

SEP 30 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-10-1342-SaPaKi
)		
JONG E. SONG,)	Bk. No.	RS 08-15238-MJ
)		
Debtor,)	Adv. No.	RS 08-01291-MJ
)		
_____)		
JONG E. SONG,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
BARBARA A. ACOSTA;)		
DEBRA M. NILA,)		
)		
Appellees.)		
_____)		

Argued and Submitted on May 13, 2011,
at Pasadena, California

Filed - September 30, 2011

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Appearances: W. Derek May of Law Offices of Stephen R. Wade,
P.C., argued for Appellant.

Arnold Wuhrman of Serenity Legal Services,
Murrieta, California, argued for the Appellees.

Before: SARGIS,** PAPPAS, and KIRSCHER, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, see Fed. R. App. P. 32.1, it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

** Hon. Ronald H. Sargis, Bankruptcy Judge for the Eastern
District of California, sitting by designation.

1 Defendant Jong E. Song ("Debtor"), the debtor in the
2 underlying Chapter 7 bankruptcy case, appeals from a judgment
3 denying him a bankruptcy discharge pursuant to 11 U.S.C.
4 § 727(a)(4)(A).¹ Because the unchallenged findings support the
5 bankruptcy court's decision, the bankruptcy court correctly
6 applied the law, its factual findings are supported by the
7 record, and the one arguable error the bankruptcy court made was
8 harmless, we AFFIRM.

9 **I. SUMMARY OF THE CASE**

10 This appeal is taken from a judgment denying the Debtor his
11 discharge based on a violation of § 727(a)(4)(A), the giving of a
12 false oath or account in or in connection with his case. The
13 Debtor commenced a Chapter 7 case on May 7, 2008, by the filing
14 of a petition, which was not accompanied by schedules or the
15 statement of financial affairs. On May 22, 2008, the Debtor
16 filed with the assistance of counsel his schedules and statement
17 of financial affairs; the accuracy of the information disclosed
18 therein became the focus of this adversary proceeding. Nearly
19 ten months later, on March 11, 2009, the Debtor filed a
20 substitution of counsel; amended Schedules B, F, I, and J; and an
21 amended statement of financial affairs. When all the pleadings
22 relevant to this appeal were filed, the Debtor was represented by
23 counsel.

24 The Debtor is a medical doctor. In 2004, two of his
25

26 ¹ Unless otherwise indicated, all chapter, section, and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 employees, Barbara Acosta and Debra Nila ("Plaintiffs"), accused
2 the Debtor of misconduct during their employment. After
3 complaining directly to the Debtor, the Plaintiffs also reported
4 his conduct to the California Medical Board and the Medical Board
5 commenced an investigation. The Debtor was subsequently involved
6 in a physical confrontation with the husband of one of the
7 Plaintiffs, which resulted in the filing of a minor criminal
8 charge against the Debtor. Through 2004 and the first half of
9 2005 the Debtor continued with his profitable medical practice,
10 the Medical Board proceeded with its investigation, and no
11 lawsuits were filed by or against the Debtor.

12 Sang Song, the Debtor's wife of 37 years, filed for
13 dissolution of their marriage in December 2004. The dissolution
14 was uncontested, with Sang Song and the Debtor entering into a
15 written agreement on March 31, 2005, for the dissolution of their
16 marriage. A Judgment of Dissolution was entered on May 13, 2005,
17 which incorporated the written dissolution agreement. Because
18 they concluded that physical separation was not practical, the
19 Debtor and Sang Song continued to live in the same home. The
20 dissolution agreement provided for the division of assets between
21 Sang Song and the Debtor, with Sang Song receiving the family
22 home, and quitclaim deeds were recorded. Additionally, under the
23 dissolution agreement Sang Song waived the right to spousal
24 support.

25 While the dissolution was properly documented and final
26 judgment was entered by the state court, the Debtor and Sang Song
27 did not disclose their divorce to family or friends. The Debtor
28 and Sang Song entered into an agreement allowing the Debtor to

1 pay between \$2,500 and \$3,000 per month to Sang Song for room,
2 board, and other living expenses. As of the dissolution, the
3 Plaintiffs had not asserted any claims against the Debtor or
4 threatened to sue him. However, in September 2006, the Debtor
5 commenced multiple lawsuits against the Plaintiffs and the
6 husband of one the Plaintiffs. The litigation did not go well
7 for the Debtor, with judgments entered against him on all three
8 suits including awards in favor of the Plaintiffs for \$40,258 in
9 damages and \$40,906 in attorneys' fees and costs.

