THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 99-50289
	)	
ENRIQUE F. VILLALBA,	)	Chapter 7
	)	
Debtor.	)	
	)	
	)	
WILLIAM J. GOLDBERG, et al.,	)	Adv. No. 99-5056
	)	
Plaintiffs,	)	JUDGE MARILYN SHEA-STONUM
	)	
v.	)	**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IN PART, AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IN PART**
	)	
	)	
ENRIQUE F. VILLALBA	)	
	)	
Defendant.	)	

This matter is before the Court on a motion for summary judgment (the "Motion for Summary Judgment") filed by plaintiffs, William J. Goldberg, Laura Lasorda Goldberg, Poster Arts Distributors & Gallery in the Courtyard, Inc. ("Poster Arts"), and William J. Goldberg, Trustee (collectively, "Plaintiffs"), and a response to that motion (the "Response to the Motion for Summary Judgment") filed by debtor-defendant, Enrique Villalba ("Defendant"). Pursuant to the Court's request at a pre-trial conference in this matter, the parties filed supplemental pleadings regarding a specific issue raised by the Motion for Summary Judgment. (Plaintiffs' supplemental pleading and the Motion for Summary Judgment shall hereinafter be collectively referred to as the "Motion" and Defendant's

supplemental pleading and the Response to the Motion for Summary Judgment shall hereinafter be collectively referred to as the "Response."). The matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), (E) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

A. BACKGROUND

On June 6, 1997, Plaintiffs filed a complaint against Defendant in the Superior Court of Los Angeles County, California alleging as separate counts the state law causes of action for "Breach of Fiduciary Duty," "Fraud," "Negligent Misrepresentation," and "Breach of Promissory Note" (the "California Complaint") (the California Complaint, together with all other pleadings filed in response and actions taken in relation to the California Complaint will hereinafter be referred to as the "California Litigation"). In the California Complaint, Plaintiffs alleged that, from sometime in March 1994 to sometime in March 1997, Defendant held himself out as a trained and licensed investment advisor who was capable of managing the savings of plaintiffs, William and Laura Goldberg, and the assets contained in pension and profit sharing accounts of Mr. Goldberg's art business, Poster Arts. Plaintiffs further alleged that Defendant placed those assets into highly risky and completely unsuitable investments and, despite contrary representations to Mr. Goldberg, made such unsuitable investments on margin. Plaintiffs contended that, because of Defendant's actions, they suffered losses in excess of $330,000.00.

On or about August 8, 1997, Defendant filed an answer and cross-complaint in the California Litigation. At or about the time that Defendant filed that answer and

cross-complaint, he served a set of interrogatories upon Plaintiffs. Those interrogatories were answered by Plaintiffs on or about September 10, 1997.

In October 1997 and May 1998, Plaintiffs submitted "Requests for Admissions to Defendant." Those requests went unanswered and Plaintiffs filed motions requesting that the matters addressed in their requests for admissions be deemed admitted. Those motions were granted in June and July of 1998. In January 1998, Defendant's counsel in the California Litigation filed a motion to withdraw citing, *inter alia*, that Defendant had ceased all communication with counsel. On March 25, 1998, Defendant's counsel's motion to withdraw in the California Litigation was granted.

At a final pre-trial conference held in the California Litigation in August 1998, the court granted Plaintiffs' motion to strike Defendant's answer due to his non-appearance and the matter was set for a default judgment hearing. Pursuant to that hearing, the court, on September 29, 1998, entered default judgment in favor of Plaintiffs and against Defendant in the principal sum of $330,000.00 plus interest and costs (the "Default Judgment").[1] It does not appear that Defendant ever filed a motion to vacate or set aside the Default Judgment and, on May 28, 1999, Defendant's attempt to appeal the Default Judgment was dismissed as untimely. The Default Judgment was domesticated in the State of Ohio in November 1998.

