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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NC-14-1153-TaPaJu
6	JOHN GREGORY LAWSON,	)	Bk. No.	13-10864
7	Debtor.	)	Adv. No.	13-01105
8	_____	)		
9	COASTAL INDUSTRIAL PARTNERS, LLC,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	JOHN GREGORY LAWSON,	)		
13	Appellee.	)		
14	_____	)		

Argued and Submitted on February 19, 2015,  
at San Francisco, California

Filed - March 20, 2015

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: David N. Chandler, Jr. argued for appellant  
Coastal Industrial Partners, LLC; Craig Alan  
Burnett argued for appellee John Gregory Lawson.

Before: TAYLOR, PAPPAS, and JURY, Bankruptcy Judges.

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\* 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 8024-1(c) (2).

1 Creditor Coastal Industrial Partners, LLC ("Coastal")  
2 obtained a partial summary judgment against debtor John Gregory  
3 Lawson in its adversary proceeding seeking a determination of  
4 nondischargeability under § 523(a)(6).<sup>1</sup> It appeals from the  
5 bankruptcy court's concurrent partial summary judgment in favor  
6 of the Debtor.

7 We VACATE the partial summary judgment in the Debtor's favor  
8 to the extent it limits the amount of damages potentially  
9 nondischargeable as a result of the Debtor's tortious conduct and  
10 REMAND to the bankruptcy court for proceedings consistent with  
11 this decision.

#### 12 **FACTS**

13 In May 2011, the Debtor, d/b/a Valley Legend Wines, and  
14 Coastal executed a two-year master distribution agreement  
15 ("MDA"). Under the MDA, Coastal received the exclusive right to  
16 market and sell the Debtor's Valley Legend Wines in China. Among  
17 other things, the MDA provided that title to purchased wine  
18 passed to Coastal upon payment to the Debtor and featured  
19 purchase price "guidelines" for three different wine varietals.

20 Coastal made purchases under the MDA in May and September of  
21 2011 and in May of 2012. In the course of these transactions,  
22 the parties extensively negotiated purchase prices for cases of  
23 wine and other related details. Although the MDA did not require  
24 it to do so, Coastal also paid the Debtor a deposit for each  
25 order.

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27 <sup>1</sup> Unless otherwise indicated, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 Signs of strain in the business relationship eventually  
2 surfaced. The Debtor's communications with Coastal became  
3 increasingly aggressive, and he also began to claim that the  
4 September 2011 order was underpriced and, thus, that Coastal owed  
5 him additional money. Shortly after Coastal placed an order for  
6 Merlot ("Merlot Order") in May of 2012, however, things got even  
7 worse.

8 Coastal paid for the Merlot Order in full before the end of  
9 the month. It also placed a fourth order under the MDA, this  
10 time for Cabernet. The Debtor responded with a request for a 50%  
11 deposit. Coastal intended to provide the deposit when its  
12 representative returned to the United States from an extended  
13 trip to China. Prior to the deposit, however, Coastal also asked  
14 the Debtor about 60 cases of wine that the Debtor previously  
15 "borrowed" from Coastal's inventory upon the promise that he  
16 would return the inventory or provide a credit on Coastal's next  
17 order. In response, the Debtor cancelled the fourth order,  
18 stating that Coastal would not obtain "any [C]abernet or any more  
19 wine in the future from [him]," and that it could pick up the  
20 Merlot Order. Adv. Dkt. No. 6 at 15.

21 Coastal accepted the order cancellation, but difficulties  
22 with the Merlot Order then began. Despite Coastal's prior  
23 payment, the Debtor refused to release the Merlot to Coastal  
24 unless it paid him an additional \$76,583. According to the  
25 Debtor, this amount included \$45,443 in expenses related to the  
26 cancelled fourth order and \$21,000 based on underpricing for  
27 prior orders.

28 In an attempt to obtain the Merlot Order, Coastal contacted

1 the third-party winery that bottled and stored the Merlot. Its  
2 attempts to obtain possession were not successful; the Debtor had  
3 failed to pay the winery \$45,535.65 for bottling. As a result,  
4 the winery rebuffed Coastal.

