

JAN 15 2010

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-09-1108-MoPaH
	)		
ROBERT S. BANE,	)	Bk. No.	LA 07-19570-BB
	)		
Debtor.	)	Adv. No.	LA 08-1006-BB
	)		
ROBERT S. BANE,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>	
	)		
HAJIME SORAYAMA,	)		
	)		
Appellee.	)		
	)		

Argued and Submitted on October 23, 2009  
at Pasadena, California

Filed - January 15, 2010

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: MONTALI, PAPPAS and HOLLOWELL, Bankruptcy Judges.

Prior to bankruptcy, a district court entered a judgment against the debtor for, inter alia, conversion and interference with prospective economic advantage. The district court further awarded the plaintiff exemplary damages in the amount of

<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 \$1,000,000 "on account of [the debtor's] willful and malicious  
2 injury" to the plaintiff. The debtor filed his chapter 7<sup>2</sup>  
3 petition and the plaintiff filed an adversary proceeding to have  
4 the judgment debt declared nondischargeable under section 523.  
5 Citing the doctrine of collateral estoppel, the bankruptcy court  
6 granted summary judgment declaring \$1,388,000 to be  
7 nondischargeable under sections 523(a)(4) and (a)(6) and another  
8 \$425,000 to be nondischargeable under section 523(a)(6). The  
9 debtor appealed. We AFFIRM.

## 10 I. FACTS

### 11 A. Background Facts<sup>3</sup>

12 Appellant Robert Bane ("Debtor") is a fine art publisher  
13 operating under various entities, including Robert Bane, Ltd.  
14 ("RBL"), of which he is the president and of which he and his  
15 wife are the sole shareholders. In the early 1990s, Debtor  
16 contacted appellee Hajime Sorayama ("Plaintiff"), an  
17 internationally known artist, and offered to become the exclusive  
18 publisher of Plaintiff's reproductions. Plaintiff and RBL  
19 entered into several written contracts under which RBL paid a fee  
20 for the right to publish Plaintiff's reproductions, and RBL took  
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22  
23

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24 <sup>2</sup>Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 <sup>3</sup>The following background facts are based on the findings of  
28 fact entered by the United States District Court for the Central  
District of California after a four-day bench trial in June 2007.

1 original artwork on consignment with an agreed-upon sale price  
2 for each piece to be divided equally between the parties.<sup>4</sup>

3 In October 2000, Plaintiff's agent told Debtor that she  
4 would conduct a physical audit of the paintings at a scheduled  
5 art show in Los Angeles. RBL cancelled the show and rescheduled  
6 the audit for April 2001. In March 2001, RBL's bookkeeper asked  
7 if Plaintiff would agree to sell nine pieces to a collector at a  
8 discounted price. The parties ultimately agreed that Plaintiff  
9 would accept \$30,400 as his share of the proceeds and Debtor  
10 wire-transferred \$15,200 to Plaintiff as a deposit.

11 In April 2001, an audit was conducted and eight pieces were  
12 missing, with Debtor offering different and conflicting  
13 explanations for the loss. Plaintiff later discovered that nine  
14 pieces reportedly sold in 2001 were actually sold in  
15 January 2000. Debtor agreed to return many of Plaintiff's  
16 original artworks, but ultimately Plaintiff did not recover or  
17 receive payment for thirty-three of his original paintings.

18 Following efforts to resolve the financial differences  
19 between RBL and Plaintiff, RBL signed a document on  
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21  
22 <sup>4</sup>The contracts were not appended or incorporated into the  
23 district court's findings, but were attached as Exhibits A-C to  
24 Debtor's answer to the second amended complaint in the underlying  
25 adversary proceeding. Depending on the type of artwork, the  
26 pricing terms varied. All of the contracts, however, provided in  
27 section VIII(A) that accounting and payments "shall be made for  
28 all sales of originals on a monthly basis and the [Plaintiff's]  
share shall be wired to an account . . . in Japan." In addition,  
all of the contracts provide in section XIII(A) that Debtor would  
account and pay every thirty days for the sale of suites and  
graphics. "Every thirty (30) days there will be a settling up of  
money due to [Plaintiff] pursuant to this Agreement relating to  
the creation of specific projects."

