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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP Nos.	CC-07-1164-KPaBa
		)		CC-07-1171-KPaBa
7	EYAD KHALIL,	)		(cross-appeals)
		)		
8	Debtor.	)	Bk. No.	SA 05-12795-ES
		)		
9	_____	)	Adv. No.	SA 05-01621-ES
		)		
10	EYAD KHALIL,	)		
	Appellant/	)		
	Cross-Appellee,	)		
11		)		
12	v.	)	<b>OPINION</b>	
		)		
13	DEVELOPERS SURETY AND INDEMNITY	)		
	COMPANY,	)		
		)		
14	Appellee/	)		
	Cross-Appellant.)	)		
15	_____	)		

Argued and Submitted on October 24, 2007  
at Los Angeles, California

Filed - November 6, 2007  
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Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and BARDWIL,<sup>1</sup> Bankruptcy Judges.

<sup>1</sup> Hon. Robert S. Bardwil, Bankruptcy Judge for the Eastern  
District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:

2  
3 Debtor Eyad Khalil appeals from the bankruptcy court's  
4 judgment denying his discharge under § 727(a)(4)<sup>2</sup> for knowingly  
5 and fraudulently making a false oath or account in, or in  
6 connection with, this bankruptcy case. Creditor Developers  
7 Surety and Indemnity Company ("DSI") cross-appeals seeking denial  
8 of Debtor's discharge under other provisions of § 727(a).

9 Debtor alleges that the bankruptcy court applied an  
10 incorrect standard for determining his intent: reckless  
11 indifference to the accuracy of bankruptcy schedules and  
12 statement of financial affairs, rather than knowing and  
13 fraudulent intent. Debtor also argues that the bankruptcy court  
14 was required to find a motive for his misstatements and  
15 omissions. We disagree on both counts, and also reject DSI's  
16 challenges to the judgment in its cross-appeal. We publish to  
17 clarify that evidence of reckless indifference to accuracy may be  
18 probative of intent even though reckless indifference alone does  
19 not suffice to establish the requisite intent. Accordingly, we  
20 AFFIRM.

21 **I. FACTS**

22 Debtor filed his voluntary Chapter 7 petition on April 25,  
23 2005 (the "Petition Date") and his bankruptcy schedules and

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24  
25 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
119 Stat. 23, because the case from which this appeal arises was  
filed before its effective date (generally October 17, 2005).

1 statement of financial affairs on May 10, 2005. DSI filed a  
2 complaint objecting to Debtor's discharge and trial was held  
3 October 25 and 26, 2006. Debtor's direct testimony was presented  
4 by declaration. Much of DSI's evidence consisted of excerpts  
5 from Debtor's deposition testimony that were read into the record  
6 and admitted without objection. See Tr., Oct. 25, 2007,  
7 pp. 89:20-90:25.

8 Debtor does not dispute that his bankruptcy schedules and  
9 statement of financial affairs omit several transfers involving  
10 his family members and that they are not listed as creditors or  
11 codebtors. Debtor's principal defense is that, at least as of  
12 the Petition Date and perhaps even now, he did not believe that  
13 such disclosures were necessary.

14 DSI focuses primarily on three transactions. First, Debtor  
15 did not disclose approximately \$100,000 that he received from his  
16 father in 2003. DSI argues that this was income that should have  
17 been listed in Debtor's statement of financial affairs, in  
18 response to questions 1 and 2 asking Debtor to state the amount  
19 of pre-petition "income" that he received in the current year and  
20 the two previous years. See Official Form 7. The initial source  
21 of the money was Atek Corporation ("Atek"), an S Corporation  
22 which has now ceased operations but was then engaged in  
23 construction focusing on public works projects. Debtor's father  
24 was the record owner of 50% of the shares and Debtor's uncle Ali  
25 Mohammed Taha ("Uncle") held the other 50%. Debtor testified  
26 that his father "was entrusted with my share in the company since  
27 [its] inception" and held it solely for Debtor's benefit; "I was  
28 the holder of [the] California Contractor's License"; and the 50%

1 share "was transferred into my name eventually." Tr., Oct. 25,  
2 2006, pp. 32:11-24, 121:17-122:3 (quoting Ex. 16 p. 176:11-22).  
3 Atek distributed about \$111,699 to Debtor's father, who paid  
4 income taxes on that money and transferred the balance to Debtor.  
5 Id. pp. 32:24-33:9 (quoting Ex. 16 pp. 176:2-177:5). Debtor  
6 testified that he did not consider this to be income. His  
7 counsel asked what Debtor understood to be income, which led to  
8 the following exchange:

9 A Income? Money you get for doing something,  
10 for doing work.

11 Q Okay, and if you receive income for doing  
12 work, do you report that on your tax return as  
13 income?

14 A Yes.

15 Q Was the money you received from your father  
16 from this profit in 2001 income to you?

17 A No. I did discuss that with my accountant  
18 and our accountant knows that my dad was save  
19 people for my work [sic] and our accountant  
20 explained that as long as my dad pay taxes on that  
21 income, what my dad does with that money, whether  
22 he spends it or gives it to me, is our business,  
23 as long as he pay taxes for the income.

