

AUG 16 2007

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	AZ-06-1346-AKPa
	)		
SPECTRUM GOLF, INC.,	)	Bk. No.	02-15894
	)		
	)	Adv. No.	02-01422
Debtor.	)		
_____	)		
ROBERT A. CHITI,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
SPECTRUM GOLF, INC.,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on July 26, 2007  
at Phoenix, Arizona

Filed - August 16, 2007

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: AHART,\*\* KLEIN and PAPPAS, 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.

\*\*Hon. Alan M. Ahart, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 This is an appeal from an Order Incorporating Memorandum  
2 Decision entered on September 22, 2006, which incorporated a  
3 Memorandum Decision dated September 22, 2006 and awarded \$22,000  
4 in punitive damages against Appellant Robert A. Chiti  
5 ("Appellant") and in favor of Appellee Spectrum Golf, Inc.  
6 ("Appellee"). In addition, pursuant to a prior Memorandum  
7 Decision dated February 21, 2006, the bankruptcy court awarded  
8 \$5,500 in compensatory damages for conversion and breach of  
9 fiduciary duty against Appellant and in favor Appellee. We

10 **REVERSE.**

11 **I. FACTS**

12 During the first part of 2002, Appellant was a general sales  
13 manager for Appellee. As part of his employment, Appellant  
14 generated a business plan (the "Business Plan"), sought investors,  
15 and "was responsible for running the day-to-day operations,  
16 including, but not limited to, setting the strategic direction of  
17 the company and ensuring that Golf Switch would be the 'number one  
18 online tee-time provider in North America.'" Tr. 8/15/05 at pgs.  
19 33-34 and Memo. Dec. 2/21/06 at p. 12. Golf Switch, one of three  
20 lines of business of Appellee, developed software to assist the  
21 golf industry in determining tee time availability at various golf  
22 courses. At the end of March 2002, Appellant ordered Fiesta Bowl  
23 tickets and authorized that they be charged to Appellee's  
24 corporate credit card. On June 7, 2002, Appellant was terminated  
25 from his employment with Appellee. The tickets appeared as a  
26 charge on the June 2002 credit card statement of Appellee. On  
27 June 12, 2002, Appellee informed Appellant that the amount charged  
28 to Appellee's credit card account for the tickets would be taken

1 out of Appellant's final check.

2 On July 24, 2002, Appellant filed a civil complaint against  
3 Appellee in the Scottsdale Justice Court alleging that Appellee  
4 had issued a check to Appellant for \$2,159.30 but breached an  
5 employment termination agreement by failing to pay the balance of  
6 six weeks of compensation. The complaint requested damages of  
7 \$9,379.16,<sup>1</sup> including appropriate taxes, plus interest of  
8 approximately \$62. Appellant asserts that Appellant did not learn  
9 what amounts had been withheld from his compensation until his  
10 attorney happened to pull the file from the Scottsdale Justice  
11 Court and saw the documentation filed by Appellee. The file  
12 included a copy of a letter mailed to the Scottsdale Justice  
13 Court, where Damian Greco ("Greco"), Appellee's president and CEO,  
14 stated that overall Appellant received \$11,076.93 gross payroll as  
15 the balance of his severance and that this amount was reduced by  
16 \$5,500 for the Fiesta Bowl tickets. The record also includes  
17 copies of three direct deposit stubs to Appellant's account, all  
18 dated July 26, 2002, which reflect that approximately \$1,833.33  
19 was deducted from each of the three direct deposits, totaling  
20 \$5,500. The "net" pay shown on each of the three deposits was  
21 only \$55.72, \$55.72, and \$55.75, respectively. On October 1,  
22 2002, since Appellee failed to appear or to respond to mediation,  
23 a default judgment was entered against Appellee for \$9,526.16 by  
24 the Scottsdale Justice Court.

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27 <sup>1</sup>This amount apparently represents six weeks of compensation  
28 totaling \$11,076.93 plus taxes of \$461.53 less the \$2,159.30  
check.

1           On October 7, 2002, Appellee filed its Chapter 11<sup>2</sup> petition.  
2 Two days later Appellant caused to serve a Writ of Garnishment in  
3 an effort to collect his default judgment against Appellee. On  
4 December 15, 2002, the Fiesta Bowl tickets became available.  
5 Appellee denied any responsibility to pick up the tickets and  
6 indicated it did not want the tickets. Appellant found out that  
7 towards the end of the period, Appellee had not claimed the  
8 tickets and therefore Appellant took them. Appellant gave some of  
9 the tickets away and sold the rest for \$1,600, which he kept. He  
10 justifies retention of these monies because he said Appellee had  
11 withheld funds from his salary.

