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

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	CC-14-1362-TaDPa
)		
YURI PLYAM and NATALIA PLYAM,)	Bk. No.	2:13-bk-15020-BB
)		
Debtors.)	Adv. No.	2:13-ap-01558-BB
)		
_____)		
YURI PLYAM; NATALIA PLYAM,)		
)		
Appellants,)		
)		
v.)	O P I N I O N	
)		
PRECISION DEVELOPMENT, LLC,)		
)		
Appellee.)		
_____)		

Argued and Submitted on January 22, 2015
at Pasadena, California

Filed - May 5, 2015

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

Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding

Appearances: _____
Dennis P. Riley of Mesisca Riley & Kreitenberg,
LLP argued for appellants Yuri Plyam and Natalia
Plyam; Leo Daniel Plotkin of Levy, Small & Lallas
argued for appellee Precision Development, LLC.

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

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1 TAYLOR, Bankruptcy Judge:
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3 Debtors Yuri Plyam and Natalia Plyam appeal from the
4 bankruptcy court's summary judgment excepting a state court
5 judgment from discharge pursuant to § 523(a)(4)¹ and (a)(6), as
6 to Yuri,² and pursuant to § 523(a)(6), as to Natalia.

7 The bankruptcy court granted summary judgment based on
8 issue preclusion and the state court judgment's award of actual
9 and punitive damages for breach of fiduciary duty. We determine
10 that the bankruptcy court erred as the state court judgment did
11 not include a finding equivalent to willfulness as required for
12 § 523(a)(6) nondischargeability, notwithstanding its award of
13 punitive damages under California Civil Code § 3294. The state
14 court judgment also failed to establish the existence of an
15 express or technical trust as required for § 523(a)(4)
16 nondischargeability.

17 As a result, we VACATE the judgment and REMAND to the
18 bankruptcy court for further proceedings consistent with this
19 opinion.

20 **BACKGROUND**

21 In 2005, Yuri formed Precision Development, LLC, a Nevada
22 limited liability company ("Precision"), for the purpose of
23 developing residential real property in Southern California.
24 Initially, he was its sole member and manager.

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

28 ² We refer to the parties hereafter by their first names
for sake of clarity; we intend no disrespect.

1 Precision obtained significant investment capital from
2 Clare Bronfman and Sara Bronfman (jointly, the "Bronfmans").
3 According to the Bronfmans, they eventually invested
4 approximately \$26.3 million.

5 Between 2005 and 2007, Precision acquired numerous parcels
6 of real property. Yuri's separate business entity oversaw their
7 development; it did not go well. Precision's funds ran out in
8 2007 before it successfully completed development of or sold any
9 of the properties.

10 Precision's operating agreement provided that it would hold
11 title to all real property acquired with Precision funds. The
12 Debtors, however, caused Precision to deed them three parcels of
13 real property (the "Transferred Properties"). And once they
14 acquired title, the Debtors alleged ownership of the Transferred
15 Properties in loan documents and used the Transferred Properties
16 as collateral for construction loans. The Debtors later also
17 transferred a fourth property from Yuri's business entity to
18 Precision and then from Precision to their family trust.

19 Eventually, the Bronfmans discovered Precision's dire
20 state; few of its developments were close to completion.
21 Indeed, some remained vacant land. The only projects with
22 significant development were the Transferred Properties. And,
23 the Debtors lost even the Transferred Properties to foreclosure
24 by their construction lender.

25 The Bronfmans attempted to remedy the situation. They
26 subsequently obtained control of Precision and caused it to sue
27 the Debtors in California state court. The complaint alleged
28 that the Debtors misused Precision funds and diverted its

1 assets.

2 Following an 18-day trial, a jury entered a special verdict
3 finding that "Yuri Plyam or Natasha [sic] Plyam" breached their
4 fiduciary duties to Precision and that "Yuri or Natasha [sic]
5 Plyam" acted with malice, oppression, or fraud. The jury
6 awarded \$10,100,000 in general damages and \$200,000 in punitive
7 damages (the "State Court Judgment"). The Debtors appealed to
8 the California court of appeal, which affirmed the State Court
9 Judgment. See Precision Dev., LLC v. Plyam, 2013 WL 5801759
10 (Cal. Ct. App. Oct. 29, 2013). The State Court Judgment is now
11 final.

12 The Debtors responded with a chapter 7 bankruptcy, and
13 Precision then commenced an adversary proceeding seeking to
14 except the State Court Judgment from discharge pursuant to
15 § 523(a)(4) (for fraud or defalcation) and (a)(6).³ It
16 subsequently moved for summary judgment or, in the alternative,
17 partial summary judgment. It based its motion solely on the
18 State Court Judgment's alleged issue preclusive effect.

19 The Debtors opposed. They defended against the § 523(a)(4)
20 claim by arguing that Natalia never owed a fiduciary duty to
21 Precision and that Yuri was not a fiduciary during the time of
22 the alleged acts of defalcation. On the § 523(a)(6) claim, they

23

24 ³ In the adversary complaint, Precision also sought
25 nondischargeability under § 523(a)(2)(A). As relevant to this
26 appeal, it obtained summary judgment only as to the § 523(a)(4)
27 and (a)(6) claims. The bankruptcy court dismissed with
28 prejudice the § 523(a)(2)(A) claim against both of the Debtors,
the § 523(a)(4) claim for defalcation against Natalia, and the
§ 523(a)(4) claim for embezzlement and/or larceny against both
of the Debtors. No appeal was taken from those decisions.

1 generally contested the sufficiency of evidence and argued, in
2 particular, that triable issues of fact existed as to the
3 justification or excuse for their actions in relation to the
4 Transferred Properties and the later transfer of the fourth
5 property to their family trust. The Debtors also argued that
6 the State Court Judgment's punitive damages award did not
7 satisfy the elements for § 523(a)(6) nondischargeability.

8 Following arguments at the hearing, the bankruptcy court
9 relied on issue preclusion and granted summary judgment in part
10 and denied it in part. It determined that Natalia did not owe a
11 fiduciary duty; thus, it granted summary judgment against her
12 only under § 523(a)(6). As to Yuri, it granted summary judgment
13 on both the § 523(a)(4) and (a)(6) claims.