24 Tr., pp. 97:15-98:16.

25 The second transaction involves Atek's sale of some  
26 unimproved residential real property (the "Big Bear Lot") in  
27 January of 2005 for \$148,642.70. Atek distributed \$40,000 to  
28 Debtor and another \$73,000 to Debtor's brother, Khalil Jaj Khalil  
("Brother"). DSI alleges that some of this money was used to  
defray Debtor's personal expenses and repay a debt that Debtor  
owed Brother. Debtor did not disclose these transactions as  
income. Nor did Debtor disclose any payments of personal debts  
to Brother or other persons in response to question 3.a. of his

1 statement of financial affairs, which requires Debtor to list all  
2 payments on loans and other debts aggregating more than \$600 to  
3 any "creditor" within 90 days before the Petition Date, or  
4 question 3.b., which requires Debtor to list all payments within  
5 one year prior to the Petition Date to or for the benefit of  
6 "creditors" who are or were insiders. See Official Form 7.

7 At trial Debtor admitted that approximately \$3,000 out of  
8 the \$40,000 was used to pay for foundation work on his personal  
9 residence, and an unspecified amount was used to pay a law firm  
10 that he consulted for both corporate and personal bankruptcy  
11 advice. Tr., Oct. 25, 2006, pp. 49:4-50:19, 100:13-21, 102:2-23  
12 (quoting Ex. 15 pp. 93:2-94:2). As for the \$73,000 transferred  
13 to Brother, Debtor testified:

14 I was worried that the bonding companies  
15 would get a hold of the money in my company  
16 account and I put it in my brother's account so he  
17 can pay my bills . . . [m]y lawyer bills, my  
18 personal bills, and he used the money to do that.

19 Tr., Oct. 25, 2006, p. 47:3-11 (quoting Ex. 15 p. 79:17-23)  
20 (emphasis added).

21 DSI's counsel confirmed that Brother spent money "on your  
22 personal bills, is that correct?" Id. p. 48:8-10 (quoting Ex. 15  
23 p. 80:13). Debtor answered, "And for lawyers." Id. p. 48:10  
24 (quoting Ex. 15 p. 80:14). Despite these unequivocal statements,  
25 the evidence is somewhat conflicting because it is not entirely  
26 clear what Debtor considered to be "personal" expenses. Some  
27 time after the testimony quoted above, DSI's counsel and Debtor  
28 had the following exchange:

Q Did you, at any time during 1996 to the time  
of [Atek's] closure, write any checks on the  
corporate account for your personal expenses?

1 A Yes.

2 Q And what type of expenses did you pay?

3 A Mostly when I, you know, buy material. When  
4 I am on sites I buy material for, you know, things  
5 that the project is missing. Workers needing  
6 tools, stuff like that, that hasn't been planned  
properly, you know, or things that came up because  
of the size of our work that occurred almost daily  
or weekly.

7 Q Okay, perhaps you misunderstood my question.  
8 My question was, did, at any time, you or anyone  
9 from the corporation write a corporate check to  
pay for your personal expenses.

10 A "Personal expenses" as in --

11 Q Mortgage, car payments, utilities?

12 A No, no.

13 Tr., Oct. 25, 2006, pp. 126:20-127:12.

14 Regardless what expenses were or were not paid from the sale  
15 of the Big Bear Lot, Debtor admitted that at the time he filed  
16 his bankruptcy schedules he owed money to his brother. Tr., Oct.  
17 25, 2006, p. 116:4. He explained that he did not list Brother as  
18 a creditor because "I knew he wasn't going to come after me for  
19 the money and he knew I was filing for bankruptcy . . . but he  
20 was helping me." Id. pp. 98:25-99:13. Debtor concluded, "[h]e's  
21 not a creditor." Id. p. 99:13. Debtor later had the following  
22 exchange with DSI's counsel:

23 Q Harkening back to your testimony earlier  
24 about your definition of income; that definition  
was you go to work and you get paid, wasn't it?  
Or am I mischaracterizing?

25 A That's the way I understand it, yes.

26 Q What about dividend income? . . . That's  
27 income too, isn't it?

28 A Yes.

1 Q How about if somebody pays a debt for you;  
2 isn't that income? Don't you get the benefit of  
that?

3 A No.

4 Q No? Just free, huh?

5 A If my brother is paying --

6 Q I'm not asking about your brother, I'm just  
7 asking hypothetically.

8 A It depends on whether they are expecting  
repayment or not, I suppose.

9 Q Oh, I see. If it's a loan it's not income  
10 . . .

11 Q May [I] reiterate for a moment, Mr. Khalil;  
12 when your bankruptcy was filed, or when these  
13 papers were filed which was just a few days  
afterwards, you personally did not believe that  
you owed your brother any money, is that right?

14 A I did not -- I knew that my brother would not  
15 come after me for that money and therefore I -- he  
knew that I was filing for bankruptcy and  
therefore I did not owe him any money.

16 Tr., Oct. 25, 2006, pp. 112:2-20, 115:8-15 (emphasis added).

17 Later, however, Debtor appears to contradict the emphasized  
18 language. He was asked, "So is your testimony, Mr. Khalil, that  
19 when you filed this case you did not owe your brother any money?"  
20 he responded, "I owed my brother money but . . . I didn't list  
21 him because I didn't think he would come after me for that  
22 money." Tr., Oct. 25, 2006, p. 116:2-6 (emphasis added). When  
23 DSI's counsel asked Debtor to confirm that he intended to repay  
24 his family and friends for funds advanced by them, he answered:  
25 "That's in my heart, not contractual. I'm not obligated to do  
26 so." Tr., Oct. 26, 2006, p. 13:15-22.