10 The Debtor attempted to set aside the judgments, ultimately
11 failing in each effort. The Plaintiffs, through their attorney,
12 began aggressive collection efforts against the Debtor, including
13 executing on his business checking account and attempting to
14 execute on his profit-sharing plan in March or April 2008. In
15 response, the Debtor stopped using his business checking account
16 and paid his business expenses through Sang Song's personal
17 checking account. Sometime in May 2008 the Debtor established a
18 new business checking account.

19 The testimony at trial was not clear how monies transferred
20 through Sang Song's checking account were reconciled and
21 accounted for between the Debtor and Sang Song. The Debtor
22 testified that he repaid Sang Song - with some payments being
23 pre-petition and not disclosed on the statement of financial
24 affairs filed by the Debtor under penalty of perjury - to balance
25 the books for the use of her checking account. The Debtor was
26 free to use Sang Song's checking account from March 2008 through
27 May 2008 because Sang Song was traveling in Korea using \$10,000
28 given to her by the Debtor.

1 In response to Plaintiffs' state-court judgment enforcement
2 efforts against the profit-sharing account, the Debtor filed two
3 claims of exemptions in state court. The state-court judge
4 denied the claims of exemption, leaving the Plaintiffs free to
5 execute against the profit-sharing account. Having failed in
6 state court, the Debtor then obtained representation from what
7 the bankruptcy court describes as well-respected consumer-
8 bankruptcy counsel and commenced the Chapter 7 case.²

9 The Debtor's original and amended Schedules and Statements
10 of Financial Affairs became the focus of this adversary
11 proceeding to deny his discharge. The Plaintiffs commenced the
12 adversary proceeding contending, among other grounds, that the
13 Debtor should be denied a discharge because he had knowingly and
14 fraudulently, in or in connection with the bankruptcy case, given
15 a false oath or account. § 727(a)(4)(A).

16 After a four-day trial, the bankruptcy court determined that
17 the Debtor had knowingly and fraudulently given a false oath in
18 his Chapter 7 case with respect to the following information:

19 1. Neither the original nor the amended statement of
20 financial affairs disclosed the payment of \$10,000 to the
21 Debtor's ex-wife in early 2008.

22 2. Neither the original nor the amended statement of
23 financial affairs disclosed the withdrawal of \$9,000 by the
24 Debtor from his business (a sole-proprietorship medical practice)
25 account, which was used to pay either Betty Song, his daughter,
26 or other expenses outside the ordinary course of business. The

27
28 ² The facts stated in the Summary of Case are taken from
the Bankruptcy Judge's decision.

1 bankruptcy court found the Debtor's testimony to be that he paid
2 Betty Song in 2007 and 2008.

3 3. To the extent the Debtor asserts that the payment of
4 \$10,000 in early 2008 to his ex-wife was repayment of a debt, it
5 was not disclosed in either the original or amended statement of
6 financial affairs in response to Question 3.

7 4. Neither the original nor amended statements of
8 financial affairs disclosed substantial payments made to the
9 Debtor's various attorneys during the two-year period preceding
10 the Debtor filing his bankruptcy case.

11 5. Neither the original nor amended schedules or statement
12 of financial affairs disclosed that the Debtor discontinued the
13 use of his business checking account the month before the
14 bankruptcy case was filed or transfers into and out of an account
15 of his ex-wife, Sang Song, for the operation of his business.

16 6. The original Schedule I ("Current Income of Individual
17 Debtor(s)") did not disclose the Debtor's substantial Social
18 Security income, and the omission was not corrected for ten
19 months.

20 7. The original Schedule J ("Current Expenditures of
21 Individual Debtor(s)") did not accurately state the Debtor's
22 expenses. While the Debtor's actual monthly expenses for room,
23 board, and other living expenses were a lump-sum of \$3,000 he
24 paid to his ex-wife, the Debtor stated in Schedule J itemized
25 expenses, which did not exist. The itemized expenses are
26 inaccurately stated on Schedule J, totaling \$3,910.

27 8. Neither Schedule G disclosed an executory contract
28 obligating the Debtor to pay \$2,500 to \$3,000 a month to Sang

1 Song. The bankruptcy court cited to the written agreement,
2 offered as part of Exhibit 247.

3 9. The Original and Amended Schedule F misstated unsecured
4 claims purportedly owed to members of the Debtor's family. The
5 obligation to Sang Song was not a loan and the Debtor had no
6 basis for listing a claim for Betty Song, his daughter, because
7 he testified that (1) he did not expect to pay Betty Song and (2)
8 Betty Song never billed him for any legal services she provided
9 him.

