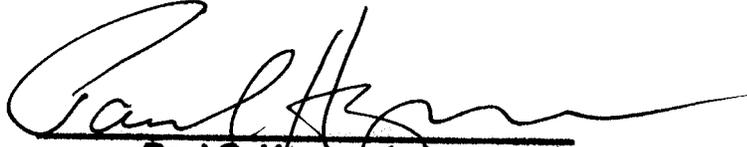


ORDERED in the Southern District of Florida on Nov 21, 2005.



  
**Paul G. Hymen, Judge**  
**United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

In re:

CASE NO.: 05-21644-BKC-PGH

Robert E. White,  
Debtor.

CHAPTER 7

\_\_\_\_\_  
Alan Cates, Successor Trustee,  
of/and Trusts Known As:  
Katherine Christy White Trust,  
Stacie Gail White Trust, Troy  
Ray White Trust, and Michelle  
Marie White Trust  
Plaintiffs,

ADV. NO.: 05-2135-BKC-PGH-A

v.

Robert E. White,  
Defendant.

MEMORANDUM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING  
DEBTOR'S CROSS MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on August 23, 2005 upon Alan Cates, Successor Trustee, of/and Trusts Known as: Katherine Christy

White Trust, Stacie Gail White Trust, Troy Ray White Trust, and Michelle Marie White Trust's ("Alan Cates, as Trustee") Motion for Summary Judgment (the "Motion"). On September 5, 2005, Robert E. White filed Debtor's Cross Motion for Summary Judgment and Response to Motion for Summary Judgment (the "Cross Motion"). On September 27, 2005, Robert E. White filed a Reply in Support of its Motion for Summary Judgment (the "Reply"). On September 27, 2005, Robert E. White and Alan Cates, as Trustee, filed a Joint Stipulation of Facts Regarding Summary Judgment Motions (the "Stipulation").

Robert E. White and Alan Cates, as Trustee, stipulated that the facts supporting their respective motions for summary judgment are set forth in the following four Tennessee state court orders: 1) the Memorandum Opinion and Order entered May 25, 1990 in the Chancery Court of Hamilton County, Tennessee in the case of Alan Cates, et al., Plaintiff, v. Robert E. White, Defendant (the "Order"); 2) *Cates v. White*, 1991 WL 168620 (Tenn App. September 4, 1991) (the "First Appellate Order"); 3) Memorandum Opinion entered May 13, 1992 in the Chancery Court of Hamilton County, Tennessee in the case of Alan Cates, et al., Plaintiff, v. Robert E. White, Defendant (the "Post-Remand Order"); and 4) *Cates v. White*, 1993 WL 173630 (Tenn. App. May 23, 1993) (the "Second Appellate Order") (collectively, the "Tennessee State Court Orders").

### BACKGROUND

The Tennessee State Court Orders establish the following background facts which are not disputed.

Selox, Inc. was a family owned corporation founded in 1938 by the father of Bill, Robert and James White. Robert E. White eventually became the President and chief executive officer of the company. James White also worked at Selox, Inc. Attorney Richard Jahn represented Selox, Inc., and he also represented Robert E. White individually. In the late 1970's Richard Jahn drafted "Clifford" trusts for both Robert E. White and James White. James White established four such trusts (the "Four Trusts") - one for each of his four minor children - with 4,000 shares of Selox, Inc. stock as the corpus for each trust. Robert E. White also established Clifford trusts for each of his children. Richard Jahn was appointed trustee for all of the trusts. The trust agreements provided that upon Richard Jahn's resignation, American National Bank would become successor trustee. Each trust had two beneficiaries: an income beneficiary and a reversionary beneficiary. As income beneficiaries, each minor child was to receive income from their respective trust during its term. Upon termination of each trust, the corpus was to revert back to the respective fathers who were the reversionary beneficiaries. Order at 3-6.

In 1983, James White granted Robert E. White a three-year

option to purchase all of his stock in Selox, Inc. for \$15 per share. The option agreement included an option to purchase the shares in the Four Trusts at the same price. *First Appellate Order* at \*1.

