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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-14-1286-KiKuD
HAI LECONG,	)	Bk. No.	2:09-40568-ER
	)	Adv. No.	10-01161
Debtor.	)		
_____	)		
HAI LECONG,	)		
	)		
Appellant,	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
ASHLEY TRAN,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on February 19, 2015,  
at Los Angeles, California

Filed - May 6, 2015

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

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Lewis R. Landau argued for appellant, Hai Lecong;  
 Gregory M. Salvato argued for appellee, Ashley  
 Tran.

\_\_\_\_\_

Before: KIRSCHER, KURTZ and DUNN, 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 8024-1.

1 Chapter 7<sup>2</sup> debtor Hai Lecong ("Debtor") appeals an order  
2 granting summary judgment to appellee, Ashley Tran ("Tran"),  
3 wherein the bankruptcy court determined that a state court  
4 judgment in favor of Tran was excepted from Debtor's discharge  
5 under § 523(a)(2)(A) on the basis of issue preclusion. We AFFIRM.

6 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

7 **A. Events leading to the state court litigation**

8 Tran is a dentist. Her sister, Lauren Tran ("Lauren"), is an  
9 attorney and general contractor. Debtor is a licensed California  
10 real estate agent and mortgage broker. Lauren and Debtor, as  
11 business associates, engaged in various enterprises in the  
12 building supply and construction business.

13 Debtor and Lauren met sometime before 1996, when Lauren  
14 performed legal services for a company owned by Debtor and his  
15 former business associate, which manufactured and sold cultured  
16 marble and synthetic kitchen and bath materials. Lauren  
17 eventually expressed an interest in becoming a shareholder in the  
18 business.

19 In about 1998, Debtor, his former associate and Lauren formed  
20 a new entity, Excelstone International, Inc. ("Excelstone"), which  
21 manufactured and sold Corian countertops. To purchase her  
22 one-third share of the business, Lauren borrowed \$60,000 from  
23 Tran, which Lauren orally agreed to pay back within two years at  
24 10% interest ("First Loan"). Eventually, Lauren and Debtor bought  
25 out the former associate's interest in Excelstone, and in 1999,

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

1 Lauren and Debtor formed a new entity called Lexcel Solid  
2 Surfacing, Inc. ("Lexcel"). Excelstone was dissolved in 1998.

3         Shortly after the First Loan, Lauren asked Tran for an  
4 additional \$65,000 to invest in Excelstone/Lexcel, which Lauren  
5 again orally promised to pay back in two years at 10% interest  
6 ("Second Loan"). Tran provided the \$65,000 for the Second Loan.  
7 Lauren claimed Tran made the Second Loan to Excelstone/Lexcel;  
8 Tran claimed she made the Second Loan to Lauren and Debtor. In  
9 any event, Tran conceded that at the time of the First Loan and  
10 Second Loan she did not speak with Debtor, only Lauren. However,  
11 Tran understood that Debtor was responsible for both loans along  
12 with Lauren because they involved the duo's business. Tran also  
13 provided a loan of \$30,000 to Lauren and Debtor for the purchase  
14 of two company cars.

15         At some point, the oral loan agreements were modified to  
16 provide that the proceeds from the First Loan and Second Loan  
17 would be used by Lauren and Debtor to build a single family  
18 residence in Whittier, California, which would be either  
19 transferred to Tran or sold and the sale proceeds used to repay  
20 her. Ultimately, Lauren and Debtor used the funds from Tran to  
21 construct a residence for Debtor and his wife, who apparently  
22 still occupy the Whittier property. Debtor's wife holds title to  
23 the Whittier property.

24         From 1999 to 2004, Tran made several requests for repayment  
25 of the First Loan and Second Loan, but no payments were made.

26         In or around 2004, Lauren decided to open a showroom to boost  
27 company sales. In late 2004, Lauren formed an entity called  
28 Goldenwest Kitchen & Bath, Inc. to operate the showroom. To pay

1 for this venture, Lauren forged a series of checks on a HELOC  
2 account owned by Tran totaling \$70,000. When Tran confronted  
3 Lauren about the forgeries, Lauren orally agreed to pay back the  
4 funds on the same terms as the First Loan and Second Loan, within  
5 two years at 10% interest (the "HELOC Loan").