5 At the end of May 2012, the Debtor increased his demand for  
6 payment to \$122,416 and then to \$122,716 just one day later. On  
7 May 29, 2012, he sent Coastal a notice of material breach and  
8 terminated the MDA. He also revoked the authorization with the  
9 Western United States Agricultural Trade Association that allowed  
10 Coastal to sell Valley Legend Wines in China. Harassing and  
11 threatening communications continued.

12 Coastal eventually commenced an action against the Debtor in  
13 state court and obtained the Merlot pursuant to a writ of  
14 possession. By that time, however, Coastal had lost two large  
15 wine purchase contracts from China and had expended funds  
16 promoting the Valley Legend brand in China.

17 On the state court's order, the parties arbitrated the  
18 dispute. The arbitrator determined that: (1) the Debtor  
19 converted the Merlot Order when he refused to release it after  
20 payment in full; (2) the Debtor breached the MDA when he  
21 converted the Merlot Order and when he revoked the MDA's  
22 exclusivity provision; and (3) the Debtor breached the covenant  
23 of good faith and fair dealing by falsely claiming that Coastal  
24 had not paid in full for its purchases, fabricating invoices to  
25 show "past due" balances, and, once again, converting the Merlot  
26 Order. The arbitrator awarded damages for breach of contract,  
27 punitive damages and attorneys' fees and costs for conversion,  
28 and attorneys' fees and costs for the state court action and

1 arbitration. The state court subsequently confirmed the  
2 arbitration award in the total amount of \$222,164.86.

3 The Debtor filed a chapter 7 petition on April 26, 2013.  
4 Coastal timely commenced an adversary proceeding seeking to deem  
5 the arbitration award nondischargeable under § 523(a)(2)(A),  
6 (a)(4), and (a)(6).

7 Coastal next moved for summary judgment on the entirety of  
8 the arbitration award, but solely sought relief under  
9 § 523(a)(6). It argued that summary judgment was appropriate as  
10 a result of the issue preclusive effect of the arbitration award.  
11 The Debtor opposed, arguing that the breach of contract damages  
12 were not excepted from discharge under § 523(a)(6).

13 The bankruptcy court held a hearing on Coastal's motion for  
14 summary judgment on May 24, 2013.<sup>2</sup> In a subsequent written  
15 memorandum decision, the bankruptcy court determined that the  
16 damages for conversion - both the punitive damages and the  
17 associated attorneys' fees and costs incurred to recover the  
18 Merlot Order - were excepted from discharge under § 523(a)(6)  
19 based on the issue preclusive effect of the arbitration award.  
20 It, thus, granted summary judgment in Coastal's favor as to those  
21 specific damages. It further determined, however, that the  
22 damages awarded for breach of contract and the fees and costs  
23 incurred in the state court action and arbitration were not  
24 subject to § 523(a)(6) nondischargeability. The bankruptcy court

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26 <sup>2</sup> Coastal did not supply a transcript of this hearing in  
27 the excerpts of record. An audio file of the hearing appears to  
28 exist on the adversary proceeding docket. The Panel, however,  
declines to exercise its discretion to listen to the audio.

1 stated that:

2 The court disagrees with Coastal only insofar as it  
3 argues that anything more than the damages for  
4 conversion are nondischargeable. The rest of the award  
5 was solely for breach of contract. The arbitrator did  
6 find that Lawson's breaches were willful, intentional  
7 and in bad faith. However, even the worst breaches of  
8 contract do not result in a nondischargeable debt  
9 absent some fundamental public policy. In re Jercich,  
10 238 F.3d 1202, 1206 (9th Cir. 2001). There is no  
11 fundamental public policy in this case which would turn  
12 Lawson's breach of contract, however unjustified, into  
13 a tort.

14 Mem. Decision at 3.

15 The bankruptcy court concluded that "nothing else in the  
16 arbitrator's decision justifie[d] any further determination of  
17 nondischargeability. If the parties agree that there are no  
18 other facts to be tried, counsel for Coastal shall submit an  
19 appropriate form of final judgment." Id. at 4. Counsel for  
20 Coastal did so; the bankruptcy court entered the judgment on  
21 March 25, 2014.

22 Coastal timely appealed.

### 23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
25 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
26 § 158.