On February 9, 1999, Defendant filed a voluntary chapter 7 bankruptcy petition. Listed on Defendant's Schedule F - Creditors Holding Unsecured Nonpriority Claims was plaintiff, Poster Arts, for a default judgment in the amount of $330,000.00 and plaintiffs,

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[1] The Default Judgment was also entered against Transcapital Management, Inc., a named co-defendant in the California Litigation with which Defendant was associated at the time the alleged activity occurred. That co-defendant is not a party to the within action.

William and Laura Goldberg, for a default judgment in that same amount. On April 28, 1999, Plaintiffs filed a complaint (the "Adversary Complaint") alleging that the claims owed them by Defendant were not dischargeable in his chapter 7 bankruptcy pursuant to 11 U.S.C. §523(a)(4).

Thereafter, Plaintiffs filed the Motion, contending that entry of the Default Judgment should collaterally estop Defendant from relitigating the issues raised in the Adversary Complaint and that summary judgment should be entered in their favor. In the Response, Defendant contends that, because the Default Judgment merely established liability and made no independent findings of fact, the doctrine of collateral estoppel should not apply in this case, the Motion should not be granted and the matter should proceed to a trial on the merits. Based upon a review of the pleadings and for the reasons set forth below, the Court determines that the Motion should be granted, in part, and denied, in part.

B. STANDARD OF REVIEW

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

C. DISCUSSION

The doctrine of collateral estoppel applies to bankruptcy proceedings and can be

invoked in a nondischargeability action to prevent the relitigation of issues already decided by a state court. *Grogan v. Garner*, 498 U.S. 279 (1991). When applying the collateral estoppel doctrine, the principles of the Full Faith and Credit Statute (28 U.S.C. §1738) require a bankruptcy court to "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 53 (6th Cir. 1995), *citing Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997). Accordingly, this Court must look to California substantive law to determine whether the Default Judgment should have any preclusive effect in this adversary proceeding.

Pursuant to California law, the doctrine of collateral estoppel will bar the relitigation of certain issues if: (1) the issues are identical to those decided in the prior litigation; (2) the issues were actually litigated in the prior litigation; (3) the issues were necessarily decided in the prior litigation; (4) the decision in the prior litigation is final and on the merits; and (5) the party against whom preclusion is sought is the same as, or in privity with, the party to the prior litigation. *See Lucido v. The Superior Court of Mendocino County*, 51 Cal. 3d 335, 341, 795 P.2d 1223 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991). In California, collateral estoppel applies to default judgments because a party who permits a default judgment to be entered against him confesses the truth of all the material allegations in the complaint. *See Naemi v. Naemi (In re Naemi)*, 128 B.R. 273, 278 (Bankr. S.D. Cal. 1991), *citing O'Brien v. Appling*, 133 Cal. App. 2d 40, 42, 283 P.2d 289 (Cal. Ct. App. 1955). *See also Horton v. Horton*, 18 Cal. 2d 579, 585, 116 P.2d 605 (1941).

In the Response, Defendant contends only that the issues raised in the Adversary

Complaint were not "necessarily decided" in the California Litigation. It appears, therefore, that Defendant does not dispute that all of the other required elements for application of the collateral estoppel doctrine pursuant to California law have been met this case. Notwithstanding this apparent absence of dispute, the Court will discuss each required element in turn.

(1) Whether the issues in the Adversary Complaint are identical to those decided in the California Litigation: In the Adversary Complaint, Plaintiffs contend that the debt owed them should not be discharged in Defendant's chapter 7 bankruptcy because it was procured by his "fraud or defalcation while acting in a fiduciary capacity." *See* 11 U.S.C. §523(a)(4).[2] Therefore, the issues that Plaintiffs are trying to preclude from being relitigated are whether Defendant committed fraud or defalcation and, if so, whether Defendant was acting in a fiduciary capacity relative to the Plaintiffs when that fraud or defalcation took place.