10 10. Neither the original nor amended Schedule F list any
11 business debts relating to the Debtor's sole-proprietorship
12 medical practice.³

13 11. Both the Original and Amended Schedule B filed by the
14 Debtor inaccurately state that the Debtor was due a tax refund of
15 \$27,000. In the Fall of 2009 the Debtor testified that the
16 actual refund he expected was \$5,000.

17 The bankruptcy court determined that this bankruptcy filing
18 was part of the Debtor's strategy to flee from the creditors
19 whose judgments arose from his own litigious nature. Using the
20 bankruptcy filing to block the Plaintiffs, the bankruptcy court
21 further determined that the Debtor sought to maintain his life as
22 normal - maintaining his medical practice without fear that the
23 Plaintiffs would enforce their judgment against his business bank
24 accounts and protect his threatened profit-sharing plan. On the

25
26 ³ Both the Original and the Amended Schedule I filed by the
27 Debtor state that the Debtor's medical practice generates \$20,502
28 a month in income and J states that the Debtor has monthly
expenses of \$19,152 for his sole-proprietorship medical practice.

1 personal side, the Debtor sought to continue his usual living
2 arrangement with his ex-wife, paying her money for living
3 expenses if and when he determined appropriate.

4 In not disclosing both the \$10,000 he paid to his ex-wife
5 for her trip to Korea just before he filed for bankruptcy
6 (whether as repayment of a "loan" or as a gift), and the other
7 monies for living expenses, the bankruptcy court concluded that
8 the Debtor sought to hide the monies from potential recovery by a
9 bankruptcy trustee. As with the transfers to his ex-wife, the
10 Debtor was motivated to not disclose payments he made to his
11 daughter, Betty Song, in 2007 or 2008 for which there were no
12 billings or other documentation that any obligation was owed in
13 the ordinary course of business. For his other attorneys who
14 were fighting the Plaintiffs and defending the criminal matter,
15 the Debtor sought to keep them working and to protect the
16 undisclosed sums he had paid to them from actions by the Chapter
17 7 trustee.

18 The bankruptcy court determined that the inaccurate or
19 omitted statements, which were made under oath, were material to
20 the Debtor's bankruptcy case and were made by the Debtor with a
21 knowing, fraudulent intent. The bankruptcy court further found
22 that many of the statements or omissions were made with such
23 reckless disregard for the truth or completeness thereof that
24 they demonstrated an intent by the Debtor to not provide accurate
25 information. When this reckless disregard of the truth was
26 coupled with the Debtor's apparent motive to favor his family,
27 ex-wife, and attorney creditors, and to hide income, assets, and
28 transfers from his known creditors, the knowing intent of the

1 Debtor to misstate the information in the schedules and statement
2 of financial affairs was established to the bankruptcy court's
3 satisfaction.

4 Having determined that the Debtor made intentional, knowing,
5 fraudulent statements under oath in his schedules and statement
6 of financial affairs, the bankruptcy court denied the Debtor his
7 discharge pursuant to § 727(a)(4)(A).

8 **II. ISSUES**

9 1. Whether the bankruptcy court improperly considered post-
10 petition disallowance of claims in determining if the Debtor made
11 a false oath under § 727(a)(4)(A).

12 2. Whether the bankruptcy court erred when it considered the
13 Debtor's nondisclosure of his social security income when it
14 found that the Debtor had made a false oath.

15 3. Whether the bankruptcy court's characterization of the
16 Debtor's misstatements of fact in his schedules and statements as
17 "wild guesses" is supported by the evidence.

18 4. Whether the bankruptcy court erroneously considered the
19 nondisclosure of business creditors on Debtor's Schedule F when
20 no evidence was adduced at trial regarding such lack of creditors
21 and the nondisclosure of business creditors was not a disputed or
22 undisputed fact in the joint pretrial order.

23 5. Whether the bankruptcy court improperly considered
24 payments the Debtor made within the two-year period prior to
25 filing of the petition to attorneys unrelated to bankruptcy law
26 or debt relief in finding that the Debtor made a false oath.

27 6. Whether in finding that the Debtor made a false oath the
28 bankruptcy court improperly relied upon the Debtor's

1 nondisclosure on Schedule G of an executory contract with his ex-
2 wife, Sang Song, which formed the basis of a disallowed claim.

3 **III. STANDARD OF REVIEW**

4 We review the bankruptcy court's factual findings for clear
5 error, the selection of the applicable legal rules under § 727 de
6 novo, and the application of the facts to those rules de novo.
7 Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP
8 2004). A court's factual finding is clearly erroneous if it is
9 illogical, implausible, or without support in the record. United
10 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en
11 banc).