1 September 9, 2002, promising to pay \$148,800 in installments.  
2 Payments were irregular and Plaintiff eventually agreed to take  
3 back 830 limited edition pieces for a credit of \$34,920 against  
4 the debt.<sup>5</sup>

5 In 2004, Plaintiff discovered that RBL was auctioning his  
6 limited edition reproductions on eBay at very low prices. Debtor  
7 denied selling the graphics on eBay for \$100 or less, but the  
8 district court found that exhibits introduced at trial "clearly  
9 establish[ed] that he did so." As a result, Plaintiff's market  
10 and price for his limited edition pieces decreased because of the  
11 availability of the paintings through eBay. Plaintiff's annual  
12 income from the sale of reproductions decreased dramatically,  
13 with a total loss of \$425,000 from 2002 through 2006.

14 B. District Court Action

15 In February 2005, Plaintiff sued Debtor and others in the  
16 district court. Following a four-day trial, the district court  
17 entered its findings of fact and conclusions of law. Among other  
18 things, the district court found that Debtor personally was  
19 liable for the torts of conversion and of intentional  
20 interference with prospective economic advantage. With respect  
21 to the conversion claim, the district court stated: "[Debtor]  
22 personally exercised dominion and control over [P]laintiff's  
23 paintings and used that property for his own benefit and to the  
24 detriment of [P]laintiff. He is personally liable for the

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26  
27 <sup>5</sup>This settlement was described in more detail in the  
28 district court's findings, quoted infra.

1 conversion of [P]laintiff's paintings. The value of the  
2 converted property was \$388,000."

3 With respect to the claim for intentional interference with  
4 prospective economic advantage, the district court observed:

5 A cause of action for intentional interference with  
6 prospective economic advantage has the following elements:  
7 an economic relationship between plaintiff and some third  
8 party; defendants' knowledge of it; intentional acts by  
9 defendants designed to disrupt the relationship; actual  
10 disruption; and economic harm. The conduct also must be  
11 shown to be wrong by some legal measure other than the fact  
12 of the interference itself. Della Penna v. Toyota Motor  
13 Sales, 11 Cal. 4th 376 (1995).

10 Plaintiff introduced evidence which demonstrated that  
11 defendants 'dumped' scores of his limited edition works onto  
12 the market by selling them on eBay for as little as \$100 or  
13 less. Further, defendants advertised themselves as the  
14 exclusive distributors of [P]laintiff's work, even though  
15 their contract had long since terminated.

14 Defendants contend that no such claim was proven,  
15 because under the terms of the parties' contract, they had  
16 the right to sell the reproductions for whatever price they  
17 chose. Although defendants are right about the language of  
18 the contract, it does not foreclose a tort claim for  
19 interference.

17 The state of the evidence is clear: [P]laintiff  
18 reasonably expected future economic benefit as a result of  
19 his relationship with his many international customers.  
20 Defendants, as [P]laintiff's American art publisher, knew of  
21 that relationship and its anticipated economic benefit to  
22 [P]laintiff. Defendants' decision to flood the market with  
23 cut-rate reproductions was clearly designed to disrupt that  
24 relationship, and did so. Plaintiff experienced great  
25 difficulty selling the reproductions in his possession,  
26 because of their availability on eBay.

23 Finally, the harm was wrongful by some legal measure  
24 other than the fact of the interference itself. In  
25 August 2002, [Debtor], unable to meet his financial  
26 obligations to [P]laintiff, offered "to work out a trade  
27 that is fair to [plaintiff]." In this regard, he offered to  
28 return to [P]laintiff his lithographs, valued at \$300 each,  
and giclees valued at \$700 each. He persuaded [P]laintiff  
to take them back and give defendants a discounted credit.  
He said this would greatly benefit [P]laintiff, who would  
have works with a total retail value of \$1,030,200. Relying

1 on those representations, [P]laintiff agreed to accept the  
2 return of many works in exchange for a reduction of  
3 defendants' debt. The benefit of that bargain was  
substantially reduced by defendants' bargain-basement sale  
of their remaining reproductions.

4 Based on the foregoing, the district court awarded damages in the  
5 amount of \$425,000 to Plaintiff for tortious interference with  
6 prospective economic advantage.<sup>6</sup>

7 In its judgment entered on September 4, 2007, the district  
8 court imposed liability against Debtor individually on the  
9 conversion and interference with prospective economic advantage  
10 claims. In addition, the court awarded exemplary damages in the  
11 amount of \$1,000,000.00 against Debtor personally "on account of  
12 his willful and malicious injury to Plaintiff and Plaintiff's  
13 property."<sup>7</sup> Emphasis added. These words appear in the district  
14 court's judgment, not in its separate findings and conclusions.  
15 The district court did not specify whether the "willful and  
16 malicious" conduct was the conversion or the intentional  
17 interference with economic advantage.