### 27 ISSUE

28 Whether the bankruptcy court erred in determining that not  
all of the damages awarded in the arbitration award were excepted  
from discharge under § 523(a)(6) based on the issue preclusive  
effect of that award.

### STANDARD OF REVIEW

"Since this case arises on summary judgment, the standard of

1 review is de novo.” Ilko v. Cal. State Bd. of Equalization  
2 (In re Ilko), 651 F.3d 1049, 1052 (9th Cir. 2011). Decisions on  
3 issue preclusion are also reviewed de novo. Honkanen v. Hopper  
4 (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011).

## 5 **DISCUSSION**

6 On appeal, Coastal chiefly contends that the Debtor’s breach  
7 of the MDA was accompanied by tortious conduct, that this breach  
8 resulted in willful and malicious injury under § 523(a)(6), and  
9 that all of the damages awarded in the arbitration award should  
10 be excepted from the Debtor’s discharge under § 523(a)(6).<sup>3</sup> On  
11 de novo review, we conclude that the bankruptcy court erred in  
12 holding, as a matter of undisputed fact and law, that the  
13 arbitration award provided no basis for nondischargeability under  
14 § 523(a)(6) in addition to the damages directly awarded for  
15 conversion.

### 16 **A. Preliminary issues**

#### 17 **1. The bankruptcy court’s decision subject to this appeal**

18 The bankruptcy court granted partial summary judgment to  
19 Coastal based on the issue preclusive effect of the arbitration  
20 award; there is no appeal from that portion of the judgment.  
21 After denying the remainder of Coastal’s motion for summary  
22 judgment, the bankruptcy court determined that nothing else in  
23 the arbitration award justified nondischargeability. It

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24  
25 <sup>3</sup> Coastal also challenges two of the bankruptcy court’s  
26 findings in its memorandum as clearly erroneous: that the use of  
27 “extortion” in the arbitration award was “hyperbole” and that the  
28 Debtor “did nothing beyond mak[e] unjustified contract demands.”  
Given our decision to vacate and remand, we do not address these  
points.

1 concluded that if the parties agreed that no other triable facts  
2 remained, Coastal could submit a form of final judgment; it did  
3 so. We conclude that the bankruptcy court, thus, granted summary  
4 judgment on the remainder of the § 523(a)(6) claim in favor of  
5 the Debtor.<sup>4</sup> See Fed. R. Civ. P. 56(f) (incorporated into  
6 adversary proceedings by Federal Rule of Bankruptcy Procedure  
7 7056).<sup>5</sup>

8 **2. Scope of review**

9 The damages awarded by the arbitrator were as follows:

10 1	Breach of Contract	Lost profits: \$42,134 Reliance: \$50,788
11 2	Fees and Costs	Attorneys fees: \$60,958.50 Costs: \$2,567.86 Arbitration fees and costs: \$9,375.24
12 3	Conversion	Punitive damages: \$25,000 Attorneys fees and costs: \$26,799

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16  
17 There is no dispute that the bankruptcy court correctly  
18 determined that the third category is nondischargeable; the

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19  
20 <sup>4</sup> The bankruptcy court also implicitly granted summary  
21 judgment in favor of the Debtor on Coastal's § 523(a)(2)(A) and  
22 (a)(4) claims. Coastal does not appeal from those  
23 determinations.

24 <sup>5</sup> Federal Rule of Civil Procedure 56(f) provides that,  
25 after notice and a reasonable time to respond, the court, among  
26 other things, may: (1) grant summary judgment for a nonmovant;  
27 (2) grant the motion on grounds not raised by a party; or  
28 (3) consider summary judgment on its own after identifying for  
the parties material facts that may not be genuinely in dispute.

Here, Coastal does not dispute that it had adequate notice  
and an opportunity to respond in connection with the bankruptcy  
court's implicit summary judgment in favor of the Debtor.

1 Debtor does not cross-appeal. The only question before us is  
2 whether the bankruptcy court erred in determining, on summary  
3 judgment based on issue preclusion, that the first and second  
4 categories did not and could not include damages that were  
5 excepted from discharge under § 523(a)(6).

