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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NOT FOR PUBLICATION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-11-1065-HPaMk
	)	
MANMOHAN SINGH BIRING,	)	Bk. No. 07-21006
	)	
Debtor.	)	Adv. No. 08-01172
	)	
MANMOHAN SINGH BIRING,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
YOGESH DHAWAN,	)	
	)	
Appellee.	)	

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

Filed - January 12, 2012

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Gregory M. Salvato, Esq. of Salvato Law Offices  
argued for the Appellant. Bren Conner, Esq. of  
Conner & Associates argued for the Appellee.

Before: HOLLOWELL, PAPPAS and MARKELL, Bankruptcy Judges.

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

1 Creditor Yogesh Dhawan (Dhawan) obtained a default judgment  
2 in California state court and subsequently sued the debtor to  
3 determine the nondischargeability of the debt pursuant to  
4 § 523(a).<sup>2</sup> The bankruptcy court granted Dhawan's motion for  
5 summary judgment, determining that there was no genuine issue of  
6 material fact because of the preclusive effect of the state court  
7 judgment. We AFFIRM.

#### 8 I. FACTS

9 The Debtor is a pulmonary and critical care physician,  
10 licensed to practice medicine in California. He has expertise in  
11 skin care and other cosmetic treatments. In 2002, the Debtor  
12 created Healthwest, Inc. (Healthwest) to offer and sell licenses  
13 for "med spa" clinics (Clinics) that provided laser hair removal,  
14 Botox, light treatment and microdermabrasion. The Debtor,  
15 through Healthwest, sold the licenses with options to operate the  
16 Clinics in certain exclusive territories. As part of the  
17 purchase, the Debtor would provide necessary support services for  
18 the operation of the Clinics.

19 On August 13, 2003, Healthwest filed an application with the  
20 California Department of Corporations (CDOC) to register its sale  
21 of licenses and options as franchises. In October or November  
22 2003, the Debtor provided Dhawan with its franchise offering.  
23 Based on the information and representations provided by the  
24 Debtor in connection with the Clinic opportunity, Dhawan

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

1 purchased a license to operate a Clinic and entered into a  
2 Licensing Servicing Agreement, a Management Support Services  
3 Agreement, and an Asset Purchase Agreement with the Debtor and  
4 Healthwest.

5 On July 7, 2004, the CDOC finalized its review of Healthwest  
6 and denied its franchise registration application, finding that  
7 Healthwest had advertised and sold the Clinics by means of  
8 fraudulent misrepresentation. It found that "the offer or sale  
9 of [the] franchises in California would constitute  
10 misrepresentation, deceit and fraud on the purchasers," for  
11 reasons including that the Debtor and Healthwest sold multiple  
12 licenses for the same territories.

13 On September 24, 2004, Dhawan filed a complaint against the  
14 Debtor and Healthwest in California state court alleging thirteen  
15 causes of action including fraud, fraudulent inducement to  
16 contract, negligent misrepresentation, breach of contract, unfair  
17 competition and unfair business practices in connection with his  
18 purchase of the Clinic (the State Court Complaint). Dhawan  
19 alleged that the Debtor, individually and as the sole shareholder  
20 and officer of Healthwest, fraudulently induced him to invest in  
21 the Clinic and enter into the associated agreements, and then  
22 systematically breached those agreements by not delivering what  
23 was promised. The State Court Complaint incorporated the  
24 findings of the CDOC. Dhawan sought general, special, and  
25 punitive damages in an unspecified amount.

26 Although the Debtor and Healthwest were properly served with  
27 the State Court Complaint, neither answered. Default judgments  
28 were entered against the Debtor and Healthwest on February 8,

1 2005. Dhawan submitted evidence and testimony concerning the  
2 claims made in the State Court Complaint to support the amount of  
3 his resulting damages at a "prove up" hearing held on  
4 September 12, 2005. Although the Debtor admits he received both  
5 the State Court Complaint and the statement of damages, he did  
6 not appear at the prove up hearing.