18 In its findings and conclusions, the district stated the  
19 following with respect to its award of exemplary/punitive  
20 damages:

21 \_\_\_\_\_  
22 <sup>6</sup>Plaintiff also alleged that Debtor had breached his  
23 fiduciary duty to Plaintiff, but the district court specifically  
held that "[Debtor] personally is not in a fiduciary relationship  
with [P]laintiff."

24 <sup>7</sup>The district court imposed damages against Debtor  
25 personally only on tort claims: conversion and intentional  
26 interference with prospective economic advantage. The district  
27 court did not impose liability against Debtor (but only against  
RBL) for breach of contract. Therefore, the district court's  
reference to Debtor's "willful and malicious injury" necessarily  
28 applies to one or both of the tort claims.

1 The record is replete with misrepresentations made by  
2 [Debtor] to [Plaintiff], on which [Plaintiff] relied to  
3 his detriment. Paintings were sold without payment to  
4 plaintiff, then lies were told to cover up the sales.  
5 The shifting of blame, reinvention of facts, and  
6 dissembling went on for years, while [Debtor]  
7 repeatedly stated he was trying to do what was best for  
8 [Plaintiff] and was making every effort to make good on  
9 his obligations. The evidence establishes clearly and  
10 convincingly that [Debtor] perpetrated a continuing  
11 fraud against [Plaintiff], whose business and  
12 reputation have suffered as a result. Punitive damages  
13 are imposed on [Debtor] personally and in favor of  
14 [Plaintiff] in the sum of \$1,000,000.

15 Emphasis added. Debtor appealed the district court judgment; the  
16 appeal is currently pending in the Ninth Circuit under  
17 No. 07-56487 and oral argument is scheduled for February 2010.

18 C. Bankruptcy Court Proceedings

19 On October 23, 2007, Debtor filed his chapter 7 petition and  
20 on January 4, 2008, Plaintiff filed his nondischargeability  
21 complaint. On October 1, 2008, Plaintiff filed a motion for  
22 summary judgment, alleging that the bankruptcy court should apply  
23 the doctrine of collateral estoppel to the district court's  
24 findings, conclusions and judgment. Plaintiff argued that the  
25 district court's ruling supported a summary judgment excepting  
26 Debtor's obligations to Plaintiff from discharge under sections  
27 523(a)(2), (a)(4), and (a)(6). Debtor opposed the motion.

28 On December 23, 2008, the bankruptcy court issued a  
tentative ruling that it would grant a nondischargeable judgment  
against Debtor in the amount of \$1,813,000 under section  
523(a)(6), but would not grant summary judgment under subsections  
(a)(2) and (a)(4). In the tentative ruling, the bankruptcy court  
noted that the district court had awarded punitive damages and

1 that "[i]n order to do so, it had to find that the debtor's  
2 wrongful conduct (here, the conversion and interference with  
3 prospective economic advantage) was wrongful and malicious."

4 At the hearing on December 23, 2008, the bankruptcy court  
5 clarified that even if the district court had not imposed the  
6 punitive damages against Debtor, the district court's  
7 descriptions of the conversion and the intentional interference  
8 with prospective economic advantage were sufficient to support  
9 liability under section 523(a)(6). The bankruptcy court also  
10 detailed the district court's other findings indicating that the  
11 injury to Plaintiff was willful and malicious.

12 Observing that the district court had conducted a four-day  
13 trial and imposed punitive sanctions for Debtor's "willful and  
14 malicious injury" to Plaintiff, the bankruptcy court refused to  
15 hold that the district court "was wrong on that score." The  
16 bankruptcy court preferred "to leave that to the appellate  
17 process." In addition, the bankruptcy court modified its  
18 tentative ruling to hold that the district court's findings were  
19 sufficient to establish that conversion damages were  
20 nondischargeable under section 523(a)(4)'s embezzlement  
21 provisions.

22 On February 12, 2009, the bankruptcy court entered its  
23 findings of fact and conclusions of law in support of summary  
24 judgment.<sup>8</sup> Applying the "principles of collateral estoppel," the  
25

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26 <sup>8</sup>The "findings" were actually a legal analysis of undisputed  
27 facts. Generally, findings of fact are not required with respect  
to an award of summary judgment. See Fed. R. Civ. P. 52(a)(3)

(continued...)