Whether Defendant Committed Fraud or Defalcation: For purposes of §523(a)(4), "fraud" means actual fraud involving intentional deceit and moral turpitude, rather than implied or constructive fraud. *See Caldwell v. Hanes (In re Hanes),* 214 B.R. 786, 813 (Bankr. E.D.Va. 1997). The term "defalcation," as used in §523(a)(4), encompasses a much broader range of conduct:

> Defalcation as that term is used in 11 U.S.C. §523(a)(4) may result from a mere deficit resulting from the debtor's misconduct. It is no defense that the debtor derived no personal gain and defalcation may result through the

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[2] Section 523(a)(4) also provides that debts procured through embezzlement or larceny will not be dischargeable in an individual's chapter 7 bankruptcy case. Those provisions of §523(a)(4) were not relied upon by Plaintiffs in the Adversary Complaint and will not be discussed further in this Order.

> debtor's negligence rather than his misconduct. Defalcation has been defined broadly as the failure by a trustee to properly account for funds entrusted to him.

Morgan v. Musgrove (In re Musgrove), 187 B.R. 808, 814 (Bankr. N.D.Ga. 1995), *citing Hayton v. Eichelberger (In re Eichelberger)*, 100 B.R. 861, 864 (Bankr. S.D.Tex. 1989) (other citations omitted). *See also Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 257 (6th Cir. 1982) (holding that "defalcation" should be measured by objective standards).

Included, *inter alia*, in the California Complaint were the following allegations regarding Plaintiffs' first cause of action ("Breach of Fiduciary Duty") against Defendant:

> 13. On or about March 21, 1994, Villalba . . . formed a fiduciary relationship with [William] Goldberg. . . . Commencing on March 21, 1994 and continuing until March 3, 1997 when [William] Goldberg terminated his fiduciary relationship, Villalba . . . received and managed virtually all of [William] Goldberg's assets. To obtain the right to manage such assets, Villalba repeatedly assured [William] Goldberg . . . that Villalba would manage [William] Goldberg's assets conservatively and with due and appropriate regard for the fact that [William] Goldberg had recently married, had a new child, was engaged in a business which was increasingly difficult to prosper in, was prepared to accept only minimal amounts of risk and could not afford to lose his principal.
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> 27. Commencing in later 1995 and continuing throughout 1996, [William] Goldberg began to notice that his account statements reflected investments in commodities including gold and precious metal funds. [William] Goldberg had specifically and repeatedly discussed with Villalba the fact that he did not wish to invest in commodities because of their extreme volatility and because [William] Goldberg had absolutely no understanding regarding them. Villalba repeatedly assured [William] Goldberg that such investments would not be made.
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> 28. When [William] Goldberg confronted Villalba with the fact that he was investing contrary to his explicit instructions, Villalba informed [William] Goldberg that market conditions necessitated the change in investment strategy to maximize the recovery of principal losses and in light of past and

> future expected conditions both in the commodities, securities and federal funds markets. [William] Goldberg did not understand what Villalba was explaining to him, did not know what his alternatives were given the substantial unrealized losses and continued to believe that his fiduciary Villalba would not deceive him . . . .
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> 29. In fact, [William] Goldberg did not learn and understand until 1997 . . . that Villalba had been lying to him for years, had misappropriated management fees from accounts which he was not authorized to take them from, commingled and lost and could not account for funds which were specifically earmarked to be maintained as cash accounts for use by [William] Goldberg in connection with certain pressing and immediate family needs, acquired tens of thousands of dollars of investments on margin, including tens of thousands of dollars of unauthorized commodities including gold and precious metals and simply lied to him in the hope that by such lulling steps [William] Goldberg would allow Villalba's wrongdoing to go uncorrected and allow Villalba to go unpunished.
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> 32. As a direct and proximate result of the breaches of fiduciary duty described herein, [Plaintiffs] ha[ve] been damaged in an amount presently unknown but which exceeds $300,000.

