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NOT FOR PUBLICATION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.	WW-15-1178-TaKuJu
6	MARK E. PHILLIPS,	)	Bk. No.	14-18440-TWD
7	Debtor.	)	Adv. No.	15-01052-TWD
8	_____	)		
9	MARK E. PHILLIPS,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	ESTATE OF ROBERT M. ARNOLD,	)		
13	Appellee.	)		
	_____	)		

Submitted Without Oral Argument\*\*  
on November 17, 2016

Filed - December 16, 2016

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Timothy W. Dore, Bankruptcy Judge, Presiding

Appearances: Appellant Mark E. Phillips pro se on brief; Alan  
J. Wenokur on brief for Appellee Estae of Robert  
M. Arnold.

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

\* 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).

\*\* The Panel unanimously determined that the appeal was  
suitable for submission on the briefs and record pursuant to  
Rule 8019(b)(3).

1 **INTRODUCTION**

2 Debtor Mark E. Phillips appeals from a summary judgment  
3 excepting from discharge a prepetition state court judgment  
4 pursuant to § 523(a)(4)<sup>1</sup> and based on embezzlement. He contends  
5 that the bankruptcy court erred in giving the state court  
6 judgment issue preclusive effect.

7 We AFFIRM the bankruptcy court.

8 **FACTS**

9 In June 2006, Debtor incorporated Banana Corporation  
10 ("Banana") in the state of Washington. At all relevant times,  
11 he was the corporation's sole director, officer, and majority  
12 shareholder.

13 Debtor solicited a \$5.5 million investment from Robert M.  
14 Arnold allegedly to allow Banana "to develop concepts, trade  
15 secrets and intellectual property regarding a mobile transaction  
16 business . . . ." The investment was made in several tranches  
17 between June 2006 and May 2007. In exchange, Arnold obtained a  
18 15% ownership interest in Banana; Debtor retained the remaining  
19 85% ownership interest. There were no other shareholders of  
20 Banana and no other cash investors aside from Arnold.

21 Debtor also owned A-Dot Corporation ("A-Dot"). Before  
22 forming Banana, he effectively rendered A-Dot inactive by  
23 shifting substantially all its employees and assets to MOD  
24 Systems, Inc. ("MOD"), yet another wholly owned company.

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25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
27 All "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure. All "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 Despite the transfers, Debtor retained a position as some type  
2 of employee at A-Dot, but MOD also employed him full-time.

3 In July 2006, the month after Arnold's infusions of capital  
4 to Banana commenced, Debtor caused Banana to enter into a  
5 contract agreeing to provide services to the now inactive A-Dot.  
6 Thus began a series of transactions between Banana and A-Dot  
7 that fall broadly into three general categories: consulting fee  
8 transfers, loans, and miscellaneous transfers.

9 **Consulting fees arrangements.** In December 2006, Banana  
10 paid A-Dot a \$1,000,000 "consulting fee." As the Washington  
11 state court later found, however, there were no records  
12 justifying this payment, documenting Banana's receipt of  
13 consulting services, or reflecting any "deliverables, action  
14 items, scheduling, scope of assignment, compensation rates,  
15 deadlines or invoices . . . ." [Findings of Fact & Conclusions  
16 of Law at 5, Arnold v. Phillips, No. 10-2-10227-2 SEA (Super.  
17 Ct. Wash., Sept. 26, 2013).] Debtor concurrently caused A-Dot  
18 to transfer the \$1,000,000 "consulting fee" into his personal  
19 brokerage account. He later claimed that the fee was a  
20 licensing fee rather than compensation for consulting services;  
21 the state court was not convinced, noting that "the intellectual  
22 property allegedly licensed had already been assigned by  
23 [Debtor] to Banana in return for stock." [Id.]