6 At some point, Lauren and Debtor told Tran they did not have  
7 the monies to repay any of the loans, although they made oral  
8 assurances to her that they would repay them. On or about  
9 September 19, 2007, Lauren and Debtor signed a promissory note in  
10 favor of Tran providing that each owed Tran one-half of a \$135,000  
11 debt ("Note"). The Note accounted for the \$65,000 Second Loan and  
12 the \$70,000 HELOC Loan. The Note required full repayment by  
13 September 12, 2008, and superseded any other prior notes. Debtor  
14 conceded that he and Lauren were obligated on the Note.

15 In November 2007, Tran filed suit against Lauren, Debtor,  
16 their related business entities and Debtor's wife for a variety of  
17 claims, including breach of contract, fraud and conversion. In  
18 her later-filed first amended complaint ("FAC"), Tran alleged with  
19 respect to the fraud claim:

20 At the times Defendants made the promises [to repay the  
21 loans], as well as the time that Defendants reaffirmed  
22 and ratified said promises to Plaintiff as alleged above,  
23 they expressly and impliedly represented to her that  
24 there existed in their then present state of mind an  
25 intention to keep the said promises.

26 The said representations were false, and each time  
27 Defendants made them, they knew they were false.

28 At the time Defendants made the promises, as well as the  
time of the said representations, and at the times of the  
reliance by Plaintiff, as herein alleged, Plaintiff  
believed that the said representations were true.

At all times herein mentioned, Defendants intended to  
defraud and deceive Plaintiff by causing her to act to

1 her detriment in reliance upon her belief in the truth of  
2 Defendants' said representations.

3 In reasonable reliance upon Plaintiff's belief in the  
4 truth of Defendant's [sic] said representations, she  
5 acted as above-described and lent the Defendants the sum  
6 of Two Hundred Twenty-Five Thousand Dollars (\$225,000).

7 Were it not for Plaintiff's trust and confidence in  
8 Defendants as her fiduciaries, and her said reliance upon  
9 and belief in the trust of his [sic] said  
10 representations, Plaintiff would not have acted as  
11 hereinabove alleged.

12 By reason of the said fraud and deceit, Plaintiff has  
13 suffered damages measured by the dollar amount of the  
14 loss of the benefit of her bargain - either repayment of  
15 the loan plus interest or transfer of title to real  
16 property . . . .

17 Tran also alleged claims for emotional distress and punitive  
18 damages, totaling \$50,000.

19 The case was tried before a jury on three causes of action -  
20 breach of contract and fraud against Lauren and Debtor, and  
21 conversion against Lauren. As to Debtor, the jury found in favor  
22 of Tran and assessed \$230,335 in damages for fraud and breach of  
23 contract. The jury also awarded Tran \$50,000 in noneconomic  
24 damages for emotional distress and \$50,000 in punitive damages.  
25 The jury found Lauren liable for fraud and breach of contract in  
26 the amount of \$407,993, as well as conversion and other damages.  
27 The jury also found against Lexcel, Goldenwest and two other  
28 entities involving Lauren and Debtor. Lauren and Debtor were  
jointly and severally liable for the \$230,335 breach of contract  
and fraud award to Tran.

The jury's special verdict ("Judgment") made the following  
findings with respect to the fraud claim against Debtor:

19. That Debtor made a false promise that was important  
to the transaction to Tran;

1 20. That Debtor knew the promise to Tran was false when  
2 made, or that he made the promise recklessly and without  
regard for the truth;

3 21. That Debtor intended for Tran to rely on the  
4 promise;

5 22. That Tran reasonably relied on Debtor's promise;

6 23. That Tran suffered harm in reliance on Debtor's  
promise; and

7 24. That Tran's reliance on Debtor's promise was a  
8 substantial factor in causing harm to Tran.

9 The parties appealed the Judgment to the California Court of  
10 Appeal. Specifically, Debtor contended that insufficient evidence  
11 existed of his fraud to support the jury verdict.