12 **IV. JURISDICTION**

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 157(b)(2)(J) and 1334(a). The Panel has jurisdiction pursuant
15 to 28 U.S.C. §§ 158(a)(1) and (c)(1).

16 **V. DISCUSSION**

17 The party objecting to discharge "bears the burden of
18 proving by a preponderance of the evidence that [a debtor's]
19 discharge should be denied." Khalil v. Developers Sur. & Indem.
20 Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd,
21 578 F.3d 1167, 1168 (9th Cir. 2009) (expressly adopting the BAP's
22 statement of the law). "In keeping with the 'fresh start'
23 purposes behind the Bankruptcy Code, courts should construe § 727
24 liberally in favor of debtors and strictly against parties
25 objecting to discharge." Retz v. Samson (In re Retz), 606 F.3d
26 1189, 1196 (9th Cir. 2010) (quoting Bernard v. Sheaffer (In re
27 Bernard), 96 F.3d 1279, 1281 (9th Cir. 1996)). This requires
28 that the objecting party show actual intent, not constructive

1 intent. Retz, 606 F.3d at 1196 (quoting Khalil, 379 B.R. at 172).

2 The Debtor's right to a discharge is tempered by the
3 provisions of § 727(a). One ground for denying the debtor a
4 discharge is where the debtor knowingly and fraudulently, in or
5 in connection with the case, made a false oath or account.
6 § 727(a)(4)(A). "The fundamental purpose of § 727(a)(4)(A) is to
7 insure that the trustee and creditors have accurate information
8 without having to conduct costly investigations." Retz, 606 F.3d
9 at 1196 (quoting Khalil, 379 B.R. at 172). A false oath in the
10 case may include a debtor's false statement or omission in the
11 schedules or statement of financial affairs. Khalil, 379 B.R. at
12 172.

13 "To prevail on this claim, a plaintiff must show, by a
14 preponderance of the evidence, that: (1) the debtor made a false
15 oath in connection with the case; (2) the oath related to a
16 material fact; (3) the oath was made knowingly; and (4) the oath
17 was made fraudulently." Retz, 606 F.3d at 1197 (internal
18 quotation marks omitted) (quoting Roberts v. Erhard (In re
19 Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005)). "A fact is
20 material if it bears a relationship to the debtor's business
21 transactions or estate, or concerns the discovery of assets,
22 business dealings, or the existence and disposition of the
23 debtor's property." Retz, 606 F.3d at 1198 (internal quotation
24 marks omitted) (quoting Khalil, 379 B.R. at 173). The
25 misstatement or omission may be material even though it does not
26 cause direct financial prejudice to creditors. Fogal Legwear of
27 Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir.
28 BAP 1999). False or incomplete information is material if it

1 affects the administration of the estate, including the discovery
2 of past transactions by the debtor. Id.

3 "A debtor acts knowingly if he or she acts deliberately and
4 consciously." Retz, 606 F.3d at 1198 (internal quotation marks
5 omitted) (quoting Khalil, 379 B.R. at 173). To show fraudulent
6 intent, a party must show:

- 7 1. that the debtor made the representations;
- 8 2. that at the time the representations were made, the
9 debtor knew they were false; and
- 10 3. that the debtor made them with the intention and
11 purpose of deceiving creditors.

12 Khalil, 379 B.R. at 173 (quoting Roberts, 331 B.R. at 884).

13 Intent is typically proven through circumstantial evidence or by
14 inferences drawn from a debtor's conduct. Retz, 606 F.3d at 1199.
15 "Reckless indifference or disregard for the truth may be
16 circumstantial evidence of intent, but is not sufficient, alone,
17 to constitute fraudulent intent." Id.

18 However, such recklessness is probative of the debtor having
19 fraudulent intent. When coupled with other factors, a pattern of
20 multiple omissions of material assets or information may support
21 the court drawing the inference of fraud by the debtor. Garcia v.
22 Coombs (In re Coombs), 193 B.R. 557, 565 (Bankr. S.D. Cal. 1996).

23 This standard echoes the long-standing legal maxim: acta exteriora
24 indicant interiora secreta.⁴ Other factors include when the
25 nature of the assets or information suggests that the debtor was
26 aware of them when the schedules were prepared and there was

27
28 ⁴ "Outward acts indicate the thoughts hidden within."
BLACK'S LAW DICTIONARY 1816 (Dlx. 9th ed. 2009).

1 something about the assets or information which the debtor might
2 want to conceal. Id.