24 Between June and December 2006, Debtor also caused Banana  
25 to pay him \$1,160,000 in "consulting fees". The state court  
26 later found that there was no written agreement between Banana  
27 and Debtor documenting a consulting arrangement or otherwise  
28 "setting forth the scope of work, deliverables, action items,

1 deadlines or rates for these 'consulting fees.'" And there were  
2 no records as to "any deliverables, action items, scheduling,  
3 scope of assignment, compensation rates, deadlines or invoices  
4 . . . ." [Id. at 7.] The state court was skeptical of Debtor's  
5 ability to provide consulting services to Banana when he was  
6 employed more than full-time (60 hours a week) by MOD.

7 In addition, Debtor caused Banana to enter into a  
8 consulting agreement with his longtime friend, Douglas Lower.  
9 Banana eventually paid a total of \$450,000 in "consulting fees"  
10 to Lower as an "advance" of the consulting fees. The state  
11 court later found, however, that the agreement did "not describe  
12 a work assignment, provide[d] no fee schedule and identifie[d]  
13 no rate of pay." [Id. at 9.] The state court also found that  
14 Debtor acknowledged that this fee constituted a "finders fee" to  
15 Lower, "for getting [Debtor] access to [] Arnold and his money  
16 through Lower's wife . . . ." [Id.] Apparently, Lower's wife  
17 was a longtime employee of Arnold's. The state court found that  
18 Debtor disguised the finder's fee to hide its true nature from  
19 Arnold.

20 **Loans.** In September 2006, Debtor caused Banana to loan  
21 \$2,385,000 to A-Dot; the loans came due and payable five years  
22 later. Debtor signed the loan documents as both lender and  
23 borrower and without corporate board authorization; he did so in  
24 contravention of A-Dot's organizational documents and in  
25 disregard of legal counsel's advice that he "avoid conflicted  
26 transactions unless an independent board approved the  
27 transaction." A-Dot ultimately repaid only \$50,000 on the loan  
28 and never paid anything categorized as interest. Despite these

1 facts, Banana's financial records did not contain any  
2 documentation of loan accruals. When the state court issued its  
3 findings of fact and conclusions of law, A-Dot owed Banana  
4 \$3,095,709.558 on this loan.

5 In February 2007, Debtor caused Banana to loan Lower  
6 \$200,000. The promissory note, signed by Debtor on Banana's  
7 behalf, provided for a five year term and established a 5%  
8 annual interest rate. Lower never paid the loan.

9 **Other transfers.** Finally, Debtor caused A-Dot to make the  
10 following transfers, apparently using funds from the Banana  
11 transactions:

- 12 • October 2006: \$150,000 wire from A-Dot to other Debtor  
13 controlled entities;
- 14 • February 2007: \$500,000 wire from A-Dot to Debtor;
- 15 • June 2007: \$25,000 wire from A-Dot to Debtor;
- 16 • 2007: Two income tax payments by A-Dot for Debtor's  
17 personal taxes in the total amount of \$705,000; and
- 18 • Payments totaling at least \$100,584.28 for repayment of  
19 credit card purchases made for Debtor's personal benefit.

20 The state court determined that all of the preceding  
21 transactions lacked a business justification and "constituted a  
22 related party transaction without an independent board review or  
23 approval, self-dealing, and a breach of [Debtor's] fiduciary  
24 duty owed to Banana Corporation."

25 **The state court actions.** After he discovered these  
26 transactions, Arnold sued Banana in Washington state court. To  
27 settle this first suit, Banana assigned to Arnold its claims  
28 against Debtor and other defendants. Arnold, as Banana's

1 assignee, brought a second state court action against Debtor and  
2 others. This complaint alleged several causes of action,  
3 including corporate waste and looting under Revised Code of  
4 Washington ("RCW") § 23B.08.300,<sup>2</sup> conversion and embezzlement  
5 under RCW § 23B.08.300, unjust enrichment, and breach of  
6 contract. After Arnold died, his estate succeeded him in the  
7 lawsuit and asserted Banana's claims.