1 bankruptcy court found that the district court's findings,  
2 conclusions, and judgment established a nondischargeable debt in  
3 the amount of \$1,388,000 under section 523(a)(4). The court also  
4 found that the debt of \$1,813,000 (which includes the \$1,388,000  
5 figure above) was nondischargeable under section 523(a)(6).

6 On the same date, the bankruptcy court entered its judgment  
7 determining that the district court judgment of \$1,813,000 was  
8 nondischargeable and that \$1,388,000 of this amount was  
9 nondischargeable under subsections (a)(4) and(a)(6) while  
10 \$425,000 of this amount was nondischargeable under subsection  
11 (a)(6) alone. The judgment also dismissed Plaintiff's claim for  
12 relief under section 523(a)(2)(A).<sup>9</sup>

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14 <sup>8</sup>(...continued)  
15 (incorporated by Rule 7052). The judicial function on a motion  
16 for summary judgment is limited to determining whether any  
17 material factual issue exists and does not extend to resolution  
18 of any such issue. Anderson v. Liberty Lobby, Inc., 477 U.S.  
19 242, 249 (1986) ("[A]t the summary judgment stage the judge's  
20 function is not . . . to weigh the evidence and determine the  
21 truth of the matter but to determine whether there is a genuine  
22 issue for trial."). "It follows that there is no such thing as a  
23 finding of fact on summary judgment. What are sometimes loosely  
24 termed 'findings' are instead facts as to which there is no  
25 genuine issue." Thompson v. Mahre, 110 F.3d 716, 719 (9th Cir.  
26 1997). The bankruptcy court's "findings" make clear the basis of  
27 its decision and indicate the undisputed facts supporting the  
28 judgment.

<sup>9</sup>In his Opening Brief, Plaintiff argues that we could affirm  
the bankruptcy court's judgment because "there is sufficient  
evidence to find that Section 523(a)(2) was also satisfied by the  
District Court's explicit findings." See footnote 7 on page 13  
of Appellee's Opening Brief. Such a finding would require a  
reversal of the bankruptcy court's dismissal (at Plaintiff's  
request) of his section 523(a)(2) claims. If Plaintiff wanted to  
preserve his section 523(a)(2) claims, he should not have  
consented to their dismissal or he should have filed a cross-  
appeal of the dismissal. While we can affirm for any reason  
supported by the record, we can only do so if the asserted ground  
would not expand the relief which has been granted. Smith v.  
Phillips, 455 U.S. 209, 215 n.6 (1982).

1 D. Post-Appeal Matters

2 Debtor filed a timely notice of appeal on February 17, 2009.  
3 Under 28 U.S.C. § 158(c)(1)(B), Plaintiff had thirty days from  
4 service of the notice of appeal to elect to have the district  
5 court hear the appeal. Local Rule 8001-2.1.2.2 of the United  
6 States District Court for the Central District of California  
7 requires that an appellee file the statement of election with the  
8 clerk of this Panel. On February 19, 2009, Plaintiff filed his  
9 statement of election with the clerk of the bankruptcy court.

10 The clerk of the bankruptcy court did not forward the  
11 election to our clerk. On March 31, 2009, Debtor filed a motion  
12 for order determining that this Panel had jurisdiction over the  
13 appeal. On June 11, 2009, we entered an order observing that if  
14 the bankruptcy court had forwarded the timely but misfiled  
15 election, the Panel would have forwarded the appeal to the  
16 district court. Since the bankruptcy court did not do so, we  
17 transferred Debtor's motion to the district court to determine  
18 its own jurisdiction and closed our appeal.

19 On July 16, 2009, the district court entered an order  
20 determining that this Panel retained jurisdiction over the appeal  
21 and transferring the appeal to us, as Plaintiff had failed to  
22 comply with Local Rule 8001-2.1.2.2. We therefore entered an  
23 order reopening the original appeal.

24 **II. ISSUE**

25 Did the bankruptcy court err in entering summary judgment  
26 excepting Debtor's obligations to Plaintiff from discharge?

1 **III. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.  
3 § 157(b)(2)(I) and § 1334. We have jurisdiction under 28 U.S.C.  
4 § 158.<sup>10</sup>

5 **IV. STANDARDS OF REVIEW**

6 We review de novo the bankruptcy court's ruling on a motion  
7 for summary judgment. Boyajian v. New Falls Corp.  
8 (In re Boyajian), 564 F.3d 1088, 1090 (9th Cir. 2009); Cutter v.  
9 Seror (In re Cutter), 398 B.R. 6, 16 (9th Cir. BAP 2008);  
10 Woodworking Enters., Inc. v. Baird (In re Baird), 114 B.R. 198,  
11 201 (9th Cir. BAP 1990).