3 **A. The Bankruptcy Court's Decision Is Supported by its**
4 **Unchallenged Factual Conclusions**

5 As correctly argued by Plaintiffs, the Debtor has
6 selectively challenged the findings of the bankruptcy court. No
7 appeal has been taken from the bankruptcy court's first, second,
8 third, fifth, seventh, and eleventh findings. Any objections to
9 these findings are waived. Butler v. Curry, 528 F.3d 624, 641
10 (9th Cir. 2008). The unchallenged findings of the bankruptcy
11 court are that:

12 First, the Debtor intentionally did not disclose in the
13 Statements of Financial Affairs material information. The first
14 is the transfer of \$10,000 to his ex-wife shortly before the
15 commencement of the bankruptcy case in response to Question 10.

16 Second, the Debtor intentionally did not disclose the
17 withdrawal of \$9,000 cash from his sole-proprietorship medical
18 practice bank account to pay his daughter. Further, the Debtor
19 also did not disclose the payments which he subsequently
20 testified were made by him to Betty Song in 2007 and 2008.

21 Third, to the extent that the Debtor asserts that the
22 \$10,000 payment to Sang Song, his ex-wife, was in consideration
23 of a debt, the Debtor did not disclose the payment in response to
24 Question 3.

25 Fourth, the Debtor did not disclose discontinuing the use of
26 his business checking account one month before the bankruptcy
27 case was filed, and transferring monies into and out of a bank
28 account belonging to his ex-wife, Sang Song, for the operation of

1 his business.

2 Fifth, the original Schedule J did not accurately state the
3 Debtor's expenses. While the Debtor's actual monthly expenses
4 for room, board, and other living expenses were a lump-sum of
5 \$3,000 he paid to his ex-wife, Schedule J stated greater itemized
6 expenses which could not be supported.

7 Sixth, the Debtor misstated that he was due a tax refund of
8 \$27,000, when in the Fall of 2009 he subsequently testified that
9 the actual refund he expected was \$5,000.

10 Given these factual conclusions by the bankruptcy court, we
11 must first consider if, assuming that the Debtor is correct in
12 his contention that the bankruptcy court erred in other findings
13 and conclusions, the bankruptcy court's purported errors would
14 have any affect on the outcome. We conclude that the
15 unchallenged findings support the bankruptcy court's judgment
16 denying the Debtor his discharge.

17 The Debtor's decision not to disclose (1) the \$10,000
18 transfer to his ex-wife, (2) the \$9,000 payment to his daughter,
19 and (3) the use of his ex-wife's bank account for the operation
20 of his business, together with the inaccurate reporting of his
21 monthly living expenses on Schedule J and misstatement of his
22 expected tax refund, support the bankruptcy court's conclusion
23 that, by a preponderance of the evidence, he made a false oath
24 regarding material facts with knowing, fraudulent intent.

25 These uncontested factual conclusions standing alone show a
26 pattern of multiple omissions supporting the bankruptcy court's
27 inference of fraud. The Debtor's reckless disregard of the
28 truth, coupled with the Debtor's obvious motive to favor his

1 family and ex-wife, as well as to hide income, assets, and
2 transfers from his known creditors, satisfactorily establishes
3 the knowing intent of the Debtor to misstate the information in
4 the schedules and statement of financial affairs.

5 The Debtor was properly denied his discharge pursuant to
6 § 727(a)(4). Therefore, all of the errors by the bankruptcy
7 court alleged by this appeal were harmless. See Yadidi v.
8 Herzlich (In re Yadidi), 274 B.R. 843, 853 (9th Cir. BAP 2002)
9 (citing Helvering v. Gowran, 302 U.S. 238, 245 (1937) (“In the
10 review of judicial proceedings the rule is settled that if the
11 decision of the court below is correct, it must be affirmed,
12 although the lower court relied upon a wrong ground or gave a
13 wrong reason.”)). The decision of the bankruptcy court is
14 affirmed based on the unchallenged findings of fact and
15 conclusions of law.

16 Nonetheless, the Panel will also address errors the Debtor
17 alleges were made by the bankruptcy court.

18 **B. The Bankruptcy Court Did Not Consider Post-petition**
19 **Disallowance of Claims in Finding That the Debtor Made a False**
20 **Oath**

21 First, the Debtor contends that the bankruptcy court
22 improperly used a post-petition decision regarding claims held by
23 his close relatives – his ex-wife Sang Song and daughter Betty
24 Song – to make its finding that he made a false oath. The only
25 basis for finding that the family debts were mischaracterized or
26 misstated, according to the Debtor, is the disallowance of their
27 claims in the bankruptcy case. The Debtor argues that the only
28 evidence adduced at trial on this issue was that he believed that

1 he owed his ex-wife and daughter money.