12           On December 30, 2002, Appellee filed a complaint in the  
13 bankruptcy court against Appellant for breach of fiduciary duty  
14 and usurpation of corporate opportunity (the "Complaint"). The  
15 Complaint alleged that Appellant breached his fiduciary duty to  
16 Appellee by disclosing the Business Plan to third parties and, as  
17 a result of that breach, Appellee was damaged in excess of  
18 \$1 million. The Complaint further alleged that Appellant usurped  
19 Appellee's corporate opportunity by an unauthorized dissemination  
20 of the Business Plan and by obtaining tickets to the Fiesta Bowl,  
21 purchased on Appellee's corporate credit card, and that Appellant  
22 had obtained the tickets for his own personal use. Appellant  
23 answered the Complaint.

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26           <sup>2</sup>Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
enacted and promulgated prior to the effective dates of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 On August 15, 2005, the bankruptcy court conducted a trial on  
2 the merits of the Complaint including whether compensatory damages  
3 should be awarded. Greco testified that an accounting was  
4 provided to the Scottsdale Justice Court and that Appellant was  
5 paid everything but the \$5,000.<sup>3</sup> In a Memorandum Decision dated  
6 February 21, 2006, the bankruptcy court found Appellant converted  
7 Appellee's property when "he obtained [the Fiesta Bowl] tickets  
8 post-petition and used those tickets personally without  
9 reimbursement to [Appellee]." Memo. Dec. 2/21/06 at p. 10.  
10 Although causes of action for turnover under §§ 542 and 543 were  
11 not pled in the Complaint, pursuant to those Code sections, the  
12 court ordered Appellant to turnover the value of the tickets in  
13 the amount of \$5,500 plus interest from June 30, 2002, to  
14 Appellee. Since Appellant had not turned over the tickets, the  
15 court held that he was liable to the bankruptcy estate for  
16 conversion of the Fiesta Bowl tickets in the amount of \$5,500 plus  
17 interest from June 2002 until paid in full.

18 The bankruptcy court also found that Appellant committed a  
19 defalcation while acting as a fiduciary. The court stated that  
20 since Appellant had been the general manager, the nature of his  
21 relationship with Appellee imposed a fiduciary duty upon him and  
22 that he breached that duty by stating that he intended to destroy  
23 an aspect of Appellee, by causing cash flow problems for Appellee,  
24 and by circulating proprietary information to friends and family  
25 without proper authorization from the Board of Directors.

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27 <sup>3</sup>Although Greco testified that Appellant was paid everything  
28 but \$5,000, he likely meant \$5,500 because he was referring to the  
charge Appellant made on Appellee's credit card for the tickets.

1 However, the bankruptcy court was unable to determine that damages  
2 resulted from Appellant's breach of fiduciary duty.

3       Instead, the bankruptcy court stated that it had "already  
4 determined that [Appellant] converted the Fiesta Bowl tickets with  
5 a value of \$5,500, for his own use. The Court may certainly use  
6 those damages as a basis to reflect damages for a breach of  
7 fiduciary duty." Memo. Dec. 2/21/06 at p. 14. The court held  
8 that "whether [Appellant] converted those tickets, or breached his  
9 fiduciary duty to [Appellee], he is responsible to return the sum  
10 of \$5,500, plus interest, to [Appellee] as compensatory damages."  
11 Memo. Dec. 2/21/06 at p. 14. The bankruptcy court found that  
12 Appellant "took control of the tickets post-petition, with no  
13 authority to do so, since he was no longer employed by [Appellee],  
14 gave the tickets away and/or sold the tickets with no Court  
15 authority to do so, and then kept the proceeds he received."  
16 Memo. Dec. 2/21/06 at p. 6. As to Appellee's claim of usurpation  
17 of a corporate opportunity, the bankruptcy court did not find a  
18 basis to support this claim.

19       The bankruptcy court concluded that Appellant's conduct was  
20 committed with express or implied malice towards Appellee and set  
21 a subsequent hearing to assess punitive damages; Nevada law  
22 permits the recovery of punitive damages for a breach of fiduciary  
23 duty. The court also left for the subsequent hearing the  
24 determination of whether Appellant was entitled to a claim for  
25 unpaid wages, the amount of said claim, and whether he was  
26 entitled to set off or recoup that claim against any damages  
27 awarded to Appellee.

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1           On May 9, 2006, the bankruptcy court conducted a hearing to  
2 resolve Appellant's Motion for Relief from Judgment, where  
3 Appellant argued that there were no compensatory damages and  
4 therefore there could be no punitive damages. The court  
5 repeatedly stated that the award of actual or compensatory damages  
6 was based on two theories: conversion and breach of fiduciary  
7 duty, and that even if the \$5,500 for that breach was repaid as  
8 part of the funds taken out of Appellant's salary, there was still  
9 interest on that claim that was not paid, whether it was in the  
10 amount of \$1.98 or \$20 or \$30. Tr. 5/9/06 at p. 13. The court  
11 denied the Motion for Relief from Judgment.