8 The state court subsequently entered an order granting  
9 summary judgment in Arnold's estate's favor on the above causes  
10 of action (i.e., the causes Arnold's estate was asserting on  
11 Banana's behalf). In doing so, it found that Debtor's "behavior  
12 amounted to a deliberate looting or waste of funds invested by  
13 [] Arnold in Banana" and established that Debtor was liable to  
14 Banana. It reserved the amount of damages for trial.

15 Following a trial on damages, the state court issued  
16 written findings of fact and conclusions of law and entered a  
17 judgment in favor of the Arnold estate, as Banana's assignee.  
18 The judgment awarded damages in the amount of \$4,190,000. The  
19 state court adopted and expanded on its summary judgment  
20 findings. Debtor appealed the judgment to the Washington court  
21 of appeal.

22 **The nondischargeability action.** Debtor then filed a  
23 voluntary chapter 7 petition. The Arnold estate commenced a  
24 nondischargeability action against him and sought to except the  
25 state court judgment from discharge under § 523(a)(2)(A),  
26

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27 <sup>2</sup> RCW § 23B.08.300 relates to the general standards for  
28 corporate directors under Washington law.

1 (a) (4), and (a) (6). Debtor received his chapter 7 discharge.

2 The Arnold estate later moved for summary judgment based on  
3 the issue preclusive effect of the state court judgment as to  
4 the claims based on § 523(a) (4) embezzlement and § 523(a) (6).  
5 Debtor, pro se, opposed. As relevant here, he asserted that  
6 § 523(a) (4) embezzlement required "fraud in fact, involving  
7 moral turpitude or intentional wrong, rather than implied or  
8 constructive fraud." He contended that Washington law did not  
9 provide for a statutory or common law cause of action for  
10 embezzlement. And he argued that the state court did not make a  
11 finding of fraud as required for § 523(a) (4) embezzlement.

12 At the hearing, the bankruptcy court granted summary  
13 judgment on the § 523(a) (4) embezzlement claim but denied the  
14 motion as to the § 523(a) (6) claim. In a thorough oral ruling,  
15 it meticulously set forth the basis for its decision,  
16 specifically pointing out that the third element of § 523(a) (4)  
17 embezzlement "require[d] only indicia of fraud as opposed to  
18 proof of all elements of fraud." It found that

19 The state court's findings and conclusions  
20 demonstrate[d] numerous indicators of fraud including  
21 "intentional conversion of Banana's funds", self-  
22 dealing, the complete lack of disclosure to [] Arnold  
23 of the improper payments, the lack of a business  
24 purpose for the improper payments, the lack of records  
25 and invoices, clear and convincing evidence of bad  
26 faith, and mislabeling the payment of a substantial  
27 finder's fee in order to avoid disclosure to []  
28 Arnold.

25 Hr'g Tr. (May 15, 2015) at 25:6-14.

26 In denying the summary judgment motion on the § 523(a) (6)  
27 claim, the bankruptcy court determined that the state court's  
28 findings and conclusions did not contain sufficient findings to

1 support the § 523(a)(6) willful injury requirement. It noted,  
2 in particular, that “[t]he state court made very few findings  
3 regarding [Debtor’s] subjective intentions.”

4 Following the bankruptcy court’s entry of the order on the  
5 summary judgment motion,<sup>3</sup> Debtor timely appealed.

6 While this appeal was pending, the Washington court of  
7 appeal issued a decision affirming the state court judgment “in  
8 all respects.” See Estate of Arnold v. Phillips, 191 Wash. App.  
9 1014, 2015 WL 7260028 (Nov. 16, 2015) (unpublished).

#### 10 JURISDICTION

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

#### 14 ISSUE

15 Whether the bankruptcy court erred in granting summary  
16 judgment to the Arnold estate by giving issue preclusive effect  
17 to the state court judgment.