12 **B. Postpetition events**

13 While the appeal of the Judgment was pending, Debtor filed a  
14 chapter 7 bankruptcy case on November 3, 2009.

15 **1. Tran's nondischargeability complaint**

16 Tran alleged that the Judgment was excepted from Debtor's  
17 discharge under § 523(a)(2)(A) and (a)(4). The bankruptcy court  
18 stayed Tran's nondischargeability action while the parties pursued  
19 the appeal of the Judgment.

20 **2. The Court of Appeal decision**

21 The California Court of Appeal reversed the awards of  
22 noneconomic and punitive damages against Debtor and a portion of  
23 the breach of contract award, but upheld the fraud award of  
24 \$230,335. It rejected Debtor's contention that no evidence  
25 existed in the record that he made any false promises to Tran.

26 The appellate court first noted that the jury found Debtor  
27 knowingly or recklessly, without regard for the truth, made false  
28 promises to Tran, with the intention that she rely on them. The

1 jury further found that she relied on the promises, causing her  
2 damage. The appellate court also observed that Debtor had taken  
3 responsibility for at least some of the unpaid loans by signing  
4 the Note, and that the money went into companies in which he was a  
5 principal. Debtor had further promised Tran that the HELOC Loan  
6 would be paid back with the proceeds from the sale of the Whittier  
7 property, which never transpired.

8 Ultimately, the appellate court concluded:

9 "[t]here was substantial evidence that [Debtor] was at  
10 least complicit with Lauren in connection with promises  
11 regarding repayment of the loans, including interest.  
12 The evidence that [Debtor] defrauded [Tran] is based  
13 upon the promise that Lauren borrowed money with a  
14 promise to pay back the money; Lauren's promise to pay  
15 the money back was false because she never had any  
16 intention to pay back the money; [Debtor] was involved  
17 in these promises because the monies went to the  
18 companies in which he was a principal; and [Debtor]  
19 continued to participate in promising [Tran] she would  
20 be repaid, including out of the sale of real property  
21 that was not sold. . . . The evidence of his conduct  
22 after the loans suggests his involvement with the false  
23 promises. There is evidence [Tran] forbore in  
24 pursuing collection of monies owed her based on the  
25 promises."

18 The state court later entered a Second Amended Judgment to  
19 reflect the appellate court's decision. It reaffirmed that Debtor  
20 was liable to Tran for fraud damages of \$230,335.

### 21 **3. Tran's motion for summary judgment**

22 Subsequently, Tran moved for summary judgment on her  
23 § 523(a)(2)(A) claim ("MSJ"). In essence, Tran contended that  
24 because the jury's fraud findings in the Judgment established the  
25 elements for a fraud claim under § 523(a)(2)(A), and given the  
26 finality of the Judgment, she was entitled to summary judgment on  
27 the basis of issue preclusion. In support, Tran attached the FAC,  
28 the Judgment, the California Court of Appeal decision and the

1 Second Amended Judgment reflecting the appellate court's decision.

2 Debtor opposed the MSJ, disputing that the elements for issue  
3 preclusion and § 523(a)(2)(A) were met. With respect to issue  
4 preclusion, Debtor conceded the Judgment was final, on the merits,  
5 and involved the same parties. However, he contended Tran had  
6 failed to show that the issues were identical; she did not offer  
7 the jury instructions or court order establishing that fraud for  
8 purposes of § 523(a)(2)(A) was the same type of fraud that was  
9 litigated in the prior action. Debtor contended that Tran had  
10 also failed to establish with any pleadings or evidence that the  
11 fraud issue was actually litigated in the prior action. For  
12 example, argued Debtor, the issue of whether Lauren's acts could  
13 be imputed to him under agency principles was never litigated  
14 before the state court. Debtor contended these same grounds  
15 supported his argument for why the fraud issue was also not  
16 necessarily decided.

17 As for the elements of Tran's § 523(a)(2)(A) claim, Debtor  
18 contended: he made no misrepresentations to Tran; no evidence  
19 supported his alleged knowledge of any falsity or his intent to  
20 deceive Tran; she did not justifiably rely on his misstatements or  
21 conduct; and Tran did not suffer damages as a proximate result of  
22 any misrepresentation.

