

At issue in this adversary proceeding is the dischargeability of the debt which the Debtor owes to Sierra Investment Associates, *ex rel. Willow Bend Bancshares, Inc.* (“Sierra”).

Trial was held on September 25, 2000. At the conclusion of the trial, the judge formerly presiding over this adversary proceeding orally rendered a partial ruling, declaring the debt to be nondischargeable under 11 U.S.C. § 523(a)(6). That judge denied relief under 11 U.S.C. § 523(a)(2) and invited post-trial briefing on issues raised under 11 U.S.C. § 523(a)(4) and (a)(11). Those briefs were filed in October, 2000.

Regrettably, this adversary proceeding then vanished and did not re-surface until it was re-assigned to the undersigned judge upon the retirement of the judge formerly presiding over it.¹ After a review of the docket and trial transcript, this Court held a status conference with counsel for both parties on July 20, 2005. Following a discussion about the possible avenues for disposition of this adversary proceeding, the parties conferred and thereafter requested that this Court *not* enter a judgment reflecting the partial oral ruling given on the record at the conclusion of the trial in September, 2000. Rather, the parties requested that this Court reconsider the trial record as a whole and “make its decision in light of the parties [sic] submissions of proposed findings of fact and conclusions of law with specific record references.” *See* E-mail from Paul Keiffer, Esq., Debtor’s counsel, to Holly Meister, Law Clerk (July 29, 2005, 11:31 CST) (on file with author). The parties thereafter filed proposed findings of fact and conclusions of law and further post-trial briefs, the last of which was received on September 30, 2005.

Therefore, this Memorandum Opinion and Order constitutes the Court’s ruling upon

¹ Oddly, the parties never brought the need for a ruling in this adversary proceeding to the Court’s attention – it was discovered when the Clerk’s Office ran a “case aging” report.

reconsideration of the record after trial.

I. Factual Background

A. The Prior Actions

To properly analyze the dischargeability questions at issue here, an understanding of the factual allegations and procedural history of two prior actions – one civil and one criminal – is required. Each will be discussed in turn.

First, in 1993, Sierra filed a derivative action, in the right of Willow Bend Bancshares, Inc. (“WBBI”) and Bonham State Bank (“Bonham”), as a shareholder and on behalf of all other shareholders, against Tomlin and others in the 199th Judicial District Court of Collin County, Texas (the “Civil Action”). Pltf. Ex. 3. The petition alleged that WBBI was a holding company for two subsidiary banks – Bonham and Willow Bend National Bank (“Bank”), and that Tomlin was a director of WBBI from 1986 through 1990. As regards Tomlin, the petition alleged that he owed a duty to exercise ordinary and reasonable care, skill, and diligence in the management, conduct, direction, and supervision of WBBI and its subsidiaries, and owed fiduciary duties to WBBI and Bonham and their shareholders to properly conduct the operations of those entities. It further alleged that in 1990, the Bank was declared insolvent and closed by regulators, due to substantial operating losses caused by liberal lending practices, weak administration, and inadequate supervision by its officers and directors. The petition further alleged that in 1992, the United States indicted several officers for creating false and misleading representations of the financial condition of the Bank by causing false entries to be made in the books, with the intent to deceive bank examiners, and that certain officers (not Tomlin) caused (i) funds to be misapplied; and (ii) sham loans to be made to disguise advances made to themselves and funneled into a business in which they had personal

interests. The petition further alleged that from 1986 through 1990, the officers and directors of WBBI, Bank, and Bonham (including Tomlin) recklessly, knowingly, and intentionally allowed false and misleading entries to be made in the books and records of those entities with the express intent of (i) overstating their income, assets, and net worth to regulators and shareholders; and (ii) concealing operating losses. It further alleged that the officers and directors operated WBBI, Bank, and Bonham in a “highly unsafe, improper and speculative manner, to the ultimate detriment of the shareholders thereof.” Pltf. Ex. 3, ¶ 2.7. The petition further alleged that the officers and directors abdicated their duties, and instead chose to be dominated by the demands of the banks’ president, John Harvard (“Harvard”), allowing him to engage in expense account abuse and corporate waste. The petition alleged that the directors further failed to ensure that management adhered to regulatory standards, and that in an attempt to deceive regulators and shareholders, they engaged in improper participations and the shifting of capital between WBBI, Bank, and Bonham. The petition further alleged that Sierra, as a shareholder of WBBI, was unaware of the misconduct until 1992 newspaper reports of the indictment, and that when Sierra learned of the misconduct, it wrote to Tomlin, among others, and demanded that he take the necessary steps to bring a suit for damages, but that no response was received, which constituted a further breach of fiduciary duty. The petition further alleged that WBBI’s directors (i) failed to elect and supervise qualified and independent directors to the board of WBBI; (ii) failed to require the appointment and proper supervision of qualified officers; (iii) failed to properly supervise, manage, and conduct the business affairs of Bank and Bonham to maximize value for WBBI’s shareholders; (iv) failed to prevent Bank and Bonham officers and directors from engaging in improper, imprudent lending practices and from making fictitious loans in exchange for kickbacks and other personal opportunities; (v) failed to supervise, operate, and

review the operations of the subsidiary banks to prevent lending which was excessive in relation to such banks' capital; (vi) failed to prevent the banks from making speculative and undercapitalized loans; (vii) failed to report to the shareholders of WBBI and Bonham that excessive, imprudent, illegal, and fictitious loans had been made by officers of Bank, and that bank funds had been misapplied, resulting in the reporting of inaccurate and inflated net worth and earnings; (viii) abdicated their fiduciary duties to exercise reasonable and independent judgment, (ix) intentionally failed to comply with regulatory requirements and failed to supervise management of the banks; (x) failed to prevent expense account abuse and corporate waste; and (xi) approved questionable shifting of capital between WBBI, Bank, and Bonham.

In addition, and as is particularly relevant here, the petition alleged a claim for breach of fiduciary duty which Tomlin owed to WBBI, Bonham, and their shareholders.² Tomlin filed an answer and appeared in the Civil Action in March of 1993. Pltf. Ex. 1.