6 **B. Exception to discharge under § 523(a)(6)**

7 Section 523(a)(6) excepts from discharge debts arising from  
8 a debtor's "willful and malicious" injury to another person or to  
9 the property of another. Barboza v. New Form, Inc.  
10 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008) The  
11 requirements of "willfulness" and "maliciousness" are subject to  
12 separate analysis by the bankruptcy court. Id.; Carrillo v. Su  
13 (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002).

14 Although § 523(a)(6) generally applies to recoveries based  
15 on a tort claim rather than those based on breach of contract, a  
16 breach of contract claim may be nondischargeable under  
17 § 523(a)(6) if the breach is both in bad faith and "accompanied  
18 by some form of 'tortious conduct' that gives rise to 'willful  
19 and malicious injury.'" Petralia v. Jercich (In re Jercich),  
20 238 F.3d 1202, 1206 (9th Cir. 2001). Whether a debtor's breach  
21 of contract is tortious is determined under state law. Id.

22 In California, tortious breach of contract requires:  
23 "[c]onduct amounting to a breach of contract [that] . . . also  
24 violates an independent duty arising from principles of tort  
25 law." Id.; see also Lockerby v. Sierra, 535 F.3d 1038, 1041 (9th  
26 Cir. 2008) (conduct is "tortious if it constitutes a tort under  
27 state law."). California law further limits recovery for  
28 tortious breach of contract to situations where: "in addition to

1 the breach of the covenant [of good faith and fair dealing] a  
2 defendant's conduct violates a **fundamental public policy** of the  
3 state." In re Jercich, 238 F.3d at 1206 (emphasis added)  
4 (internal quotation marks omitted) (alteration in original).

5 **1. Reliance on In re Jercich is unnecessary to an**  
6 **increased § 523(a)(6) judgment.**

7 Relying on In re Jercich, Coastal asserts strenuously that  
8 the bankruptcy court erred. It asserts that the Debtor's conduct  
9 in breaching the MDA was accompanied by tortious conduct under  
10 California law, including conversion, attempted extortion,  
11 interference with prospective economic advantage, and malicious  
12 prosecution. It argues that under Jercich, § 523(a)(6)  
13 nondischargeability necessarily follows.

14 Resort to a Jercich analysis, however, is unnecessary where  
15 the debt that a creditor seeks to except from discharge under  
16 § 523(a)(6) involves duplicative damages on account of both tort  
17 and breach of contract theories. In that context, the damages  
18 for tort independently support nondischargeability under  
19 § 523(a)(6), and there is no need to determine whether the breach  
20 of contract was tortious.

21 Our review of Jercich's limited progeny supports this  
22 interpretation. None of the cases applying the Jercich standard  
23 involved a situation where the judgment was based on both breach  
24 of contract *and* tort; instead, those cases involved solely a  
25 breach of contract claim. See Lockerby v. Sierra, 535 F.3d 1038  
26 (9th Cir. 2008); Stout v. Marshack (In re Stout), 2014 WL 1724506  
27 (9th Cir. BAP May 1, 2014); Spigot Res., Inc. v. Radow  
28 (In re Radow), 2013 WL 1397342 (9th Cir. BAP Apr. 2, 2013); Oney

1 v. Weinberg (In re Weinberg), 410 B.R. 19 (9th Cir. BAP 2009),  
2 aff'd, 407 F. App'x 176 (9th Cir. 2010); cf. Bresnahan v. Dunn  
3 (In re Dunn), 2006 WL 6810930 (9th Cir. BAP Oct. 31, 2006);  
4 Nahman v. Jacks (In re Jacks), 266 B.R. 728 (9th Cir. BAP 2001).  
5 But cf. Diamond v. Kolcum (In re Diamond), 285 F.3d 822 (9th Cir.  
6 2002) (state court judgment included fraud). The one exception  
7 - In re Diamond - appears distinguishable as it is unclear from  
8 the opinion whether the state court judgment was based solely on  
9 breach of contract or breach of contract and tort.

