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8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 In re:) Case No. 99-3-3021-STC
12 JOSEPH NATHAN GARCIA,) Chapter 7
13 Debtor.)
14 _____)
15 STEPHEN J. SUZMAN, individually) **Adv. No. 99-3-443-TC**
16 and d/b/a SUZMAN DESIGN ASSOCIATES,)
17 Plaintiff,)
18 vs.) **FINDINGS OF FACT AND**
19 JOSEPH NATHAN GARCIA,) **CONCLUSIONS OF LAW**
20 Defendant.)
21 _____)

22 This above-entitled action came to trial on August 15, 2000.
23 Benjamin Elliot Kaplan and Douglas Cameron MacLellan appeared for
24 Plaintiff. James D. Wood appeared for Defendant. Upon due
25 consideration, the court hereby makes the following findings of
26 fact and conclusions of law.
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28

1 **FINDINGS OF FACT**

2 (1) Defendant Joseph Nathan Garcia lived in a close personal
3 relationship with Bert Walden from 1984 until Walden's death in
4 1998.

5 (2) Walden suffered from alcoholism and depression. Prior
6 to September 1997, he had not worked for more than two years.
7 Starting in 1996, Walden collected Social Security disability
8 benefits of approximately \$650 per month.

9 (3) Garcia maintained two credit cards for his personal use:
10 Mastercard account number 5458-0001-9214-2145 and American Express
11 account number 3722-813610-31004. Walden was an additional
12 cardholder on the Mastercard account, but not on the American
13 Express account.

14 (4) Prior to Summer 1997, Garcia learned that Walden had
15 obtained credit cards in Garcia's name without Garcia's
16 permission.

17 (5) In mid-Summer 1997, Garcia discovered that Walden had
18 obtained approximately \$10,000 cash through Garcia's American
19 Express account by forging Garcia's signature on convenience
20 checks.

21 (6) Plaintiff Stephen Suzman operates an interior design
22 studio.

23 (7) In September 1977, Walden applied for a job as Suzman's
24 bookkeeper. On his employment application, he listed Garcia as a
25 reference.

26 (8) In September 1997, Suzman called Garcia to obtain an
27 employment reference regarding Walden. Garcia gave a favorable
28 reference. He stated that Walden was honest. He did not reveal

1 that Walden had recently forged checks on his American Express
2 account or that he lived with Walden in a close personal
3 relationship.

4 (9) Suzman hired Walden as a bookkeeper in September 1997 at
5 a salary of approximately \$3,000 per month.

6 (10) Beginning in early October 1997, Walden embezzled funds
7 from Suzman. He did so by preparing checks on Suzman's account
8 payable to Mastercard and American Express (Suzman had accounts
9 with both) and then obtaining or forging Suzman's signature on
10 each check. Walden later wrote on each check the number of
11 Garcia's Mastercard or American Express account. In this way,
12 Walden used Suzman's bank account to make payments on Garcia's
13 credit cards.

14 (11) Between October 6, 1997 and July 29, 1998, Walden
15 misdirected 51 checks on Suzman's account in the total amount of
16 \$28,614. Of these, 38 checks totalling \$16,986 were misdirected
17 to Garcia's Mastercard account and 13 checks totalling \$11,628
18 were misdirected to Garcia's American Express account.

19 (12) In 1998, Suzman became dissatisfied with Walden
20 absenteeism and slowness in processing accounts and asked his
21 Controller, Donna Downer, to examine Walden's work papers.

22 (13) When Downer's investigation uncovered Walden's
23 embezzlement, Walden committed suicide.

24 (14) Suzman demanded that Garcia repay the embezzled funds
25 that had been used to pay Garcia's credit cards. When Garcia
26 refused, Suzman filed suit against Garcia in San Francisco County
27 Superior Court.

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1 (15) Garcia filed a petition under chapter 7 of the
2 Bankruptcy Code on September 16, 1999.

3 (16) Suzman timely filed the present nondischargeability
4 action on December 30, 1999.

5 (17) Garcia received monthly credit card statements that
6 showed what payments had been made within the prior month on his
7 Mastercard and American Express cards.

8 (18) Garcia carefully monitored the statements for the
9 American Express account because Walden had recently forged checks
10 on that account. He carefully monitored the statements for the
11 Mastercard account because that was his primary personal credit
12 card. Garcia received and reviewed each statement within 10 days
13 of the closing date shown on the statement.

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1 (19) An examination of the misdirected Suzman checks and
 2 Garcia's credit card statements show that the following payments
 3 were made with Suzman's funds.

Statement date	Credit card account	Payments shown	Payments from Suzman funds
May 3, 1997	American Express	\$ 325	\$ 0
May 14, 1997	Mastercard	100	0
June 3, 1997	American Express	325	0
June 13, 1997	Mastercard	1,000	0
July 3, 1997	American Express	500	0
July 15, 1997	Mastercard	750	0
August 8, 1997	American Express	700	0
August 14, 1997	Mastercard	100	0
September 9, 1997	American Express	600	0
September 15, 1997	Mastercard	1,000	0
October 3, 1997	American Express	620	0
[Embezzlement begins October 6, 1997]			
October 14, 1997	Mastercard	1,066	1,000
November 2, 1997	American Express	900	900
November 14, 1997	Mastercard	1,000	1,000
December 3, 1997	American Express	900	0
December 15, 1997	Mastercard	2,000	2,000
January 3, 1998	American Express	900	900
January 15, 1998	Mastercard	2,640	2,640
Summary:			
October 14, 1997 to	American Express	2,700	1,800
January 15, 1998	Mastercard	6,706	6,640
	Total	\$ 9,406	\$ 8,440

1 (20) Garcia knew that between September 15, 1997 and
2 January 15, 1998, Walden had made payments on the Mastercard and
3 American Express accounts totalling \$8,440. In so finding, I
4 make and rely upon the following subsidiary findings of fact.