While the Civil Action was pending, a criminal action was also proceeding. In August, 1994, the United States Attorney filed an Information (the "Information") against Tomlin in the United States District Court for the Eastern District of Texas (the "Criminal Action"). The U.S. Attorney alleged that Tomlin was a Director of Bank. In Count 1, entitled "Misprision of Felony," the U.S. Attorney alleged that Tomlin had knowledge of the actual commission of a felony – bank fraud – by Harvard. The Information alleged that Harvard knowingly executed a scheme and artifice to defraud or obtain funds from the Bank by means of false and fraudulent pretenses and representations, and

² The petition also alleged claims for negligence, gross negligence, breach of contract, fraud, and conspiracy to commit fraud. Sierra sought actual damages, punitive damages, pre- and post-judgment interest, and attorneys' fees. In a supplemental petition, Sierra sought actual damages in the amount of \$15 million, representing the capital of WBBI and Bonham which was allegedly lost due to the actions of the defendants, together with punitive damages, pre-judgment interest, and attorneys' fees.

that the proceeds of said fraud were provided to a corporation controlled by Tomlin (“TPI”), which was experiencing financial difficulties and which already had loans outstanding in amounts close to the Bank’s legal lending limit to Tomlin and his related businesses. The Information further alleged:

The scheme and artifice used in said fraud was a sham loan in the amount of \$375,000 from [Bank] to TPI in the name of Erline Tomlin, Daniel O. Tomlin’s mother, which was intended to maintain TPI’s loan position at [Bank] and to prevent detection of the actual financial condition of [Bank] by the bank’s examiners. Daniel O. Tomlin, Jr., concealed said bank fraud by creating and signing a bogus bill of sale for antiques which were purported to secure the loan in the name of Erline Tomlin and by failing to disclose the loan in the name of Erline Tomlin on his ‘Statement of Interest of Directors and Principal Officers of National Banks.’ Daniel O. Tomlin, Jr., did not as soon as possible make known said bank fraud to some judge or other person in civil or military authority under the United States. All in violation of Title 18, United States Code, Section 4.”

Pltf Ex. 10.

Shortly thereafter, Tomlin entered into a plea agreement with the U.S. Attorney in which he, *inter alia*, waived the rights of indictment and trial, and pled guilty to the Misprision of Felony Count pled in the Information (the “Plea Agreement”). Pltf. Ex. 11. Tomlin further agreed that the loss caused by the bank fraud charged in the Information was approximately \$295,485.17 (the unpaid amount of the Erline Tomlin loan), which would be an appropriate amount of restitution should the court order restitution to be made. Tomlin also executed a “Factual Resume,” to be used by the court, the U.S. Attorney, and the U.S. Probation officer to recommend or determine an appropriate sentence. In the Factual Resume, Tomlin stipulated to the truth of the following uncontroverted facts:

- Bank was a federally insured national bank regulated by the Office of Comptroller of Currency (“OCC”) from 1983 until June 14, 1990. It was declared insolvent on the latter date and the FDIC was appointed as receiver.
- Tomlin was a director of Bank from 1983 until July 21, 1989. He was also a managing principal of TPI.
- Harvard was chairman of the board and president of the Bank at relevant times.

- Erline Tomlin is Tomlin's mother.
- In the fall of 1988, Tomlin contacted Harvard concerning TPI's loans with the Bank. Tomlin informed Harvard of TPI's cash shortages, and Harvard was concerned because TPI's default on the loans would adversely impact the Bank.
- In January 1989, Tomlin contacted Harvard about a loan for TPI, to be secured by antiques located in TPI's offices and appraised at \$668,590. Harvard, concerned about an additional loan's effect on the Bank's loan limit to TPI, told Tomlin that the loan would be in the name of Erline Tomlin, rather than TPI. Tomlin and Harvard agreed that the loan would appear to be secured by TPI's antiques.
- On January 30, 1989, the Bank's loan committees approved the loan to Erline Tomlin "to purchase antiques," but the true, undisclosed purpose was to fund TPI's cash shortfall. On February 2, 1989, Tomlin signed a conveyance and bill of sale of the antiques and a TPI "consent of directors" to sell the antiques to Erline Tomlin, although she did not in fact purchase the antiques or pay the purchase price stated in the bill of sale. The loan proceeds were paid to TPI, not Erline Tomlin, and TPI used them in its operations.
- In April of 1989, Tomlin signed a "Statement of Interest of Directors and Principal Shareholders" in preparation for an OCC examination of the Bank, and omitted the \$375,000 loan to Erline Tomlin/TPI from this disclosure.
- FDIC records showed that at the time of the Factual Resume, \$295,485.17 of the principal of the \$375,000 loan remained unpaid.

Ultimately, a judgment was entered in the Criminal Case, adjudging Tomlin guilty of Misprision of Felony. Def. Ex. 11. Pursuant to a "Presentence Investigation Report" identifying the FDIC (as receiver of the Bank) as the victim, the judgment also directed Tomlin to pay to the FDIC restitution in the amount of \$295,485.17.³ *Id.*

Meanwhile, back in the Civil Action, the case proceeded to trial as against Tomlin.⁴ Sierra's counsel sent Tomlin a letter on October 6, 1997 notifying him that the Civil Action was set for trial

³ The amount of restitution was subsequently reduced to \$100,000.00, Def. Ex. 13, which Tomlin paid. Def. Exs. 14 - 18.

⁴ In 1993, several of the defendants other than Tomlin (specifically, defendants Alan Barber, Jack Harvard, and Richard Wells, collectively referred to as "Movants") sought summary judgment, in part on the ground that Sierra lacked standing to prosecute its claims, as those claims properly belonged to the FDIC. Def. Exs. 5, 9 and 20. In March of 1994, the state court ruled that Sierra's claims against the officers and directors of *Bank*, whether asserted by Sierra individually or derivatively on behalf of WBBI, belonged solely to the FDIC. Those claims were dismissed with regard to the Movants only, and all other claims against all other defendants, including Tomlin and the Movants, remained intact. Def. Ex. 9. Subsequently, Sierra settled the Civil Action with all defendants except Tomlin and Harvard. Claims against Tomlin and Harvard were severed and proceeded to trial. Def. Ex. 5.

on November 25, 1997. Pltf. Ex. 9. Tomlin did not appear at trial, and Sierra proceeded with its evidence. First, it admitted into evidence copies of the Factual Resume, the Plea Agreement, and the Information. Sierra also called Christopher Kelley (“Kelley”), a financial consultant retained by Sierra, as an expert witness. Pltf. Ex. 18. Kelley testified that Bank and Bonham were wholly owned subsidiaries of WBBI, and that he had reviewed thousands of documents detailing transactions between WBBI and Bank, including those involving the Erlene Tomlin loan. Kelley further testified that Tomlin executed false documents in connection with Erlene Tomlin loan, and that the loan went unpaid in the approximate amount of \$295,000. Kelley further testified that the Erlene Tomlin loan violated the Bank’s legal lending limit to TPI. As to damages, Kelley testified that the stock of Bank was shown on WBBI’s books and records as an asset, and that Tomlin’s actions injured not just the Bank, but WBBI, because the Bank’s loan loss on the Erlene Tomlin loan translated into a dollar-for-dollar capital loss at the holding company level, on WBBI’s books and records.