In 1985 Robert E. White and Richard Jahn had disagreements about certain issues including Richard Jahn's fees. By letter of May 13, 1985, Selox, Inc.'s CPA, Mr. Fox, advised Richard Jahn that "Bob wants your resignation as director and as trustee for the various trusts for Bob and Jim." Based upon an agreement, Richard Jahn resigned as trustee. James White joined in releasing Richard Jahn as trustee. Apparently no one reviewed the Four Trust agreements at the time or realized that by their terms, American National Bank should have become trustee of the trusts. *Order* at 7-8. Instead, Robert E. White and James White agreed between themselves that each would become the trustee for the other's children's trusts. *Id.*

On April 14, 1986, Robert E. White resigned as trustee of the Four Trusts, and Alan Cates, as Trustee, became the successor trustee. The next day Robert E. White arranged for Alan Cates, as Trustee, to transfer 16,000 shares of Selox, Inc. stock to Robert E. White for \$15 per share. *First Appellate Order* at \*1.

In the fall of 1987, an agreement was reached as to the sale of Selox, Inc. in which the shareholders would receive approximately \$165 per share. *Order* at 9. In March, 1988, Robert E.

White sold all the stock in Selox, Inc. for approximately \$165 per share. *Id.*

On February 24, 1989, Alan Cates, as Trustee, brought suit against Robert E. White alleging breach of his duties as trustee and self-dealing in the Chancery Court of Hamilton County, Tennessee (the "State Trial Court"). Robert E. White counterclaimed against Alan Cates, as Trustee, and brought a third-party action against James White. At the same time, litigation between James White and Robert E. White was proceeding concurrently in Federal District Court<sup>1</sup>, which included the same elements as the third-party claim in the state court action. Upon motion, the State Trial Court severed the third-party claim against James White, and bifurcated the suit as to the interests of James White and the interests of the minor children. The State Trial Court ruled that the respective interests of the children should be determined without further delay, and that the disputes between James White and Robert E. White included matters which were irrelevant as to whether or not there had been a breach of fiduciary duty to the four minor children of James White. *Order at 11.*

Accordingly, the State Trial Court restricted the proceedings to the following issues: "[W]hether or not [Robert E. White] was Trustee or whether [Robert E. White] had a fiduciary relationship

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<sup>1</sup>The federal litigation involved 36,000 shares of Selox, Inc. stock owned individually by James White.

to [the] income beneficiaries of the [Four Trusts], whether or not [Robert E. White] breached any fiduciary duty that caused a loss to the income beneficiaries, and if so what the measure of damages would be and what those damages are." *First Appellate Order* at \*2.

Robert E. White appealed several issues after the first trial to the Court of Appeals of Tennessee (the "Appellate Court"). The Appellate Court ruled that an award of only one facet of damages was interlocutory in nature and the appeal was denied. The Appellate Court found that while it was proper to bifurcate the evidentiary hearings on damages as to the income and reversionary beneficiaries, the appeal could not be bifurcated. The Appellate Court remanded the case to the State Trial Court for determination of Robert E. White's total liability to each of the Four Trusts. *First Appellate Order* at \*4

On remand, the State Trial Court took up the matter of Robert E. White's liability to James White as the reversionary beneficiary of the Four Trusts. The State Trial Court found that Robert E. White was not liable to James White based upon several factors including: James White's release in favor of Robert E. White, James White's representation by counsel, James White's seeking independent advice as to the value of the stock, James White's receipt of valuable consideration for the option and for the release, James White's employment at Selox, Inc., and James White's participation on Selox, Inc.'s board of directors. The State Trial

Court found that differentiating the interests of the reversionary and income beneficiaries was proper given the incapacity of the minor children to convey or alienate their interests in the Four Trusts. *Post-Remand Order*.

Robert E. White and Alan Cates, as Trustee, appealed the *Order* and the *Post-Remand Order*. The issues relevant to this adversary proceeding were affirmed on appeal without opinion. *Second Appellate Opinion* at \*3.