14 The bankruptcy court subsequently entered a judgment
15 excepting the State Court Judgment, in the total amount of
16 \$10,497,843.24, from discharge. The Debtors timely appealed.

17 **JURISDICTION**

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
20 § 158.

21 **ISSUE**

22 Did the bankruptcy court err in granting summary judgment
23 to Precision by giving issue preclusive effect to the State
24 Court Judgment as to the § 523(a)(4) and (a)(6)
25 nondischargeability claims?

26 **STANDARDS OF REVIEW**

27 We review de novo the bankruptcy court's decisions to grant
28 summary judgment and to except a debt from discharge under

1 § 523(a)(4) and (a)(6). See Boyajian v. New Falls Corp. (In re
2 Boyajian), 564 F.3d 1088, 1090 (9th Cir. 2009); Black v. Bonnie
3 Springs Family Ltd. P'ship (In re Black), 487 B.R. 202, 210 (9th
4 Cir. BAP 2013); see also Carrillo v. Su (In re Su), 290 F.3d
5 1140, 1142 (9th Cir. 2002) (nondischargeability presents mixed
6 issues of law and fact and is reviewed de novo).

7 We also review de novo the bankruptcy court's determination
8 that issue preclusion was available. In re Black, 487 B.R. at
9 210. If issue preclusion was available, we then review the
10 bankruptcy court's application of issue preclusion for an abuse
11 of discretion. Id. A bankruptcy court abuses its discretion if
12 it applies the wrong legal standard, misapplies the correct
13 legal standard, or if its factual findings are illogical,
14 implausible, or without support in inferences that may be drawn
15 from the facts in the record. See TrafficSchool.com, Inc. v.
16 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United
17 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en
18 banc)).

19 DISCUSSION

20 Summary judgment is appropriate where the movant shows that
21 there is no genuine dispute of material fact and the movant is
22 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)
23 (applicable in adversary proceedings under Rule 7056). The
24 bankruptcy court must view the evidence in the light most
25 favorable to the non-moving party when determining whether
26 genuine disputes of material fact exist and whether the movant
27 is entitled to judgment as a matter of law. See Fresno Motors,
28 LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir.

1 2014). And, it must draw all justifiable inferences in favor of
2 the non-moving party. See id. (citing Anderson v. Liberty
3 Lobby, Inc., 477 U.S. 242, 255 (1986)).

4 A bankruptcy court may rely on the issue preclusive effect
5 of an existing state court judgment as the basis for granting
6 summary judgment. See Khaligh v. Hadaegh (In re Khaligh), 338
7 B.R. 817, 831-32 (9th Cir. BAP 2006). In so doing, the
8 bankruptcy court must apply the forum state's law of issue
9 preclusion. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240,
10 1245 (9th Cir. 2001); see also 28 U.S.C. § 1738 (federal courts
11 must give "full faith and credit" to state court judgments).
12 Thus, we apply California preclusion law.

13 In California, application of issue preclusion requires
14 that: (1) the issue sought to be precluded from relitigation is
15 identical to that decided in a former proceeding; (2) the issue
16 was actually litigated in the former proceeding; (3) the issue
17 was necessarily decided in the former proceeding; (4) the
18 decision in the former proceeding is final and on the merits;
19 and (5) the party against whom preclusion is sought was the same
20 as, or in privity with, the party to the former proceeding.
21 Lucido v. Super. Ct., 51 Cal. 3d 335, 341 (1990). California
22 further places an additional limitation on issue preclusion:
23 courts may give preclusive effect to a judgment "only if
24 application of preclusion furthers the public policies
25 underlying the doctrine." In re Harmon, 250 F.3d at 1245
26 (citing Lucido, 51 Cal. 3d at 342-43); see also In re Khaligh,
27 338 B.R. at 824-25.

28 The party asserting preclusion bears the burden of

1 establishing the threshold requirements. In re Harmon, 250 F.3d
2 at 1245. This means providing “a record sufficient to reveal
3 the controlling facts and pinpoint the exact issues litigated in
4 the prior action.” Kelly v. Okoye (In re Kelly), 182 B.R. 255,
5 258 (9th Cir. BAP 1995), aff’d, 100 F.3d 110 (9th Cir. 1996).
6 Ultimately, “[a]ny reasonable doubt as to what was decided by a
7 prior judgment should be resolved against allowing the [issue
8 preclusive] effect.” Id.

9 The Debtors do not challenge the bankruptcy court’s
10 determination that the State Court Judgment is final and against
11 the Debtors. Consequently, we do not review this determination
12 on appeal.

13 **A. The bankruptcy court erred in granting summary judgment to**
14 **Precision on its § 523(a) (6) claim based on the issue**
15 **preclusive effect of the State Court Judgment.**

16 **1. Exceptional circumstances justify our review of the**
17 **propriety of issue preclusion as to both Yuri and**
18 **Natalia.**

19 Yuri and Natalia filed a joint opening brief on appeal that
20 requests de novo review of the availability of issue preclusion
21 in connection with the § 523(a) (6) judgment, but named only
22 Natalia when discussing this portion of the summary judgment.
23 Precision, thus, argues that Yuri did not specifically challenge
24 the § 523(a) (6) judgment against him and that he cannot obtain
25 relief from that portion of the summary judgment on appeal. We
26 acknowledge that a technical waiver exists. Nonetheless, based
27 on the circumstances of this case and the nature of our ultimate
28 conclusion, we determine that exceptional circumstances exist,

1 and we exercise our discretion and extend review as to Yuri as
2 well. See Mano-Y&M, Ltd. v. Field (In re Mortg. Store, Inc.),
3 773 F.3d 990, 998 (9th Cir. 2014) (appellate court may exercise
4 discretion to consider waived issues based on exceptional
5 circumstances).

6 Here, the Debtors share an attorney and filed a joint
7 appellate brief, which squarely challenges the bankruptcy
8 court's § 523(a)(6) determination. Our de novo review and
9 resulting conclusion is based on a strictly legal point. While
10 the Debtors do not argue this point directly as to Yuri in their
11 opening brief, they do argue in their discussion of § 523(a)(4)
12 that the State Court Judgment did not necessarily decide that
13 Yuri acted with gross recklessness, a less culpable state of
14 mind than that required for § 523(a)(6) willfulness. We, thus,
15 determine that vacating the judgment solely as to Natalia would
16 be manifestly unjust.