After hearing the evidence and considering the exhibits, the trial court in the Civil Action ruled that Tomlin was duly noticed of the hearing but failed to appear, and that judgment should issue against Tomlin in the amount of \$295,485.17, along with exemplary damages of \$1,000 and prejudgment interest of \$306,204.17. On November 25, 1997, the trial judge entered final judgment (the “State Court Judgment”) against Tomlin as follows:

The Court determined that the evidence submitted was clear, convincing and conclusive with respect to all issues of liability and damages. Upon the evidence submitted, the Court determined that . . . Tomlin. . . conspired to breach, and did in fact breach, fiduciary duties which [he], as director[] of [WBBI], owed to that corporation. The Court further determined that such conduct was knowing and intentional, and was a direct and proximate cause of actual and substantial damages to that corporation.

It is therefore Ordered that [Sierra] have and recover from . . . Tomlin for the use and benefit of [WBBI] and the shareholders of that corporation, the sum of \$602,689.34. . . .

It is the debt represented by the State Court Judgment which Sierra contends is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (a)(4), (a)(6), and (a)(11) here.

B. The Present Adversary Proceeding

In its complaint, Sierra alleges that (i) it was a shareholder of WBBi, which owned 100% of the stock of its subsidiary banks – Bank and Bonham; (ii) Tomlin was a director of WBBi and a borrower from the two banks; and (iii) prior to 1993, WBBi became insolvent and was dissolved, causing its shareholders, including Sierra, to lose substantially all of their investment. Sierra also alleges that (i) upon learning of misconduct by WBBi’s officers and directors, Sierra commenced a derivative action against Tomlin, among others; (ii) the Civil Action proceeded to trial, resulting in the State Court Judgment; and (iii) the debt represented by the State Court Judgment is nondischargeable.

Finally, Sierra alleges that (i) Tomlin was criminally indicted and ultimately entered into the Plea Agreement, based upon an affidavit he executed which allocuted to a number of facts set forth in his indictment; (ii) a copy of the affidavit was “filed in the civil action . . . and served as a portion of the evidence against Tomlin. . . .” Compl. ¶ 2.4; (iii) Tomlin admitted in the affidavit that he conspired to deceive and defraud WBBi and its subsidiary banks while he was a director thereof, and that in pursuit of such criminal activities submitted false documents to WBBi and the banks; (iv) the loan which Tomlin received as a result of his criminal activity was never repaid and caused material losses to WBBi and its subsidiary banks; and (v) as a result, the debt owed to Sierra by virtue of the State Court Judgment is nondischargeable.

As noted earlier, trial in this adversary proceeding took place in 1999, before the judge formerly presiding over this case. The parties appeared at trial and Sierra argued that the State Court

Judgment is entitled to preclusive effect under the doctrine of collateral estoppel. Because the issue was raised at trial and not by way of pre-trial dispositive motion, the judge formerly presiding over this case first heard argument with respect to the application of the doctrine of collateral estoppel, but then permitted the parties to present their trial evidence. Accordingly, the Court heard testimony from Tomlin and from Kelley. The Court also admitted into evidence, by stipulation of the parties, various documentary exhibits, including the Information, the Plea Agreement, and the Factual Resume.⁵ The Court also had before it the Joint Pretrial Order containing, *inter alia*, the following factual stipulations:

- Tomlin was a director of both WBBI and Bank from 1983 until July, 1989.
- Tomlin was managing principal of TPI, and Erline Tomlin is his mother.
- TPI “effectively borrowed from the Bank \$375,000 in the name of Erline Tomlin.” *Pretrial Order*, ¶ 5. The Bank lost \$295,485.17 on that loan.
- Tomlin falsified his Statement of Interest to OCC, since the loan would have put Bank over the legal lending limits to Tomlin and his related entities.
- Tomlin entered into the Plea Agreement, which requires him to pay restitution to the FDIC, but not to WBBI.⁶
- The judgment in the Criminal Action provided that restitution be paid to and for the benefit of the FDIC as receiver for the Bank.
- Tomlin has paid the restitution and has been released from any further liability to the FDIC.
- In an order entered on March 3, 1994, the judge in the Civil Action found that some, but not all, of the claims asserted against Tomlin belonged to the FDIC and could not be asserted by WBBI.
- The State Court Judgment was entered on November 25, 1997 after the state court considered the Plea Agreement. Tomlin did not actively participate in the Civil Action.

⁵ Specifically, Pltf. Exs. 1-18 and Def. Exs. 1-21 were received into evidence.

⁶ Technically, the Plea Agreement did not require Tomlin to pay restitution. It merely recited that the loss caused by the bank fraud charged in the Information was approximately \$295,485.17, and that such would be an appropriate amount should the Court order that restitution be made. The Judgment in Criminal Case entered on June 6, 1995 is the judgment which required Tomlin to pay restitution to the FDIC.

II. Legal Analysis

A. Collateral estoppel

Sierra argues that the State Court Judgment must be given preclusive effect under the doctrine of collateral estoppel, and is conclusive with respect to the dischargeability issues here. Tomlin disagrees, and argues that the doctrine of collateral estoppel does not apply, because (i) the State Court Judgment does not contain specific, subordinate factual findings on the identical dischargeability issues in question; (ii) those subordinate facts cannot be discerned from the record in the Civil Action, because the judgment “is premised entirely upon the Plea Agreement . . . which specifically concerns acts by Tomlin as to [Bank], not the Plaintiff herein, [WBBI],” *Debtor’s Trial Br.*, pp. 9-10, and WBBI is not listed as a victim in the restitution order; (iii) Tomlin did not appear at trial, and thus the underlying claim was not fully and fairly litigated; and (iv) application of the doctrine would be unfair, because (a) the claim which resulted in the State Court Judgment belonged exclusively to the FDIC “or was merely an attempt to mirror the FDIC’s claim,” *Debtor’s Trial Br.*, p. 21, (b) the victim of any improper actions was the FDIC, not Sierra, and (c) Tomlin had little incentive to defend the Civil Action since he was hopelessly insolvent at the time of trial.