27 The third transaction on which DSI focuses is Debtor's  
28 acquisition of Uncle's 50% interest in Atek at the end of 2003 or

1 beginning of 2004 for an agreed purchase price of \$2 million.  
2 Tr., Oct. 25, 2006, p. 54:1-5. Debtor testified that transfers  
3 of \$50,000 and \$150,000 from Atek to Uncle in March of 2004 were  
4 in part payment of that \$2 million debt. Id. pp. 86:4-11, 88:5-  
5 7. DSI argues that these transfers were for Debtor's benefit and  
6 should have been disclosed as part of his income. Debtor's  
7 counsel asked, did you understand that this \$200,000 transfer  
8 from Atek to Uncle was "income to you?" Id. p. 100:2. Debtor  
9 responded:

10 A How can . . . my company pay something and it  
11 be income? Of course not. Did you say "income"?

12 Q Income, as we discussed before.

13 A It's -- no.

14 Id. p. 100:3-7.

15 DSI argues that Debtor should have listed Uncle as a  
16 creditor on his bankruptcy Schedule F (general unsecured  
17 creditors). Debtor's direct testimony declaration states:

18 With the closure of [Atek] prior to my bankruptcy  
19 filing, I did not believe that [Uncle] expected  
20 payment from me for the purchase of his stock in  
21 Atek, an agreement that I previously entered into,  
22 or for reimbursement for any money he might have  
23 to pay to the corporate creditors, since the  
24 source of my income to pay him was from the  
25 operation of Atek. In addition, since [he] is my  
26 uncle, I did not believe that he would come after  
27 me for payment, thus I did not consider him to be  
28 a creditor of mine when I filed bankruptcy.

Direct Testimony Decl., ¶ 3.c.

25 At trial Debtor testified that he did not personally owe  
26 money to Uncle. Tr., Oct. 25, 2006, p. 98:19-24. According to  
27 Debtor, the written agreement for purchase and sale of Atek for  
28 \$2 million was supplemented by an oral agreement that the



1 \$2 million would only be paid by Atek, not by Debtor personally.  
2 Tr., Oct. 25, 2006, pp. 136:14-19, 138:21-139:1; Tr., Oct. 26,  
3 2006, pp. 25:11-22, 26:16-25, 28:21-24, 58:24-59:7.

4 DSI also objects that Uncle and his wife are not listed as  
5 codebtors in bankruptcy Schedule H (codebtors) even though they  
6 are jointly obligated with Debtor as guarantors of Atek's  
7 obligations to DSI and another bonding company. Debtor's direct  
8 testimony states:

9 It was my understanding that as a result of  
10 [Uncle] selling his stock in [Atek] and resigning  
11 as an officer of the corporation, and based upon a  
12 sale agreement that was entered into, he and his  
13 wife were no longer liable to any of the corporate  
14 creditors. Thus, I did not think I was required  
15 to include them as co-debtors in my schedules. I  
16 had no intention of misleading the Court or  
creditors by the omission of this information. I  
later found out that notwithstanding my belief as  
to the effect of the sale of the stock and  
resignation, their liability for these debts  
remained -- a fact that the affected creditors  
must have known regardless of the manner in which  
my schedules were completed.

17 Direct Testimony Decl. ¶ 3.b.

18 Debtor also acknowledges that he under-reported what he  
19 acknowledges to be income in 2003 through 2005. For 2003, Debtor  
20 explained that he "looked at the 2003 corporate tax return which  
21 included 'Shareholder's Share of Income, Credits, Deductions'  
22 which shows ordinary income for me at \$372,981 instead of the  
23 \$400,000+ figure from my personal 2003 return." Direct Testimony  
24 Decl. ¶ 3.h. (emphasis added). For 2004, Debtor's statement of  
25 financial affairs shows "Estimated gross income from [Atek]" of  
26 \$35,000 but in an examination by DSI Debtor admitted that this  
27 was only payroll and "I found out that I had . . . made some  
28 draws" that added another \$14,000 or so to his income. Tr., Oct.

1 25, 2006, pp. 56:15-57:12 (quoting Ex. 14 p. 63:17-64:10).

2 The bankruptcy court gave its oral ruling on December 18,  
3 2006. After rejecting DSI's claims under § 727(a)(2), (3), and  
4 (5) the bankruptcy court turned to § 727(a)(4)(A).<sup>3</sup> It noted  
5 that, as Debtor admits, he "understated gross income for 2003 by  
6 approximately \$76,000" and "understated income for 2004 by  
7 approximately \$14,000." Tr., Dec. 18, 2006, p. 9:7-9. In  
8 addition, the bankruptcy court found that at least some portion  
9 of the amounts paid to lawyers and to Debtor's brother was used  
10 for Debtor's personal benefit, but was not disclosed in Debtor's  
11 statement of financial affairs (i.e., neither disclosed as income  
12 nor as payments to creditors). Tr., Dec. 18, 2006, p. 10:10-15.

13 Similarly, [the bankruptcy court stated,]  
14 money that the Debtor received -- I believe he  
15 referred to this as a gift from his father,  
16 approximately \$100,000 that was paid out to the  
17 father as a dividend from [Atek]. Again, this was  
18 not disclosed on the Debtor's statement of  
19 financial affairs.