17 Section 523(a)(6) excepts from discharge debts arising from
18 a debtor's "willful and malicious" injury to another person or
19 to the property of another. Barboza v. New Form, Inc. (In re
20 Barboza), 545 F.3d 702, 706 (9th Cir. 2008). The "willful" and
21 "malicious" requirements are conjunctive and subject to separate
22 analysis.⁴ Id.; In re Su, 290 F.3d at 1146-47.

24 ⁴ A "malicious" injury requires: "(1) a wrongful act,
25 (2) done intentionally, (3) which necessarily causes injury, and
26 (4) is done without just cause or excuse." Petralia v. Jercich
27 (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). The
28 Debtors do not challenge the bankruptcy court's application of
issue preclusion as to § 523(a)(6) maliciousness. As a result,
that issue is deemed waived. See Padgett v. Wright, 587 F.3d
983, 985 n.2 (9th Cir. 2009).

1 **2. The State Court Judgment did not satisfy the element**
2 **of willful injury as required for § 523(a)(6)**
3 **nondischargeability.**

4 Under § 523(a)(6), the willful injury requirement speaks to
5 the state of mind necessary for nondischargeability. An
6 exacting requirement, it is satisfied when a debtor harbors
7 “either a subjective intent to harm, or a subjective belief that
8 harm is substantially certain.” In re Su, 290 F.3d at 1144; see
9 also In re Jercich, 238 F.3d at 1208. The injury must be
10 deliberate or intentional, “not merely a deliberate or
11 intentional **act** that leads to injury.” Kawaauhau v. Geiger, 523
12 U.S. 57, 61 (1998) (emphasis in original). Thus, “debts arising
13 from recklessly or negligently inflicted injuries do not fall
14 within the compass of § 523(a)(6).” Id. at 64.

15 The terms “willful” and “malicious,” first appearing in the
16 Bankruptcy Act of 1898,⁵ seemingly derive in some measure from
17 the common law concepts of malice in fact and malice in law,
18 respectively.

19 California, for example, defines malice in law as an
20 “intent to do a wrongful act, established either by proof or
21 presumption of law . . . from the intentional doing of the act
22 without justification or excuse or mitigating circumstances.”
23 In re V.V., 51 Cal. 4th 1020, 1028 (2011) (citing Davis v.
24 Hearst, 160 Cal. 143 (1911); Cal. Penal Code §§ 7(4), 450(e);
25 1 Witkin & Epstein, Cal. Criminal Law § 11) (internal quotation
26 marks omitted); see also Tinker v. Colwell, 193 U.S. 473, 485-86

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28 ⁵ 30 Stat. 544, ch. II § 17(2) (1898) (repealed 1978).

1 (1904) ("Malice, in common acceptation, means ill will against a
2 person, **but in its legal sense it means a wrongful act, done**
3 **intentionally, without just cause or excuse.**" (emphasis added)
4 (quoting Bromage v. Prosser, 4 Barn. & Cress. 247, 107 Eng. Rep.
5 1051 (K.B. 1825) (internal quotation marks omitted)), superseded
6 by statute, Pub. L. No. 95-598, 92 Stat. 2549 (1978); Maynard v.
7 Fireman's Fund Ins. Co., 34 Cal. 48, 53 (1867) (same). Thus,
8 malice in law squares cleanly with § 523(a)(6) maliciousness.

9 In contrast, malice in fact is defined as "a **state of mind**
10 arising from hatred or ill-will, evidencing a willingness to
11 vex, annoy, or **injure another person.**" Davis v. Hearst, 160
12 Cal. at 160 (emphasis added); In re V.V., 51 Cal. 4th at 1028
13 ("Malice in fact – defined as 'a wish to vex, annoy, or injure'
14 . . . – consists of actual ill will or **intent to injure.**")
15 (emphasis added).

16 This background, highlights two points critical to any
17 § 523(a)(6) willfulness determination. First, by holding that
18 the requisite state of mind was an actual intent to injure (or
19 substantial certainty regarding injury), the Supreme Court in
20 Geiger effectively adopted a narrow construction and the most
21 blameworthy state of mind included within the common
22 understanding of malice in fact. As relevant here, under
23 California law, the general definition of malice in fact
24 encompasses less reprehensible states of mind.

25 Second, as the Supreme Court clarified in Geiger,
26 recklessly inflicted injuries do not satisfy the § 523(a)(6)
27 willfulness requirement. See 523 U.S. at 61-62. This
28 necessarily includes all degrees of reckless conduct, whether

1 arising from recklessness simple, heightened, or gross; conduct
2 that is reckless merely requires an intent to act, rather than
3 an intent to cause injury as required under Geiger. See H.R.
4 Rep. 95-595, at 365 (1977) (“‘Willful’ means deliberate or
5 intentional. To the extent that Tinker v. Colwell, 193 U.S. 473
6 [1904], held that a looser standard is intended, and to the
7 extent that other cases have relied on Tinker to apply a
8 ‘reckless disregard’ standard, they are overruled.”) (emphasis
9 added); Restatement (Second) of Torts § 500 cmt. f (1965). But
10 see Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1757 (2013)
11 (holding that, for the purposes of § 523(a)(4), the state of
12 mind for “defalcation” includes gross recklessness).

13 Here, the State Court Judgment provided two possible bases
14 for the application of issue preclusion: the findings in the
15 punitive damages award and the determination of breach of
16 fiduciary duty under state law. Neither basis supported an
17 application of issue preclusion on the issue of § 523(a)(6)
18 willfulness.

19 **3. The punitive damages award was an insufficient basis**
20 **for issue preclusion.**⁶

21 The jury’s punitive damages award against both of the
22 Debtors was based on a disjunctive finding of malice,
23 oppression, or fraud. The “malice, oppression or fraud” finding
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25 ⁶ The Debtors make much of the fact that the jury finding
26 was made in the alternative; that is, Yuri or Natalia. But, as
27 the bankruptcy court noted, the punitive damages award was
28 entered against both of the Debtors, which necessarily required
a finding of malice, oppression, or fraud against each
individual.