23 Much of Debtor's opposing argument was based on his erroneous  
24 assertion the bankruptcy court could not consider the Judgment or  
25 the appellate court decision because they were "inadmissible  
26 hearsay," which the court properly rejected. Notwithstanding,  
27 Debtor contended he made no representations to Tran before she  
28 loaned the money to Lauren, and the Judgment failed to identify



1 what he allegedly said or when. While Debtor conceded the  
2 appellate court's finding that his statement about the companies  
3 making good on some of the loans was "circumstantial evidence" of  
4 a fraudulent promise to repay, Debtor argued this was not enough  
5 to satisfy the first element of § 523(a)(2)(A). Debtor further  
6 contended the appellate court's determination that he was involved  
7 with the false promises because the monies went to his companies  
8 showed, at best, only constructive fraud.

9 Debtor also claimed there was no evidence to show that he  
10 intended to deceive Tran when the alleged representations were  
11 made and his reassurances of repayment were not enough to show  
12 intent to deceive under § 523(a)(2)(A). In addition, Debtor  
13 disputed Tran's justifiable reliance, contending he had nothing to  
14 do with procuring the loans. Tran admitted at trial that she  
15 never discussed the terms of any of the loans with Debtor until  
16 October 2007 – years after they were given. Finally, Debtor  
17 argued that proximate cause and damages were not established  
18 because he did not cause Tran to make the loans and therefore  
19 suffer damages for failure to repay them.

20 In reply, Tran argued that Debtor was seeking to relitigate  
21 the factual findings and legal conclusions already resolved by the  
22 Judgment and affirmed by the California Court of Appeal. Tran  
23 contended the bankruptcy court's only concern was whether the  
24 findings made in the Judgment were sufficient for her debt to be  
25 excepted from discharge under § 523(a)(2)(A) or whether further  
26 factual issues remained; it was not to "look behind" the Judgment  
27 to determine whether it was properly entered. Tran argued that  
28 the elements for common law fraud in California mirrored those

1 under § 523(a) (2) (A) and that the jury's specific and detailed  
2 findings made it clear that a claim for "actual fraud" was  
3 actually litigated and necessarily decided in the prior action.

4 **4. The bankruptcy court's ruling on the MSJ**

5 Prior to the scheduled hearing on the MSJ, the bankruptcy  
6 court issued a tentative ruling, which it ultimately adopted and  
7 incorporated into its Memorandum Decision, granting the MSJ on the  
8 basis of issue preclusion. The court determined that the jury had  
9 made findings for a fraud cause of action sufficient for  
10 § 523(a) (2) (A) based on the claim alleged in the FAC. As for  
11 Debtor's requisite intent when he made representations to Tran,  
12 the court reasoned that "the jury must have so found by reference  
13 to the [FAC] which alleges that the defendants, including Debtor,  
14 **knew the representations were false each time they were made, and**  
15 **intended to defraud and deceive [Tran]."** The court further  
16 concluded that the jury's finding of Tran's "reasonable" reliance  
17 on Debtor's false promise met the lower standard of "justifiable"  
18 reliance required for § 523(a) (2) (A). Finally, the jury had found  
19 that Tran was damaged as a result of Debtor's fraud in the amount  
20 of \$230,335.

21 The parties made their arguments at the MSJ hearing. In  
22 response to Debtor's argument that the bankruptcy court was  
23 relying on the FAC as evidence, the court stated it was not taking  
24 the allegations of the FAC as any sort of proof, but only  
25 determining whether the jury's findings were consistent with the  
26 FAC. Debtor then proceeded to argue that one could not tell from  
27 the Judgment what sort of fraud was litigated in the prior  
28 proceeding, actual or some other kind, and the following colloquy

1 ensued:

2 THE COURT: What you want to do is to have this Court not  
3 only occupy the State Court's position, but also the  
4 jury's position. And they said yes when asked, did Hai  
5 Lecong make a false promise. It's fairly clear.

6 MR. COHON: Wait a minute. Where -- where is the  
7 evidence of the false promise? Because here is the  
8 issue.

9 THE COURT: I'm not dealing with the evidence. I'm just  
10 dealing with the response to Number 19.

11 Hr'g Tr. (Jan. 8, 2013) 14:7-14. After hearing further argument  
12 from the parties, the court took the matter under advisement to  
13 review cases cited by Debtor's counsel.