12           On May 23, 2006, the bankruptcy court held an evidentiary  
13 hearing on the wage claim and punitive damages. On June 28, 2006,  
14 the trial on the punitive damages claim was concluded.<sup>4</sup>

15           The decision from this latter hearing is embodied in a  
16 Memorandum Decision dated September 22, 2006. The bankruptcy  
17 court found that Appellant "was still acting improperly although a  
18 fiduciary, with no adequate controls in place, at his new  
19 [c]ompany." Memo. Dec. 9/22/06 at p. 4. The court reiterated  
20 Appellant's conduct that resulted in the finding that he breached  
21 his fiduciary duty and found that all the factors for assessing  
22 punitive damages were met - his conduct was reprehensible,  
23 Appellant's conduct was recidivist, and that the potential harm to  
24 Appellee was high. The court held that a multiple of four times  
25 the actual damages (\$5,500) was reasonable and assessed \$22,000 in  
26 punitive damages against Appellant. The bankruptcy court

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28           <sup>4</sup>The parties failed to provide us with a transcript of the  
punitive damages hearing.

1 addressed Appellant's choice of law argument and found that the  
2 state of incorporation, Nevada, provided the law that must be used  
3 in assessing whether there was a breach of fiduciary duty. The  
4 court then concluded by stating that it shall continue to apply  
5 the law of Nevada to this controversy.

## 6 **II. JURISDICTION**

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

## 9 **III. ISSUES**

10 The following are the issues on appeal:

11 1. Whether the bankruptcy court erred in determining that  
12 compensatory damages should be awarded to Appellee.

13 2. Whether the bankruptcy court erred in awarding punitive  
14 damages against Appellant.

15 3. Whether the bankruptcy court erred when it ignored  
16 Appellee's and its attorney's knowing failure to list Appellant as  
17 a creditor of the bankruptcy estate and knowing failure to give  
18 Appellant notice of important dates and deadlines.

## 19 **IV. STANDARD OF REVIEW**

20 The standard of review for legal questions is de novo and  
21 clearly erroneous for factual findings. Ting v. Chang (In re  
22 Chang), 163 F.3d 1138, 1140 (9th Cir. 1998) (citing In re Bammer,  
23 131 F.3d 788, 792 (9th Cir. 1992) (en banc)); Goichman v. Bloom (In  
24 re Bloom), 875 F.2d 224, 226 (9th Cir. 1989) (citing Joseph F.  
25 Sanson Inv. Co. v. 268 Ltd. (In re 268 Ltd.), 789 F.2d 674, 677  
26 (9th Cir. 1986)). Punitive damages are reviewed for abuse of  
27 discretion. Smith's Food & Drug Cntrs., Inc. v. Bellegrade, 958  
28 P.2d 1208, 1211 (Nev. 1998).



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## V. DISCUSSION

### A. Compensatory Damages

Appellant argues that the bankruptcy court erred in determining that compensatory damages should be awarded to Appellee, despite clear evidence that Appellant did not owe compensatory damages to the bankruptcy estate and despite the bankruptcy court's acknowledgment that those amounts were not due and owing.

The Complaint alleged: (1) breach of fiduciary duty and (2) usurpation of a corporate opportunity for dissemination of proprietary information and use of corporate monies to obtain Fiesta Bowl tickets for Appellee's own benefit. The bankruptcy court held that Appellant breached his fiduciary duty for disseminating proprietary information to his friends and family but did not find that there was a usurpation of a corporate opportunity. Although the Complaint did not allege conversion, the bankruptcy court concluded that Appellant converted the Fiesta Bowl tickets with a value of \$5,500. The court then used that amount as a basis to reflect damages for a breach of fiduciary duty. The court "set the actual or compensatory damages at \$5,500, and predicated it on two theories: conversion and breach of fiduciary duty." Tr. 5/9/06 at p. 15.

"Claims involving 'internal affairs' of corporations, such as the breach of fiduciary duties, are subject to the laws of the state of incorporation." Davis & Cox v. Summa Corp., 751 F.2d 1507, 1527 (9th Cir. 1985). Appellee is a Nevada corporation. Corporate officers and directors have a fiduciary relationship with their corporation. W. Indus., Inc. v. Gen. Ins. Co., 533

1 P.2d 473 (Nev. 1975). The elements of breach of fiduciary duty  
2 are (1) the existence of a fiduciary relationship; (2) breach of  
3 that duty; and (3) damages proximately caused by such a breach.  
4 Cascade Invs., Inc. v. Bank of Am., N.A., CV-N-99-559-ECR (RAM),  
5 2000 U.S. Dist. LEXIS 21474, at \*7 (D. Nev. Sept. 29, 2000)  
6 (citing Fid. & Deposit Co. v. Curtis Day, No. C-92-1714 THE, 1993  
7 U.S. Dist. LEXIS 5725, at \*16 (N.D. Cal. Apr. 22, 1993).