Also included in the California Complaint were the following allegations regarding Plaintiffs' second cause of action ("Fraud") against Defendant:

> 35. Commencing in 1995 and continuing through 1997, Defendant Villalba repeatedly told [William] Goldberg that Villalba would and had invested [William] Goldberg's life's savings only in suitable and conservative investments.
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> 36. The representations . . . were false and, [William] Goldberg is informed and believes, were known by Villalba at all relevant times to be false.
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> 37. Villalba made each such representation with the intent to defraud [William] Goldberg, that is with the intent of inducing [William] Goldberg's justifiable reliance upon such representations.
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> 38. [William] Goldberg was unaware of the falsity of such representations and acted in justifiable reliance upon such representations.

> 39. As a direct and proximate result of the misrepresentations of Villalba, [Plaintiffs] ha[ve] been damaged in an amount that is presently unknown but which exceeds $300,000 . . . .

The foregoing allegations clearly set forth actions which, if proven to be true, would provide the basis for a finding of fraud and defalcation by Defendant as those terms are defined in §523(a)(4). Accordingly, the issues of whether Defendant committed fraud or defalcation relative to this proceeding are identical to issues raised in the California Litigation.

Whether Defendant was Acting in a Fiduciary Capacity: Under California law fiduciary relationships are construed very broadly to include any relation between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. *See Reuling v. Reuling,* 23 Cal. App. 4th 1428, 1438, 28 Cal. Rptr. 2d 726 (Cal. Ct. App. 1994). For purposes of an action under §523(a)(4), the term "fiduciary capacity" is construed very narrowly to include only an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt. *Davis v. Acceptance* Co., 293 U.S. 328 (1934); R.E. *America, Inc. v. Garver (In re Garver),* 116 F.3d 176, 179 (6th Cir. 1997). To prove the creation of an express or technical trust Plaintiffs must show: (1) a clearly defined res; (2) an unambiguous trust relationship; and (3) specific, affirmative duties undertaken by a trustee. *See Carlisle Cashway, Inc. v. Johnson (In re Johnson),* 691 F.2d 249, 252-53 (6th Cir. 1982) (discussing express trust requirements under §17(a)(4) of the Bankruptcy Act).

In the California Complaint, Plaintiffs allege that Defendant held himself out as a "trained and licensed investment advisor" who was capable of suitably managing Plaintiffs' assets and that from March 21, 1994 to March 3, 1997 Defendant acted in a fiduciary

capacity relative to Plaintiffs and their assets. *See* California Complaint ¶¶ 1 and 13. Apart from these general allegations regarding the existence of a fiduciary relationship under the laws of California, no specific allegations were made that could demonstrate the existence of "an express or technical trust" pursuant to federal bankruptcy law. *Cf. Prudential-Bache Securities, Inc. v. Sawyer (In re Sawyer)*, 112 B.R. 386 (D. Co. 1990) (debtor's coverage as "broker" under Commodity Exchange Act created technical trust in favor of customers for purposes of §523(a)(4)); *Jacobs v. Mones (In re Mones)*, 169 B.R. 246 (Bankr. D.C. 1994) (debtors' coverage under Investment Advisor Act of 1940 gave rise to "fiduciary relationship" as contemplated by §523(a)(4)); *Windsor v. Libani (In re Libani)*, 1994 WL 832019 (Bankr. M.D. Pa 1994) (debtor-investment advisor who did not maintain funds for clients over which he could exercise discretionary control was not a "fiduciary" for purposes of §523(a)(4)); *Lock v. Scheuer (In re Scheuer)*, 125 B.R. 584 (Bankr. C.D. Cal 1991) (finding that a California securities broker is a fiduciary for purposes of §523(a)(4)); *Woosley v. Edwards (In re Woosley)*, 117 B.R. 524 (B.A.P. 9th Cir. 1990) (debtor's California real estate license carried with it fiduciary obligations that qualified him as a "fiduciary" for purposes of §523(a)(4)).