2 The Debtor's argument is unpersuasive. In the first
3 instance, he did not provide the Panel with an adequate record to
4 review. While attempting to cast this issue as a question of law
5 – whether the bankruptcy court's consideration of post-petition
6 disallowance of claims was proper – this is actually a question
7 centered on the sufficiency of the evidence before the bankruptcy
8 court and its factual finding, a determination reviewed for clear
9 error. Therefore, the Debtor should have provided the Panel with
10 a full transcript, not some 30 pages of excerpts for a four-day
11 trial. See 9th Cir. BAP Rule 8006-1. The lack of an adequate
12 record to support the contention that the Debtor's belief
13 regarding the debts was the only evidence offered at trial is
14 cause to affirm. See In re Friedman, 126 B.R. 63, 68 (9th Cir.
15 BAP 1991) (failure to provide an adequate record may be grounds
16 to affirm).

17 Moreover, as Appellees argue, the bankruptcy judge did not
18 rely upon the disallowance of the claims to conclude that the
19 Debtor mischaracterized or misstated the debts owed to Sang Song
20 and Betty Song. Rather, the bankruptcy court relied upon the
21 Debtor's own testimony at trial where he testified that he paid
22 Sang Song \$2,500 - \$3,500 per month for living expenses,⁵ not a
23 personal loan identified on Schedule F. Further, while the
24 Debtor scheduled his debt to Betty Song as \$20,000, he admitted

25
26 ⁵ The Debtor testified, "Well, we signed, we agreed, if I
27 have money, I'm going to pay her minimum \$2,500 per month. That
28 include [sic] rent, and then boarding, and other – like the
utilities, anything – the house maintenance." Trial Tr. 144:14-
17.

1 that he never really knew how much Betty Song charged him for
2 services though May 1, 2008.⁶ There was sufficient evidence
3 before the bankruptcy court for its determination that the Debtor
4 mischaracterized or misstated the debts owed to Sang and Betty.
5 This determination was made not on reliance of the allowance or
6 disallowance of a claim, but rather based on the Debtor's own
7 testimony at trial.

8 **C. The Debtor's Decision to Not Disclose the Social Security**

9
10 _____
11 ⁶ The testimony at trial was:

12 Q As you sit here today, do you have any dollar amount in
13 mind as to what Betty charged to prepare and file those
14 three civil lawsuits?

15 . . .

16 A I cannot even estimate, but I believe she charged me
17 \$200 per hour, and then maybe like filing fees, and
18 maybe there might be extra fees because I think it's
19 beyond just a charging how many hours. But - so
20 whatever normal regular type fees, filing, something
21 like that.

22 . . .

23 Q Doctor Song, at any time when Betty was performing
24 legal services for you from 2004 until May 1st of 2008,
25 did you ever ask her, "how much will this cost me?"

26 A Not any specific amount. But I wanted to know, then she
27 said, well I have my own handwritten record. Then I
28 didn't really pursue how much. But when she mentioned,
like for '04, say \$7,000, if I had money I'd pay her
\$7,000.

But if I wanted I can really ask her, like a regular
private practice, the invoices, but I wasn't really
interested in that.

Trial Tr. 53:18-55:7.

1 **Benefits Was Material**

2 The Debtor next contends that the nondisclosure his \$1,980
3 monthly Social Security benefit was not material because the
4 claims against him were for primarily nonconsumer debts, he only
5 began receiving the benefit in September 2007, and the benefit is
6 exempt. The Panel reviews this question of law de novo.

7 Social Security benefits must be disclosed on Schedule I.
8 Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th
9 Edition, § 35.10, at ¶ 8, Sec. Rev. May 12, 2009, (discussing a
10 debtor's obligation of full disclosure). The fact that the
11 Debtor filed for bankruptcy protection under Chapter 7 did not
12 relieve him of this obligation. As the bankruptcy estate
13 includes all legal or equitable interest of a debtor on
14 commencement of the case, inclusion of Social Security benefits
15 is proper even when those benefits may be exempted. Looney v.
16 Feldman (In re Feldman), 242 B.R. 88, 93 (Bankr. S.D. Fla. 1999).
17 While the Feldman court concluded that not disclosing Social
18 Security benefits was immaterial because of the exempt nature of
19 the benefits, at least one other court found that not disclosing
20 Social Security income for two years was material. Chambers v.
21 Coon (In re Coon), No. 6:07-ap-00048-AAB, 2008 Bankr. LEXIS 3561,
22 at *14-*15 (Bankr. M.D. Fla. 2008). Still other courts have
23 found that not disclosing fully exemptible assets or assets that
24 will not be disbursed to creditors through the bankruptcy estate
25 is material. See Coombs, 193 B.R. at 566 (401(k) plan); Mertz v.
26 Rott (In re Mertz), 955 F.2d 596, 598-99 (8th Cir. 1992) (fully-
27 exempt state income tax refund).