### 8 **1. Fiduciary relationship**

9 Nevada courts have recognized fiduciary relationships formed  
10 by employment, bailment, insurance, and partnerships. Cascade  
11 Invs., Inc. v. Bank of Am., N.A., CV-N-99-559-ECR (RAM), 2000 U.S.  
12 Dist. LEXIS 21474, at \*3 (D. Nev. Sept. 29, 2000) (citing A.C.  
13 Shaw Constr. v. Washoe County, 784 P.2d 9 (Nev. 1989). "A  
14 fiduciary relationship exists when one has the right to expect  
15 trust and confidence in the integrity and fidelity of another."  
16 Powers v. United Servs. Auto. Ass'n, 962 P.2d 596, 602 (Nev.  
17 1998).

18 Here, there is no dispute that Appellant and Appellee had a  
19 fiduciary relationship. In 2002, Appellant served as a general  
20 sales manager for Appellee. The bankruptcy court found that since  
21 Appellant was the general manager, the nature of his relationship  
22 with Appellee imposed a fiduciary duty upon him. Thus, we  
23 conclude the bankruptcy court did not err in finding a fiduciary  
24 relationship.

### 25 **2. Breach of that duty**

26 There is no dispute that Appellant breached his fiduciary  
27 duty. The bankruptcy court held that Appellant breached his  
28 fiduciary duty by stating that he intended to destroy an aspect of

1 Appellee by causing cash flow problems for Appellee, and by  
2 circulating proprietary information to friends and family without  
3 proper authorization from the Board of Directors. Thus, we  
4 conclude the bankruptcy court did not err in finding that  
5 Appellant breached his fiduciary duty to Appellee.

6 **3. Damages proximately caused by the breach**

7 Once the breach of a fiduciary duty has been shown, damages  
8 must be proven that result from the breach. Mort Wallin of Lake  
9 Tahoe, Inc. v. Commercial Cabinet, Co., Inc., 784 P.2d 954, 955  
10 (Nev. 1989). The bankruptcy court determined that Appellant  
11 converted the Fiesta Bowl tickets with a value of \$5,500 and that  
12 the court may use those damages as a basis to reflect damages for  
13 a breach of fiduciary duty. This is where the bankruptcy court  
14 erred.

15 Appellant argues that there were no actual damages and that  
16 there is overwhelming evidence that Appellant did not owe the  
17 \$5,500 to Appellee. Appellee argues that there is overwhelming  
18 evidence that Appellant converted Appellee's property by  
19 purchasing \$5,500 in Fiesta Bowl tickets and subsequently not  
20 turning the tickets over to Appellee once the tickets were  
21 received by Appellant post-petition. Appellee points out that the  
22 bankruptcy court's award of damages of \$5,500 plus interest was  
23 based on conversion as well as on the breach of fiduciary duty  
24 claim. Appellee further states that, while Appellant had the  
25 right to assert an offset to prove up his proof of claim, he  
26 ultimately withdrew that claim.

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1           **a. The bankruptcy court erred in finding damages based on**  
2   **conversion**

3           The record shows that the bankruptcy court found that  
4 Appellant converted the property of Appellee, the Fiesta Bowl  
5 tickets, in December 2002, when Appellant received the tickets  
6 post-petition and kept them for his own personal use. However,  
7 Appellee's Complaint for damages against Appellant alleged only  
8 two causes of action: breach of fiduciary duty and usurpation of  
9 corporate opportunity. Nowhere in the Complaint did Appellee  
10 allege a conversion by Appellant. In fact, the only mention of  
11 the tickets in the Complaint occurred in a one sentence factual  
12 allegation in support of Appellee's claim for usurpation of  
13 corporate opportunity, which mentions Appellant's purchase of the  
14 tickets. Appellee does not allege that Appellant was not  
15 authorized to make such a purchase or that Appellee was damaged as  
16 a result thereof. By going outside the four corners of the  
17 Complaint and finding Appellant liable on a cause of action not  
18 pled, and imposing damages accordingly, the bankruptcy court  
19 potentially violated Appellant's due process rights by finding  
20 Appellant committed a conversion.

21           Even ignoring the due process consideration, the bankruptcy  
22 court erred in finding Appellant liable for "conversion" because  
23 the evidence does not demonstrate that Appellee met the burden of  
24 proof on the elements of conversion. "Arizona has adopted the  
25 following definition of conversion, which is in the Restatement  
26 (Second) of Torts § 222A(1) (1965): 'Conversion is an intentional  
27 exercise of dominion or control over a chattel which so seriously  
28 interferes with the right of another to control it that the actor

1 may justly be required to pay the other the full value of the  
2 chattel.'" Miller v. Hehlen, 104 P.3d 193, 203 (Ariz. App. 2005).  
3 Here, the evidence does not show the elements of conversion have  
4 been met, specifically the elements of intent and control over  
5 property of another.