Collateral estoppel, or issue preclusion, requires that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. *U.S. v. Angleton*, 314 F.3d 767 (5th Cir. 2002). The doctrine of collateral estoppel applies in nondischargeability actions under 11 U.S.C. § 523. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991); *In re Pancake*, 106 F.3d 1242 (5th Cir. 1997). In such actions, collateral estoppel may apply to subsidiary facts actually litigated and necessarily decided in a prior state court suit. *Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F.2d 1253 (5th Cir. 1984).

It applies “only if the first court has made specific, subordinate findings on the identical dischargeability issue in question – that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue – and the facts supporting the court’s findings are discernible from that court’s record.” *In re Dennis*, 25 F.3d 274, 278 (5th Cir. 1994). Where the state court judgment is conclusory and does not contain detailed facts sufficient as findings to meet the federal test of nondischargeability, the court will look at the evidence produced in the state court proceedings to support the judgment and determine whether the record of the state proceedings is sufficient to discern the subsidiary facts supporting the judgment. *Id.* The court must be able to discern a sufficient factual basis in the state court record to support the conclusions recited in the state court judgment, *Patino’s, Inc. v. Poston (In re Poston)*, 735 F.2d 866 (5th Cir. 1984), or collateral estoppel will not bar relitigation of those facts.

In the present case, the State Court Judgment was entered by a Texas state court. Accordingly, Texas rules of preclusion apply. *Pancake*, 106 F.3d at 1244; *In re Garner*, 56 F.3d 677 (5th Cir. 1995). Collateral estoppel, or issue preclusion, is appropriate under Texas law where the facts sought to be litigated in the second action were fully and fairly litigated in the prior action, those facts were essential to the judgment in the first action, and the parties were cast as adversaries in the first action. *Pancake*, 106 F.3d at 1244; *Garner*, 56 F.3d at 677 (citing *Bonniwell v. Beach Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)).

Ordinarily, a default judgment does not satisfy the “fully and fairly litigated” prong, and is not entitled to collateral estoppel effect. However, the courts have distinguished between a default judgment entered where the defendant has not answered the complaint, and one entered post-answer, where the defendant has answered the complaint but has failed to appear for trial. *In re Gober*, 100

F.3d 1195 (5th Cir. 1996); *In re Garner*, 56 F.3d 677 (5th Cir. 1995). In the latter circumstance, the merits of the plaintiff's claims are at issue, and the plaintiff must offer evidence and prove his case in order to obtain a judgment. *In re Garner*, 56 F.3d at 680. Therefore, a post-answer default judgment is accorded collateral estoppel effect where the plaintiff has put on evidence in the state court sufficient to carry his burden of proof; those issues are "fully and fairly litigated" for collateral estoppel purposes. *Pancake*, 106 F.3d at 1244; *Garner*, 56 F.3d at 680.

As relevant here, Tomlin filed an answer in the Civil Action. Therefore, the State Court Judgment is entitled to preclusive effect if Sierra was put to its proof, and introduced evidence in the state court sufficient to carry its burden of proof. At trial in the Civil Action, Sierra introduced the Information, the Plea Agreement, and the Factual Resume into evidence, and Kelley testified as an expert witness. Sierra was clearly put to its proof and there was evidence before the state court at the default prove-up sufficient to support the State Court Judgment. Therefore, the Civil Action falls within the rule of *Garner* and *Pancake*, and the issues decided by the state court were "fully and fairly litigated" for collateral estoppel purposes.

Next, Tomlin asserts that collateral estoppel should not apply because the State Court Judgment does not contain specific, subordinate factual findings on the identical dischargeability issues in question, and those subordinate facts cannot be discerned from the record in the Civil Action, because the judgment "is premised entirely upon the Plea Agreement . . . which specifically concerns acts by Tomlin as to [Bank], not the Plaintiff herein, [WBBI]," *Def.'s Trial Br.*, pp. 9-10. This argument is factually incorrect because, as noted earlier, other facts were in evidence before the state court – not solely the Plea Agreement. Also before the state court were the Information, the Factual Resume, and the testimony of Kelley. Together, those documents and testimony establish

facts sufficient to support the State Court Judgment.

Tomlin further argues that WBBi is not listed as a victim in the restitution order. While factually correct, it is irrelevant. The restitution order was not a part of the evidence before the state court in the Civil Action. Moreover, the fact that the restitution was payable only to the FDIC does not mean that it was the sole victim. The State Court Judgment found that Tomlin breached fiduciary duties owed to WBBi, and found damages to WBBi separate and apart from any loan loss to Bank.⁷ If Tomlin believed the State Court Judgment was in error, his remedy was to appeal. It is well settled that even erroneous judgments have preclusive effect if the requirements for collateral estoppel are satisfied. *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1296 (5th Cir. 1995) (stating that the district court's view of the accuracy of a jury verdict was irrelevant to the question of the verdict's preclusive effect).

In addition, Tomlin argues that the application of collateral estoppel here would be unfair, because (i) the claim which resulted in the State Court Judgment belonged exclusively to the FDIC “or was merely an attempt to mirror the FDIC's claim,” *Def.'s Trial Br.*, p. 21; and (ii) the victim of any improper actions was the FDIC, not Sierra. The Court rejects each of these arguments. First, there is no evidence that the claim which resulted in the State Court Judgment belonged to the FDIC.

⁷ The Court notes that the Information alleged that Tomlin was a Director of Bank. The Factual Resume likewise recited that Tomlin was a Director of Bank. The state court found, however, breach of fiduciary duty owed to WBBi. To the extent the state court record does not support a finding that Tomlin was a fiduciary of WBBi, that deficiency is cured by the trial record in the present adversary proceeding, where Tomlin stipulated in the Joint Pretrial Order that he was a director of both Bank *and* WBBi during the relevant time period. Further, Kelley testified that Tomlin was an officer of both entities in 1988 and 1989. *Tr.* 8/25/00 65:20-24. When combined with the other facts found by the state court, it is clear that the claim for Tomlin's breach of fiduciary duty owed to WBBi has been established by the evidence. Moreover, as noted earlier, *see supra*, n. 3, the state court distinguished between claims against the directors and officers of *Bank*, and claims against directors and officers of *WBBi*, and held that claims against the directors and officers of *Bank* were owned by the FDIC. The FDIC obtained restitution – presumably, on its own claims. Those are not the claims prosecuted by Sierra against Tomlin. Rather, the claims by Sierra against Tomlin resulted in judgment that he breached his fiduciary duties to WBBi.