7 On September 12, 2005, the state court entered a  
8 \$1,924,008.64 judgment jointly and severally against the Debtor  
9 and Healthwest (the Judgment). The state court awarded damages  
10 based on the "oral testimony and other evidence presented by  
11 [Dhawan], including [his] written declaration, and supporting  
12 exhibits." It found that "consistent with this action and the  
13 evidence presented," Dhawan "sustained damages as alleged in the  
14 complaint." The Judgment specified the damages:

15 1) \$85,000 for Mr. Dhawan's initial payment for the  
16 [Clinic] and options pursuant to the License Agreement,  
17 which has been rendered useless by the Defendants'  
18 misrepresentations and breaches of contract to aid in  
19 the operation of the [Clinic];

20 2) \$225,000 for the lost value of the options on the  
21 . . . territories . . . pursuant to both the parties'  
22 Option Agreement and Asset Purchase Agreement for which  
23 Mr. Dhawan was denied his opportunity to exercise the  
24 options due to the breaches and fraudulent conduct as  
25 evidenced and identified by the Department of  
26 Corporations;

27 3) \$129,000 in the amount that Mr. Dhawan became  
28 obligated, and now remains obligated on the promissory  
note executed in connection with the Asset Purchase  
Agreement, but which Defendants breached by failing to  
provide the assets promised;

4) \$198,990 to purchase the equipment and other assets

1 that should have been provided by Defendants . . .  
2 pursuant to the Asset Purchase Agreement;

3 5) \$245,343.64 in losses and additional expenditures  
4 . . . due to Defendants' failure to provide the  
5 support, training and marketing efforts that had been  
6 promised in both the Licensing Agreement and Marketing  
7 Agreement;

8 6) \$510,000 in lost profits . . . ;

9 7) \$510,000 which represents the net income for [the  
10 Clinics] that had been optioned as was set forth in the  
11 profit and loss statements which were used by the  
12 Defendants to induce Mr. Dhawan's reliance;

13 8) costs in the amount of \$675; and,

14 9) \$20,000 in relocation and related expenses for  
15 Plaintiff's family.

16 On November 28, 2007, the Debtor filed a voluntary petition  
17 under chapter 7. Dhawan filed an adversary proceeding on  
18 February 26, 2008, to have the Judgment declared nondischargeable  
19 under § 523(a)(2), (a)(4) and (a)(6) (the Nondischargeability  
20 Complaint). Like the State Court Complaint, the  
21 Nondischargeability Complaint alleged that the Debtor  
22 fraudulently induced him to invest in the Clinic. Dhawan  
23 contended that the Debtor knew that the information in the  
24 franchise offering was false and never intended to perform on the  
25 agreements in connection with the Clinic as promised. He  
26 asserted that the offering and sale of the Clinic was part of a  
27 scheme to defraud him.

28 Dhawan filed a motion for summary judgment on the basis that  
the Judgment had preclusive effect on the issue of whether the  
Debtor committed fraud under § 523(a)(2)(A). The Debtor filed an

1 opposition. After a hearing on December 21, 2010, the bankruptcy  
2 court issued a memorandum decision determining that the Debtor  
3 had a full and fair opportunity to litigate the State Court  
4 Complaint and that because the issue of his fraudulent conduct  
5 was necessarily decided in the state court, he was precluded from  
6 relitigating Dhawan's fraud claim in bankruptcy. The bankruptcy  
7 court entered a judgment on January 19, 2011, declaring the  
8 Judgment nondischargeable pursuant to § 523(a)(2). The Debtor  
9 timely appealed.

## 10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction under 28 U.S.C.  
12 § 157(b)(2)(A), (I), (O) and § 1334. We have jurisdiction under  
13 28 U.S.C. § 158.

## 14 **III. ISSUE**

15 Did the bankruptcy court err in granting summary judgment  
16 excepting from discharge the \$1,924,008 in damages awarded by the  
17 state court?

## 18 **IV. STANDARDS OF REVIEW**

19 We review de novo the bankruptcy court's grant of summary  
20 judgment. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219,  
21 1221-22 (9th Cir. 2010); Cutter v. Seror (In re Cutter), 398 B.R.  
22 6, 16 (9th Cir. BAP 2008).