6 The record shows the bankruptcy court found Appellant liable  
7 for conversion as the result of Appellant's failure to turn over  
8 the Fiesta Bowl tickets to Appellee when they were received by  
9 Appellant in December 2002 and Appellant's subsequent personal use  
10 of the tickets. While Appellant's retention and use of the  
11 tickets could be deemed an intentional act, Appellee did not want  
12 the tickets and they were no longer property of Appellee at the  
13 time the tickets were received and used by Appellant because  
14 Appellee effectively sold the tickets to Appellant through its set  
15 off.

16 Set off is defined as "the discharge or reduction of one  
17 demand by an opposite one, and it has frequently been defined as a  
18 cross claim, for which an action might be maintained." Am.  
19 Smelting & Ref. Co. v. Swisshelm Gold & Silver Co., 160 P.2d 757,  
20 760 (Ariz. 1945) ("Swisshelm") (quoting 47 Am.Jur., Setoff and  
21 Counterclaim, § 3, p. 709). Arizona law provides that an employer  
22 may withhold the wages of an employee for the purpose of  
23 effectuating a set off.<sup>5</sup>

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25 <sup>5</sup>Arizona Revised Statutes ("Ariz. Rev. Stat.") § 23-352  
26 (2007) states that an employer may withhold an employee's wages if  
27 there is a reasonable good faith dispute as to the amount of wages  
28 due, including any claim of debt, reimbursement, recoupment or  
set-off. Specifically, Ariz. Rev. Stat. § 23-352 (2007) provides

(continued...)

1 In July 2002, Appellee chose to set off the value of the  
2 Fiesta Bowl tickets by withholding funds from Appellant's final  
3 three direct deposits, all dated July 26, 2002, in the total  
4 amount of \$5,500. The reason for the decision by Appellee to set  
5 off this amount is not established by the record. Therefore, it  
6 cannot be determined whether Appellee considered that Appellant's  
7 credit card charge for the tickets was not authorized or whether  
8 Appellee anticipated that it would not have a use for the tickets  
9 five months later, in December, due to its own situation, i.e.,  
10 the possibility of a sale of or bankruptcy filing for Appellee's  
11 business. Nevertheless, the record shows that both Appellant and  
12 Appellee recognize that the set off constituted a satisfaction of

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<sup>5</sup>(...continued)

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No employer may withhold or divert any portion  
of an employee's wages unless one of the  
following applies:

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1. The employer is required or empowered to do  
so by state or federal law.

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2. The employer has prior written  
authorization from the employee.

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3. There is a reasonable good faith dispute as  
to the amount of wages due, including the  
amount of any counterclaim or any claim of  
debt, reimbursement, recoupment or set-off  
asserted by the employer against the employee.

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Ariz. Rev. Stat. § 23-350 (2007) defines wages as

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nondiscretionary compensation due an employee in  
return for labor or services rendered by an  
employee for which the employee has a reasonable  
expectation to be paid whether determined by a  
time, task, piece, commission or other method of  
calculation. Wages include sick pay, vacation  
pay, severance pay, commissions, bonuses and  
other amounts promised when the employer has a  
policy or a practice of making such payments.

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1 any amount owed to Appellee for the purchase of the Fiesta Bowl  
2 tickets. The testimony by Greco on behalf of Appellee included  
3 statements admitting that Appellant's final compensation was  
4 reduced by the amount paid for the tickets. In addition, the  
5 record includes a letter from Greco and evidence of three direct  
6 deposit stubs showing that \$5,500 was withheld from Appellant's  
7 final compensation for the Fiesta Bowl tickets. The fact that  
8 Appellee failed to list Appellant as a creditor in its bankruptcy  
9 case also tends to show that Appellee believed it was fully repaid  
10 for the tickets.

11 Thus, through the set off, Appellee essentially sold the  
12 tickets to Appellant. Consequently, the tickets became  
13 Appellant's property in July 2002 as a result of the withholding  
14 of the \$5,500 from Appellant's final compensation.

15 It is clear that one cannot convert his own property. See  
16 Miller v. Hehlen, 104 P.3d at 203 ("Conversion also requires  
17 conduct intended to affect property of another."); Shartzler v.  
18 Ulmer, 333 P.2d 1084, 1088 (Ariz. 1959) ("It is settled that  
19 conversion is any act of dominion wrongfully exerted over  
20 another's personal property in denial of or inconsistent with his  
21 rights therein." (quoting Gruber v. Pac. States Sav. & Loan Co.,  
22 88 P.2d 137, 139 (Cal. 1939))). Because the Fiesta Bowl tickets  
23 were no longer property of Appellee when Appellant used them,  
24 Appellant cannot be liable to Appellee for conversion.