12 **V. DISCUSSION**

13 A. General Principles of Issue Preclusion

14 The primary issue on this appeal is whether the bankruptcy  
15 court appropriately applied preclusive effect to the district  
16 court's findings, conclusions, and judgment.<sup>11</sup> Issue preclusion

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17  
18 <sup>10</sup>Plaintiff contends in his opening brief that we do not  
19 have jurisdiction because he filed a timely election with the  
20 bankruptcy court. As noted above, the district court, in  
21 determining that it lacked jurisdiction over the appeal, found  
22 that Plaintiff did not make an effective election to have the  
23 appeal heard by that court. In light of the district court's  
24 decision, we do have jurisdiction. See also Hupp v. Educ. Credit  
25 Mgmt. Corp. (In re Hupp), 383 B.R. 476 (9th Cir. BAP 2008)  
26 (absent effective election to have appeal heard by district  
27 court, BAP retains jurisdiction). We have no authority to review  
28 the district court's decision to transfer the appeal back to us.

24 <sup>11</sup>Although the bankruptcy court and the parties refer to the  
25 collateral estoppel effect of the district court's rulings, the  
26 Supreme Court now generally uses the term "issue preclusion"  
27 instead of "collateral estoppel." Taylor v. Sturgell, -- U.S. --,  
28 128 S.Ct. 2161, 2171 n.5 (2008) ("issue preclusion encompasses  
the doctrines once known as 'collateral estoppel' and 'direct  
estoppel'"), citing Migra v. Warren City School Dist. Bd. of  
Educ., 465 U.S. 75, 77 n.1 (1984); see also Paine v. Griffin  
(In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002).

1 applies in nondischargeability proceedings. Grogan v. Garner,  
2 498 U.S. 279, 284-85 (1991). "Issue preclusion . . . bars  
3 successive litigation of an issue of fact or law actually  
4 litigated and resolved in a valid court determination essential  
5 to the prior judgment, even if the issue recurs in the context of  
6 a different claim." Taylor, 128 S.Ct. at 2171 (citation, internal  
7 quotation marks omitted) (emphasis added).

8 The preclusive effect of the district court's decision is  
9 governed by the federal common law of issue preclusion. Taylor,  
10 128 S.Ct. at 2171. Under the federal common law, issue  
11 preclusion applies if (1) the issue necessarily decided at the  
12 previous proceeding is identical to the one which is sought to be  
13 relitigated; (2) the first proceeding ended with a final judgment  
14 on the merits; and (3) the party against whom collateral estoppel  
15 is asserted was a party or in privity with a party at the first  
16 proceeding. Town of N. Bonneville v. Callaway, 10 F.3d 1505,  
17 1508 (9th Cir. 1993).

18 B. Section 523(a)(6) Claims

19 The bankruptcy court held that the district court's judgment  
20 for intentional interference with prospective economic advantage  
21 and for conversion (and the resulting exemplary/punitive damages)  
22 constituted a nondischargeable debt under section 523(a)(6).  
23 Section 523(a)(6) provides that an individual debtor may not  
24 discharge any debt "for willful and malicious injury by the  
25 debtor to another entity or to the property of another entity."  
26 11 U.S.C. § 523(a)(6).

1 The "willful" requirement is separate and distinct from the  
2 "malicious" requirement. See Barboza v. New Form, Inc.  
3 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). Willfulness  
4 requires a "deliberate or intentional injury, not merely a  
5 deliberate or intentional act that leads to injury." Kawaauhau v.  
6 Geiger, 523 U.S. 57, 61 (1998); Ditto v. McCurdy, 510 F.3d 1070  
7 (9th Cir. 2007). "A 'malicious' injury involves '(1) a wrongful  
8 act, (2) done intentionally, (3) which necessarily causes injury,  
9 and (4) is done without just cause or excuse.'" Carrillo v. Su  
10 (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (quoting  
11 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209  
12 (9th Cir. 2001)).