23 We review de novo a bankruptcy court's determination that  
24 issue preclusion is available. Lopez v. Emerg. Serv.  
25 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP  
26 2007); Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823  
27 (9th Cir. BAP 2006). Once we determine that issue preclusion is  
28 available, we review whether applying it was an abuse of

1 discretion. In re Lopez, 367 B.R. at 103; In re Khaligh,  
2 338 B.R. at 823; Miller v. County of Santa Cruz, 39 F.3d 1030,  
3 1032 (9th Cir. 1994). A bankruptcy court abuses its discretion  
4 when it applies the incorrect legal rule or its application of  
5 the correct legal rule is "(1) illogical, (2) implausible, or  
6 (3) without support in inferences that may be drawn from the  
7 facts in the record." United States v. Loew, 593 F.3d 1136, 1139  
8 (9th Cir. 2010) (quoting United States v. Hinkson, 585 F.3d 1247,  
9 1261-62 (9th Cir. 2009)(en banc))(internal quotation marks  
10 omitted).

## 11 V. DISCUSSION

### 12 A. Summary Judgment

13 In reviewing the bankruptcy court's decision on a motion for  
14 summary judgment, we apply the same standards as the bankruptcy  
15 court. Summary judgment may be granted "if the pleadings, the  
16 discovery and disclosure materials on file, and any affidavits  
17 show that there is no genuine issue as to any material fact and  
18 that the movant is entitled to judgment as a matter of law."  
19 Fed. R. Civ. P. 56(a) (incorporated by Rule 7056); Barboza v. New  
20 Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).

21 The party seeking summary judgment bears the initial burden  
22 of establishing the absence of a genuine issue of material fact.  
23 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A dispute  
24 is genuine if there is sufficient evidence for a reasonable fact-  
25 finder to hold in favor of the non-moving party, and a fact is  
26 "material" if it might affect the outcome of the case. Far Out  
27 Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001) (citing  
28 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986)).

1 Once the moving party has met its initial burden, the non-moving  
2 party must show specific facts establishing the existence of  
3 genuine issues of fact for trial. Id., at 256.

4 **B. Issue Preclusion**

5 Issue preclusion applies in nondischargeability proceedings  
6 to bar the relitigation of factual issues that were determined in  
7 a prior state court action. Grogan v. Garner, 498 U.S. 279, 284-  
8 85 n.11 (1991). To determine the issue-preclusive effect of a  
9 California state court's judgment, we apply California preclusion  
10 law. 28 U.S.C. § 1738; Marrese v. Am. Acad. of Orthopaedic  
11 Surgeons, 470 U.S. 373, 380 (1985); Gayden v. Nourbakhsh (In re  
12 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Under California  
13 law, the party asserting issue preclusion has the burden of  
14 establishing the following "threshold" requirements:

15 (1) the issue sought to be precluded must be identical to  
16 that decided in a former proceeding;

17 (2) the issue must have been actually litigated in the  
18 former proceeding;

19 (3) it must have been necessarily decided in the former  
20 proceeding;

21 (4) the decision in the former proceeding must be final and  
22 on the merits; and,

23 (5) the party against whom preclusion is sought must be the  
24 same as, or in privity with, the party to the former proceeding.

25 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
26 2001); In re Lopez, 367 B.R. at 104.

27 Additionally, the application of issue preclusion requires a  
28 "mandatory 'additional' inquiry into whether imposition of issue  
preclusion would be fair and consistent with sound public



1 policy." In re Khaligh, 338 B.R. at 824-25. As stated by the  
2 California Supreme Court:

3 We have repeatedly looked to the public policies  
4 underlying the doctrine before concluding that  
5 collateral estoppel should be applied in a particular  
6 setting. . . . Accordingly, the public policies  
7 underlying collateral estoppel - preservation of the  
8 integrity of the judicial system, promotion of judicial  
9 economy, and protection of litigants from harassment by  
10 vexatious litigation - strongly influence whether its  
11 application in a particular circumstance would be fair  
12 to the parties and constitutes sound judicial policy.

13 Lucido v. Super. Ct., 51 Cal.3d 335, 342-43 (1990)(internal  
14 citations omitted); see also In re Lopez, 367 B.R. at 108.

15 To meet its burden, the moving party must have pinpointed  
16 the exact issues litigated in the prior action and introduced a  
17 record revealing the controlling facts. Kelly v. Okoye (In re  
18 Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d  
19 110 (9th Cir. 1996). Reasonable doubts about what was decided in  
20 the prior action are resolved against the party seeking  
21 preclusion. Id.