1 arises from California Civil Code § 3294 ("CC § 3294"), which
2 provides for the recovery of punitive damages in non-contract
3 breach civil cases. Each finding supplies an independent basis
4 for a punitive damages award under CC § 3294. See Coll. Hosp.
5 Inc. v. Super. Ct., 8 Cal. 4th 704, 721 (1994).

6 Civil Code § 3294 provides statutory definitions of these
7 terms.⁷ "Malice" is defined as either: (1) conduct that the
8 defendant intends to cause injury to the plaintiff ("Intentional
9 Malice"); or (2) despicable conduct carried on by the defendant
10 with a willful and conscious disregard of the rights or safety
11 of others ("Despicable Malice"). Cal. Civ. Code § 3294(c)(1).⁸
12 "Oppression" means "despicable conduct that subjects a person to
13 cruel and unjust hardship in conscious disregard of that
14 person's rights." Id. § 3294(c)(2). And, "fraud" refers to "an
15 intentional misrepresentation, deceit, or concealment of a
16 material fact known to the defendant with the intention on the
17 part of the defendant of thereby depriving a person of property
18 or legal rights or otherwise causing injury." Id. § 3294(c)(3).

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21 ⁷ Although enacted in 1872, CC § 3294 remained largely
22 unaltered until amendment in 1980. Civil Code § 3294 was
23 previously amended in 1901 (deemed unconstitutional and void in
24 Lewis v. Dunne, 134 Cal. 291 (1901)) and 1905.

25 Prior to 1980, although the statute required a finding of
26 malice, oppression, or fraud to recover punitive damages, it did
27 not expressly define those categories. The 1980 amendment added
28 the statutory definitions.

⁸ In 1987, the California legislature amended CC § 3294
and added the "despicable" adjective to the type of conduct
necessary for Despicable Malice and oppression. It also
qualified Despicable Malice with the requirement that a
defendant willfully and consciously disregard the rights or
safety of another.

1 Only Intentional Malice, see Brandstetter v. Derebery (In
2 re Derebery), 324 B.R. 349, 356 (Bankr. C.D. Cal. 2005), and
3 fraud expressly require an intent to cause injury. As a result,
4 only those findings satisfy the § 523(a)(6) willfulness
5 requirement for the purposes of issue preclusion. Conversely,
6 Despicable Malice and oppression, which arise from acts in
7 conscious disregard of another's rights or safety, fail to
8 satisfy the requisite state of mind for § 523(a)(6) willfulness.
9 As discussed in further detail below, conscious disregard is
10 akin to recklessness.

11 **a. A punitive damages award under California law can**
12 **be based on acts in conscious disregard.**

13 As defined by the California Supreme Court, a person acts
14 with a conscious disregard of another's rights or safety when he
15 is aware of the probable dangerous consequences of his conduct
16 and he willfully and deliberately fails to avoid those
17 consequences. Taylor v. Super. Ct., 24 Cal. 3d 890, 895-96
18 (1979); see also Jud. Council of Cal. Civ. Jury Instruction
19 (CACI) 3940, 3941; Cal. Civ. Jury Instructions (BAJI) 14.71,
20 14.72.1.

21 The conscious disregard requirement found in CC § 3294
22 appears to track the Taylor decision. In Taylor, the California
23 Supreme Court examined whether the act of driving while
24 intoxicated constituted malice for the purposes of a CC § 3294
25 punitive damages award. Previously, some California courts held
26 that reckless conduct did not establish malice as required for a
27 punitive damages award. See G.D. Searle & Co. v. Super. Ct., 49
28 Cal. App. 3d 22 (1975); see also Ebaugh v. Rabkin, 22 Cal. App.

1 3d 891, 896 (1972); Gombos v. Ashe, 158 Cal. App. 2d 517 (1958).
2 Contra Nolin v. Nat'l Convenience Stores, Inc., 95 Cal. App. 3d
3 279, 285-88 (1979) (gross recklessness supported punitive
4 damages award under CC § 3294). In an earlier case, the
5 California Supreme Court, however, used the term "reckless
6 misconduct" in dicta. See Donnelly v. S. Pac. Co., 18 Cal. 2d
7 863, 869-70 (1941).

8 The Taylor court held that "a conscious disregard of the
9 safety of others [could] constitute malice within the meaning of
10 [CC § 3294]." 24 Cal. 3d at 895. It also stated that to the
11 extent Gombos v. Ashe was inconsistent with its holding, that
12 case was disapproved. Id. at 900. Gombos previously held that
13 drunk driving, while reckless, wrongful, and illegal, did not
14 constitute malice within the meaning of CC § 3294. 158 Cal.
15 App. 2d at 527. The Taylor court never expressly excluded
16 recklessness as a basis for an award of punitive damages; it
17 thus kept the door open to punitive damages based on a state of
18 mind other than actual intent to injure.

19 Within a year of the Taylor decision, CC § 3294 was amended
20 to require conscious disregard with respect to Despicable Malice
21 and oppression. In so amending the statute, the California
22 legislature included the two types of malice that exist
23 currently: Intentional Malice and Despicable Malice. Clearly,
24 it did not intend to include two identical forms of malice in
25 the statutory definition. Thus, conscious disregard begins to
26 take shape as a state of mind less malicious than an intent to
27 injure.

28 ///

1 **i. Conscious disregard is the equivalent of**
2 **reckless conduct.**

3 In the continuum of states of mind supporting a judgment
4 based on tort, recklessness rests between negligence, requiring
5 no intent, and intentional misconduct, requiring both a
6 deliberate act and the desire to cause the consequences of the
7 act. In Donnelly v. S. Pac. Co., 18 Cal. 2d 863 (1941), the
8 California Supreme Court considered whether existing law
9 precluded a personal injury action based on negligence. It
10 examined the contours of negligence and intentional torts and
11 identified the existence of a third, intermediary category of
12 tort law: “[a] tort having some of the characteristics of both
13 negligence and willfulness occur[ed] when a person with **no**
14 **intent to cause harm** intentionally perform[ed] an act so
15 unreasonable and dangerous that he kn[ew], or should [have]
16 know[n], it [was] highly probable that harm [would] result.”
17 Id. at 869 (emphasis added). Noting the various terms employed
18 by the courts to describe this category of tort, it adopted with
19 approval the term “wanton and reckless misconduct.” Id.