5 (a) The checks and statements show that Walden used
6 embezzled funds to make payments totalling \$8,440 during that
7 period.

8 (b) Garcia knew Walden had made payments in that amount,
9 even if Garcia did not have knowledge of the embezzlement,
10 because Garcia knew the total payments made from the account
11 statements, Garcia knew the amounts he had paid personally,
12 and Garcia would assume that all payments he did not make
13 were made by Walden.

14 (21) By January 22, 1998, Garcia knew that Walden was using
15 stolen funds to make payments on Garcia's Mastercard and American
16 Express accounts. In so finding, I make and rely upon the
17 following subsidiary findings of fact.

18 (a) Garcia knew that Walden's income from all sources
19 from September 15, 1997 to January 15, 1998 did not provide
20 Walden sufficient funds to make credit card payments in any
21 amount near \$8,440.

22 (b) Garcia knew that Walden was dishonest, because
23 Walden had recently diverted money from Garcia by forging
24 checks on Garcia's American Express account.

25 (c) Garcia knew that as Suzman's bookkeeper Walden had
26 an opportunity to embezzle funds from Suzman.

27 (d) The long-term personal relationship between Garcia
28 and Walden enabled Walden to keep few secrets from Garcia.

1 I use the language "Garcia knew Walden was using stolen funds" to
2 describe the following state of mind: (i) Garcia had consciously
3 thought about whether Walden was using stolen funds; and (ii)
4 Garcia subjectively believed it was more likely than not that
5 Walden was using stolen funds. Thus, Garcia "knew" Walden was
6 using stolen funds even if he was not certain that was the case,
7 but Garcia did have a conscious belief that Walden was using
8 stolen funds and not merely reason to know.

9 (22) Walden misdirected a total of \$17,046 of Suzman's funds
10 into the Mastercard and American Express accounts after January
11 22, 1998.

12 (23) Any finding of fact that is properly a conclusion of law
13 shall be construed as a conclusion of law.

14

15 **CONCLUSIONS OF LAW**

16 (1) This court has subject-matter jurisdiction over this
17 action under 28 U.S.C. § 1334(b).

18 (2) Venue is proper in this district under 28 U.S.C.
19 § 1409(a).

20 (3) This action is a core proceeding under 28 U.S.C.
21 § 157(b)(2)(I).

22 (4) Under California law, Garcia is liable to Suzman under
23 the theory of unjust enrichment for the entire amount of Suzman
24 funds that Walden diverted to pay Garcia's Mastercard and American
25 Express accounts. See 1 B.E. Witkin, Summary of California Law,
26 § 91 (9th ed. 1987).

27 (5) Garcia's liability to Suzman under California law is
28 nondischargeable in Garcia's chapter 7 bankruptcy to the extent

1 that liability results from Garcia's willful and malicious injury
2 to Suzman. 11 U.S.C. § 523(a)(6).

3 (6) To constitute willful and malicious injury, Garcia's
4 actions must have been both intentional and malicious (i.e., with
5 the intent to harm Suzman). See Kawaauhau v. Geiger, 523 U.S.
6 57, 61-62 (1998).

7 (7) Malice (intent to harm) need not be proven directly, but
8 may be inferred from the nature of Garcia's actions. If Garcia
9 intentionally performed an act that was plainly and inherently
10 harmful to Suzman, it is reasonable to infer that Garcia intended
11 the harmful natural consequences of his act. See Miller v. J.D.
12 Abrams, Inc., 156 F.3d 598, 603 (5th Cir. 1998).

13 (8) In personally using the Mastercard and American Express
14 cards, and in continuing to maintain the Mastercard that he knew
15 Walden was using, after he acquired knowledge that Walden was
16 using funds stolen from Suzman to pay both accounts, Garcia caused
17 willful and malicious injury to Suzman. Garcia's maintenance and
18 use of the cards was an intentional act. When done after
19 January 22, 1998 with knowledge that he and Walden were using
20 funds stolen from Suzman to pay those accounts, this intentional
21 act was so inherently wrongful that Garcia's malice toward Suzman
22 should be inferred from the nature of the act.

23 (9) Garcia's liability to Suzman is nondischargeable
24 pursuant to 11 U.S.C. § 523(a)(6) with respect to all funds Walden
25 diverted from Suzman that were credited to the Mastercard and
26 American Express accounts after January 22, 1998.

27 (10) Plaintiff is entitled to recover prejudgment interest on
28 each diverted check at the federal judgment rate of 6.241 percent

1 per annum. Cal. Civil Code § 3287(a); 28 U.S.C. § 1961. Pre-
2 judgment interest is calculated from the date that each transfer
3 of funds diverted from Suzman was credited to the Mastercard or
4 American Express account.

5 (11) Any conclusion of law that is properly a finding of fact
6 shall be construed as a finding of fact.

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12 Dated: September 15, 2000

Thomas E. Carlson
United States Bankruptcy Judge

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