22 **C. Section 523(a)(2)(A)**

23 The Bankruptcy Code excepts from discharge any debt for  
24 money, property, services, or credit obtained by false pretenses,  
25 a false representation, or actual fraud. 11 U.S.C.  
26 § 523(a)(2)(A). To prevail on a claim under § 523(a)(2)(A), a  
27 creditor must demonstrate five elements: (1) misrepresentation,  
28 fraudulent omission or deceptive conduct by the debtor;  
(2) knowledge of the falsity or deceptiveness of the debtor's  
statement or conduct; (3) an intent to deceive; (4) justifiable  
reliance by the creditor on the debtor's statement or conduct;  
and (5) damage to the creditor proximately caused by its reliance

1 on the debtor's statement or conduct. Candland v. Ins. Co. of N.  
2 Am. (In re Candland), 90 F.3d at 1466, 1469 (9th Cir. 1996);  
3 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),  
4 234 F.3d 1081, 1085 (9th Cir. 2000). The elements of  
5 § 523(a)(2)(A) mirror common law fraud. Field v. Mans, 516 U.S.  
6 59, 61 (1995). The creditor bears the burden of proving each  
7 element of § 523(a)(2)(A) by a preponderance of the evidence.  
8 Grogan v. Garner, 498 U.S. at 287.

9 **D. Application of Issue Preclusion**

10 The Debtor argues that issue preclusion should not apply in  
11 this case because the issue of fraud, including the element of  
12 intent to deceive, was not actually litigated or necessarily  
13 decided in the state court since it was the result of a default.

14 However, while in the minority, California law accords  
15 preclusive effect to default judgments, "at least where the  
16 judgment contains an express finding on the allegations."  
17 Gottlieb v. Kest, 141 Cal.App.4th 110, 149 (Cal. Ct. App. 2006);  
18 Green v. Kennedy (In re Green), 198 B.R. 564, 566 (9th Cir. BAP  
19 1996). The rationale behind finding that default judgments can  
20 be preclusive is that defendants who are served with a summons  
21 and complaint but fail to respond are presumed to admit all the  
22 facts pled in the complaint. In re Harmon, 250 F.3d at 1247.

23 Therefore, a default judgment:

24 conclusively establishes, between the parties so far as  
25 subsequent proceedings on a different cause of action  
26 are concerned, the truth of all material allegations  
27 contained in the complaint in the first action, and  
28 every fact necessary to uphold the default judgment

. . . .

1 Gottlieb v. Kest, 141 Cal.App.4th at 149 (internal citations  
2 omitted).

3 For a default judgment to be "actually litigated," the  
4 material factual issues must have been both raised in the  
5 pleadings and necessary to uphold the default judgment. Id.  
6 Therefore, the record in the prior proceeding must show an  
7 express finding upon the allegation for which preclusion is  
8 sought. However, "the express finding requirement can be waived  
9 if the court in the prior proceeding necessarily decided the  
10 issue." Cantrell v. Cal-Micro, Inc. (In re Cantrell), 329 F.3d  
11 1119, 1124 (9th Cir. 2003). "In such circumstances, an express  
12 finding is not required because if an issue was necessarily  
13 decided in a prior proceeding, it was actually litigated." Id.  
14 (internal citations omitted).

15 There is no dispute here that the Debtor received notice of  
16 the State Court Complaint, as well as the default judgment and  
17 Dhawan's filed statement of damages and notice of the "prove up"  
18 hearing. Nevertheless, the Debtor asserts that the issue of  
19 fraud was not actually litigated because the Judgment did not  
20 contain express findings of fraud. He contends that the issue of  
21 fraud was not necessarily decided because the damages that were  
22 awarded could have been based on Dhawan's claims for negligent  
23 misrepresentation or breach of contract rather than fraud.

24 The Debtor relies on In re Harmon to support his position.  
25 250 F.3d 1240. In that case, the plaintiff sued the debtor for  
26 conversion, contract violations and damages for restitution and  
27 dissolution of partnership in connection with a failed joint  
28 venture in an Ostrich ranch. After the state court judgment

1 became final, the plaintiff sought to have it declared  
2 nondischargeable under § 523(a)(2)(A). The Ninth Circuit held  
3 that the state court did not provide express findings of fraud  
4 (or anything else) in the judgment and because fraud could not be  
5 interpreted from the basis of the complaint, the issue of fraud  
6 had not been actually litigated.