#### **FINDINGS OF FACT**

The Tennessee State Court Orders made the following findings of fact:

##### **The Order**

1. [E]ven though [Robert E.White's] intent may have been that he would act as trustee for very limited purposes, he, nevertheless, assumed the demanding fiduciary obligations of a trustee. *Order* at p.1;
2. [Robert E. White] violated those fiduciary responsibilities by purchase of the stock held in trust one day after he resigned as Trustee. *Order* at p.1;
3. While he was chairman of the board and president of Selox, Inc., [Robert E. White] agreed to become the trustee for four nieces and nephews in 1985. *Order* at p.2;

4. [Robert E. White] presented considerable proof attempting to show that he was not really the trustee. *Order* at p.2;
5. [Robert E. White] interfered with the trust relationship between Richard Jahn and the beneficiaries by bringing about [Richard Jahn's] resignation. *Order* at p. 12;
6. Then, the brothers [Robert E. White and James White] agreed to "swap out" as trustee for each other without, apparently either reading the [Four Trust] agreements (or not caring). *Order* at p. 12;
7. Then, neither is concerned when [Robert E. White] steps down as trustee one day and the next day buys the stock from the [Four Trusts] which he previously was charged with administering. *Order* at p. 12;
8. [I]t is apparent, under the proof, that [Robert E. White] was not thinking about the best interests of the minor beneficiaries when he purchased the stock. *Order* at p. 13;
9. James White's intentions and/or desires as to the trustee's duties under the [Four Trusts] are immaterial after the execution of the [Four Trusts]. *Order* at p. 13;
10. [Robert E. White] signed the [Four Trust's] tax returns. *Order* at p. 14;
11. Employees subject to [Robert E. White's] direction held the stock certificates and [Four Trust] agreements. *Order*

- at p. 14;
12. [Robert E. White] and/or his attorneys represented in letters that he was the trustee of the [Four Trusts]. *Order* at p. 14;
  13. [Robert E. White] admitted in two answers that he was the trustee. Since [Robert E. White's] two initial answers were amended the admissions are no longer "conclusive". Nevertheless, such is very persuasive as to how [Robert E. White] viewed his relationship as to these [Four Trusts]. *Order* at p. 14 (citations omitted);
  14. The [State Trial Court] does not believe that it is necessary to determine whether [Robert E. White] was a defacto trustee under the written agreement, trustee under an oral trust, or precisely define the state of his fiduciary relationship. *Order* at p. 14;
  15. In any event, [Robert E. White] had a fiduciary relationship whether he voluntarily accepted same or whether such was imposed upon him by law. *Order* at p. 15;
  16. [Robert E. White] contended he was bound to the price of \$15 per share by virtue of the option agreement signed in 1983. The [State Trial Court] ruled, however, that the settlor, James White, had no authority to contract to sell the stock held by the trustee in 1983. *Order* at p. 16;

17. The great disparity between the purchase price in April, 1986 and the ultimate sales price in 1988 alone raises a strong inference that the purchase price of \$15 per share was inadequate when the interest of the minors are considered. *Order* at p. 16;
18. Despite contending that \$15 per share was a fair price in April of 1986, [Robert E. White] certified on his financial statement of March 12, 1986, that the value of Selox, Inc. stock was approximately \$115 per share. *Order* at p. 16;
19. [Robert E. White] was in the process of taking over as majority stockholder in April-May 1986. *Order* at p. 19;
20. The [State Trial Court] was of the opinion that [Robert E. White] failed to carry the burden of proof to show that he paid a fair value for the stock. The preponderance of evidence is to the contrary. *Order* at p. 19;
21. A confidential memorandum of [Selox, Inc.] states, that "since becoming CEO of [Selox, Inc.], [Robert E.] White has consistently followed a strategy of buying, or having the company redeem, outstanding stock in the company." [Robert E. White] disavowed any thoughts of selling the company until late July, 1987. Yet, there had been periodic discussions with Airco as to such over several