See supra, n.3. Even if there were, Tomlin’s remedy was to appeal the State Court Judgment. Moreover, the Court has earlier rejected Tomlin’s assertion that WBBI (and, derivatively, Sierra) was not a victim of his actions. The evidence before the state court was to the contrary.

Lastly, Tomlin argues that collateral estoppel should not apply because he had little incentive to defend the Civil Action since he was hopelessly insolvent. In support of this argument, Tomlin points the Court to the Fifth Circuit’s discussion regarding the application of the doctrine of collateral estoppel where a defendant’s answer is stricken as a discovery sanction and punitive damages are assessed. *In re Gober*, 100 F.3d 1195 (5th Cir. 1996). There, the Fifth Circuit held that collateral estoppel properly applied, even though the defendant was placed, under Texas law, in the same legal position as if he had filed no answer at all. In that context, the Circuit stated,

“we . . . do not purport to establish a *per se* rule that collateral estoppel precludes relitigation of issues whenever punitive damages are assessed against a defendant after default. The rationale for the general rule denying preclusive effect to default judgments is that a party may choose not to litigate issues for reasons that have nothing to do with the merits of the case – for example, if the amount at stake does not justify the expense of contesting the lawsuit.”

Gober, 100 F.3d at 1205. Because the defendant had actively participated in the litigation for two years, the Fifth Circuit held that the rationale for the general rule did not apply, and therefore the judgment should be given preclusive effect.

Tomlin seizes upon the example given by the Fifth Circuit in its *dictum*, and argues that the rationale for the rule denying preclusive effect to default judgments *does* apply in this case, notwithstanding his filing of an answer in the Civil Action. Tomlin asserts that he was hopelessly insolvent when Sierra’s case against him went to trial, and he therefore had no incentive to litigate, because the judgments pending against him were already overwhelming.

The Court disagrees with this reasoning for several reasons. First, as noted above, the Fifth

Circuit's example in *Gober* was *dictum*. The facts before the Fifth Circuit were akin to a classic no-answer default judgment, since the defendant's answer had been stricken. Under those circumstances, the general rule is that collateral estoppel will not apply. The Fifth Circuit applied the doctrine nonetheless and, in doing so, it appeared in its *dictum* to carve out an exception to the general rule denying preclusive effect to no-answer default judgments. Tomlin finds solace in the language the Fifth Circuit used in describing its exception, and argues that it militates against the application of collateral estoppel in the present case. The present case, however, involves a post-answer default judgment, like that addressed in *Pancake* and *Garner*, and thus any rationale described in *Gober* does not apply. In the present case, Sierra was put to its proof in state court, and introduced evidence at the hearing sufficient to sustain its burden of proof. The record of the state proceedings is sufficient to discern the subsidiary facts supporting the judgment, *Dennis*, 25 F.3d 274 at 279, and the Court is able to discern a sufficient factual basis in the state court record to support the conclusions recited in the State Court Judgment. *Patino's, Inc. v. Poston (In re Poston)*, 735 F.2d 866 (5th Cir. 1984).

More importantly, even if the rationale set forth in *dictum* in *Gober* were implicated, the Court does not find it supports Tomlin. The doctrine of collateral estoppel is an equitable doctrine, to be applied when warranted. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415 (5th Cir. 1995). The Court agrees with the Fifth Circuit that "where [the defendant] received notice of all hearings that were conducted but chose not to appear, he did so at his peril." *Gober*, 100 F.3d at 1202. Further,

[t]here should be a difference in effect as to issue preclusion between a default judgment where there is no participation by a party and an uncontested judgment against a party that has appeared but has elected not to defend. If an answer is filed, then the case may be deemed to have been actually litigated. To hold otherwise would allow defendants to play the litigation game, while providing them with a mechanism by which to escape the collateral estoppel effects of an adverse judgment if things start to go badly. A plaintiff who has been forced to undergo the costs of litigation should not be deprived of the fruits of its labor in this way. Once an answer

has been filed by a defendant and the case is at issue, the defendant cannot assume it is permissible to quit at any time prior to trial and not be subject to the constraints of collateral estoppel.

Ramsey v. Bernstein (In re Bernstein), 197 B.R. 475, 481 (Bankr. D. Md. 1996), *aff'd*, 113 F.3d 1231 (4th Cir. 1997).

For these reasons, the Court holds that the State Court Judgment is properly accorded preclusive effect in this adversary proceeding. Therefore, the Court must examine whether (i) the State Court Judgment contains sufficient factual findings, or the subsidiary facts supporting the judgment are discernible from the record, and (ii) those findings encompass each of the *prima facie* elements required for nondischargeability under § 523(a)(2), (4), (6), and (11).

B. Section 523(a)(2)

Sierra contends that the State Court Judgment is nondischargeable under subsections (A) and (B) of § 523(a)(2). Section 523(a)(2) provides that a discharge under § 1141 does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
- (B) use of a statement in writing -
 - (i) that is materially false;
 - (ii) respecting the debtor's or an insider's financial condition;
 - (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
 - (iv) that the debtor caused to be made or published with intent to deceive....

11 U.S.C. § 523(a)(2)(A), (B). The creditor bears the burden of proof and must establish each of the required elements of a claim under § 523(a)(2)(A) and/or (B) of the Bankruptcy Code by a preponderance of the evidence. *In re Slonaker*, 269 B.R. 595 (Bankr. N.D. Tex. 2001).

To prevail on a claim under § 523(a)(2)(A), the creditor must establish that (i) the debtor made false representations; (ii) with the intent and purpose of deceiving the creditor; (iii) the debtor knew to be false at the time the statement was made, or made the statement with reckless disregard for the truth; (iv) the creditor justifiably relied on the representations; and (v) the creditor sustained a loss as a result of the representations. *See In re Rea*, 245 B.R. 77 (Bankr. N.D. Tex. 2000) (*citing RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir.1995)); *In re Faish*, No. SA-99-CA1091EP, 1999 WL 33289708 (W.D.Tex. Dec. 20, 1999); *In re Townsley* 195 B.R. 54 (Bankr..E.D.Tx 1996). To prevail on a claim under § 523(a)(2)(B), the creditor must prove that there is a debt for “money, property, services, or an extension, renewal or refinancing of credit,” which was obtained by (i) a statement in writing; (ii) which was materially false; (iii) respecting the debtor’s financial condition; (iv) upon which the creditor reasonably relied; and (v) that the statement was given with intent to deceive. *Slonaker*, 269 B.R. at 602. As is clear from the literal language of the statute itself,⁸ nondischargeability claims under § 523(a)(2)(A) and (B) are mutually exclusive. *See, e.g., First Nat’l Bank of Olathe v. Pontow*, 111 F.3d 604 (8th Cir. 1997); *In re Kirsh*, 973 F.2d 1454 (9th Cir. 1992); *In re Moore*, 118 B.R. 64 (Bankr. N.D. Tex. 1990).