13 1. Claim for Intentional Interference With Prospective  
14 Economic Advantage

15 California law recognizes the tort of intentional  
16 interference with prospective business relations or advantages.  
17 Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376,  
18 45 Cal. Rptr. 2d 436, 902 P.2d 740 (Cal. 1995). "(A) plaintiff  
19 seeking to recover for an alleged interference with prospective  
20 contractual or economic relations must plead and prove . . . that  
21 the defendant . . . engaged in conduct that was wrongful by some  
22 legal measure other than the fact of interference itself."  
23 11 Cal.4th at 393 (emphasis added); see also Korea Supply Co. v.  
24 Lockheed Martin Corp., 29 Cal. 4th 1134, 1158, 131 Cal. Rptr. 3d  
25 29, 63 P.3d 937 (Cal. 2003) ("a plaintiff that chooses to bring a  
26 claim for interference with prospective economic advantage has a  
27 more rigorous pleading burden since it must show that the

1 defendant's conduct was independently wrongful") (emphasis  
2 added).

3 Thus, to prevail on a claim for interference with  
4 prospective economic advantage under California law, a plaintiff  
5 must demonstrate more than intent to injure (i.e., willfulness);  
6 the conduct must be independently wrongful. The additional  
7 requirement of independent wrongfulness is not unlike the  
8 requirement in section 523 that the conduct be malicious in  
9 addition to willful. If a court determines that a defendant's  
10 conduct was independently wrongful, the requisites of  
11 maliciousness (wrongful act done intentionally without just  
12 cause) under Su are satisfied.

13 As the district court correctly recognized in its findings,  
14 a plaintiff can recover damages for intentional interference with  
15 prospective economic advantage if the following elements exist:  
16 an economic relationship between the plaintiff and a third person  
17 which contains the probability of a future economic benefit; the  
18 defendant's knowledge of this relationship; intentional acts that  
19 are independently wrongful by the defendant to disrupt the  
20 relationship; actual disruption; and resulting economic harm.  
21 Della Penna, 11 Cal. 4th at 389.

22 The district court found that Debtor's actions in flooding  
23 the market with cut-rate reproductions were "clearly designed to  
24 disrupt" Plaintiff's relationship with his international  
25 customers; this finding establishes that Debtor acted  
26 deliberately to injure Plaintiff and Plaintiff's property  
27 interests (i.e., prospective economic advantage), thus satisfying

1 the willfulness prong of section 523(a)(6). In addition, the  
2 court also found that the harm was wrongful by some legal measure  
3 (deprivation of benefit of bargain to be provided by settlement  
4 with Debtor) other than the interference itself.<sup>12</sup> These factual  
5 findings, among others, support a determination that Debtor's  
6 actions were wrongful, done intentionally, and without just cause  
7 or excuse. Consequently, the resulting injury to Plaintiff was  
8 "malicious" under Su. 290 F.3d at 1146-47.

9 The district court necessarily decided the following issues  
10 when it held that Debtor intentionally interfered with  
11 Plaintiff's prospective economic advantage: (1) did Plaintiff  
12 have an economic relationship with third parties about which  
13 Debtor was aware, (2) did Debtor knowingly and deliberately  
14 disrupt Plaintiff's economic relationship with others, (3) was  
15 the disruption wrong by some legal measure other than the  
16 interference itself, and (4) did the disruption cause economic  
17 harm to Plaintiff? These issues are relevant to and encompassed  
18 within those that a bankruptcy court would consider in  
19 determining if Debtor's actions constituted a willful and  
20

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21  
22 <sup>12</sup>The California Supreme Court in Korea Supply stated that  
23 an act is "independently wrongful if it is unlawful, that is, if  
24 it is proscribed by some constitutional, statutory, regulatory,  
25 common law, or other determinable legal standard." 29 Cal. 4th at  
26 1159. The district court found that by depriving Plaintiff of  
27 the full value of his settlement with Debtor, Debtor satisfied  
28 the "independent wrongfulness" standard. We are not sitting as  
the appellate court for the district court. As the Ninth Circuit  
observed in Bugna v. McArthur (In re Bugna), 33 F.3d 1054,  
1057-58 (9th Cir. 1994), a bankruptcy court errs if it permits  
relitigation of issues fully and fairly decided by another court.  
We will not and cannot revisit the district court's findings and  
judgment. Paine, 283 B.R. at 40.

1 malicious tortious injury to Plaintiff. Relitigation of these  
2 already decided issues is precluded. Bugna, 33 F.3d at 1059  
3 ("The bankruptcy court's otherwise broad powers do not include  
4 the power to reject a party's invocation of collateral estoppel  
5 on an issue fully and fairly litigated in another court.").