20 This type of tort, the California Supreme Court explained,
21 “involve[d] no intention, as [did] willful misconduct, to do
22 harm, and i[t] differ[ed] from negligence in that it . . .
23 involve[d] an intention to perform an act that the actor [knew],
24 or should [have] know[n], [would] very probably cause harm.”
25 Id. Importantly, it recognized that “wanton and reckless
26 misconduct” was more closely akin to willful misconduct than to
27 negligence and, “[t]hus, it justifie[d] an award of punitive
28 damages.” Id. at 869-70.

1 The Donnelly court's analysis on this point is dicta, but
2 it is also consistent with the Restatement of Torts discussion
3 of reckless conduct.⁹ The Restatement explains that one type of
4 recklessness involves the situation where a person knows, or has
5 reason to know (based on an objective person standard),¹⁰ of
6 facts creating a high degree of risk of physical harm to
7 another, and deliberately proceeds to act, or **fails to act**, in
8 **conscious disregard** of, or indifference to, that risk.

9 Restatement (Second) of Torts § 500 cmt. a (1965) (emphasis
10 added).¹¹ The person must know (or have reason to know of) the
11 facts creating an unreasonable risk. Id.

12 The critical difference between intentional and reckless
13 misconduct is the necessary state of mind; for conduct to be
14 reckless, the person must intend the reckless act but need not
15 intend to cause the resulting harm. Id., cmt. f. To establish
16 recklessness, it is sufficient that the person realizes (or
17 should realize) the "strong probability that harm may result,
18 even though he hopes or even expects that his conduct will prove
19 harmless." Id. But, a strong probability is not equivalent to

20
21 ⁹ We refer to the Restatement (Second) of Torts, in
22 deference to the Supreme Court's discussion of the Restatement
23 Second in Geiger and the Ninth Circuit's decisions in In re
24 Jercich and In re Su. The Restatement (Third) of Torts:
Liability for Phys. & Emot. Harm §§ 1 (Intent) (2010) and 2
(Recklessness) (2010) do not contain substantive differences
that change our analysis.

25 ¹⁰ See Restatement (Second) of Torts § 12(1) (1965).

26 ¹¹ The Restatement Second also points out a second type of
27 reckless conduct: where the person knows (or has reason to know)
28 of the facts but does not realize or appreciate the high degree
of risk involved, although a reasonable man in his position
would do so. Restatement (Second) of Torts § 500 cmt. a (1965).

1 substantial certainty. See id. (“[A] strong probability is a
2 different thing from the substantial certainty without which he
3 cannot be said to intend the harm in which his act results.”);
4 id. § 8A cmt. b. Thus, “[a]s the probability that [injurious]
5 consequences will follow decreases, and becomes less than
6 substantial certainty, the [person’s] conduct loses the
7 character of intent, and becomes mere recklessness.” Id. § 8A
8 cmt. b.

9 Comparing the explanations of reckless conduct provided by
10 the Donnelly court and the Restatement of Torts with the
11 definition of conscious disregard, it becomes clear that
12 conscious disregard proceeds from reckless conduct. The common
13 factor between conscious disregard and reckless conduct is the
14 accompanying state of mind; both require solely an intent to act
15 and the focus lies there, rather than on an intent to cause the
16 consequences of the act as required by Geiger. Degrees of
17 recklessness may exist; but, again, whether recklessness is
18 heightened or gross, it is insufficient for a determination of
19 § 523(a)(6) willfulness.

20 In defining conscious disregard, the California Supreme
21 Court in Taylor employed a description consistent with reckless
22 conduct. As stated, acting with a conscious disregard within
23 the meaning of CC § 3294 requires: (1) being aware of the
24 probable dangerous consequences of one’s own conduct; and
25 (2) willfully and deliberately failing to avoid those
26 consequences. Taylor, 24 Cal. 3d at 895-96.

27 First, to be aware of probable dangerous consequences, a
28 person must first know or have reason to know of the facts

1 giving rise to a high degree of risk of harm to another.

2 Knowledge of such facts is an essential element of recklessness.

3 See Restatement (Second) of Torts § 500 cmt. a.

4 Second, whether consequences are "dangerous" relates to the
5 character of a person's unreasonable conduct and the necessarily
6 high degree of risk that serious harm will result from that
7 conduct. See id., cmts. a, c.

8 Third, the probability factor of dangerous consequences
9 also relates to reckless conduct. See id., cmt. a. Even a
10 strong probability that consequences may result, however, is not
11 equivalent to substantial certainty for the purposes of intent.
12 See id., cmt. f; id. § 8A cmt. b. In this context, probable
13 means more likely than not, while substantial certainty requires
14 near certainty.

15 Fourth, the terms "willfully" and "deliberately" mean only
16 that the person failed, by design, to avoid the consequences of
17 his wrongful act. His intent is focused on the act of being
18 unsuccessful in preventing potential bad consequences, rather
19 than on the actual consequences of his act. See id. § 500
20 cmt. b ("Conduct cannot be in reckless disregard of the safety
21 of others unless the act or omission is itself intended[.]").

22 The Supreme Court's decision in Bullock, although involving
23 a different exception to discharge and federal common law rather
24 than California state law, also strengthens the connection
25 between conscious disregard and recklessness. There, the
26 Supreme Court held that the term "defalcation," within the
27 meaning of § 523(a)(4), included a state of mind involving gross
28 recklessness with respect to improper fiduciary behavior. 133

1 S. Ct. at 1757. In doing so, it concluded that “[w]here actual
2 knowledge of wrongdoing is lacking, we consider conduct as
3 equivalent if the fiduciary ‘**consciously disregards**’ (or is
4 willfully blind to) ‘a substantial and **unjustifiable risk**’ that
5 his conduct will turn out to violate a fiduciary duty.” Id. at
6 1759 (quoting Model Penal Code § 2.02(2)(c) (1985)) (emphasis
7 added).

8 In sum, conscious disregard within the meaning of CC § 3294
9 is consistent with reckless conduct as discussed by California
10 cases, the Restatement of Torts, and Bullock.