- years prior to the final sale. Order at p. 21;
22. Upon cross-examination, [Robert E. White] testified that he thought the stock purchased in April of 1986 from the [Four Trusts] was worth a greater figure than \$15 per share. Order at p. 21;
23. The [State Trial Court] finds that [Robert E. White] breached his fiduciary duties and the price was disadvantageous to the minor beneficiaries. Order at p. 22;
24. The inadequacy of consideration appears gross and manifest. Order at p. 22;
25. The [State Trial Court] finds [Robert E. White] is liable under the terms of the express agreement by his willful commission of acts in breach of trust and in violation of his fiduciary duties to the minor beneficiaries of the [Four Trusts]. Order at p. 21;

**First Appellate Order**

26. [Alan Cates, as Trustee] sued [Robert E. White] who was a predecessor trustee for the [Four Trusts]. *First Appellate Order* at \*1;
27. About June, 1985, [Richard] Jahn resigned and [Robert E. White] became trustee. *First Appellate Order* at \*1;
28. On April 14, 1986, [Robert E. White] resigned as trustee of the Four Trusts. *First Appellate Order* at \*1;

### The Post-Remand Order

29. Suit was filed by, [Alan Cates, as Trustee,] who alleged breach of fiduciary duties on the part of Robert E. White, who the court found was trustee immediately before [Alan] Cates became the trustee of each trust. *Post-Remand Order* at p.1;
30. James White had no actual authority to bind the [Four Trusts] to sell the stock at the stated price of \$15 per share at the time the option agreement was given, or at the time of sale. *Post-Remand Order* at p.2;
31. The [State Trial Court] is satisfied that as of April, 1986, [Robert E. White] was working toward the sale of Selox, Inc. at a substantial profit to himself. *Post-Remand Order* at p.3;
32. The [State Trial Court] has previously held that even though the trustee relationship was tenuous, such was sufficient to hold [Robert E. White] liable for damages to the minor beneficiaries. *Post-Remand Order* at p.3;
33. The [State Trial Court] has essentially held that Robert E. White was estopped, barred or precluded from denying that he was a trustee as to the minor beneficiaries. *Post-Remand Order* at p.3.

## CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

### **I. Summary Judgment**

Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that Summary Judgment is appropriate if the Court determines that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In considering a motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987) (citing *Anderson*, 477 U.S. at 248). Summary judgment is appropriate when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the

non-moving party. *Anderson*, 477 U.S. at 248-49.

Robert E. White and Alan Cates, as Trustee, do not dispute the material facts in this matter. Summary judgment is therefore appropriate as a matter of law.

## **II. Collateral Estoppel**

The Motion seeks a determination that the debt owed by Robert E. White to Alan Cates, as Trustee, is nondischargeable pursuant to 11 U.S.C. § 523(a)(4) by application of collateral estoppel to the Tennessee State Court Orders.

Collateral estoppel, or issue preclusion, bars relitigation of an issue previously decided in judicial proceedings "if the party against whom the prior decision is asserted had a 'full and fair opportunity' to litigate that issue in an earlier case." *S. St. Laurent, II, v. Ambrose, (In re S. St. Laurent)*, 991 F. 2d 672, 675 (11th Cir. 1993). It is well established that "collateral estoppel principles . . . apply in discharge exception proceedings pursuant to § 523(a)." *Grogan v. Garner*, 498 U.S. 279, 287 n.11 (1987). "If the prior judgment was rendered by a state court, then the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect." *S. St. Laurent*, 991 F.2d at 675.

In this case, Alan Cates, as Trustee, asks the Court to give preclusive effect to final Tennessee State Court Orders. Under Tennessee law, the doctrine of collateral estoppel is "held to be applicable only when it affirmatively appears that the issue

involved in the case under consideration has already been litigated in a prior suit between the same parties, even though based upon a different cause of action, if the determination of such issue in the former action was necessary to the judgment." *Dickerson v. Godfrey*, 825 S.W. 2d 692, 694 (Tenn. 1992) (citations omitted). "The party who asserts the doctrine of collateral estoppel in seeking to bar litigation of an issue has the burden of proving that the issue was, in fact, determined in a prior suit between the same parties and that the issue's determination was necessary to the judgment." *Id.* at 695.