In this case, the only facts before the state court in the Civil Action regarding any false representations – financial or otherwise – relate to representations made to the Bank or to bank examiners, not to WBBI. The record before the state court was that Tomlin executed a false bill of sale for antiques in order to secure a loan from Bank, and a false Statement of Interest of Directors and Principal Officers in order to hide the loan from bank examiners. There was no evidence before the state court that Tomlin made *any* representations to WBBI, or that he obtained any “money,

⁸The statute is written in the disjunctive, by the use of “or.” 11 U.S.C. § 523(a)(2).

property, services, or an extension, renewal or refinancing of credit” from WBBI based on any representations. Further, Kelley testified at trial that the loan was from Bank, not WBBI, and that no financial statements were ever provided to WBBI to obtain the loan. *Tr.* 8/25/00, 94:23-95:10. Thus, there were no facts before the state court in the Civil Action which establish a link between Tomlin’s fraud and the creation of the debt owed to WBBI – *i.e.*, that its debt is for money *obtained* by the fraud perpetrated upon it. 11 U.S.C. § 523(a)(2); *In re Spiegel*, 260 F.3d 27 (1st Cir. 2001). Rather, the facts establish that Tomlin defrauded and obtained the funds from Bank, not WBBI.

Moreover, because the alleged false statements were made to Bank and bank examiners, WBBI could not have actually, let alone justifiably, relied on such misrepresentations or falsehoods. *See Wymard v. Ali (In re Ali)*, 321 B.R. 685 (Bankr. W.D. Pa. 2005) (stating that creditor could not have relied on debtor’s alleged misrepresentations to credit card company, which resulted in chargebacks to creditor). Further, there was no evidence in the Civil Action that Tomlin intended to deceive WBBI when he executed false documents and concealed the sham loan. Rather, the only evidence before the state court was that Tomlin intended to prevent detection of the Bank’s financial condition by bank examiners.⁹ *See* Information, p. 4.

Accordingly, the Court does not believe that the state court in the Civil Action made specific, subordinate findings which encompass the same *prima facie* elements as those required by 11 U.S.C. § 523(a)(2). *In re Dennis*, 25 F.3d 274, 278 (5th Cir. 1994). Nor did WBBI put on any evidence at trial here sufficient to establish nondischargeability under that section. Therefore, the State Court

⁹ Sierra’s state court petition alleged an intent to deceive shareholders, but it presented no such evidence at the November 25, 1997 trial in the Civil Action. Moreover, the evidence in the Civil Action was that the act which caused injury to WBBI was not the execution of false documents, but the failure to repay the Erline Tomlin loan. There was no evidence, either in the Civil Action or here, that Tomlin intended to allow the loan to go unpaid.

Judgment is not excepted from discharge pursuant to § 523(a)(2).

C. *Section 523(a)(4)*

Under § 523(a)(4) a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" may not be discharged. In construing § 523(a)(4), the Fifth Circuit has stated that this discharge exception "was intended to reach those debts incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts; both classes of conduct involve debts arising from the debtor's acquisition or use of property that is not the debtor's." *In re Miller*, 156 F.3d 598, 602 (5th Cir. 1998) (*citing In re Boyle*, 819 F.2d 583,588 (5th Cir 1987)).

The definition of "fiduciary" under § 523(a)(4) is controlled by federal common law rather than applicable non-bankruptcy law. Fiduciary capacity under § 523(a)(4) does not refer to a relationship involving confidence, trust, or good faith. Rather, § 523(a)(4) concerns a relationship arising out of a technical or express trust. In *Miller*, 156 F.3d at 602 (*citing Texas Lottery Comm'n v. Tran*, 151 F.3d 339, 342 (5th Cir. 1998)), the Fifth Circuit noted that "[t]he concept of fiduciary under § 523(a)(4) is narrower than it is under the general common law. Under § 523(a)(4), 'fiduciary' is limited to instances involving express or technical trusts." As noted by the Fifth Circuit in *Texas Lottery Comm'n v. Tran*, 151 F.3d 339, 342 (5th Cir. 1998), the purported trustee's duties must arise independent of any contractual obligation. The trustee's obligations must have been imposed prior to, rather than by virtue of, any claimed misappropriation or wrong. Constructive trusts or trusts *ex malificio* thus also fall short of the requirements of § 523(a)(4).

As noted by the court in *In re Rea*, 245 B.R. 77 (Bankr. N.D. Tx. 2000):

An express trust traditionally includes (1) an explicit declaration of a trust, (2) a defined trust res, and (3) an intent to create a trust relationship. To create an express

trust, the legal and equitable title to the trust res must be separate, the former being vested in a trustee and the latter in a beneficiary. But, the express trust may be created by an express agreement, the direct acts of the parties, or a written instrument. A technical trust, on the other hand, may be imposed by law. The trust must exist before the transactions that give rise to the claim.

Id. at 87 (internal citations omitted). The technical or express trust requirement is not limited to trusts that arise by virtue of formal, written trust agreements, but can be satisfied by a relationship in which trust-type obligations are imposed pursuant to statute or common law. *In re Bennett*, 989 F.2d 779 (5th Cir. 1993). *See, e.g. In re Schwager*, 121 F.3d 177 (5th Cir. 1997) (holding fiduciary relationship between general and limited partners sufficient under § 523(a)(4)); *In re Moreno*, 892 F.2d 417, 421 (5th Cir. 1990) (officers of corporation owe fiduciary duty to corporation and its shareholders).

In this case, the State Court Judgment was premised upon Sierra’s claim for breach of fiduciary duty. The state court found that Tomlin “conspired to breach, and did in fact breach, fiduciary duties which [he], as director[] of Willow Bend Bancshares, Inc., owed to that corporation.” Def. Ex. 3 (State Court Judgment). Under Texas law, the elements of a breach of fiduciary claim are (i) a fiduciary relationship between the plaintiff and defendant; (ii) the defendant must have breached his fiduciary duty to the plaintiff; and (iii) the defendant’s breach must result in injury to the plaintiff. *Kelly v. Gaines*, No. 10-03-00369-CV, 2005 WL 2387202 (Tex. App. – Waco, Sept. 28, 2005). The state court therefore found the existence of a fiduciary relationship between Tomlin and WBBi under Texas law.