17 And I do find this significant, because in  
18 reviewing the deposition testimony that was  
19 presented into evidence, the Debtor testified at  
20 his deposition that the father's interest in  
21 [Atek] was really in name only, and that is that  
22 at all times it was the arrangement between [him]  
23 and his father that the father was holding the  
24 interest for him, that it was really his interest  
25 and that he had put the money into the company.

22 Tr., Dec. 18, 2006, pp. 10:18-11:5.

23 The bankruptcy court found that Debtor's omissions are  
24 "numerous and/or substantial in terms of dollar amount" and that  
25

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26 <sup>3</sup> Section 727(a)(4)(A) provides, "(a) The court shall grant  
27 the debtor a discharge, unless -- . . . (4) the debtor knowingly  
28 and fraudulently, in or in connection with the case -- (A) made a  
false oath or account[.]"

1 Debtor's explanation "that these were relatives, [that] he didn't  
2 think that they would come after him, I really found not  
3 persuasive." Id. p. 13:10-14. The bankruptcy court noted that  
4 bankruptcy Schedule F requires that "all" entities that are owed  
5 money be listed and "[t]here is no exception for family members,  
6 there is no exception for friends, there is no exception for  
7 entities that one believes are not going to seek to recover  
8 [their] claims." Id. p. 13:14-20. The bankruptcy court was also  
9 troubled that, even after DSI's complaint was filed, Debtor did  
10 not amend his bankruptcy schedules and statement of financial  
11 affairs to disclose all omitted or misstated items, and even at  
12 trial he testified that these documents were accurate "in the  
13 face of obvious inconsistencies and omissions." Id. pp. 13:21-  
14 14:12. The bankruptcy court noted that, as Debtor admits, this  
15 was "not a matter of mistake or forgetting that a debt existed"  
16 but a "conscious decision" not to list debts or family members.  
17 Id. p. 14:15-20. See also Tr., Oct. 25, 2006, p. 116:7-22.

18 The bankruptcy court entered a judgment denying Debtor's  
19 discharge under § 727(a)(4) on April 18, 2007. Debtor filed a  
20 timely notice of appeal and DSI filed a timely cross-appeal.

## 21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction over this core  
23 proceeding under 28 U.S.C. §§ 157(b)(2)(J) and 1334. We have  
24 jurisdiction under 28 U.S.C. § 158(a)(1), (b), and (c).

## 25 **III. STANDARDS OF REVIEW**

26 . . . the Ninth Circuit standard of review of a  
27 judgment on an objection to discharge is that:  
28 (1) the court's determinations of the historical  
facts are reviewed for clear error; (2) the  
selection of the applicable legal rules under

1 § 727 is reviewed de novo; and (3) the  
2 application of the facts to those rules requiring  
3 the exercise of judgments about values animating  
4 the rules is reviewed de novo.

5 Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP  
6 2004) (citations omitted), aff'd, 212 Fed. App'x 589 (9th Cir.  
7 2006).

8 "When there are two permissible views of the evidence, the  
9 trial judge's choice between them cannot be clearly erroneous."  
10 Village Nurseries v. Gould (In re Baldwin Builders),  
11 232 B.R. 406, 410 (9th Cir. BAP 1999) (citation omitted).

#### 12 **IV. ISSUES**

13 A. Did the bankruptcy court apply the correct standard of  
14 intent under § 727(a)(4)(A)?

15 B. On the cross-appeal, did the bankruptcy court err in  
16 denying DSI's claims under § 727(a)(2), (3), and (5)?

#### 17 **V. DISCUSSION**

18 Section 727 provides, in relevant part:

19 § 727. Discharge

20 (a) The court shall grant the debtor a discharge,  
21 unless --

22 . . .

23 (2) the debtor, with intent to hinder, delay,  
24 or defraud a creditor or an officer of the  
25 estate charged with custody of property under  
26 this title, has transferred, removed,  
27 destroyed, mutilated, or concealed, or has  
28 permitted to be transferred, removed,  
destroyed, mutilated, or concealed --

(A) property of the debtor, within one  
year before the date of the filing of  
the petition; or

(B) property of the estate, after the  
date of the filing of the petition;

1 (3) the debtor has concealed, destroyed,  
2 mutilated, falsified, or failed to keep or  
3 preserve any recorded information, including  
4 books, documents, records, and papers, from  
5 which the debtor's financial condition or  
6 business transactions might be ascertained,  
7 unless such act or failure to act was  
8 justified under all of the circumstances of  
9 the case;

10 (4) the debtor knowingly and fraudulently, in  
11 or in connection with the case --

12 (A) made a false oath or account;

13 . . .

14 (5) the debtor has failed to explain  
15 satisfactorily, before determination of  
16 denial of discharge under this paragraph, any  
17 loss of assets or deficiency of assets to  
18 meet the debtor's liabilities[.]

19 § 727(a) (2), (3), (4) (A), and (5).