14 The bankruptcy court issued its Memorandum Decision and  
15 entered a judgment excepting the Judgment debt of \$230,335 from  
16 discharge under § 523(a)(2)(A). Recapping Debtor's position at  
17 the MSJ hearing, Debtor had argued that the debt to Tran was not  
18 excepted from discharge under § 523(a)(2)(A) because he was not  
19 involved in the discussions between Tran and Lauren, and did not  
20 actively participate in Lauren's fraud. Debtor had also argued  
21 that the jury found he made a false promise to Tran only because  
22 they imputed Lauren's statements to him based on their business  
23 relationship. Debtor argued that while misrepresentations could  
24 be imputed for purposes of finding fraud under state law,  
25 imputation was not a proper basis for nondischargeability under  
26 § 523(a)(2)(A).

27 Relying on an unpublished Panel decision, Babian v. Tamamian  
28 (In re Babian), 2013 WL 646386, at \*5 (9th Cir. BAP Jan. 4, 2013),  
which cited Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa),  
287 B.R. 515, 525 (9th Cir. BAP 2002), the bankruptcy court  
concluded that Debtor was incorrect; actual fraud could be imputed

1 to a debtor under partnership/agency principles. Thus, based on  
2 the appellate court's decision (and Debtor's counsel's concession)  
3 that Lauren and Debtor were business partners, the bankruptcy  
4 court found that Lauren's fraud could be imputed to Debtor for  
5 purposes of Tran's claim under § 523(a) (2) (A).<sup>3</sup>

## 6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
8 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C. § 158.

## 9 **III. ISSUE**

10 Did the bankruptcy court err when it granted Tran summary  
11 judgment on her claim under § 523(a) (2) (A) by applying issue  
12 preclusion to the Judgment?

## 13 **IV. STANDARDS OF REVIEW**

14 The bankruptcy court's order granting summary judgment is  
15 reviewed de novo. Shahrestani v. Alazzeh (In re Alazzeh),  
16 509 B.R. 689, 692-93 (9th Cir. BAP 2014). "Viewing the evidence  
17 in the light most favorable to the non-moving party, we must  
18 determine 'whether there are any genuine issues of material fact  
19 and whether the trial court correctly applied relevant substantive  
20 law.'" New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R.  
21 138, 141 (9th Cir. BAP 2007) (quoting Tobin v. San Souci Ltd.  
22 P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001)).

23 We also review de novo the preclusive effect of a judgment;  
24 whether issue preclusion is available is a mixed question of law

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26 <sup>3</sup> Debtor's initial appeal of the nondischargeability judgment  
27 was dismissed as interlocutory because the bankruptcy court had  
28 not yet determined Tran's claim under § 523(a) (4). Once the court  
entered an order dismissing that claim, Debtor timely appealed the  
nondischargeability judgment.

1 and fact. Stephens v. Bigelow (In re Bigelow), 271 B.R. 178, 183  
2 (9th Cir. BAP 2001). If issue preclusion is available, the  
3 bankruptcy court's decision to apply it is reviewed for abuse of  
4 discretion. Lopez v. Emergency Serv. Restoration, Inc.  
5 (In re Lopez), 367 B.R. 99, 104 (9th Cir. BAP 2007). Under that  
6 standard, we reverse where the bankruptcy court applied an  
7 incorrect legal rule or where its application of the law to the  
8 facts was illogical, implausible or without support in inferences  
9 that may be drawn from the record. Ahanchian v. Xenon Pictures,  
10 Inc., 624 F.3d 1253, 1258 (9th Cir. 2010) (citing United States v.  
11 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

12 We can affirm on any ground supported by the record,  
13 regardless of whether the bankruptcy court relied upon, rejected,  
14 or even considered that ground. Fresno Motors, LLC v. Mercedes  
15 Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014).

## 16 V. DISCUSSION

### 17 A. Summary judgment standards

18 Summary judgment is appropriate where the movant shows that  
19 no genuine dispute of material fact exists and the movant is  
20 entitled to judgment as a matter of law. Civil Rule 56(a)  
21 (applicable in adversary proceedings under Rule 7056). The  
22 bankruptcy court views the evidence in the light most favorable to  
23 the nonmoving party in determining whether any genuine disputes of  
24 material fact exist and whether the movant is entitled to judgment  
25 as a matter of law. Fresno Motors, LLC, 771 F.3d at 1125.