25 Similarly, although not addressed by either Appellee or the  
26 bankruptcy court, liability for conversion cannot be found based  
27 on the credit card charge in June 2002 for the Fiesta Bowl  
28 tickets. It is not clear from the record whether Appellant was

1 authorized to order the tickets, and the record does not show that  
2 Appellant purchased the tickets with the intent to use them for  
3 his personal use or gain, rather than for a legitimate corporate  
4 purpose, such as client development or solicitation of investors.  
5 Intent is a necessary element for the tort of conversion. "The  
6 intent required is 'an intent to exercise a dominion or control  
7 over the goods which is in fact inconsistent with the plaintiff's  
8 rights.'" Miller v. Hehlen, 104 P.3d at 203 (quoting Sterling  
9 Boat Co. v. Ariz. Marine, Inc., 653 P.2d 703, 706 (Ariz. App.  
10 1982) (quoting William Prosser, Handbook on the Law of Torts § 15,  
11 at 83 (4th ed. 1971))). Because nothing in the record shows that  
12 Appellant originally obligated Appellee to purchase the tickets  
13 for other than corporate purposes, or "inconsistent with  
14 [Appellee's] rights," Appellant cannot be liable for conversion  
15 based upon the purchase of the Fiesta Bowl tickets. As a result,  
16 the bankruptcy court erred in finding damages resulting from a  
17 purported conversion.

18 **b. The bankruptcy court did not find damages based on breach of**  
19 **fiduciary duty**

20 The bankruptcy court stated that it could not find damages  
21 for breach of fiduciary duty based upon Appellant's dissemination  
22 of the Business Plan or the alleged intent to destroy an aspect of  
23 Appellee's business. The only basis on which the court found  
24 damages in favor of Appellee was the purported conversion of the  
25 Fiesta Bowl tickets by Appellant. Accordingly, because the  
26 bankruptcy court found that no other damages were demonstrated for  
27 breach of fiduciary duty, the court erred in finding actual or  
28 compensatory damages.



1           **c. There were no damages as a result of Appellee's set off**

2           The bankruptcy court committed clear error in finding damages  
3 owing to Appellee based on the value of the Fiesta Bowl tickets  
4 because, at the time Appellee filed its Complaint against  
5 Appellant, no damages based on the purchase of the tickets could  
6 be claimed, as Appellee was made whole through its use of the  
7 remedy of set off. By withholding \$5,500 from Appellant's final  
8 compensation, Appellee was wholly repaid for the value of the  
9 tickets.

10           More importantly, by Appellee's choice to utilize the self-  
11 help remedy of set off, Appellee waived its right to assert a  
12 cause of action and claim damages based on the transaction giving  
13 rise to the set off.<sup>6</sup> The Supreme Court of Arizona has recognized  
14 "the defense of payment" in the situation of a set off, and held  
15 that the original owner of converted property "may either  
16 acquiesce in the conversion and [seek a remedy such as set off],  
17 or refuse to acquiesce therein and ask for damages for the  
18 conversion." Swisshelm, 160 P.2d at 760. In the Swisshelm case,  
19 an employee of Swisshelm converted ore and other property  
20 belonging to Swisshelm, some of which was sold to a third party.  
21 Id. at 758. At a trial on a claim brought by the employee for  
22 unpaid wages, Swisshelm stated that the wages were withheld as set  
23 off for the property taken by the employee. Id. at 758. The  
24 trial court essentially approved the set off in its findings of  
25 fact by stating that the employee received far more from the  
26 property than the claim for unpaid wages, and entered judgment in

27           <sup>6</sup>As mentioned above, Appellee did not assert a cause of  
28 action against Appellant, based on the purchase of the Fiesta Bowl  
tickets. However, because this transaction was the basis for the  
bankruptcy court's finding of damages, this memorandum discusses  
the legality and propriety under Arizona law of this finding.

1 favor of Swisshelm. Id. at 758. Swisshelm later sued the third  
2 party who purchased the ore from the employee for the value  
3 thereof. Id. at 757. The Arizona Supreme Court stated that  
4 Swisshelm was precluded from asserting a claim against the third  
5 party by virtue of its decision to set off the value of the ore.  
6 Id. at 760 ("In adopting this position, Swisshelm may be said to  
7 have waived the tort [of conversion]. By so doing it approved of  
8 the sale and ratified the payment by the [third party] to [the  
9 employee].") The Arizona Supreme Court held that "Swisshelm  
10 waived the tort [of conversion] and proceeded in *assumpsit* by way  
11 of setoff. . ." Id. at 760.

12 Similarly, in this case, Appellee had the option to sue  
13 Appellant for the value of the Fiesta Bowl tickets on the ground  
14 of conversion. Appellee chose not to do so. Rather, Appellee  
15 asserted its right under the Arizona statute to set off the value  
16 of the tickets from Appellant's wages. At that point, Appellee  
17 was made whole and waived its right to later assert a claim based  
18 on an alleged debt owing for the tickets, such as a claim for  
19 conversion.