20 DSI bears the burden of proving by a preponderance of the  
21 evidence that Debtor's discharge should be denied. Searles, 317  
22 B.R. at 376. The bankruptcy court noted that discharge  
23 provisions are liberally construed in favor of debtors and  
24 strictly against the person objecting to the discharge. See  
25 Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 730 (9th Cir.  
26 BAP 1999), aff'd, 5 Fed. App'x 743 (9th Cir. 2001). That does  
27 not, however, change the preponderance of evidence standard.  
28 Rather, it has been held to mean that actual, rather than  
constructive, intent is required. See Garcia v. Coombs (In re  
Coombs), 193 B.R. 557, 560 (Bankr. S.D. Cal. 1996) (strict  
construction of statute in favor of discharge is rule of  
"statutory interpretation" not "rule to apply to consideration of  
evidence").

1           A.    Section 727(a)(4)(A)

2                   1.    In general

3           Section 727(a)(4)(A) denies a discharge to a debtor who  
4 "knowingly and fraudulently" makes a false oath or account in the  
5 course of the bankruptcy case. § 727(a)(4)(A). A false  
6 statement or an omission in the debtor's bankruptcy schedules or  
7 statement of financial affairs can constitute a false oath. See  
8 Searles, 317 B.R. at 377; Roberts v. Erhard (In re Roberts), 331  
9 B.R. 876, 882 (9th Cir. BAP 2005), aff'd, 2007 WL 2089041 (9th  
10 Cir.). "The fundamental purpose of § 727(a)(4)(A) is to insure  
11 that the trustee and creditors have accurate information without  
12 having to conduct costly investigations." Fogal Legware of  
13 Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir.  
14 BAP 1999) (citing Aubrey v. Thomas (In re Aubrey), 111 B.R. 268,  
15 274 (9th Cir. BAP 1990)). That said, a false statement or  
16 omission that has no impact on a bankruptcy case is not material  
17 and does not provide grounds for denial of a discharge under  
18 § 727(a)(4)(A). Id.

19           DSI must show by a preponderance of the evidence that:

20           (1) Debtor made such a false statement or omission, (2) regarding  
21 a material fact, and (3) did so knowingly and fraudulently. See  
22 Searles, 317 B.R. at 377; Roberts, 331 B.R. at 882 (same test,  
23 broken down into four elements). The first of these three  
24 elements is satisfied. Debtor has cited no authority, either  
25 before the bankruptcy court or on this appeal, that his relatives  
26 were not creditors simply because they would not "come after" him  
27 for the money he had borrowed from them. Whatever Debtor  
28 allegedly believed, the definition of "creditor," incorporating

1 the definition of "claim," is very broad and Debtor has shown no  
2 error in the bankruptcy court's conclusion that his relatives are  
3 in fact creditors. See § 101(5), (10). Nor has Debtor cited  
4 authority that transfers of money from Atek were anything but  
5 income within the meaning of the statement of financial affairs  
6 (Official Form 7), regardless of whether the money came to him  
7 through his father or was used to pay his creditors (through him  
8 or through Brother).

9 The next element is that the false statement or omission  
10 must involve a material fact. A fact is material "if it bears a  
11 relationship to the debtor's business transactions or estate, or  
12 concerns the discovery of assets, business dealings, or the  
13 existence and disposition of the debtor's property." Wills, 243  
14 B.R. at 62 (citations omitted). Debtor's briefs make no argument  
15 that his transactions with his family, and the debts and payments  
16 related to those transactions, are not material under this broad  
17 test. See Coombs, 193 B.R. at 566 (distinguishing between broad  
18 test of materiality and narrower test of intent).

19 The last element is intent. Debtor must have "knowingly and  
20 fraudulently" made a false oath or account. Section  
21 727(a)(4)(A). A debtor "acts knowingly if he or she acts  
22 deliberately and consciously." Roberts, 331 B.R. at 883  
23 (citation omitted). In this case Debtor admits that he made a  
24 deliberate and conscious choice to omit his family and  
25 transactions with them from his bankruptcy papers, but he claims  
26 to have done so through an honest belief that he was not required  
27 to list them, or through innocent oversight. As for acting  
28 fraudulently, we held in Roberts that the elements of common law

1 fraud substantially overlap the elements of a claim under  
2 Section 727(a) (4) (A), except that “materiality replaces the  
3 elements of reliance and proximately caused damage,” so that the  
4 creditor must show: “(1) [that] the debtor made the  
5 representations [e.g., a false statement or omission in  
6 bankruptcy schedules]; (2) that at the time he knew they were  
7 false; [and] (3) that he made them with the intention and purpose  
8 of deceiving the creditors . . . .” Id. at 884 (citations  
9 omitted, emphasis added).

## 10 2. Recklessness

11 In Roberts we reversed a judgment denying a discharge under  
12 § 727(a) (4) (A) because the bankruptcy court only found that the  
13 debtor exhibited a “careless and reckless approach to the  
14 important duty of disclosure in sworn bankruptcy filings.”  
15 Roberts, 331 B.R. at 884. We held that “recklessness does not  
16 measure up to the statutory requirement of ‘knowing’ misconduct.”  
17 Id.

18 On the other hand, recklessness can be probative of  
19 fraudulent intent. In Wills we stated in dicta that a court “may  
20 find the requisite intent where there has been a pattern of  
21 falsity or from a debtor’s reckless indifference to or disregard  
22 of the truth.” Wills, 243 B.R. at 64 (emphasis added) (citing  
23 Coombs, 193 B.R. at 564). We specifically left unresolved in  
24 Roberts whether “a reckless disregard of both the serious nature  
25 of the information sought and the necessary attention to detail  
26 and accuracy in answering may rise to the level of fraudulent  
27 intent necessary to bar a discharge . . . .” Roberts, 331 B.R.  
28 at 884 n.4 (quoting Mondore v. Mondore (In re Mondore), 326 B.R.