Application of collateral estoppel to the Tennessee State Court Orders is proper in this matter. The Tennessee litigation involved the same parties, the issues determined in the litigation were necessary to the judgment, and the parties had a full and fair opportunity to litigate the issues through two full trials and two appeals in Tennessee state courts.

### **III. 11 U.S.C. § 523(a)(4)**

The Motion argues that the findings of fact contained in the Tennessee State Court Orders establish the required elements to except the subject debt from discharge for "defalcation while acting in a fiduciary capacity" pursuant to 11 U.S.C. §523(a)(4)<sup>2</sup>.

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<sup>2</sup> 11 U.S.C. § 523(a)(4) excepts from discharge any debt incurred by an individual debtor "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny". The Motion does not argue fraud, embezzlement, or larceny.

The Cross Motion argues in opposition that the findings of fact are insufficient to except the debt from discharge under section 523(a)(4).

In order to except a debt from discharge under § 523(a)(4) the Court must find that both a defalcation occurred and that a fiduciary relationship existed. *Morales v. Codias (In re Codias)*, 78 B.R. 344, 346 (Bankr. S.D. Fla. 1988). As discussed below, the Court finds that the Tennessee State Court Orders establish the elements required to except Robert E. White's debt to Alan Cates, as Trustee, from discharge for defalcation while acting in a fiduciary capacity.

**A. Acting in a Fiduciary Capacity**

The meaning of "fiduciary capacity" for § 523(a)(4) is a question of federal law. *Angelle v. Reed (In re Angelle)*, 610 F.2d 1335, 1341 (5th Cir. 1980)<sup>3</sup>. "The rather broad concept of 'fiduciary duty' under state law is not equivalent to the narrower bankruptcy meaning of 'fiduciary capacity' for purposes of §523(a)(4)." *Kapila v Talmo (In re Talmo)*, 175 B.R. 775, 778 (Bankr. S.D. Fla. 1994). The Supreme Court has consistently held that when determining exceptions to discharge under bankruptcy law, the term "fiduciary" is intended to refer to technical trusts. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993) (citing *Chapman*

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<sup>3</sup> On October 1, 1981 the Fifth Circuit of the United States Court of Appeals was divided to create the new Fifth and Eleventh Circuits.

*v. Forsyth*, 43 U.S. 202 (1844); *Upshur v. Briscoe*, 138 U.S. 365 (1891); *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934)).

Thus, for purposes of § 523(a)(4), the term "fiduciary capacity" requires a fiduciary relationship involving a technical or express trust. In addition, there is a temporal aspect to this requirement: the technical or express trust "must exist prior to the act creating the debt and without reference to that act." *Angelle*, 610 F.2d at 1338, (citing *Upshur v. Briscoe*, 138 U.S. 365 (1890)). The Supreme Court discussed these requirements in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934):

It is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio*. He must have been a trustee before the wrong and without reference thereto. In the words of Blatchford, J., "The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created." *Angelle*, 610 F.2d at 1338 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. at 333 quoting *Upshur v. Briscoe*, 138 U.S. 365).

The Seventh Circuit explained the *Davis* distinction above as the difference between "a trust or other fiduciary relationship that has an existence independent of the debtor's wrong and a trust or other fiduciary relation that has no existence before the wrong is committed . . . [I]n the case of a constructive or resulting trust there is no fiduciary duty until a wrong is committed." *Matter of Marchiando*, 13 F.3d 1111, 1115 (7th Cir. 1994) (emphasis added). Consequently, a constructive trust or resulting trust is not sufficient to create a fiduciary relationship for the exception

to discharge provisions of section 523(a)(4).<sup>4</sup> *Angelle*, 610 F. 2d at 1339.