7 Here, however, the State Court Complaint, like the  
8 Nondischargeability Complaint, alleged fraud in connection with  
9 the offer and sale of the Clinics. While the Debtor asserts that  
10 the State Court Complaint alleged many causes of action that were  
11 non-fraud related, the causes of action were, in fact, all  
12 related to the Debtor's alleged fraud in the offer and sale of  
13 the Clinic franchises. The State Court Complaint alleged facts  
14 supporting Dhawan's claims that the Debtor falsely represented to  
15 Dhawan the profits available from the Clinic, the exclusiveness  
16 of operations, and the support available from the Debtor. Dhawan  
17 alleged that the Debtor fraudulently induced him to enter the  
18 Licensing Servicing Agreement and the Asset Purchase Agreement.  
19 He alleged that he relied on the Debtor's misrepresentations in  
20 purchasing the Clinic and entering into the agreements as part of  
21 the transaction. Finally, Dhawan alleged that the Debtor  
22 breached those agreements by intentionally failing to perform as  
23 promised.

24 In entering the Judgment, the state court expressly found  
25 that Dhawan presented evidence consistent with the allegations in  
26 the State Court Complaint and awarded Dhawan the damages  
27 sustained as a result. Additionally, the Judgment referenced the  
28 CDCO findings that the Debtor had engaged in fraudulent conduct

1 with respect to the offer and sale of the Clinics and in selling  
2 exclusive operating territories under its agreements.

3 Thus, the Debtor's fraud underlies all of the state court  
4 claims. Simply because the Judgment did not expressly identify  
5 that each component of the \$1,924,008 award was based on the  
6 fraudulent conduct of the Debtor, it does not mean that there was  
7 a "reasonable doubt as to what was decided." See In re Kelly,  
8 182 B.R. at 258. The Judgment cannot be sustained, as the Debtor  
9 argues, on solely the non-fraud breach of contract claims because  
10 the agreements themselves were found to be the result of the  
11 Debtor's fraudulent conduct.<sup>3</sup>

12 Because the factual issues supporting fraud were raised in  
13 the State Court Complaint and necessary to the Judgment, the  
14 State Court Complaint was "actually litigated" and necessarily  
15 decided. Id.; see Younie v. Gonya (In re Younie), 211 B.R. 367,  
16 374-75 (9th Cir. BAP 1997). There is no question that the  
17 parties to the bankruptcy action are the same as those that  
18 participated in the state court. The State Court Complaint and  
19 the Nondischargeability Complaint alleged the same set of facts  
20 and circumstances, and the Judgment was a final decision on the  
21 merits. Thus, the threshold requirements for the application of  
22 issue preclusion are satisfied. The bankruptcy court did not err

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23  
24 <sup>3</sup> The bankruptcy court relied on the state court's oral  
25 ruling that Dhawan was entitled to an award of punitive damages,  
26 although punitive damages were ultimately not reduced to  
27 judgment, as a basis for determining that the issue of fraud was  
28 necessarily decided. In this case, regardless of the punitive  
damage award, the evidence in the record is sufficient to  
demonstrate that the issue of fraud was necessary to uphold the  
Judgment.

1 in concluding that the issue of whether the Debtor committed  
2 fraud within the meaning of § 523(a)(2)(A) was precluded by the  
3 Judgment and could not be relitigated in the bankruptcy court.  
4 We perceive no abuse of discretion in the bankruptcy court's  
5 decision to apply issue preclusion in this case.

6 Because of the preclusive effect of the Judgment, Dhawan  
7 satisfied his burden of demonstrating that there were no genuine  
8 issues of material fact as to the elements of fraud. As a  
9 result, the bankruptcy court did not err in granting Dhawan  
10 summary judgment on his Nondischargeability Complaint.

#### 11 **VI. CONCLUSION**

12 The bankruptcy court did not err in giving preclusive effect  
13 to the Judgment. For that reason, we AFFIRM the bankruptcy  
14 court's grant of summary judgment to Dhawan.