1 214, 217 (Bankr. W.D.N.Y. 2005)). We now address that issue.

2 There is no Ninth Circuit authority deciding this issue, but  
3 numerous courts including five other circuit courts have held a  
4 reckless indifference to the truth can support denial of  
5 discharge under § 727(a)(4)(A). See, e.g., Boroff v. Tully (In  
6 re Tully), 818 F.2d 106, 111 (1st Cir. 1987) (debtor's omissions  
7 evidenced "reckless indifference to truth equivalent to fraud for  
8 purposes of § 727(a)(4)(A)"); Salomon v. Kaiser (In re Kaiser),  
9 722 F.2d 1574, 1584 n. 4 (2d Cir. 1983) (citing authority that  
10 reckless indifference to truth is the equivalent of fraud, and  
11 that a pattern of reckless and cavalier disregard for truth can  
12 be serious enough to supply the necessary fraudulent intent  
13 required by § 727(a)(4)(A)); Beaubouef v. Beaubouef (In re  
14 Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992) (multiple  
15 falsehoods, combined with "failure to take advantage of the  
16 opportunity to clear up all inconsistencies and omissions when he  
17 filed his amended schedules," constituted "reckless indifference  
18 to the truth and, therefore, the requisite intent to deceive")  
19 (citation omitted); Keeney v. Smith (In re Keeney), 227 F.3d 679,  
20 686 (6th Cir. 2000) ("A reckless disregard as to whether a  
21 representation is true will also satisfy the intent requirement")  
22 (citation omitted); In re Chavin, 150 F.3d 726, 728 (7th Cir.  
23 1998) ("not caring whether some representation is true or false  
24 -- the state of mind known as 'reckless disregard' -- is, at  
25 least for purposes of the provisions of the Bankruptcy Code  
26 governing discharge, the equivalent of knowing that the  
27 representation is false and material") (citations omitted);  
28 Martin Marietta Materials Southwest, Inc. v. Lee (In re Lee), 309

1 B.R. 468 (Bankr. W.D. Tex. 2004) (following Beaubouef). See  
2 generally C.C. Marvel, Annotation, False Oath or Account as Bar  
3 to Discharge in Bankruptcy Proceedings, 59 A.L.R.2d 791 (1958,  
4 updated weekly per Westlaw) ("Annotation, False Oath or  
5 Account"); § 9.5 (reckless disregard).

6 These cases could be read as equating recklessness with a  
7 knowing and fraudulent intent, but that goes too far. The  
8 statute specifically requires that the debtor make a false oath  
9 or account "knowingly and fraudulently." § 727(a)(4)(A). As one  
10 court put it:

11 [A] debtor does not necessarily act with  
12 fraudulent intent even if he knowingly makes a  
13 false oath, and § 727(a)(4)(A), by requiring both  
14 knowledge and the intent to defraud, implicitly  
15 acknowledges that fact. It would certainly be  
16 anomalous to hold that a finding of reckless  
17 disregard on the part of a debtor for the accuracy  
18 of her schedules obviates the need to establish  
19 fraudulent intent, even though the Code permits no  
20 such "short cut" with respect to a debtor who  
21 signs schedules containing information which she  
22 knows to be false.

18 United States v. Sumpter (In re Sumpter), 136 B.R. 690, 696  
19 (Bankr. E.D. Mich. 1991), aff'd on other grounds, 170 B.R. 908  
20 (E.D. Mich. 1994), aff'd in part, rev'd in part, 64 F.3d 663 (6th  
21 Cir. 1995) (table).

22 On the other hand, intent usually must be proven by  
23 circumstantial evidence or inferences drawn from the debtor's  
24 course of conduct. See, e.g., Searles, 317 B.R. at 377 (evidence  
25 supported "factual inference" that debtor "intended to list a sum  
26 below the trustee's radar screen"); Roberts, 331 B.R. at 884  
27 (fraudulent intent "may be established by inferences drawn from  
28 [debtor's] course of conduct"); Wills, 243 B.R. at 64 (same).

1 Recklessness can be part of that circumstantial evidence.

2 Coombs strikes the appropriate balance. It is critical of  
3 too easy a reliance on recklessness, but as we noted in Wills it  
4 also stands for the general proposition that a court "may find  
5 the requisite intent where there has been a pattern of falsity or  
6 from a debtor's reckless indifference to or disregard of the  
7 truth." Wills, 243 B.R. at 64 (emphasis added) (citing Coombs,  
8 193 B.R. at 564). The Coombs court said it well:

9 Neither sloppiness nor an absence of effort by the  
10 debtor supports, by itself, an inference of fraud.  
11 Courts which hold otherwise are simply devising a  
12 court-made prophylactic rule that the debtor must  
13 make substantial effort to provide accurate and  
14 complete schedules. Had the Congress intended to  
15 make such a rule, it could have done so easily, as  
16 it did with § 727(a)(3) (failure to keep adequate  
17 books and records), and (a)(5) (failure to  
18 adequately explain the loss of assets), neither of  
19 which have an express element of fraudulent  
20 intent. [Citation omitted.] But the Congress did  
21 not do so, and it is not for the courts to create  
22 new bars to discharge under § 727(a), or to so  
23 distort a requisite element as to make it no  
24 element at all.