28 In fact, the disclosure of the benefits ten months after

1 filing of the petition accounted for 68.5% of the swing in the
2 Debtor's monthly net income (\$1,980 of \$2,890) as reported on the
3 amended Schedule J. While the benefits are exempt in the Chapter
4 7 proceeding, disclosure of the benefits is required to afford
5 creditors and the trustee accurate information about a debtor's
6 financial position without having to conduct costly
7 investigation. See Retz, 606 F.3d at 1196.

8 The Debtor's argument that the trustee and creditors could
9 have determined the possible existence of additional wealth
10 hidden from view through a review of his schedules is
11 unpersuasive. This argument is premised on the fact that the
12 bank account holding the accumulated Social Security benefits was
13 disclosed on Schedule B.⁷ However, neither the schedules nor the
14 original or amended Statements of Financial Affairs disclosed the
15 source of these funds and Schedule C, which apparently was never
16 amended, claims the funds exempt pursuant to California Code of
17 Civil Procedure § 703.140(b)(5) (the "wildcard" exemption). From
18 this record, it is unclear to us how the trustee and creditors
19 were to divine the existence of the Debtor's Social Security
20 benefit since the source of the funds in the personal savings
21 account was not disclosed, the funds were not marked as not
22 property of the estate, nor was the fact that the Debtor was even
23 receiving Social Security benefits disclosed.

24 Not disclosing the Social Security benefits, even in this
25

26
27 ⁷ Presumably the Debtor refers to the "Citibank Individual
28 Savings - Account Number 1997" which had a balance of \$16,600 on
the petition date, the only personal bank account disclosed on
Schedule B.

1 nonconsumer case, denied the trustee and creditors the full
2 financial picture to which they were entitled. If the trustee,
3 creditors, and other parties in interest could be expected to
4 believe the schedules, the Debtor was losing \$2,580 every month.
5 In fact, the Debtor's amended schedules state that he had monthly
6 net income of \$310. The bankruptcy court properly found this
7 omission to be material.

8 **D. The Bankruptcy Court's Characterization of the Debtor's**
9 **Misstatements of Fact in the Schedules and Statements as "Wild**
10 **Guesses" is Supported by the Evidence**

11 Next, the Debtor challenges the bankruptcy court's factual
12 finding that his misstatements and mischaracterizations of his
13 debts, income, and expenses represented "wild guesses." This
14 factual finding is reviewed for clear error. Searles, 317 B.R. at
15 373.

16 Again, the Panel notes that this issue may be summarily
17 rejected as the Debtor did not provide an adequate record. For
18 the Panel to properly review the challenged factual finding, the
19 Debtor should have provided the Panel with a full transcript, not
20 some 30 pages of excerpts for a four-day trial. Only with the
21 complete record could the Panel review the sufficiency of the
22 evidence before the bankruptcy court to support its factual
23 finding. The Debtor did not provide an adequate record
24 supporting his contention that insufficient evidence underpins
25 the bankruptcy court's finding that the misstatements and
26 mischaracterizations were "wild guesses," which is cause to
27 affirm. 9th Cir. BAP Rule 8006-1; Friedman, 126 B.R. at 68.
28 However, even looking at the record provided, the Panel cannot

1 find that the bankruptcy court committed clear error.

2 The Debtor argues that even if some of the items in his
3 schedules and statements were not accurate, this does not qualify
4 them as "wild guesses." The only place in the record before the
5 Panel where the Debtor utters the phrase "wild guess" is when he
6 answered questions relating to exemptions in a state-court levy
7 proceeding. The phrase "wild guesses" appears only four times in
8 the bankruptcy judge's opinion.⁸ The bankruptcy judge's opinion
9 does indicate at two places that the Debtor stated that his
10 initial disclosures or schedules were "wild guesses." This
11 attribution is unsupported by the record before us and the issue
12 was conceded by Plaintiffs at oral argument.

13 However, the misattribution does not undermine the actual
14

15 ⁸ The appearances are as follows:

16
17 "Debtor's explanation that these inaccuracies were pure
18 negligence or oversight falls woefully short, especially coming
19 from a person who said under oath that his initial disclosures of
20 financial information were 'wild guesses.'" Mem. of Decision on
21 Obj. to Discharge ("Mem. Dec'n") 4:24-5:1.

22 "Perhaps this itemization was part of what Dr. Song was referring
23 to when he said his initial schedules were 'wild guesses.'" Id.
24 at 18:5-6.

