrator and by the Los Angeles Superior Court three  
10 times.

11           The arbitration was not stayed pending the appeal and  
12 appellant's voluntary choice not to appear does not vitiate the  
13 adjudicatory nature of the arbitration.

14           As noted, the record reveals that the arbitrator was a  
15 retired California Superior Court judge who, by definition, had  
16 extensive knowledge and dealings with the adjudicatory process.  
17 All parties were adequately notified of all hearings, including  
18 the final hearing. Appellee appeared through his counsel, and  
19 appellant voluntarily chose not to appear or to present evidence  
20 in opposition. The Final Award is a twenty-six page reasoned  
21 decision that reaffirms and incorporates the factual findings,  
22 legal conclusions, and remedies from the three interim awards.

23           The Final Award reflects that the arbitrator reviewed the  
24 entire record of all proceedings before him, which included  
25 evidence and written statements from appellant during the two-  
26 year course of the proceedings. The arbitrator explained, in  
27 detail, the facts and evidence before him and concluded that the  
28 appellant engaged in conduct that was "intentionally tortious,

1 and malicious and oppressive[.]”

2       Therefore, the arbitration process satisfies the essential  
3 elements of adjudication and was conducted in an inherently  
4 adjudicatory fashion. See Khaligh, 338 B.R. at 830.

5       Having concluded that the sixth element regarding  
6 adjudicatory process was satisfied, we turn to whether the five  
7 “threshold” requirements of issue preclusion were satisfied.  
8 Because appellee brought a nondischargeability action under  
9 § 523(a)(6) in the bankruptcy court, the issues litigated in the  
10 arbitration would need to equate with “willful and malicious”  
11 injury. Id. at 831.

12       The § 523(a)(6) inquiry involves a two-step analysis. The  
13 first step is whether there was a “willful injury.” Id.  
14 “Willful” injury entails a “deliberate or intentional” injury.  
15 Id. Intent is either the “subjective intent of the actor to  
16 cause harm or the subjective knowledge of the actor that harm is  
17 substantially certain to occur.” Id.

18       The second step is whether the subject conduct was  
19 “malicious.” Id. To constitute malicious conduct, there must be  
20 a (1) wrongful act; (2) done intentionally; (3) which necessarily  
21 causes injury; and (4) without just cause and excuse. Id.

22       In all three interim awards and in the Final Award (which  
23 incorporated the interim awards), the arbitrator specifically  
24 found the appellant’s conduct to be intentionally tortious and  
25 malicious. The arbitrator also found that appellant’s conduct  
26 was deliberate and “undertaken with specific intent to injure  
27 [appellee] emotionally, embarrass him at his place of work, and  
28 undermine the value to [appellee] of the Agreement into which she

1 had entered.”

2 The arbitrator also awarded a total of \$600,000 in punitive  
3 damages to appellee “in recognition of the recalcitrantly  
4 malicious, oppressive, willful and repetitive nature of  
5 [appellant’s] violations” and to deter her from further  
6 violations.

7 Thus, the issue of whether appellant’s conduct was willful  
8 and malicious was actually litigated and necessarily decided in  
9 the arbitration. The Final Award was made on the merits of the  
10 case and was not based on appellant’s default. The Final Award  
11 was confirmed over appellant’s objection by the Superior Court,  
12 and affirmed on appeal by the California Court of Appeal, and the  
13 California Supreme Court denied review. And finally, both  
14 proceedings (the arbitration and the adversary proceeding)  
15 involve the same parties. Thus, all five “threshold” elements  
16 are satisfied.

17 The bankruptcy court did not err when it concluded issue  
18 preclusion was available to establish willful and malicious  
19 injury for purposes of § 523(a)(6). Further, the bankruptcy  
20 court did not abuse its discretion when it chose to impose issue  
21 preclusion as a basis for summary judgment without relitigating  
22 the issue of willful and malicious injury. See Khaligh, 338 B.R.  
23 at 832.

24  
25 CONCLUSION

26 The bankruptcy court did not err when it entered summary  
27 judgment in favor of appellee without relitigating the issue of  
28 willful and malicious injury under § 523(a)(6). AFFIRMED.