11 **ii. California statutory authority and case law**
12 **otherwise support that conscious disregard**
13 **proceeds from reckless conduct.**

14 A statutory analogue lends significant support to the
15 determination that conscious disregard arises from reckless
16 conduct. California law provides for enhanced remedies in cases
17 of elder abuse. See Cal. Welf. & Inst. Code § 15657. In order
18 to claim these enhanced statutory remedies, a defendant must be
19 found guilty of **recklessness**, oppression, fraud, or malice in
20 the commission of abuse. See id. For the purposes of an elder
21 abuse act claim, recklessness is defined as “a ‘deliberate
22 disregard’ of the ‘high degree of probability’ that an injury
23 will occur.” Delaney v. Baker, 20 Cal. 4th 23, 31 (1999)
24 (citing Cal. Civ. Jury Instructions (BAJI) 12.77, defining
25 “recklessness” for intentional infliction of emotional distress;
26 Restatement (Second) of Torts § 500)). Thus, recklessness
27 “rises to the level of a conscious choice of a course of action
28 . . . with knowledge of the serious danger to others involved in

1 it." Id. at 31-32 (citing Restatement (Second) of Torts § 500
2 cmt. g).

3 The descriptions of recklessness for the purpose of an
4 elder abuse claim and conscious disregard within the meaning of
5 CC § 3294 are substantively similar. Indeed, the California
6 Supreme Court has held that a plaintiff alleging an elder abuse
7 claim must allege conduct "essentially equivalent" to conduct
8 necessary to support a CC § 3294 punitive damages award. See
9 Covenant Care, Inc. v. Super. Ct., 32 Cal. 4th 771, 789 (2004).
10 It, thus, implicitly recognized that an award of CC § 3294
11 punitive damages can be based on reckless conduct.

12 Moreover, various California courts have recognized the
13 availability of CC § 3294 punitive damages for **nonintentional**
14 **torts** when the offensive conduct is a conscious disregard of the
15 rights or safety of others. See Peterson v. Super. Ct., 31 Cal.
16 3d 147, 158 (1982) ("Nonintentional torts may [] form the basis
17 for punitive damages when the conduct constitutes conscious
18 disregard of the rights or safety of others."); Potter v.
19 Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1004 (1993)
20 ("[P]unitive damages sometimes may be assessed in unintentional
21 tort actions under [CC §] 3294."). Nonintentional torts,
22 including those predicated on reckless conduct, require only an
23 intent to act. See, e.g., Peterson, 31 Cal. 3d at 158-59
24 (Punitive damages are available to punish "[n]onintentional
25 conduct . . . when a party intentionally **performs an act** from
26 which he knows, or should know, it is highly probable that harm
27 will result.") (emphasis added).

28 ///

1 **iii. That "willful" is an additional requirement**
2 **for Despicable Malice does not change the**
3 **outcome of the analysis.**

4 As stated, Despicable Malice is defined as despicable
5 conduct done **willfully** and in conscious disregard of the rights
6 or safety of another; oppression, notably, requires only a
7 conscious disregard. Cal. Civ. Code § 3294(c)(1)-(2). The
8 additional "willful" requirement in Despicable Malice, however,
9 does not change the outcome of the analysis.

10 In the context of CC § 3294, the term "willful" refers only
11 to the deliberate conduct committed by a person in a despicable
12 manner. The statute, thus, employs the dictionary definition of
13 "willful." See Geiger, 523 U.S. at 61 n.3 (noting that Black's
14 Law Dictionary defined "willful" as "voluntary" or
15 "intentional"). There is no indication that "willful" refers to
16 a subjective intent to injure or a subjective belief that injury
17 is substantially certain to result. And, this interpretation
18 makes practical sense; to read the statute otherwise would
19 render the inclusion of Intentional Malice in CC § 3294
20 superfluous.

21 **b. Determining that conscious disregard is**
22 **insufficient to satisfy the § 523(a)(6)**
23 **willfulness requirement is consistent with**
24 **existing precedent.**

25 Construing conscious disregard as a form of reckless
26 conduct is consistent with Geiger and its progeny, including the
27 Ninth Circuit's decisions in In re Jercich and In re Su. As the
28 Supreme Court recognized in Geiger, expanding § 523(a)(6) to

1 include reckless conduct "would obviate the need for
2 § 523(a)(9), which specifically exempts 'debts for death or
3 personal injury caused by the debtor's operation of a motor
4 vehicle if such operation was unlawful because the debtor was
5 intoxicated from using alcohol, a drug, or another substance.'" Geiger, 523 U.S. at 62 (quoting 11 U.S.C. § 523(a)(9)).

7 Yet, the availability of punitive damages for injuries
8 caused while driving intoxicated was exactly the issue before
9 the California Supreme Court in Taylor. It was this issue that
10 caused the California Supreme Court to determine that conscious
11 disregard could constitute malice. Not long after, the
12 California legislature codified the inclusion of conscious
13 disregard into CC § 3294.

14 We cannot reconcile the rationale supplied by the Supreme
15 Court in Geiger in regards to § 523(a)(9) with the factual
16 circumstances giving rise to the conscious disregard standard in
17 Taylor. Thus, consistent with Geiger, we must reject the
18 attempt to give issue preclusive effect to findings based on
19 conscious disregard in the context of § 523(a)(6) willfulness.
20 As recognized in Geiger, a determination to the contrary would
21 render superfluous § 523(a)(9) in nondischargeability
22 proceedings.

23 **c. Despicable conduct, as also required for**
24 **Despicable Malice and oppression, is based on an**
25 **objective person standard.**

26 In addition to conscious disregard, both Despicable Malice
27 and oppression require conduct that is despicable. Cal. Civ.
28 Code § 3294(c)(1)-(2). Conduct is despicable when it is so

1 vile, base, contemptible, miserable, wretched, or loathsome that
2 ordinary decent people would look down upon and despise it.
3 Coll. Hosp. Inc., 8 Cal. 4th at 725 (describing despicable as
4 circumstances that are "base," "vile," or "contemptible."); Jud.
5 Council of Cal. Civ. Jury Instruction (CACI) 3940, 3941; Cal.
6 Civ. Jury Instructions (BAJI) 14.71, 14.72.1.