6 Because the issues are identical, the district court's  
7 judgment was final and on the merits, and the same parties are  
8 involved in both actions, the federal requisites for application  
9 of issue preclusion are satisfied. N. Bonneville, 10 F.3d at  
10 1508. The bankruptcy court therefore did not err in granting  
11 preclusive effect to the district court's findings and to the  
12 district court's conclusion that Debtor was liable to Plaintiff  
13 in the amount of \$425,000 because of intentional interference  
14 with prospective economic advantage.

## 15 2. Conversion

16 The district court found that Debtor "personally exercised  
17 dominion and control over [P]laintiff's paintings and used that  
18 property for his own benefit and to the detriment of [P]laintiff.  
19 He is personally liable for the conversion of [P]laintiff's  
20 paintings." The court valued the converted property at \$388,000.  
21 Debtor contends that because conversion is not a "per se" willful  
22 and malicious injury under California law, the bankruptcy court  
23 erred in declaring that liability to be nondischargeable under  
24 section 523(a)(6). See Peklar v. Ikerd (In re Peklar),  
25 260 F.3d 1035 (9th Cir. 2001); Thiara v. Spycher Bros.  
26 (In re Thiara), 285 B.R. 420 (9th Cir. BAP 2002).



1 Debtor is correct that not all conversions are "willful and  
2 malicious" injuries. The Ninth Circuit stated in Peklar that a  
3 judgment for conversion under California law "does not, without  
4 more, establish that a debt arising out of that judgment is non-  
5 dischargeable under § 523(a)(6)." Peklar, 260 F.3d at 1038.

6 A judgment for conversion under California substantive  
7 law decides only that the defendant has engaged in the  
8 "wrongful exercise of dominion" over the personal  
9 property of the plaintiff. It does not necessarily  
10 decide that the defendant has caused "willful and  
11 malicious injury" within the meaning of § 523(a)(6).

12 Id. Here, the district court's findings offered "more" (id.)  
13 than a mere judgment for conversion.

14 The district court's findings in support of its exemplary  
15 damages reflect an ongoing campaign by Debtor to cover up the  
16 conversion of the paintings and to deceive Plaintiff about  
17 Debtor's tortious disposition of them, thus demonstrating  
18 willfulness as well as maliciousness in intent. A debtor's  
19 intent can be established by circumstantial evidence. Ormsby v.  
20 First Am. Title Co. of Nev. (In re Ormsby), --- F.3d ---, 2010 WL  
21 47560 at \*3 (9th Cir. Jan. 8, 2010) (in section 523 action,  
22 "intent may properly be inferred from the totality of the  
23 circumstances and the conduct of the person accused");  
24 Khalil v. Dev. Sur. & Indem. Co. (In re Khalil), 578 F.3d 1167  
25 (9th Cir. 2009) (section 727 case). Other courts have considered  
26 a subsequent cover-up of a conversion as probative of a debtor's  
27 intent. See United States v. Foust (In re Foust), 52 F.3d 766,  
28 769 (8th Cir. 1995) (debtor's fabrication of grain thefts to  
cover up conversion provided evidence of knowledge and intent);

1 First Stuttgart Bank & Trust Co. v. Jackson (In re Jackson),  
2 203 B.R. 146, 148 (Bankr. E.D. Ark. 1996) (the "wilful and  
3 malicious element of the [conversion] cause of action is further  
4 demonstrated by the fact that the debtor attempted to conceal the  
5 disposition . . ."); Kopelman & Shatz, Inc. v. Mastrangelo  
6 (In re Mastrangelo), 34 B.R. 399 (Bankr. D. Mass. 1983) (evidence  
7 that a debtor lied or fabricated a story regarding the  
8 disposition of property or funds may constitute circumstantial  
9 evidence of fraudulent intent; debtor "lied" about possession of  
10 consigned diamonds and did not satisfactorily explain their  
11 disappearance).

12 In addition, the district court's judgment itself stated  
13 that Debtor inflicted intentional and malicious injuries on  
14 Plaintiff. The district court's findings in support of the  
15 exemplary damages reflect an ongoing campaign by Debtor to cover  
16 up the conversion of the paintings and to deceive Plaintiff about  
17 Debtor's disposition of them. As the findings in support of the  
18 exemplary damages refer to the uncompensated and misrepresented  
19 sales of the paintings, the "willful and malicious" injury giving  
20 rise to the punitive damages was the conversion.