#### 18 STANDARDS OF REVIEW

19 We review de novo the bankruptcy court’s decisions to grant  
20 summary judgment and to except a debt from discharge under  
21 § 523(a). See Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219,  
22 1221-22 (9th Cir. 2010); Oney v. Weinberg (In re Weinberg),  
23 410 B.R. 19, 28 (9th Cir. BAP 2009); see also Carrillo v. Su  
24 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002)

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25  
26 <sup>3</sup> The bankruptcy court’s order on the summary judgment  
27 motion contained a Civil Rule 54(b) certification and stated  
28 that it was a final order. Thus, the order is final for the  
purposes of this appeal.



1 (nondischargeability presents mixed issues of law and fact and  
2 is reviewed de novo).

3 We also review de novo the bankruptcy court's determination  
4 that issue preclusion was available. Black v. Bonnie Springs  
5 Family Ltd. P'Ship (In re Black), 487 B.R. 202, 210 (9th Cir.  
6 BAP 2013). If issue preclusion was available, we then review  
7 the bankruptcy court's application of issue preclusion for an  
8 abuse of discretion. Id. A bankruptcy court abuses its  
9 discretion if it applies the wrong legal standard, misapplies  
10 the correct legal standard, or if its factual findings are  
11 illogical, implausible, or without support in inferences that  
12 may be drawn from the facts in the record. See  
13 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
14 Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262  
15 (9th Cir. 2009) (en banc)).

## 16 DISCUSSION

17 **Summary judgment.** Summary judgment is appropriate where  
18 the movant shows that there is no genuine dispute of material  
19 fact and that the movant is entitled to judgment as a matter of  
20 law. Fed. R. Civ. P. 56(a) (applicable in adversary proceedings  
21 under Rule 7056). The bankruptcy court must view the evidence  
22 in the light most favorable to the non-moving party when  
23 determining whether genuine disputes of material fact exist and  
24 whether the movant is entitled to judgment as a matter of law.  
25 See Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119,  
26 1125 (9th Cir. 2014). And it must draw all justifiable  
27 inferences in favor of the non-moving party. See id. (citing  
28 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

1           **Issue preclusion in a nondischargeability proceeding.** In a  
2 summary judgment context, the bankruptcy court may give issue  
3 preclusive effect to a state court judgment as the basis for  
4 excepting a debt from discharge. Harmon v. Kobrin  
5 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). The party  
6 asserting preclusion bears the burden of establishing the  
7 threshold requirements. Id. This means providing "a record  
8 sufficient to reveal the controlling facts and pinpoint the  
9 exact issues litigated in the prior action." Kelly v. Okoye  
10 (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100  
11 F.3d 110 (9th Cir. 1996). Ultimately, "[a]ny reasonable doubt  
12 as to what was decided by a prior judgment should be resolved  
13 against allowing the [issue preclusive] effect." Id.

14           We apply the forum state's law of issue preclusion when  
15 determining if issue preclusion is appropriate. In re Harmon,  
16 250 F.3d at 1245. Here, that requires analysis under Washington  
17 law.

18           **Washington issue preclusion.** In Washington, issue  
19 preclusion requires that:

- 20           (1) the issue decided in the prior adjudication is  
21 identical with the one presented in the second action;  
22 (2) the prior adjudication must have ended in a final  
23 judgment on the merits; (3) the party against whom the  
24 plea is asserted was a party or in privity with the  
25 party to the prior adjudication; and (4) application  
26 of the doctrine does not work an injustice.

27 In re Estate of Hambleton, 181 Wash. 2d 802, 834 (2014).

28           On appeal, Debtor does not contest that the second,<sup>4</sup> third,

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29           <sup>4</sup> Under Washington law, a trial court judgment is final  
30 for preclusion purposes during an appeal. State v. Harrison,

(continued...)

1 and fourth elements were satisfied. Instead, he focuses on  
2 whether the issues decided by the state court were identical to  
3 those required for a determination of § 523(a)(4) embezzlement.