Although the allegations in the California Complaint regarding Defendant's fiduciary relationship to Plaintiffs must be taken as true given entry of the Default Judgment, they are, alone, insufficient to demonstrate that the parties' relationship also satisfied the "fiduciary capacity" requirements of §523(a)(4). Thus, the issue of whether Defendant was acting in a "fiduciary capacity" relative to this proceeding is not identical to the issue raised in the California Litigation and genuine issues of material fact still exist regarding this matter.

(2) Whether the issues in the Adversary Complaint were actually litigated

in the California Complaint: Pursuant to California law, if issues were necessarily decided by a default judgment, those same issues are deemed to have also been actually litigated because a default judgment "conclusively establishes, between the parties. . .the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment." *Mitchell v. Jones,* 172 Cal. App. 2d 580, 586-87, 342 P.2d 503 (Cal. Ct. App. 1959). *See also Newsom v. Moore (In re Moore),* 186 B.R. 962, 970 (Bankr. N.D. Cal. 1995) (and California state court cases cited therein). *See also Younie v. Gonya (In re Younie),* 211 B.R. 367, 375 (B.A.P. 9th Cir. 1997). Because the Court finds that the issues of whether Defendant committed fraud or defalcation were necessarily decided in the California Litigation (*see* pp. 12-15, *infra*), the Court must also find that those same issues were actually litigated in the California Litigation.

(3) Whether the issues sought to be precluded were necessarily decided in the prior litigation. In the Response, Defendant claims that the issues in this adversary proceeding were not "necessarily decided" by the Default Judgment because that judgment only established liability and did not specifically indicate on which of the alternative causes of action it was based. With the exception of distinguishing this matter from cases that applied collateral estoppel to default judgments where alternative causes of action were not pled, Defendant does not set forth any case law to support his claim.

Pursuant to California law, which follows the Restatement, it is clear that a lower court judgment entered after trial and based on alternative causes of action has no subsequent preclusive effect as to any of those causes of action. *See Stout v. Pearson*, 180 Cal. App. 2d 211, 216-17, 4 Cal. Rptr. 313 (Cal. Ct. App. 1960). *See also* Restatement (Second) of Judgments §27 cmt. i (1980) ("If a judgment of a court of first instance is

based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone"). It is not clear, however, whether this same rule applies to a lower court judgment entered by default. Although there is no California precedent directly on point, this issue was recently discussed and decided in the case of *Harmon v. Kobrin*, 242 B.R. 183 (D. E.D. Cal. 1999).

In *Harmon*, a judgment-creditor, who obtained a pre-petition default judgment against debtor after a California state court struck debtor's pleadings as a sanction for abusive litigation practices, subsequently brought an adversary proceeding seeking a determination from the bankruptcy court that the judgment was nondischargeable pursuant to §523(a)(2). The bankruptcy court granted summary judgment in favor of the judgment-creditor and the debtor appealed. On appeal, the district court held that under California law (as predicted by the district court), collateral estoppel should apply to the default judgment even though the judgment-creditor's state court claim rested on alternative causes of action and the default judgment did not specify on which of those alternative causes of action it was based.

In reaching its decision, the district court in *Harmon* acknowledged a tension between two principles of California law that apply to default judgments: the principle that a default judgment has the same preclusive effect as a judgment after trial and the principle that a default judgment conclusively establishes between the parties the truth of all material allegations contained in the complaint in the first action. The court then resolved that tension by analyzing the different reasons for the rule that judgments on alternative grounds are not entitled to preclusive effect:

> In discussing the preclusive effect of a judgment on alternative grounds, the Restatement observes that while "it might be argued that the [lower court's] judgment should be conclusive with respect to both issues,"

> There are. . .persuasive reasons for analogizing the case to that of the nonessential determination. . . . First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens.
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> None of these reasons applies to a default judgment, however. First, where the judgment is by default none of the alternative grounds have been "carefully or rigorously considered" due to the default. Even so, California law gives preclusive effect to default judgments presumably because the defaulting party has deprived the other party of the opportunity to achieve a more considered judgment. Second, a party against whom a default judgment is entered is not entitled to an appeal on the merits. The sole avenue for relief is by motion to set aside the default and then appeal of a denial of that motion. Thus, the reasoning of the Restatement - - that a losing party might not appeal because of the possibility that the appellate court would not reach all grounds or that a party would appeal solely to avoid preclusion - - has no application to a default judgment.