In this case, the Court does not agree with Robert E. White's position that the Tennessee State Court Orders' findings are insufficient to except the debt from discharge pursuant to §523(a)(4). Robert E. White's arguments fall into two categories: 1) Robert E. White's liability as trustee was imposed pursuant to a constructive or resulting trust; and 2) Robert E. White was not the actual or express trustee.

1. *Robert E. White's liability was imposed pursuant to express trusts.*

The Court's analysis begins with the fact that the Four Trusts are express trusts, they are neither constructive nor resulting trusts. The *Order* found Robert E. White "liable under the terms of the express agreement by his willful commission of acts in breach of trust and in violation of his fiduciary duties to the minor beneficiaries of the [Four Trusts]." *Order* at 22 (emphasis added). The Four Trusts were established in the late 1970's pursuant to trust agreements. The Four Trusts existed independently for many years prior to Robert E. White's alleged defalcation: the purchase of Selox, Inc. stock for less than fair value on April 15, 1986.

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<sup>4</sup>"The language of § 523(a)(4) is similar, but not identical, to provisions of various bankruptcy statutes since 1841. Although the wording has changed slightly, all the versions have referred to 'defalcation' and to 'fiduciary capacity' or 'fiduciary character'". *Quaif*, F.3d at 943. Thus even though *Angelle* construed § 17(a) of the Bankruptcy Act, the law as stated by the Eleventh Circuit in *Angelle* applies to § 523(a)(4) of the Bankruptcy Code.

The Tennessee State Court Orders include the following date-specific findings: "[Robert E. White] agreed to become trustee for four nieces and nephews in 1985" *Order* at 2; and "[a]bout June, 1985, [Richard] Jahn resigned and [Robert E. White] became trustee". *First Appellate Order* at \*1. The findings show that Robert E. White took on the fiduciary relationship by acting as trustee for the Four Trusts in advance of the breach. The Four Trusts at issue are neither constructive or resulting trusts in which the fiduciary relation came into existence after the wrong was committed. See *Marchiando*, 13 F.3d at 1115. In this case, Robert E. White's liability was imposed pursuant to four express trusts that existed independently of, and prior to Robert E. White's alleged defalcation.

Robert E. White argues further that by differentiating the interests of the income and reversionary beneficiaries, the State Trial Court imposed a constructive trust. This Court notes that the issues relating to the divisibility of the Four Trusts were fully litigated and affirmed on appeal in the Tennessee courts.<sup>5</sup> The *Order* ruled that the disputes between James White and Robert E. White were irrelevant to the issue of whether or not there had been a breach of fiduciary duty to the four minor children of James White. *Order* at 11. The matter before this Court is the

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<sup>5</sup> The *Second Appellate Order* affirmed without opinion the following issue presented by the Successor Trustee: "Whether the Chancellor erred by treating each trust as divisible, subject to different defenses depending on who the beneficiary was." *Second Appellate Order* at \*1.

dischargeability of Robert E. White's debt for breach of fiduciary duty to the minor children beneficiaries of the express Four Trusts. The disputes between James White and Robert E. White are similarly irrelevant to this Court's determination.

2. *Robert E. White was "acting in a fiduciary capacity" with respect to the Four Trusts*

Robert E. White argues that he was not the actual or express trustee. The Order notes that "[Robert E. White] presented considerable proof attempting to show that he was not really the trustee." Order at 2. The State Trial Court was apparently not persuaded since the Order makes multiple findings showing that Robert E. White was either trustee of, or acting in a fiduciary capacity with respect to the Four Trusts. Robert E. White further argues that the State Trial Court never defined the fiduciary relationship. The Order stated, "[t]he[State Trial Court] does not believe it is necessary to determine whether [Robert E. White] is a de facto trustee under the written agreement, trustee under an oral trust, or precisely define the state of his fiduciary relationship." Order at 14 (citations omitted). The Order then conjectures that under the circumstances a court of equity could impose a constructive trust or the relationship could be called a resulting trust. The State Trial Court stated that "[i]n any event, [Robert E. White] had a fiduciary relationship whether he voluntarily accepted same or whether such was imposed upon him by law." *Id.*

Although the *Order* stated that it was not necessary to precisely define the state of the fiduciary relation, it nevertheless made numerous findings showing that Robert E. White voluntarily took on the trustee fiduciary obligations established by the Four Trust agreements. Despite the State Trial Court's conjectures regarding constructive and resulting trusts, the *Order's* findings reveal that the fiduciary obligation was not imposed by law to remedy a wrong by a debtor who did not have a fiduciary relationship at the time of his wrongdoing.