4 **Section 523(a)(4).** Section 523(a)(4) prevents discharge  
5 “for fraud or defalcation while acting in a fiduciary capacity,  
6 embezzlement, or larceny.” Federal law (and not state law)  
7 supplies the definition of embezzlement within the meaning of  
8 § 523(a)(4). First Del. Life Ins. Co. v. Wada (In re Wada),  
9 210 B.R. 572, 576 (9th Cir. BAP 1997). It is defined as “the  
10 fraudulent appropriation of property by a person to whom such  
11 property has been [e]ntrusted or into whose hands it has  
12 lawfully come.” Id. (citing Moore v. United States, 160 U.S.  
13 268, 269 (1895)). And it “requires a showing of wrongful  
14 intent.” See Bullock v. BankChampaign, N.A., 133 S. Ct. 1754,  
15 1760 (2013). “Embezzlement, thus, requires three elements:  
16 (1) property rightfully in the possession of a nonowner;  
17 (2) nonowner’s appropriation of the property to a use other than  
18 which [it] was entrusted; and (3) circumstances indicating  
19 fraud.” Transamerica Commercial Fin. Corp. v. Littleton  
20 (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991) (internal  
21 quotation marks and citation omitted).

22 Debtor does not dispute on appeal that he was entrusted  
23 with Banana’s funds. Nor can he credibly dispute the state  
24 court’s findings, now affirmed by the Washington court of  
25 appeal, that he acted inappropriately as to the funds. Thus,

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27 <sup>4</sup>(...continued)  
28 148 Wash. 2d 550, 561-62 (2003).

1 the only question on appeal relates to the third element:  
2 whether the circumstances indicated fraud and whether the state  
3 court judgment previously adjudicated this issue.

4 **Issue preclusion was available.** As noted, in determining  
5 whether issue preclusion was available in this  
6 nondischargeability action, we must compare the elements  
7 establishing liability in the state court judgment with the  
8 elements required for a § 523(a)(4) embezzlement judgment.  
9 Here, this task is superficially complicated because there is no  
10 civil cause of action for embezzlement under Washington law.  
11 Instead, under Washington law, embezzlement is a form of  
12 criminal theft. See In re Disciplinary Proceeding Against  
13 Schwimmer, 153 Wash. 2d 752, 761 n.2 (2005) (citing RCW  
14 § 9A.56.020(1)(a)). Thus, the state court civil cause of action  
15 labeled as an embezzlement claim was not based on RCW  
16 § 9A.56.020(1)(a), a criminal statute. Instead, embezzlement  
17 referred imprecisely to a claim for breach of Debtor's duties as  
18 a director under RCW § 23B.08.300.

19 The Washington action conversion claim presents another  
20 facial problem. In Washington, "[c]onversion is the willful  
21 interference with another's property without lawful  
22 justification, resulting in the deprivation of the owner's right  
23 to possession." Lowe v. Rowe, 173 Wash. App. 253, 263 (2012).  
24 But conversion under Washington law does not require a wrongful  
25 intent, Damiano v. Lind, 163 Wash. App. 1017 (2011), as is  
26 necessary for a § 523(a)(4) embezzlement determination.

27 Notwithstanding these differences, we conclude that the  
28 substance of the state court's findings and conclusions taken

1 together support a determination that the circumstances  
2 sufficiently indicated fraud and a wrongful intent as required  
3 for a § 523(a)(4) nondischargeability judgment.

4 Debtor primarily asserts error because the state court did  
5 not make an explicit finding of fraud. We acknowledge this  
6 point but find it inapposite. The finding required for a  
7 determination of § 523(a)(4) embezzlement is that Debtor's  
8 actions indicated fraud. Such a determination is not synonymous  
9 with an intent to defraud as required under § 523(a)(2)(A). And  
10 even if it were, § 523(a)(2)(A) does not necessarily require a  
11 misrepresentation as Debtor argues. Recently in Husky Int'l  
12 Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016), the United States  
13 Supreme Court clarified that misrepresentation is not an element  
14 of actual fraud under § 523(a)(2)(A). That is, actual fraud may  
15 include a wider array of misconduct. The record here  
16 sufficiently establishes misconduct that falls within the  
17 broader definition of actual fraud and even more plainly meets  
18 the § 523(a)(4) requirement of indicia of fraud.