Harmon v. Kobrin, 242 B.R. 183, 187 (D. E.D. Cal. 1999), *citing* Restatement (Second) of Judgments §27 cmt. i (1980) (all alterations in the original). The court went on to note additional considerations of California law that tip the scales in favor of treating a default judgment on alternative grounds differently from a fully litigated judgment:

> A default judgment is a sanction for failing to participate in a litigation in good faith. The collateral estoppel rules ought not to benefit the party against whom the default is entered. Yet if the issue of fraud were now to be determined in the bankruptcy court, then [plaintiff] would be deprived of his chosen forum for determining that issue. Further, had there been a litigated judgment in state court, there may well have been specific findings

> on fraud, perhaps a special verdict, such that the [default judgment] may have rested on a single ground entitled to preclusive effect. In short, [debtor] ought not to be in a position to transfer the fraud litigation to the bankruptcy court through the device of a default and then argue that the state court judgment lacks specificity when his own conduct was responsible in part for the generality of the judgment.

Harmon v. Kobrin, 242 B.R. 183, 188 (D. E.D. Cal. 1999).

The Court considers the reasoning in the *Harmon* case persuasive especially where, as in this case, a defendant actively participates in litigation and then through dilatory conduct or deliberate inaction causes a default to be entered against him. Accordingly, the Court finds that the issue of whether Defendant committed fraud or defalcation was "necessarily decided" in the California Litigation.

(4) Whether the Default Judgment is final and on the merits: The outcome in the California Litigation was clearly a determination on the merits because "a default judgment is as conclusive upon the issues tendered by the complaint as if rendered after an answer is filed and a trial is held on the allegations." *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 318 (6th Cir. 1997), (*citing* various bankruptcy and California state court cases that apply California law). Because Defendant did not timely appeal that determination or file a motion to set aside that judgment, it became final. Accordingly, the Default Judgment was a final determination on the merits raised in the California Litigation.

(5) Whether the Defendant is the same as or in privity with, a party to the California Litigation: With the exception of certain co-defendants named by Plaintiffs

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[3] Plaintiffs also named as defendants, Transcapital Management, Inc., a Washington corporation "through which [Defendant] was then conducting his affairs," and Does 1 through 100, "individuals and entities involved in some manner in causing the injuries

in the California Complaint,[3] the parties to this adversary proceeding are identical to the parties involved in the California Litigation. Accordingly, this element of collateral estoppel has also been met.

D. CONCLUSION

Based upon the foregoing, the Court finds that, as to the issues of whether Defendant committed fraud or defalcation pursuant to §523(a)(4), the doctrine of collateral estoppel applies to the Default Judgment and Defendant is precluded from relitigating those issues in this adversary proceeding. The Court also finds that, as to the issue of whether Defendant was acting in a "fiduciary capacity" when he committed such fraud or defalcation, the doctrine of collateral estoppel does not apply to the Default Judgment, that genuine issues of material fact exist regarding that matter and that Defendant is not precluded from relitigating that issue in this adversary proceeding.

THEREFORE IT IS HEREBY ORDERED:

1. That the Motion is granted, in part, and denied, in part, and

2. That a pre-trial conference shall be held in this matter on **February 15, 2000** at **2:00 p.m.**, in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 2/01/00

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complained of [in the California Complaint] but whose identities are presently unknown to Plaintiffs." *See* California Complaint ¶¶ 9 and 11.