7 Whether conduct is despicable is measured by an objective
8 person standard. See In re Derebery, 324 B.R. at 356. But, an
9 objective, reasonable person standard is not allowed in the
10 § 523(a)(6) willfulness analysis. See In re Su, 290 F.3d at
11 1145 ("By its very terms, the objective standard disregards the
12 particular debtor's state of mind and considers whether an
13 objective, reasonable person would have known that the actions
14 in question were substantially certain to injure the
15 creditor."). Thus, a punitive damages award based on Despicable
16 Malice or oppression does not establish the subjective intent
17 required for § 523(a)(6) willfulness.

18 **d. The disjunctive findings in the punitive damages**
19 **award included Despicable Malice and oppression.**

20 Here, the CC § 3294 findings in the punitive damages award
21 were stated in the disjunctive: that Yuri and Natalia each acted
22 with malice **or** oppression **or** fraud. On this record, we cannot
23 ascertain the exact basis for the jury's findings. Because the
24 punitive damages award may have been based only on a finding of
25 Despicable Malice or oppression, issue preclusion was
26 unavailable on the issue of § 523(a)(6) willfulness.

27 To be clear, our holding does not eviscerate a bankruptcy
28 court's ability or opportunity to apply issue preclusion to a

1 state court jury's findings pursuant to CC § 3294. To the
2 extent the findings are **clearly** and **solely** based on a finding of
3 Intentional Malice, fraud, or both, such findings are sufficient
4 to meet the willfulness requirement of § 523(a)(6). And, of
5 course, a state court judgment based on an intentional tort may
6 independently satisfy the § 523(a)(6) willfulness requirement.

7 But, to the extent that CC § 3294 findings are stated in
8 the disjunctive or based on Despicable Malice or oppression or
9 both, those findings prevent the use of issue preclusion as to
10 § 523(a)(6) willfulness. Even then, however, those particular
11 findings are not without value to a creditor seeking
12 nondischargeability under § 523(a)(6). The creditor is still
13 entitled to seek issue preclusion on other issues based on
14 findings of Despicable Malice or oppression, including the
15 maliciousness requirement of § 523(a)(6). Under those
16 circumstances, the bankruptcy court need only try the singular
17 issue of the debtor's intent for the purposes of § 523(a)(6)
18 willfulness; that is, whether the debtor subjectively intended
19 to cause injury or was substantially certain that injury would
20 follow. It need not retry the entire state court case a second
21 time.

22 **4. The breach of fiduciary duty determination under**
23 **California law was an insufficient basis for issue**
24 **preclusion on the issue of § 523(a)(6) willfulness.**

25 In California, the elements for a breach of fiduciary duty
26 are the existence of a fiduciary relationship, breach of that
27 fiduciary duty, and damages. Oasis W. Realty, LLC v. Goldman,
28 51 Cal. 4th 811, 820 (2011). There is no particular scienter

1 requirement, let alone a requirement of a subjective intent to
2 injure. See Correia-Sasser v. Rogone (In re Correia-Sasser),
3 2014 WL 4090837, at *8 (9th Cir. BAP Aug. 19, 2014). As a
4 result, without more, a judgment for breach of fiduciary duty
5 under California law cannot support a willfulness determination
6 under § 523(a)(6).

7 **B. The bankruptcy court erred in granting summary judgment to**
8 **Precision on its § 523(a)(4) claim against Yuri based on**
9 **the issue preclusive effect of the State Court Judgment.**

10 Section 523(a)(4) excepts from discharge debts for fraud or
11 defalcation while acting in a fiduciary capacity. Whether a
12 debtor is a fiduciary for the purposes of § 523(a)(4) is a
13 question of federal law. Lewis v. Scott (In re Lewis), 97 F.3d
14 1182, 1185 (9th Cir. 1996). The definition is construed
15 narrowly, requiring that the fiduciary relationship arise from
16 an express or technical trust that was imposed prior to the
17 wrongdoing that caused the debt. Ragsdale v. Haller, 780 F.2d
18 794, 796 (9th Cir. 1986) (“The broad, general definition of
19 fiduciary—a relationship involving confidence, trust and good
20 faith—is inapplicable in the dischargeability context.”); see
21 also Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir.
22 1997).

23 **1. Express or technical trust**

24 State law determines whether the requisite trust
25 relationship exists. See In re Lewis, 97 F.3d at 1185; Mele v.
26 Mele (In re Mele), 501 B.R. 357, 365 (9th Cir. BAP 2013). The
27 Debtors argue that here an express trust did not exist because
28 the elements for a trust were not satisfied under California

1 law. They maintain that, at best, the 2005 operating agreement
2 required that Yuri hold the properties in trust for Precision;
3 but, because Yuri was the sole member of Precision from 2005 to
4 2008, the duty to hold the properties in trust was effectively a
5 duty to himself.

6 In response, Precision argues that the Debtors ignore
7 Yuri's status as its manager, which independently established
8 fiduciary duties owed to the company. In any event, it contends
9 that, based on the 2008 amendment, the Bronfmans' membership
10 interests in Precision were deemed issued as of the date of the
11 2005 operating agreement. And, it argues that pursuant to
12 former California Corporations Code § 17153, a manager of a
13 limited liability company is subject to the same fiduciary
14 duties as a partner in a partnership; thus, by extension and
15 pursuant to Ragsdale, a manager is a trustee of the limited
16 liability company.

17 Something that neither party addresses is that Precision is
18 a Nevada limited liability company. Pursuant to the 2005
19 operating agreement, Precision was organized under the laws of
20 Nevada. Former California Corporations Code § 17450(a),¹² in
21 effect at the time of the underlying events and the state court
22 action, established that: "[t]he laws of the state . . . under
23 which a foreign limited liability company is organized shall
24 govern its organization and **internal affairs** and the **liability**
25 **and authority of its managers and members.**" Emphasis added.

26 The 2008 amendment to the Precision operating agreement

27
28 ¹² The new version, California Corporations Code
§ 17708.01, provides for the same.