19 The state court, at summary judgment, found that Debtor  
20 "admitted in [a] hearing that he personally received 'millions'  
21 of dollars from Banana when Banana made 'nothing'" and that his  
22 "behavior amounted to a deliberate looting or waste of funds  
23 invested by [] Arnold in Banana." And it found, in effect, that  
24 Debtor misidentified the Lower \$450,000 finder's fee in Banana's  
25 records by characterizing it as a consulting fee and that he did  
26 this to hide the fee's true nature from Arnold.

27 Then, in its findings of fact and conclusions of law, the  
28 state court found (or we can extrapolate that it found) that:

- 1 • Debtor acted in bad faith in a number of unauthorized  
2 transactions between Banana and A-Dot;
- 3 • There was no Banana business justification for the  
4 unauthorized transactions;
- 5 • There were no records justifying the \$1,000,000 "consulting  
6 fee" from Banana to A-Dot or the \$1,160,000 "consulting  
7 fee" from Banana to Debtor;
- 8 • There were no accruals shown on Banana's financial records  
9 for the loans that Debtor caused Banana to make to A-Dot or  
10 Lower, Debtor's longtime friend;
- 11 • Debtor engaged in several related-party transactions on  
12 Banana's behalf without corporate authorization;
- 13 • Debtor engaged in self-dealing in a number of the  
14 unauthorized transactions;
- 15 • Debtor improperly caused Banana to make several payments to  
16 himself;
- 17 • Debtor used some of the funds from Banana for improper  
18 personal expenditures and obligations;
- 19 • Debtor breached his fiduciary duties to Banana;
- 20 • Debtor never disclosed to Arnold any of the fees, loans,  
21 and payments made from Banana, even though Arnold was a 15%  
22 shareholder;
- 23 • Debtor's attempt to characterize the \$1,000,000 payment  
24 from Banana to A-Dot as a "licensing fee" was baseless  
25 since Debtor had already assigned the intellectual property  
26 allegedly licensed to Banana in exchange for stock; and
- 27 • Aside from a minuscule amount (\$50,000), neither of the two  
28 loans totaling \$2,585,000, which Debtor caused Banana to

1 make to A-Dot or Lower, were ever repaid and no interest  
2 was paid on either loan.

3 As stated, these findings were affirmed by the Washington  
4 court of appeal and are now final. Nothing in the state court's  
5 findings suggests that Debtor's acts were a mistake or  
6 innocuous. And Debtor's actions were not a one time occurrence;  
7 numerous transactions transferred substantial amounts of  
8 Banana's money to A-Dot – and then mostly to Debtor – during the  
9 time that Arnold invested money in Banana, all without  
10 appropriate Banana business justification. These facts indicate  
11 fraud and evidence wrongful intent.

12 Debtor finally contends that “[t]he Bankruptcy Court was  
13 forced to admit during oral argument, [that] there were no  
14 findings regarding the ‘subjective intentions’ of [Debtor],  
15 specifically such intentions that demonstrated he intended to  
16 harm Banana or Arnold.” The record shows, however, that the  
17 bankruptcy court made this comment when discussing Arnold's  
18 § 523(a)(6) claim. Section 523(a)(6) requires willful injury, a  
19 subjective intent to injure. Kawaauhau v. Geiger, 523 U.S. 57  
20 (1998) and Petralia v. Jercich (In re Jercich), 238 F.3d 1202  
21 (9th Cir. 2001). There is no authority requiring the same state  
22 of mind for § 523(a)(4) embezzlement. Thus, Debtor's reference  
23 to Geiger – a § 523(a)(6) case – is inapposite.

24 Based on the foregoing, granting summary judgment of  
25 nondischargeability based on § 523(a)(4) embezzlement is proper.

#### 26 CONCLUSION

27 For the reasons stated, we AFFIRM.