The *Order* made the following findings: "[E]ven though [Robert E. White's] intent may have been that he would act as trustee for very limited purposes, he nevertheless assumed the demanding fiduciary obligations of a trustee." *Order* at 1; Robert E. White "agreed to become the trustee for four nieces and nephews in 1985." *Order* at 2; "[T]he brothers agreed to 'swap out' as trustee for each other." *Id.* at 12; "Then neither is concerned when Robert E. White steps down as trustee one day and the next day buys the stock from the [Four Trusts] which he previously was charged with administering." *Id.*; "[Robert E. White] signed the [Four Trust's] tax returns." *Id.* at 14; "Employees subject to [Robert E. White's] direction held the stock certificates and [Four Trust] agreements." *Id.*; "[Robert E. White] and/or his attorneys represented in letters that he was the trustee of these [Four Trusts]." *Order* at 14.

The *First Appellate Order* notes that: the "Plaintiffs named

above sued [Robert E. White] who was a predecessor trustee for the [Four Trusts]", *First Appellate Order* at \*1; and "[o]n April 14, 1986, [Robert E. White] resigned as trustee of the Four Trusts." *Id.*

The State Trial Court made the following additional findings in the *Post-Remand Order*: "Suit was filed by [Alan Cates, as Trustee], who alleged breach of fiduciary duties on the part of Robert E. White, who the court found was trustee immediately before [Alan] Cates became the trustee of each trust." *Post-Remand Order* at 1; and "The [State Trial Court] has essentially held that Robert E. White was estopped, barred or precluded from denying that he was a trustee as to the minor beneficiaries." *Id.* at 3.

These findings, and others not repeated here, show that Robert E. White voluntarily assumed the role of trustee and held himself out as trustee. The *Order* also noted that "Robert E. White admitted in two answers that he was the trustee. Since [Robert E. White's] two initial answers were amended the admissions are no longer 'conclusive'. Nevertheless, such is very persuasive as to how [Robert E. White] viewed his relationship as to these [Four Trusts]." *Order* at p. 14 (citations omitted). In this Court's opinion, Robert E. White's resignation as trustee is further evidence that Robert E. White understood he had a fiduciary relationship to the Four Trusts. If he were not the trustee or holding himself out as the trustee, there would have been no need to resign.

Notwithstanding, Robert E. White still argues here that he could not have been the actual or express trustee since by the Four Trusts' terms, the trustee should have been the American National Bank after Richard Jahn's resignation. Order at 8. The Court finds that it is immaterial whether Robert E. White was the actual or express trustee. The requirements of § 523(a)(4) are met if a debtor was acting in a fiduciary capacity with respect to a technical or express trust. Having carefully reviewed all four Tennessee State Court Orders, this Court is of the opinion that the numerous findings therein establish that Robert E. White was "acting in a fiduciary capacity" pursuant to § 523(a)(4) when he voluntarily assumed the role of trustee for the express Four Trusts.

**B. Defalcation**

The remaining issue is whether Robert E. White's purchase of the Four Trusts' Selox, Inc. stock at \$15 per share constitutes a defalcation pursuant to § 523(a)(4), so as to except the debt from discharge. "Defalcation is defined as the slightest misconduct, negligence or ignorance and it does not require intentional conduct." *Berry v. Mullin, (In re Mullin)*, 91 B.R. 175, 176 (Bankr. S.D. Fla. 1988). "Indeed, defalcation does not require substantial culpability or misconduct. Creating a debt by breaching a fiduciary duty is sufficient to constitute defalcation, even in the absence of evidence of bad faith." *Bookbinder v. Pleeter (In re Pleeter)*, 293 B.R. 812, 817 (Bankr. S.D. Fla. 2003).

