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Monday, March 4, 2002

In re

JEDD F. DUNAS,

No. 01-12310

[Debtor](#) ⁱ(s).

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JUDITH B. KRAFT,

[Plaintiff](#) ⁱ(s),

v.

A.P. No. 01-1157

JEDD F. DUNAS,

[Defendant](#) ⁱ(s).

_____ /

Memorandum on Motion to Dismiss

Defendant is technically correct, in that the complaint does not state a [claim](#) ⁱ for nondischargeability under § 523(a)(4) of the [Bankruptcy Code](#) ⁱ. Although there are a few reported cases which incorrectly hold that "defalcation while acting in a fiduciary capacity" under federal law is the same thing as "breach of fiduciary duty" under state law, the correct rule is that state law concepts of fiduciary duty are not relevant to § 523(a)(4), and that liability under that section requires breach of an express trust created by agreement or statute. See *In re Niles*, 106 F.3d 1456, 1463 (9th Cir. 1997).

However, the complaint is not subject to dismissal just because it asserts liability under the

wrong theory. The complaint alleges that the defendant intentionally misled and lied to plaintiffs in order to get them to invest in securities in which he had an interest and failed to disclose this interest to plaintiffs. If these facts are proved, their claims will be nondischargeable under § 523(a)(2). Since the complaint states facts sufficient to constitute a claim, it will not be dismissed.

The effect of a prepetition release has nothing to do with the sufficiency of the complaint. Defendant should raise the issue by motion for summary judgment.

The issue of a jury is also not properly before the court, although the court has no intention of following those few and wrongly decided cases which separate liability from dischargeability and allow a jury trial as to the former. For the correct law, see *In re McLaren*, 990 F.2d 850 (6th Cir. 1993); *In re Choi*, 135 B.R. 649 (Bkrtcy.N.D.Cal.1991).

For the foregoing reasons, defendants' motion to dismiss will be denied. Defendant shall have 20 days to answer. Counsel for plaintiffs shall submit an appropriate form of order.

Dated: March 4, 2002

Alan Jaroslovsky
U.S. [Bankruptcy Judge](#) 

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