25 The essential point is that there must be  
26 something about the adduced facts and  
27 circumstances which suggest that the debtor  
28 intended to defraud creditors or the estate. For  
instance, multiple omissions of material assets or  
information may well support an inference of fraud  
if the nature of the assets or transactions  
suggests that the debtor was aware of them at the  
time of preparing the schedules and that there was  
something about the assets or transactions which,  
because of their size or nature, a debtor might  
want to conceal.

29 Coombs, 193 B.R. at 565-66 (emphasis added).

### 30 3. Application of the law to this case

31 Debtor claims that he did not know that his representations  
32 were false and he did not have the intention and purpose of  
33 deceiving creditors. According to Debtor, (1) he inadvertently

1 used the wrong documents to measure his gross income in 2003 and  
2 2004, and he truly believed (2) that roughly \$100,000 he received  
3 from Atek (through his father) was not "income," (3) that his  
4 obligation to repay his family did not make them "creditors,"  
5 (4) that his agreement to acquire 50% of Atek from Uncle for  
6 \$2 million did not make Uncle a "creditor," (5) that Uncle and  
7 his wife were not codebtors to DSI and another bonding company  
8 despite written guarantees, and (6) that payments of Debtor's  
9 debts through Brother and other transfers did not need to be  
10 reported in his bankruptcy schedules and statement of financial  
11 affairs. The bankruptcy court did not believe him.

12 Although the bankruptcy court did not explicitly say that  
13 Debtor acted with a knowing and fraudulent intent, its oral  
14 ruling leaves us with no doubt that it properly applied the  
15 correct legal standards described above. As part of that ruling,  
16 it quoted the following passage from Lee:

17 The party objecting to the debtor's discharge  
18 under [§ 727(a)(4)(A)] has the burden to show by a  
19 preponderance of the evidence that: (1) the  
20 statement was false; (2) the debtor knew the  
21 statement was false; (3) the debtor made the  
22 statement with fraudulent intent; and (5) the  
23 statement related materially to the bankruptcy  
24 case. False oaths sufficient to justify the  
25 denial of discharge under section 727(a)(4)(A)  
26 include: (1) a false statement or omission in the  
27 debtor's schedules or (2) a false statement by the  
28 debtor at the examination during the course of the  
proceedings. A discharge cannot be denied when  
items are omitted from the schedules by honest  
mistake. However, the existence of more than one  
falsehood, together with a debtor's failure to  
take advantage of the opportunity to clear up all  
inconsistencies and omissions, such as when filing  
amended schedules, can be found to constitute  
reckless indifference to the truth satisfying the  
requisite finding of intent to deceive.

1 Lee, 309 B.R. at 477 (emphasis added, citations omitted); see  
2 Tr., Dec. 18, 2006, pp. 7:23-8:25.

3 According to Debtor, the above reference to a "reckless  
4 indifference to the truth" shows that the bankruptcy court  
5 applied a recklessness standard rather than requiring DSI to  
6 prove his knowing and fraudulent intent. We disagree. First,  
7 Debtor ignores the clear statements earlier in the same paragraph  
8 that § 727(a)(4)(A) is only satisfied if "the debtor knew the  
9 statement was false" and "the debtor made the statement with  
10 fraudulent intent." Lee, 309 B.R. at 477 (emphasis added). Tr.,  
11 Dec. 18, 2006, p. 8:2-4. Second, the bankruptcy court later  
12 summarized Lee (correctly in our view) as requiring an "intent to  
13 deceive," not just Debtor's conscious omissions; but Lee also  
14 permits that intent to be inferred from appropriate  
15 circumstantial evidence:

16 The existence of more than one falsehood, together  
17 with a debtor's failure to take advantage of the  
18 opportunity to clear up all inconsistencies and  
19 omissions, such as when filing amended schedules,  
20 can be found to constitute a basis for a finding  
21 of intent to deceive. In other words, the court  
22 need not find that there is any actual admission  
23 by a debtor of any intent to deceive, but rather  
24 in looking at all of the circumstances, whether or  
25 not such intent may be inferred.

22 Tr., Dec. 18, 2006, pp. 12:17-13:5 (emphasis added) (summarizing  
23 Lee).

24 Third and finally, the bankruptcy court's factual findings  
25 overwhelmingly support that inference. At the end of its oral  
26 ruling it reiterated that

27 the requisite intent is supported . . . by the  
28 number of omissions, by the magnitude of the  
omissions, by the . . . conscious exclusion of

1 information, even at the time of trial, and no  
2 attempt to correct the inaccuracies.

3 Tr., Dec. 18, 2006, p. 15:3-8.

4 These are exactly the sort of circumstances referred to in  
5 Coombs (and Lee) as supporting an inference of knowing and  
6 fraudulent intent. Debtor has shown no error in the bankruptcy  
7 court's reliance on inferences.