### 26 B. Issue preclusion standards

27 The doctrine of issue preclusion applies to dischargeability  
28 proceedings under § 523(a). Grogan v. Garner, 498 U.S. 279, 284

1 n.11 (1991). In determining the effect of a state court judgment,  
2 we must apply, as a matter of full faith and credit, the state's  
3 law of issue preclusion. Gayden v. Nourbakhsh (In re Nourbakhsh),  
4 67 F.3d 798, 800 (9th Cir. 1995); Jung Sup Lee v. Tcast Commc'ns,  
5 Inc. (In re Jung Sup Lee), 335 B.R. 130, 136 (9th Cir. BAP 2005).

6 Under California law, a prior judgment is entitled to issue  
7 preclusive effect if all five of the following requirements are  
8 met:

9 (1) The issue sought to be precluded must be identical to  
10 that decided in the former proceeding;

11 (2) The issue must have been actually litigated in the  
12 former proceeding;

13 (3) The issue must have been necessarily decided in the  
14 former proceeding;

15 (4) The decision in the former proceeding must be final  
16 and on the merits;

17 (5) The party against whom issue preclusion is sought  
18 must be the same as, or in privity with, the party to the  
19 former proceeding.

20 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
21 2001); Lucido v. Super. Ct., 51 Cal.3d 335, 341 (1990). Even if  
22 all five requirements are satisfied, however, California places an  
23 additional limitation on issue preclusion: courts may give  
24 preclusive effect to a judgment "only if application of preclusion  
25 furthers the public policies underlying the doctrine."

26 In re Harmon, 250 F.3d at 1245 (citing Lucido, 51 Cal.3d at 342).

27 The party asserting preclusion bears the burden of  
28 establishing these threshold requirements. Id. This burden means  
providing "a record sufficient to reveal the controlling facts and  
pinpoint the exact issues litigated in the prior action." Kelly  
v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995),

1 aff'd, 100 F.3d 110 (9th Cir. 1996). Any reasonable doubt as to  
2 what was decided by a prior judgment should be resolved against  
3 allowing the [issue preclusive] effect." Id.

4 The bankruptcy court initially ruled that based on the jury's  
5 express findings of actual fraud and the cause of action alleged  
6 in the FAC, the jury had found Debtor liable for actual fraud, and  
7 therefore he was precluded from relitigating that issue.

8 Accordingly, Tran's fraud damages were excepted from discharge  
9 under § 523(a)(2)(A). The bankruptcy court also determined, as a  
10 separate and sufficient basis, the Judgment supported a finding  
11 that Debtor was imputedly liable for Lauren's fraud.

12 **C. The bankruptcy court did not err in applying issue preclusion**  
13 **to the Judgment.**

14 Debtor spends a great deal of time disputing the bankruptcy  
15 court's finding of imputed fraud, contending that Lauren's fraud  
16 could not be imputed to him because nothing in the record  
17 establishes that he knew or should have known of Lauren's fraud.  
18 Debtor, however, glosses over the bankruptcy court's initial  
19 ruling that Tran's debt was nondischargeable based on his actual  
20 fraud found by the jury, the basis on which we affirm. Debtor  
21 does not dispute that the Judgment was final and on the merits,  
22 and that the parties are the same. Therefore, we only address the  
23 first three elements of issue preclusion.

24 **1. Identity of issues**

25 Section 523(a)(2)(A) excepts from discharge any debt for  
26 money, property, services or an extension, renewal, or refinancing  
27 of credit, to the extent obtained by false pretenses, a false  
28 representation or actual fraud. The creditor bears the burden of

1 demonstrating, by a preponderance of the evidence, each of the  
2 following five elements: (1) misrepresentation, fraudulent  
3 omission or deceptive conduct by the debtor; (2) knowledge of the  
4 falsity or deceptiveness of the representation or omission; (3) an  
5 intent to deceive; (4) the creditor's justifiable reliance on the  
6 representation or conduct; and (5) damage to the creditor  
7 proximately caused by reliance on the debtor's representations or  
8 conduct. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222  
9 (9th Cir. 2010).