10 Here, Coastal did not just prevail on a breach of contract  
11 claim; it also prevailed on a tort claim based on conversion.  
12 Nothing in the arbitration award establishes that the arbitrator  
13 determined that some or all of the breach of contract damages  
14 were not recoverable in the alternative as damages for  
15 conversion. Indeed, a facial review of the record demonstrates  
16 to the contrary. In awarding damages for conversion, the  
17 arbitrator stated that "[g]iven the damages awarded [for breach  
18 of contract], the award for conversion will be limited to  
19 attorney's fees and costs expended in recovering the wine as well  
20 as a nominal amount for punitive damages." Adv. Dkt. No. 6 at  
21 20-21. This language suggests that the arbitrator specifically  
22 awarded damages for conversion only to the extent they were  
23 additional to the breach of contract damages. Indeed, the breach  
24 of contract damages included an award on account of Coastal's  
25 lost profits as a result of the Debtor's conversion. These lost  
26 profit damages, thus, are equally recoverable under both the  
27 conversion and breach of contract claims. See Cal. Civ. Code  
28 § 3336 (presumptive measure of damages for conversion based on

1 value of converted property at time of conversion or, in the  
2 alternative, compensation for loss legally caused by conversion  
3 and that could be avoided by proper prudence); Haigler v.  
4 Donnelly, 18 Cal. 2d 674, 681 (1941) (punitive damages are  
5 recoverable for conversion); Gonzales v. Pers. Storage, Inc.,  
6 56 Cal. App. 4th 464, 475-77 (1997) (emotional distress damages  
7 are recoverable for conversion under limited circumstances).  
8 Other damages may also be equally recoverable under both  
9 theories.

10 We, thus, conclude that the bankruptcy court erred in  
11 granting summary judgment to the Debtor to the extent the  
12 liquidated damages were recoverable both as a result of  
13 conversion and breach of contract; and we do so without resort to  
14 a Jercich analysis.

15 **2. In re Jercich does not independently support an**  
16 **increase of the § 523(a)(6) judgment; the Debtor's**  
17 **breaches of contract were not tortious.**

18 Contrary to Coastal's suggestion, breach of contract damages  
19 are nondischargeable under Jercich only in the narrow situation  
20 where the breach of contract is, in and of itself, tortious under  
21 state law. The existence of tortious activity in concert with a  
22 contract breach is not sufficient for § 523(a)(6)  
23 nondischargeability.

24 Thus, to the extent Coastal must rely on Jercich for a  
25 nondischargeability determination, the bankruptcy court correctly  
26 determined that its claim failed. As stated, in California, tort  
27 recovery for a bad faith breach of contract is only available  
28 when the debtor's conduct also violates a fundamental public

1 policy of the state. See In re Jercich, 238 F.3d at 1206.

2 Coastal advances no argument that Debtor's breach of contract  
3 violates any such fundamental public policy; and we do not  
4 independently discern any such policy violation here.

5 **3. The bankruptcy court must re-evaluate the quantum of**  
6 **the § 523(a)(6) judgment.**

7 As stated, some of the damages directly awarded for breach  
8 of contract - in particular, the damages awarded for lost profits  
9 - also constitute damages as a result of the Debtor's conversion.  
10 Other damages that the arbitrator awarded for breach of contract  
11 may also be correctly awarded based on the alternative conversion  
12 claim. This determination, however, is ultimately a factual one;  
13 the bankruptcy court should make it in the first instance.  
14 Further, Coastal raises on appeal other tort theories not  
15 resolved by the arbitration award. A nondischargeability  
16 determination may also be appropriate based on these theories,  
17 even if not on summary judgment based on the issue preclusive  
18 effect of an arbitration award that never discusses them.<sup>6</sup>

19 As a result, we vacate the partial § 523(a)(6) judgment in  
20 favor of the Debtor; we remand to the bankruptcy court for a  
21 determination as to whether any of the "breach of contract"  
22 damages, in addition to the lost profit damages, were also  
23 recoverable on account of the Debtor's conversion or other  
24 appropriately preserved tort theory.

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27 <sup>6</sup> We leave it to the bankruptcy court to decide whether  
28 Coastal properly preserved the other tort theories or whether a  
trial is required on any of the issues that remain.

**CONCLUSION**

Based on the foregoing, we VACATE that portion of the § 523(a)(6) judgment in favor of the Debtor as discussed above and REMAND to the bankruptcy court for proceedings consistent with this decision.