As noted earlier, *see supra*, n. 7, the facts discernible from the record in the Civil Action do

not support the existence of a fiduciary relationship between Tomlin and WBBI.¹⁰ However, the trial record in this adversary proceeding cures any such deficiency. Tomlin stipulated in the Joint Pretrial Order that he was a director of both Bank *and* WBBI during the relevant time period. Further, Kelley testified that Tomlin was an officer of both entities in 1988 and 1989. *Tr.* 8/25/00, 65:20-24. When combined with the other evidence before the state court in the Civil Action, it is clear that Sierra's claim for breach of fiduciary duty owed to WBBI has been established under Texas law. While the federal definition of a "fiduciary relationship" is more narrow, *In re Hickman*, 260 F.3d 400, 404-05 (5th Cir. 2001), its existence has also been established. *Moreno*, 892 F.2d at 421 (officers of corporation owe fiduciary duty to corporation and its shareholders).

The subsidiary facts discernible from the record in the Civil Action establish "fraud or defalcation" under § 523(a)(4). A breach of fiduciary duty will constitute defalcation for purposes of § 523(a)(4) where the breach is "willful." *In re Felt*, 255 F.3d 220, 226 (5th Cir. 2001). The term "defalcation" has been defined as a "willful neglect of duty, even if not accompanied by fraud or embezzlement." *Moreno*, 892 F.2d at 421. The Fifth Circuit has stated that the "willful neglect of fiduciary duty" is "essentially a recklessness standard," *In re Schwager*, 121 F.3d 177, 185 (5th Cir. 1997), and that willfulness is "measured objectively by reference to what a reasonable person in the debtor's position knew or reasonably should have known." *Felt*, 255 F.3d at 226.

Under Texas law, "three broad duties stem from the fiduciary status of corporate officers and directors: namely, the duties of obedience, loyalty and due care." *Loy v. Harter*, 128 S.W.3d 397,

¹⁰ It is well settled that even erroneous judgments have preclusive effect if the requirements for collateral estoppel are satisfied. *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1296 (5th Cir. 1995) (stating that the district court's view of the accuracy of a jury verdict was irrelevant to the question of the verdict's preclusive effect). Tomlin's remedy was to appeal the State Court Judgment if he thought it erroneous.

407 (Tex. App. – Texarkana 2004). Further,

the duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow his or her personal interest to prevail over the interest of the corporation. The duty of loyalty is described as requiring an extreme measure of candor, unselfishness, and good faith on the part of the officer or director.

Id. (citing *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963)).

Here, the state court had before it un-refuted evidence that Tomlin, an officer and director of both WBBi and Bank, participated in the making and concealing of a loan to a corporation (TPI) in which he had a personal interest which, if it had been revealed, would have violated the Bank’s legal lending limit and revealed the sham lending practices the Bank was using. This Court has no difficulty concluding that Tomlin, a Bank director and officer, who was also an officer and director of the Bank’s 100% shareholder, WBBi, willfully breached fiduciary duties to those entities and their shareholders and thereby committed defalcation within the meaning of § 523(a)(4). Therefore, the State Court Judgment is excepted from discharge pursuant to § 523(a)(4).

D. Section 523(a)(6)

Section 523(a)(6) provides that a discharge under § 727 does not discharge an individual debtor from any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity” In the Fifth Circuit, a “‘willful and malicious injury’ results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury.” *Texas ex rel. Bd. of Regents v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (citing *Kawaauhau v. Geiger*, 523 U.S. 57 (1998)). In this context, “an injury is ‘willful and malicious’ where there is either an objective substantial certainty of harm or a subjective motive to cause harm.” *In re Miller*, 156 F.3d 598, 605 (5th Cir. 1998).

Here, the State Court Judgment recites that “the Court further determined that such *conduct*

was knowing and intentional” As noted earlier, however, more is required before the judgment is nondischargeable under § 523(a)(6). It is not sufficient that the act is done intentionally – rather, the injury must be intended. *Walker*, 142 F.3d at 823. The State Court Judgment does not recite such a finding. Moreover, the subsidiary facts supporting the State Court Judgment, which are discernible from the record in state court, do not establish a willful and malicious injury within the meaning of § 523(a)(6). The only evidence before the state court was that Tomlin intended to conceal the Bank’s financial condition from its examiners. There are *no* facts which establish that Tomlin intended to injure WBBI or its shareholders.¹¹ More importantly, Kelley’s testimony established that the act which caused injury to WBBI was the failure to repay the loan, because the loan loss at the Bank level translated into a dollar-for-dollar loss at the holding company (WBBI) level. There was absolutely no evidence before either the state court, or before this Court at trial, that Tomlin ever intended that the loan go unpaid. Accordingly, the State Court Judgment is not excepted from discharge pursuant to § 523(a)(6).

E. Section 523(a)(11)

Section 523(a)(11) excepts from discharge any debt “provided in any final judgment . . . entered in any court of the United States or of any State . . . arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union.”¹² In addition, § 523(e), added to the Bankruptcy Code in 1990, provides that “[a]ny institution-affiliated party of an insured depository institution shall be considered to be

¹¹ Again, while Sierra’s state court petition alleged intent to deceive WBBI and its shareholders, no evidence was put before the state court regarding this claim.

¹² The term “depository institution” is not defined in the Code. Chapter 16 of the United State Code, however, which establishes the FDIC, defines the term as “any bank or savings association.” 12 U.S.C. § 1813(c)(1).

acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).” The Bankruptcy Code defines the term “institution-affiliated party” as any director, officer, employee, or controlling stockholder (other than a bank holding company) of any bank or savings association insured by the FDIC. *See* 11 U.S.C. 101(33), (35).¹³

The evidence before the state court in the Civil Action was that Tomlin was a director of Bank, which was a federally-insured depository institution. He was therefore an “institution-affiliated party” within the meaning of § 101(33) of the Bankruptcy Code. Accordingly, under § 523(e), Tomlin is considered to have been acting in a fiduciary capacity within the meaning of § 523(a)(11).

Tomlin argues that § 523(a)(11) should not apply here because it was not intended to benefit private parties in their prosecution of litigation. Tomlin asserts that § 523(a)(11) should only apply when it is the institution itself which is seeking to except a debt from discharge.

When interpreting a statute,

the court must begin with "the language of the statute itself." We follow the "plain and unambiguous meaning of the statutory language," interpreting undefined terms according to their ordinary and natural meaning and the overall policies and objectives of the statute.