10 The "identical issue" requirement addresses whether  
11 "identical factual allegations" are at stake in the two  
12 proceedings. Lucido, 51 Cal.3d at 342. "The elements of  
13 § 523(a)(2)(A) 'mirror the elements of common law fraud' and match  
14 those for actual fraud under California law, which requires the  
15 plaintiff to show: (1) misrepresentation; (2) knowledge of the  
16 falsity of the representation; (3) intent to induce reliance;  
17 (4) justifiable reliance; and (5) damages." In re Tobin, 258 B.R.  
18 at 203 (citing Younie v. Gonya (In re Younie), 211 B.R. 367,  
19 373-74 (9th Cir. BAP 1997), aff'd, 163 F.3d 609 (9th Cir. 1998)  
20 (table decision)).

21 The FAC alleged what appears to be a cause of action for  
22 actual and/or promissory fraud. The elements of a fraud claim  
23 based on a false promise are (1) a promise by the defendant  
24 (2) made without an intent to perform and (3) made with the intent  
25 to induce reliance by the plaintiff, followed by (4) reasonable  
26 reliance by the plaintiff that results in (5) injury to the  
27 plaintiff. CAL. CIV. CODE §§ 1572, 1710; Lazar v. Super. Ct.,  
28 12 Cal.4th 631, 638 (1996). "'Promissory fraud' is a subspecies



1 of the action for fraud and deceit. A promise to do something  
2 necessarily implies the intention to perform; hence, where a  
3 promise is made without such intention, there is an implied  
4 misrepresentation of fact that may be actionable fraud." Lazar,  
5 12 Cal.4th at 638. See also Rubin v. West (In re Rubin), 875 F.2d  
6 755, 759 (9th Cir. 1989) (a promise made with a positive intent not  
7 to perform or without a present intent to perform satisfies  
8 § 523(a) (2) (A)).

9 The FAC alleged the required elements for either cause of  
10 action, including that Debtor had made promises or representations  
11 to Tran that he never intended to keep and/or knew were false at  
12 the time he made them, that he intended for Tran to rely on the  
13 false promises or representations, and that Tran reasonably relied  
14 on the false promises or representations and suffered damages as a  
15 result. In the special verdict supporting the Judgment, the jury  
16 expressly found that Debtor made a knowing false promise he  
17 intended Tran to rely on, that Tran reasonably relied on the false  
18 promise and that she suffered harm as a result. Although the jury  
19 found "reasonable" reliance as opposed to the "justifiable"  
20 reliance required under § 523(a) (2) (A), a finding of reasonable  
21 reliance meets the lower standard of justifiable. Tallant v.  
22 Kaufman (In re Tallant), 218 B.R. 58, 69 (9th Cir. BAP 1998). The  
23 Judgment, therefore, was an adjudication of a fraud claim  
24 identical to that required to find the debt nondischargeable under  
25 § 523(a) (2) (A).

26 **2. Actually litigated and necessarily decided**

27 Debtor argues "the record contains no factual determinations  
28 that could support a fraud claim under § 523(a) (2) (A)." Debtor

1 contends that if his fraud could not be established as a matter of  
2 vicarious liability based on Lauren's actions, the bankruptcy  
3 court was required to find that he made fraudulent representations  
4 to Tran, that he knew were false, with intent to deceive, upon  
5 which Tran justifiably relied and which proximately caused her  
6 damage. Debtor contends the bankruptcy court failed to identify  
7 what "allegedly false representation" he made to Tran and that we  
8 are unable to determine whether the allegedly false representation  
9 arose out of operation of imputed fraud or is based on some  
10 representation by Debtor.

11       What Debtor fails to recognize is that when faced with a  
12 prior judgment where a jury has made express findings of actual  
13 fraud that satisfy the elements of a claim under § 523(a)(2)(A),  
14 the bankruptcy court is not required to "look behind" that  
15 judgment to determine whether the factual record supported it, or  
16 whether or not any representation was made. That was the role of  
17 the California Court of Appeal, which affirmed the actual fraud  
18 judgment against Debtor.