21 Because the district court's judgment and findings describe  
22 a totality of circumstances demonstrating that Debtor willfully  
23 and maliciously converted Plaintiff's property, the bankruptcy  
24 court did not err in applying issue preclusion and granting  
25  
26  
27

1 summary judgment to Plaintiff on the conversion claim.<sup>13</sup>

2 3. Exemplary Damages

3 The district court awarded \$1,000,000 in exemplary or  
4 punitive damages because of Debtor's "willful and malicious"  
5 injury to Plaintiff and Plaintiff's property. California law on  
6 allowance of punitive or exemplary damages requires both a tort  
7 action and a finding of "oppression, fraud or malice." Cal. Civ.  
8 Code § 3924(a); Butcher v. Sunclipse, Inc. (In re Butcher),  
9 200 B.R. 675, 679 (Bankr. C.D. Cal. 1996). "In California, 'an  
10 award of exemplary damages cannot be based on mere speculation;  
11 it depends instead on a definite showing of a willingness to vex,  
12 harass, or injure consistent with a wrongful intent to injure."  
13 Butcher, 200 B.R. at 679 (quoting Roth v. Shell Oil Co., 185 Cal.  
14 App. 2d 676, 682 (1960)).

15 As discussed above, the exemplary damages relate to and flow  
16 from the district court's conclusion that Debtor had converted  
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22 <sup>13</sup>Debtor argues that application of issue preclusion and  
23 consideration of the circumstantial evidence required the  
24 bankruptcy court to make improper inferences about the district  
25 court's ruling. We disagree. In the context of a summary  
26 judgment, a court may infer intent from the "totality of  
27 circumstances" described in another court's findings of fact.  
28 See Ormsby, 2010 WL 47560 at \*3 (affirming a summary judgment in  
a nondischargeability action, the Ninth Circuit held that the  
debtor's fraudulent intent could be inferred from the totality of  
the circumstances and the "totality of circumstances as described  
in the state court's findings of fact make clear that [the  
debtor] acted with fraudulent intent").

1 property belonging to Plaintiff.<sup>14</sup> Consequently, as the  
2 exemplary damages were awarded "with respect to" or "by reason  
3 of" the same underlying conduct giving rise to the  
4 nondischargeable compensatory damages, the exemplary damages are  
5 nondischargeable. de la Cruz, 523 U.S. at 220-21.<sup>15</sup>

## 6 VI. CONCLUSION

7 For the foregoing reasons, we AFFIRM the summary judgment  
8 declaring the debt for interference with prospective economic  
9 advantage nondischargeable under section 523(a)(6) and AFFIRM the  
10 summary judgment declaring \$425,000 to be a nondischargeable debt  
11 for conversion under section 523(a)(6). We also AFFIRM the  
12 bankruptcy court's judgment that the punitive damages are  
13 nondischargeable under section 523(a)(6).

14 \_\_\_\_\_  
15 <sup>14</sup>Debtor contends that the exemplary damages and the  
16 district court's designation of "willful and malicious" conduct  
17 cannot be tied to any particular tort. We disagree, as the  
18 findings in support of the exemplary damages refer to the sale of  
19 paintings without payment to Plaintiff and the "lies . . . told  
20 to cover up the sales." Those findings tie the exemplary damages  
21 to the tortious conversion. In any event, the district court's  
22 judgment was limited to two torts; the punitive damages  
23 necessarily related to one or both of those torts. We are  
24 affirming the bankruptcy court's decision that the compensatory  
25 damages from both of these torts are nondischargeable. As the  
26 punitive damages relate to and flow from either one or both of  
27 these torts, they are nondischargeable. Cohen v. de la Cruz, 523  
28 U.S. 213, 220-21 (1998) (treble damages awarded with respect to  
or by reason of the underlying conduct which precluded discharge  
of the compensatory damages were also nondischargeable); Suarez  
v. Barrett (In re Suarez), 400 B.R. 732, 738-39 (9th Cir. BAP  
2009) (applying Cohen v. de la Cruz to section 523(a)(6) claims).

<sup>15</sup>As we are affirming the bankruptcy court's judgment that  
all of the damages (compensatory and exemplary) awarded by the  
district court are nondischargeable under section 523(a)(6), we  
do not have to reach the issue of whether the \$425,000 in  
conversion damages are also nondischargeable under section  
523(a)(4) (providing that debts for embezzlement are  
nondischargeable).