20 The bankruptcy court acknowledged the possibility of a set  
21 off of the value of the Fiesta Bowl tickets. However, the court  
22 went on to find that, even if the principal value of the tickets  
23 were repaid through the set off, any damages resulting from  
24 interest owing were sufficient compensatory damages to justify  
25 judgment in favor of Appellee and the award of punitive damages.

26 **d. The bankruptcy court erred in finding interest as damages**

27 The bankruptcy court repeatedly stated that even if the  
28 \$5,500 were repaid as part of the funds taken out of Appellant's

1 salary, there was still interest on that claim that was not paid,  
2 whether it was in the amount of \$1.98 or \$20 or \$30.

3 As part of a judgment, a court may award interest on any debt  
4 or liability demonstrated on the part of the defendant. Under  
5 Arizona law, a debt is defined as a promise to pay.<sup>7</sup> In this  
6 case, there is no evidence that Appellant ordered the tickets for  
7 his own use, rather than for corporate purposes. Consequently, no  
8 showing has been made that Appellant made an express or implied  
9 promise to Appellee to repay the amount charged to Appellee's  
10 credit card for the purchase of the tickets. Therefore, no debt  
11 arose with respect to the purchase of the tickets by virtue of any  
12 promise to repay.

13 Debt can also arise based on a party's liability under a  
14 legal cause of action, such as an action under a breach of  
15 contract or tort. The debt in such a situation arises at the time  
16 liability is imposed. According to Arizona law, liability is  
17 imposed the "instant. . .the wrong was done." Kain v. Ariz.  
18 Copper Co., 133 P. 412, 415 (Ariz. 1913) ("[T]he liability arises  
19 immediately upon such breach of contract or disregard of duty, and

20 \_\_\_\_\_  
21 <sup>7</sup>The Arizona Supreme Court defined debt as follows:

22 The word 'debt' is as applicable to a sum of  
23 money promised at a future day as to a sum now  
24 due and payable; the former is a debt owing; the  
25 latter, a debt due. Anderson's Law Dictionary,  
26 315. A sum of money which is payable is a debt,  
27 'without regard to the fact whether it be  
28 payable now or at a future time.' The money  
need not be immediately payable; obligations yet  
to become due constitute indebtedness, as well  
as those already due. 'A party becomes indebted  
when he enters into an obligation to pay.'

27 City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr.  
28 Ass'n, Inc., 408 P.2d 818, 831 (Ariz. 1965) (internal citations  
omitted).

1 an action to recover the damages, which are the measure of such  
2 liability, may be immediately maintained." (quoting Lattin v.  
3 Gillette, 30 P. 545, 546 (Cal. 1892)). Accordingly, a judgment  
4 may award interest against a defendant from the moment liability  
5 arises against him. However, logically, interest cannot be  
6 awarded as damages absent a determination that the defendant is  
7 liable under the claimed cause of action in the first place.

8 Here, the bankruptcy court awarded interest on the principal  
9 award of damages in the amount of \$5,500, which was based on the  
10 court's finding that Appellant converted Appellee's property.  
11 Because the court erred in awarding damages against Appellant for  
12 conversion, the award of interest on such damages cannot be  
13 affirmed. Further, because the bankruptcy court did not find  
14 damages against Appellant on any other grounds for breach of  
15 fiduciary duty, there exists no basis whatsoever for an award of  
16 interest in this case.

17 In conclusion, because damages must be shown as an element of  
18 a claim for breach of fiduciary duty, and because Appellee failed  
19 to demonstrate any damages, the bankruptcy court erred in  
20 rendering judgment against Appellant and in favor of Appellee.  
21 The court found no damages shown under any allegations of breach  
22 of fiduciary duty, other than those based on an alleged act of  
23 conversion. However, the bankruptcy court erred in finding  
24 conversion where it was not sufficiently pled or demonstrated  
25 through evidence. Moreover, Appellee waived any claim for  
26 conversion through its decision to set off the charge for the  
27 tickets. Finally, because there are no underlying damages or  
28 liability owing from Appellant to Appellee, no interest could have

1 accrued that would justify an award of compensatory damages based  
2 on any interest. Thus, we conclude the bankruptcy court erred in  
3 finding actual or compensatory damages.

#### 4 **B. Punitive Damages**

5 Appellant argues that the bankruptcy court erred in awarding  
6 punitive damages. Appellant cites to State Farm Mutual Auto. Ins.  
7 Co. v. Campbell, 538 U.S. 408, 416 (2003) for the proposition that  
8 should the court determine punitive damages, the court must do so  
9 without violating Appellant's due process rights. Without citing  
10 any authority, Appellant argues that if the action for breach of  
11 fiduciary duty took place in a state other than where the entity  
12 was incorporated, the court has to apply the law where the act  
13 occurred, which in this case would be Arizona, and in Arizona,  
14 punitive damages cannot be awarded absent actual damages.