8 4. Motive

9 Motive can support a finding of knowing and fraudulent  
10 intent, but it is not indispensable. A bankruptcy court might  
11 find that a debtor's reckless indifference to the truth is part  
12 of an attempt to fly "below the trustee's radar screen" (Searles,  
13 317 B.R. at 377), or to protect family or friends from intrusive  
14 discovery or preference or fraudulent transfer actions, or simply  
15 to make investigation difficult for the bankruptcy trustee or  
16 creditors. Alternatively, the court might never know the  
17 debtor's motive, but the number of misstatements or omissions, or  
18 the size or nature of a single one, might suffice to support a  
19 finding that a debtor knowingly and fraudulently made a false  
20 oath or account. See Hansen v. Moore (In re Hansen), 368 B.R.  
21 868, 878 (9th Cir. BAP 2007) ("The sheer number of material  
22 inaccuracies contained in schedules that debtor, an attorney,  
23 admittedly reviewed and revised twice suffices as circumstantial  
24 evidence to support the finding that the 'knowingly and  
25 fraudulently' element of § 727(a)(4) was proven.").

26 Debtor cites White v. Nielsen (In re Nielsen), 383 F.3d 922  
27 (9th Cir. 2004), for the proposition that the bankruptcy court  
28 must find a motive to defraud. That case did not involve an

1 objection to discharge. It involved a creditor's attempt to  
2 revoke the debtors' discharge under § 727(d)(1), which applies if  
3 the discharge "was obtained through the fraud of the debtor."  
4 § 727(d)(1). The creditor in that case alleged that the debtors  
5 intentionally omitted her from their list of creditors, but she  
6 did not show how, even if she had known of the bankruptcy case in  
7 time to object to the discharge, she would have had any grounds  
8 to do so. The Ninth Circuit recognized that debtors might  
9 "purposely leave a creditor off the list if that creditor would  
10 have knowledge of assets," or for other reasons. See id. p. 926.  
11 This implies that such a motive could be circumstantial evidence  
12 of grounds to deny the debtors' discharge, but the Ninth Circuit  
13 never held that a motive had to be proven. Debtor's reliance on  
14 Nielsen is misplaced.

15 Debtor argues that any duty to amend his bankruptcy  
16 schedules and statement of financial affairs relates only to  
17 omitted assets and not to omitted creditors (i.e., his family,  
18 and transactions with them). Building on this supposed  
19 foundation, Debtor argues that DSI cannot prove a knowing and  
20 fraudulent intent without proving a motive, such as an intent to  
21 hide assets that DSI otherwise would not have known about.  
22 Debtor is wrong on the facts and the law.

23 First, Debtor did not simply omit creditors. The bankruptcy  
24 court found that he omitted income, and Debtor has shown no error  
25 in that finding. Debtor belatedly disclosed some of that income,  
26 when deposed about it, but that is not the same as disclosing it  
27 voluntarily. See Beauchamp, 236 B.R. at 732-34.

28 Second, nondisclosure of creditors (and debts) can be just

1 as important as nondisclosure of assets. Information regarding  
2 business and personal dealings can lead to discovery of assets,  
3 potentially avoidable transfers, or other relevant information  
4 such as grounds to deny a debtor's discharge. "A false statement  
5 or omission may be material even if it does not cause direct  
6 financial prejudice to creditors." Wills, 243 B.R. at 63  
7 (cataloguing cases). See generally Annotation, False Oath or  
8 Account, 59 A.L.R.2d 791, § 18 (omission of creditors or debts).  
9 Debtor cites our decision in Searles, which acknowledges that  
10 "the rules may be inexact about [the debtor's] continuing duty to  
11 amend schedules to reflect property of the estate accurately,"  
12 but Searles focused on property because that was what was at  
13 issue in that case. See Searles, 317 B.R. at 378-79 and nn. 6-8  
14 (emphasis added). Nothing in Searles held or implied that the  
15 duty to amend applies only to assets and not to liabilities.

16 For all of these reasons Debtor has shown no error in the  
17 bankruptcy court's judgment. Debtor's discharge was properly  
18 denied under § 727(a)(4)(A).

19 B. DSI's claims under § 727(a)(2), (3), and (5)

20 DSI's alternative grounds for denial of Debtor's discharge  
21 might be relevant if Debtor takes a further appeal to the Ninth  
22 Circuit, but DSI's brief on this appeal makes no substantive  
23 arguments under § 727(a)(2), (3), or (5). The panel may decline  
24 to address an issue that is summarily mentioned in the brief but  
25 not fully briefed. Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005  
26 n. 1 (9th Cir. 1995). Issues that are raised but not supported  
27 by argument are typically deemed abandoned. Acosta-Huerta v.  
28 Estelle, 7 F.3d 139, 144 (9th Cir. 1992). We decline to address



1 DSI's other grounds for denial of Debtor's discharge.

2 **VI. CONCLUSION**

3 Debtor's discharge cannot be denied under § 727(a)(4)(A)  
4 unless his false statements or omissions were made "knowingly and  
5 fraudulently." Recklessness by itself will not suffice, but  
6 recklessness combined with other circumstances can support an  
7 inference that he acted with knowing and fraudulent intent. The  
8 bankruptcy court found that Debtor made numerous, substantial,  
9 and conscious omissions from his bankruptcy schedules and  
10 statement of financial affairs, that Debtor's explanations were  
11 not persuasive, that he chose not to correct these inaccuracies  
12 when he had the opportunity, and that he had the requisite intent  
13 to deceive. Debtor has shown no error in these findings or the  
14 bankruptcy court's application of the law. The judgment denying  
15 his discharge under § 727(a)(4)(A) is AFFIRMED.