1 states that: "[n]otwithstanding a conflict of [l]aws, the
2 operating agreement may be enforced in the Courts of the State
3 of California and or in the Courts of the State of New York,
4 including the Federal District Courts of California and/or New
5 York." Enforcing the operating agreement in a California or New
6 York court, however, does not alter the law under which the
7 agreement arose or by which it is governed. Thus, it appears
8 that, for the purposes of § 523(a)(4), we look to Nevada law to
9 determine whether an express or technical trust existed such
10 that Yuri was a fiduciary to Precision.

11 **a. An express trust did not exist.**

12 Under Nevada law, an express trust requires that:

13 (1) "[t]he settlor properly manifest[] an intention to create a
14 trust; and [(2)] [t]here is trust property" Nev. Rev.
15 Stat. § 163.003. There are various methods to create a trust,
16 including a declaration by the owner of property that he or she
17 holds the property as trustee or a transfer of property by the
18 owner during his or her lifetime to another person as trustee.
19 Id. § 163.002. Nevada also permits the creation of a business
20 trust. See Nev. Rev. Stat. §§ 88A.010-88A.930 (2003). To
21 create a business trust, a party must file with the Nevada
22 secretary of state a certificate of trust. See id. § 88A.210
23 (2005).

24 Here, there is no indication that an express trust existed.
25 Neither the 2005 operating agreement nor the 2008 amendment
26 satisfied the requirements for an express trust. Nor is there
27 anything else in the record that suggests the creation of an
28 express trust during the time that Yuri was manager of

1 Precision. Similarly, nothing in the record before us evidences
2 the creation of a business trust. Thus, the next issue is
3 whether a technical trust existed under Nevada law.

4 **b. On this record, we cannot determine whether a**
5 **technical trust existed.**

6 Nevada law does not define a technical trust. In the
7 absence of a definition under state law, we construe a technical
8 trust as one imposed by law. See In re Mele, 501 B.R. at 365;
9 see also Teamsters Local 533 v. Schultz (In re Schultz), 46 B.R.
10 880, 885 (Bankr. D. Nev. 1985) (“[A technical] trust . . . may
11 arise by operation of a state statute which imposes trust-like
12 obligations on those entering into certain kinds of
13 contracts.”).

14 Our review of the Nevada Revised Statutes (“NRS”) reflects
15 that a Nevada limited liability company does not necessarily
16 involve a trust relationship between a manager or member and the
17 limited liability company. One exception – NRS § 86.391 –
18 provides that “[a] member **holds as trustee** for the company
19 specific property stated in the articles of organization or
20 operating agreement as contributed by the member, but which was
21 not so contributed.” Nev. Rev. Stat. § 86.391(2) (emphasis
22 added). And, NRS § 86.311 establishes that “[r]eal and personal
23 property owned or purchased by a company must be held and owned,
24 and conveyance made, in the name of the company.”

25 Unlike California, Nevada does not have a statute equating
26 the fiduciary duties of a manager in a limited liability company
27 context to those of a partner in a partnership. Therefore,
28 duties under partnership law are irrelevant. Instead, Nevada

1 law establishes that, in addition to a limited liability
2 company's articles of organization, the operating agreement, if
3 any,¹³ is central to defining the contours of the fiduciary
4 relationship. And, parties to an operating agreement have
5 significant latitude in expanding or limiting fiduciary duties.
6 See Nev. Rev. Stat. § 86.286 (2013).

7 Here, the 2005 operating agreement does not expressly
8 establish the existence or the non-existence of fiduciary duties
9 owed to Precision by its manager. Nor does it provide that Yuri
10 contributed any property to the company, the only manner in
11 which Nevada law expressly creates a fiduciary duty to a limited
12 liability company. See Nev. Rev. Stat. § 86.391(2). The
13 operating agreement, however, provides that "[n]o real or other
14 property of the LLC shall be deemed to be owned by any Member
15 individually, but shall be owned by and title shall be vested
16 solely in the LLC." While that provision and NRS § 86.311
17 created duties owed to Precision, we cannot determine whether
18 either appropriately relates to a technical trust, rather than
19 to a constructive or resulting trust. The latter trusts, of
20 course, are insufficient to support § 523(a)(4)
21 nondischargeability. See Ragsdale, 780 F.2d at 796.

22 Other documents and evidence may also exist that fill the
23 lacuna here; for example, Precision's articles of organization,
24 required to create a limited liability company under Nevada law.
25 See Nev. Rev. Stat. § 86.151(1)(a) (2003). Such document may or

27 ¹³ In Nevada, "[a] limited-liability company may, but is
28 not required to, adopt an operating agreement." Nev. Rev. Stat.
§ 86.286.

1 may not establish that a trust relationship existed between Yuri
2 and Precision. These determinations, however, must be made by
3 the bankruptcy court, rather than the Panel, in the first
4 instance.

5 On this record, we cannot conclude that, as a matter of
6 law, a technical trust existed under Nevada law. The bankruptcy
7 court, thus, abused its discretion in giving preclusive effect
8 to the State Court Judgment on the issue of whether there
9 existed a fiduciary relationship in relation to a technical
10 trust for the purposes of § 523(a)(4) nondischargeability.¹⁴

11 **C. Judgment amount excepted from discharge**

12 Finally, the Debtors argue that the bankruptcy court was
13 required to conduct a separate inquiry into the measure of
14 damages attributable to the specific tortious conduct at issue
15 in the state court action. They contend that there were
16 multiple breaches of fiduciary duty alleged and to the extent
17 any of the breaches do not constitute a breach under federal
18 law, any damages flowing from such breach are dischargeable.
19 They also contend that only a damages judgment for fraud is
20 subject to issue preclusion without further analysis by the
21 bankruptcy court.

22 Based on our conclusions on both the § 523(a)(6) and (a)(4)
23 issues, we need not address this argument on appeal.

24 **CONCLUSION**

25 Given the unavailability of issue preclusion, the
26 bankruptcy court erred in granting summary judgment in favor of

27 ¹⁴ Given our conclusion, we do not address the other issues
28 related to the § 523(a)(4) nondischargeability judgment.

1 Precision based on the preclusive effects of the State Court
2 Judgment. Therefore, we VACATE the summary judgment and REMAND
3 to the bankruptcy court for further proceedings consistent with
4 this opinion.

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