15 Appellant asserts that he does not owe Appellee \$5,500, that there  
16 has been no harm to Appellee because Appellee kept Appellant's  
17 funds and has been paid for the Fiesta Bowl tickets, that Appellee  
18 failed to prove any actual damages, and that the bankruptcy court  
19 did not find any actual damages based on Appellant's conduct.

20 Appellee argues that since Appellee was incorporated in  
21 Nevada, Nevada law applies. Appellee states that there was ample  
22 evidence to justify an award of punitive damages - that Appellant  
23 intended to injure Appellee by converting estate assets for his  
24 own personal use and to disseminate Appellee's proprietary  
25 information to others without any authorization. Appellee argues  
26 that Appellant presented no evidence to the contrary that his  
27 conduct qualified as express malice, since he had the ability and  
28 intent to destroy Appellee. Appellee also states that Appellant's

1 conduct had not changed, so the amount of punitive damages was  
2 appropriate to punish and deter him. Appellee argues that given  
3 the fact that it sought the statutory maximum of \$300,000 in  
4 punitive damages but was awarded only \$22,000, or four times the  
5 actual damages, the punitive damages award was well within the  
6 statutory restrictions, so this award must be upheld.

7 Nevada Revised Statutes ("Nev. Rev. Stat.") § 42.005 (2007)  
8 provides for an award of punitive damages upon a showing of fraud,  
9 oppression or malice by clear and convincing evidence.

10 Specifically, it states

11 1. Except as otherwise provided in N.R.S.  
12 42.007, in an action for the breach of an  
13 obligation not arising from contract, where it  
14 is proven by clear and convincing evidence that  
15 the defendant has been guilty of oppression,  
16 fraud or malice, express or implied, the  
17 plaintiff, in addition to the compensatory  
damages, may recover damages for the sake of  
example and by way of punishing the defendant.  
Except as otherwise provided in this section or  
by specific statute, an award of exemplary or  
punitive damages made pursuant to this section  
may not exceed:

18 (a) Three times the amount of compensatory  
19 damages awarded to the plaintiff if the amount  
of compensatory damages is \$100,000 or more; or

20 (b) Three hundred thousand dollars if the amount  
21 of compensatory damages awarded to the plaintiff  
22 is less than \$100,000.

23 Punitive damages may be assessed for breach of fiduciary duty.

24 Clark v. Lubritz, 944 P.2d 861, 867 (Nev. 1997).

25 Both the states of Nevada and Arizona require that there  
26 first be an award of actual or compensatory damages before  
27 punitive damages may be awarded. Sprouse v. Wentz, 781 P.2d 1136,  
28 1138 (Nev. 1989) ("Compensatory damages must be awarded before the

1 court can award punitive damages."); Wyatt v. Wehmuller, 806 P.2d  
2 870, 874 (Ariz. 1991) ("A plaintiff must be entitled to actual  
3 damages before being entitled to punitive damages.")

4 As stated above, Appellee did not show that it had suffered  
5 any actual or compensatory damages. Because punitive damages  
6 cannot be awarded absent actual damages, Appellee is not entitled  
7 to punitive damages. We conclude the bankruptcy court abused its  
8 discretion on this issue.

9 **C. Failure to list Appellant as a creditor**

10 Appellant argues that the bankruptcy court erred when it  
11 ignored Appellee's and its attorney's knowing failure to list  
12 Appellant as a creditor of the bankruptcy estate and knowing  
13 failure to give Appellant notice of important dates and deadlines.  
14 Appellant asserts that although the bankruptcy judge stated that  
15 she was unhappy with the parties, she never rebuked or censured  
16 Appellee for failing to reveal to the court that \$5,500 was not  
17 due and owing to the estate and that the court forced Appellant to  
18 withdraw his proof of claim but failed to give any basis for an  
19 award of interest.

20 This argument provides no basis whatsoever for reversing the  
21 bankruptcy court's ruling. The record simply does not show that  
22 the bankruptcy court forced Appellant to withdraw his proof of  
23 claim or that Appellant was entitled to any monies from the  
24 estate.

25 **VI. CONCLUSION**

26 The bankruptcy court found that the only actual or  
27 compensatory damages due from Appellant were the \$5,500 charge  
28 used to purchase the Fiesta Bowl tickets and interest from June

1 2002. Appellee lawfully offset the full amount of this charge  
2 against the final compensation due Appellant. The bankruptcy  
3 court erred in finding a conversion and any damages resulting from  
4 the purported conversion. There was no other determination of  
5 compensatory damages based on the breach of fiduciary duty alone.  
6 Because there are no underlying damages, no interest could have  
7 accrued. Therefore, the bankruptcy court erred in awarding  
8 compensatory damages. Since punitive damages cannot be awarded in  
9 the absence of compensatory damages, Appellee is also not entitled  
10 to punitive damages. We **REVERSE** the order of the bankruptcy  
11 court.

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