19       Given the jury's findings in the special verdict, it is clear  
20 that the issue of actual fraud was actually litigated and  
21 necessarily decided in the prior state court proceedings. The FAC  
22 specifically alleged that Debtor made false promises and  
23 representations to Tran, that he made them knowingly with the  
24 intent to defraud and deceive her and that Tran reasonably relied  
25 on them to her detriment. The jury's express findings that Debtor  
26 was liable for each element of actual/promissory fraud necessarily  
27 included a determination of all of the facts required for such a  
28 claim under California law, which mirrors the elements of

1 § 523(a)(2)(A). The jury awarded Tran damages of \$230,335 based  
2 on Debtor's fraud, which the appellate court affirmed.

3 Accordingly, the bankruptcy court properly applied issue  
4 preclusion to the jury's findings of actual/promissory fraud in  
5 the Judgment. See Mading v. Shepherd (In re Mading), 1994 WL  
6 718767, at \*1 (9th Cir. Dec. 27, 1994) (where jury makes specific  
7 finding of "yes" to actual fraud against debtor the judgment is  
8 conclusive on that specific jury finding and supports the damages  
9 awarded as a result of the fraud; issue preclusion properly  
10 applied); Cobe v. Smith (In re Cobe), 229 B.R. 15, 17 (9th Cir.  
11 BAP 1998) (bankruptcy court properly applied issue preclusion when  
12 it granted summary judgment based on jury's affirmative findings  
13 on all elements to support claim under § 523(a)(2)(A));  
14 In re Davis, 486 B.R. 182, 190-92 (Bankr. N.D. Cal. 2013) (applying  
15 issue preclusion and granting summary judgment for § 523(a)(2)(A)  
16 claim based on jury's express findings of actual fraud).

17 Even if the bankruptcy court could have looked behind the  
18 Judgment to determine what misrepresentation(s) Debtor made, if  
19 any, to support the jury's finding of actual/promissory fraud, we  
20 reject Debtor's argument that Tran's debt could not be excepted  
21 from discharge because he was not involved in obtaining any of the  
22 loans from Tran.

23 Section 523(a)(2)(A) also applies to a debtor who obtains an  
24 "extension, renewal or refinancing of credit." An "extension of  
25 credit" is "an indulgence by a creditor giving his debtor further  
26 time to pay an existing debt." John Deere Co. v. Gerlach  
27 (In re Gerlach), 897 F.2d 1048, 1050 (10th Cir. 1990) (internal  
28 quotation marks omitted). Section 523(a)(2) protects a creditor

1 deceived into forbearing collection efforts. Ojeda v. Goldberg,  
2 599 F.3d 712, 718-19 (7th Cir. 2010); Lardner v. Biondo  
3 (In re Biondo), 180 F.3d 126, 131-32 (4th Cir. 1999) (extension of  
4 credit under § 523(a)(2)(A) is properly viewed as merely an agreed  
5 enlargement of time allowed for payment); In re Gerlach, 897 F.2d  
6 at 1050. The record, particularly the conclusion reached by the  
7 California Court of Appeal, reflects that: Debtor made false oral  
8 promises of repayment to Tran; Tran extended the time for  
9 repayment of the loans based on Debtor's false promises to repay;  
10 and she was deceived into forbearing her collection efforts as a  
11 result and suffered damages.

12 Thus, even if the jury's findings were based on Debtor's  
13 false promises to repay rather than representations made in  
14 connection with obtaining the loans initially, this is sufficient  
15 to establish fraud within the meaning of § 523(a)(2)(A).<sup>4</sup>

## 16 VI. CONCLUSION

17 Because the bankruptcy court did not err in concluding that  
18 the issue of whether Debtor committed fraud within the meaning of  
19 § 523(a)(2)(A) was precluded by the Judgment and could not be  
20 relitigated in the bankruptcy court, and because no genuine issues  
21 of material fact were in dispute, summary judgment was properly  
22 granted to Tran. We AFFIRM.

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26 <sup>4</sup> The bankruptcy court did not determine whether public  
27 policy favored applying issue preclusion in this case. However,  
28 because Debtor has not raised this issue on appeal, it has been  
waived. Golden v. Chi. Title Ins. Co. (In re Choo), 273 B.R. 608,  
613 (9th Cir. BAP 2002) (arguments not raised in appellant's  
opening brief are deemed waived).