United States v. Orellana, 405 F.3d 360, 365 (5th Cir. 2005) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) and *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004)). “Only after application of the principles of statutory construction, including the canons

¹³ Section 101(33) provides that the term “institution-affiliated party,” when used with respect to an insured depository institution (as defined in § 3(c)(2) of the Federal Deposit Insurance Act), “has the meaning given it in section 3(u) of the Federal Deposit Insurance Act.” Section 3(u) of the Federal Deposit Insurance Act defines an institution-affiliated party as “any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution.” 12 U.S.C. § 1813(u). Section 101(35) of the Bankruptcy Code provides that the term “insured depository institution” “has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act,” which in turn provides that an insured depository institution means “any bank or savings association the deposits of which are insured by the Corporation pursuant to this Act.” 12 U.S.C. § 1813(c)(2).

of construction, and after a conclusion that the statute is ambiguous may the court turn to the legislative history. For the language to be considered ambiguous, . . . it must be ‘susceptible to more than one reasonable interpretation’ or ‘more than one accepted meaning.’” *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 518-19 (5th Cir. 2004) (citing *United States v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004)).

In this case, the statute’s plain meaning is clear and unambiguous. It excepts from discharge *any final judgment* . . . entered in *any court* arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution. *See Meyer v. Rigdon*, 36 F.3d 1375, 1380 (7th Cir. 1994) (stating that § 523(a)(11) is intended to preempt common law collateral estoppel principals and therefore precludes relitigation of *any* judgment, even default judgment, and finding that default judgment against bank president for allowing bank to engage in unsound lending practices was nondischargeable under § 523(a)(11)). The Court need not resort to legislative history to divine its meaning. Had Congress wanted to restrict § 523(e)’s applicability to institutional plaintiffs, it could have so provided. Therefore, the Court holds that the State Court Judgment is “any judgment” entered in “any court,” and that it arises from an act of fraud or defalcation while acting in a fiduciary capacity committed with respect to a depository institution. *Cf. Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998) (“once it is established that specific money or property has been obtained by fraud . . . ‘any debt’ arising therefrom is excepted from discharge”) (construing § 523(a)(2)). Accordingly, the State Court Judgment is excepted from discharge under § 523(a)(11).

F. Damages

Finally, Tomlin argues that Sierra is not entitled to recover damages already recovered by the FDIC. He argues that Sierra has not shown that the damages awarded by the State Court Judgment

are distinguishable from those already recovered by the FDIC as restitution, and that the only evidence in either the Civil Action or before this Court is evidence as to damages stemming from the fiduciary duty owed to Bank, not WBBi, and those damages as to Bank have already been paid (in the form of restitution). Tomlin also argues that even if Sierra has shown that WBBi sustained damages separate from those sustained by Bank, it has failed to quantify those damages, as it has failed to establish any decline in the value of WBBi's stock.¹⁴

As noted earlier, collateral estoppel applies to bar relitigation of subsidiary facts actually litigated and necessarily decided in a prior state court suit, *In re Shuler*, 722 F.2d 1253 (5th Cir. 1984), where the facts supporting the state court's findings are discernible from that court's record. *In re Dennis*, 25 F.3d 274, 278 (5th Cir. 1994). Here, Sierra put on evidence of damages to WBBi in the Civil Action. Kelley testified that Tomlin's actions injured not just Bank, but WBBi at the holding company level, because the loan loss at the bank translated into a dollar-for-dollar capital loss at WBBi. Tomlin is collaterally estopped from relitigating this issue.¹⁵

Moreover, the Court is not persuaded that the damages awarded by the State Court Judgment stem solely from the fiduciary duty owed to the Bank, and not from the fiduciary duty

¹⁴ Specifically, Tomlin asserts that Kelley testified that he did not know the value of the WBBi shares prior to the Erline Tomlin loan, but that he did know that the stock value went down after the loan. Tomlin argues that Kelley could not attribute the decline in value to the Erline Tomlin loan and could not recall whether the losses sustained by WBBi could have been attributable to anything else. Tomlin attacks Sierra's use of "book value" as a measure, because "[WBBi's] assets on the date of the loan could have been negative because of [WBBi's] other assets.

¹⁵ Tomlin concedes that he may not now challenge the amount of Sierra's claim. *See Def.'s Second Post-Trial Br.*, p. 5, n. 3. However, Tomlin argues that the State Court Judgment is dischargeable because Sierra has not quantified its damages here. The Court disagrees – Sierra's damages were quantified in the State Court Judgment; this Court is not issuing a money judgment in which damages must be quantified. Rather, this Court is considering whether the debt represented by the State Court Judgment is dischargeable in bankruptcy. Nor is this a case where damages were awarded on several varying claims, some of which may have been based on conduct which would not give rise to nondischargeability claims. *All* of the damages in the State Court Judgment were awarded for the same conduct, and on the breach of fiduciary duty claim.

owed to WBBI.¹⁶ Nor does the Court believe that WBBI has already been made whole for the damages it suffered. Rather, the Court agrees with Sierra – there were two separate and distinct losses in this case.

The first loss . . . came when the fraudulent 1989 loan was made and funded. Because the loan was never repaid, the direct capital loss to WBBI was \$295,417.95. It is this direct capital loss which is reflected in the [State Court Judgment] The second loss . . . was incurred after the . . . Bank failed and the FDIC made millions of dollars in insurance payments to the depositors of the . . . Bank. This insurance loss was separate from, and came long after, the loss of capital occurred at WBBI. Stated in another way, WBBI did not lose money to the FDIC, and the FDIC did not use any WBBI money to fund its insurance payments. WBBI lost money to Tomlin, and the FDIC used government money to make the insurance payments. There is no direct connection between the two funds of money. Moreover, the payment made by Tomlin to the FDIC merely served to recapitalize the ongoing insurance fund of the FDIC. The payment did not serve to return any capital to WBBI.

Pltf. 's Second Trial Br., p. 6.

III. Conclusion

The State Court Judgment is not excepted from discharge pursuant to § 523(a)(2) or (a)(6). It is, however, excepted from discharge pursuant to § 523(a)(4) and (a)(11). A judgment consistent with this Memorandum Opinion and Order will be entered separately.

SO ORDERED.

END OF ORDER

¹⁶ In fact, as noted earlier, *see supra* p. 7 n.4, the state court ruled, on a motion for summary judgment by other defendants, that Sierra's claims against officers and directors of *Bank* properly belonged to the FDIC and should be dismissed, but that Sierra's claims against officers and directors of WBBI remained intact.