A trustee owes a duty of loyalty to the trust's beneficiaries. This principle is sometimes expressed as the obligation of the trustee not to place his own interests over those of the beneficiaries. Most, but not all, violations of the duty of loyalty concern transactions involving the trust property. *Comment Tenn. Uniform Trust Code* §35-18-802. A conflict between the trustee's personal and fiduciary interests is inherent when a trustee purchases trust assets for his own account.

In this case, the State Trial Court ruled that the sale of the Four Trusts' stock to Robert E. White was not fair and that it was "apparent, under the proof, that Robert E. White was not thinking about the best interests of the minor beneficiaries when he purchased the stock." *Order* at 13.

The *Order's* findings establish that Robert E. White breached his fiduciary duty to the Four Trusts by purchasing the stock for his own account at a price that was far less than its fair value. These findings include: "Despite contending that \$15 per share was a fair price in April of 1986, [Robert E. White] certified on his financial statement of March 12, 1986 that the value of [Selox, Inc.] stock was approximately \$115 per share." *Order* at 16; Robert E. White "failed to carry the burden of proof to show that he paid a fair value for the stock. The preponderance of evidence is to the contrary." *Order* at 19; "Upon cross-examination, [Robert E.] White testified that he thought the stock purchased in April of 1986 from

the [Four Trusts] was worth a greater figure than \$15 per share." *Order* at 21; "The inadequacy of consideration appears gross and manifest." *Order* at 22; and "The [State Trial Court] finds that [Robert E. White] breached his fiduciary duties and the price was disadvantageous to the minor beneficiaries." *Id* 21.

It might be argued that Robert E. White was not acting in a fiduciary capacity since he resigned as trustee one day prior to buying the Four Trusts' stock. The State Trial Court considered and rejected this argument. The *Order* relied on *Coffee v. Ruffin*, wherein the Tennessee Supreme Court noted that it was settled doctrine that trustees

are incapable, themselves, of purchasing the trust property ...[unless] the party seeking to maintain such transaction can show by clear and satisfactory proof, that the same was, in all respects, fair and entirely free from all imputation of fraud, or unfair advantage; . . .The fact that the relation may have terminated before the date of the transaction cannot affect or change the rule; but it is a fact, to be taken in to consideration. . . - depending on the particular circumstances of the case.

*Coffee v. Ruffin*, 44 Tenn 487 (1867), 1867 WL 2224 at \*11-12.

The State Trial Court found the circumstances in this matter were "suspicious" and that the "termination of [Robert E. White] as trustee immediately before the sale [did] not 'change the rule.'" *Order* at 22. Thus, Robert E. White's resignation as trustee did not sanitize the transaction.

This Court finds that the Tennessee State Court Orders contain sufficient findings of fact that establish that Robert E. White breached his fiduciary duty by purchasing the stock for less than

fair value, and that the breach constitutes a defalcation while acting in a fiduciary duty pursuant to § 523(a)(4).

**CONCLUSION**

Application of collateral estoppel to the Tennessee State Court Orders establishes that the debt owed to Alan Cates, as Trustee, by Robert E. White is excepted from discharge pursuant to 11 U.S.C. §523(a)(4) based upon Robert E. White's defalcation while acting in a fiduciary capacity.

**ORDER**

For the reasons stated above, the Court having reviewed the Motion, the Cross-Motion, the Reply, the Stipulation, the Tennessee State Court Orders, the applicable law, and being otherwise fully advised in the premises, hereby

**ORDERS AND ADJUDGES:**

1. The Motion is **GRANTED**.
2. The Cross Motion is **DENIED**.
3. The debt owed to Alan Cates, as Trustee, by Robert E. White is excepted from discharge pursuant to 11 U.S.C. § 523(a)(4) for Robert E. White's defalcation while acting in a fiduciary capacity.

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U.S. Trustee

Plaintiff's Counsel is hereby directed to serve a copy of this Order upon all interested parties not listed above.