25 "The sums owed to Betty were apparently more of Dr. Song's 'wild
26 guesses' because his testimony was first that he did not expect
27 to pay her, then that he expected to pay her but she never
28 presented him with a billing until after the bankruptcy petition
was filed." Id. at 18:11-14.

"Dr. Song's failure to provide full disclosure of his assets,
income and transactions prior to bankruptcy was not an accident
and he made no attempt to correct his initial 'wild guesses'
until he had had plenty of time to understand the potential
consequences of the initial falsity." Id. at 19:23-20:1.

1 factual finding that the Debtor's "initial Schedule J was a total
2 misstatement of the Debtor's expenses, not reflecting his
3 accurate monthly lump sum payment to Sang Song for room and board
4 and other living expense, but instead itemizing [fictional]
5 expenses" Mem. Dec'n 18:3-5.

6 To the extent that the bankruptcy judge may have incorrectly
7 cited the source of the "wild guesses" phrase, this does not
8 undercut her finding that expenses on the initial Schedule J were
9 fiction. Nor was it improper for the bankruptcy judge to use the
10 Debtor's own words – though lifted from a slightly different
11 context – to describe his conduct in the bankruptcy case. Judges
12 have many different literary techniques at their disposal and the
13 effective use of these techniques should not be unnecessarily
14 frustrated. See, e.g., In re Judicial Misconduct, 632 F.3d 1289,
15 2011 U.S. App. LEXIS 2108, at *2-*3 (9th Cir. Jud. Council 2011)
16 (discussing the use of humor as an effective literary tool which
17 does not violate Code of Conduct for United States Judges).

18 The bankruptcy court's underlying factual finding – that the
19 initial schedules were inaccurate – is supported by the evidence
20 and the bankruptcy court's decision is not clearly erroneous.
21 The fact that the bankruptcy court elected to use the Debtor's
22 own words to emphasize that he did not base his disclosures in
23 the schedules and statement of financial affairs on the accurate
24 information available to him does not render bankruptcy judge's
25 decision reversible.

26 **E. The Bankruptcy Court Properly Considered the Absence of**
27 **Business Creditors on Debtor's Schedule F**

28 The 32-page joint pretrial order in this adversary

1 proceeding did not, according to the Debtor, create a basis for
2 the bankruptcy court to conclude that he did not list business
3 creditors on Schedule F. Because this was not a disputed or
4 undisputed fact, the Debtor concludes that the bankruptcy court
5 improperly considered this factor in determining that he made a
6 false oath. Appellants concede the issue in their briefs, but
7 argue that the error was harmless. The Panel reviews this issue
8 of law de novo and concludes that both parties are incorrect.

9 It is undisputed that the original and amended schedules
10 were admitted into evidence at trial. As the bankruptcy court
11 observed, neither of the Schedules F included any business
12 creditors other than Appellees. On this point, the bankruptcy
13 court said, "Dr. Song was not a corporation and on any given date
14 he clearly had business obligations which were unpaid, including
15 the petition date." Mem. Dec'n 18:15-17. Though unstated, it is
16 apparent that the bankruptcy court took judicial notice, pursuant
17 to Federal Rule of Evidence 201(b)-(c), of the fact that ongoing
18 businesses have obligations that remain unpaid at any given point
19 in time. That this issue was not listed in the joint pretrial
20 statement is not fatal to the decision. See Fed. R. Civ. P.
21 15(b)(2) incorporated by Fed. R. Bankr. P. 7015.

22 The Panel does note that bankruptcy court's findings do not
23 include any statement that such creditors existed. Though the
24 absence of such business expenses is contrary to common
25 experience, the Panel gives this finding minimal weight in
26 affirming the bankruptcy court. The other misstatements and
27 omissions are sufficient to sustain the judgment.

28

1 **F. The Bankruptcy Court's Consideration of Undisclosed Payments**
2 **to Attorneys for Services Unrelated to Bankruptcy Law or Debt**
3 **Relief was Proper**

4 The Debtor also attacks the bankruptcy court's finding that
5 he committed a false oath when he did not disclose payments to
6 attorneys for services unrelated to debt relief or his
7 bankruptcy. Because the services were not related to debt relief
8 or his bankruptcy, he contends that disclosure was not required
9 by Question 9 on the statement of financial affairs.

10 However, the bankruptcy court's opinion notes that in
11 responding to Question 10 on the statement of financial affairs
12 the Debtor did not disclose payments during the two-year period
13 prior to filing of the petition. Unlike Question 9, which asks
14 about transfers during the one-year period prior to filing,
15 Question 10 of the statement of financial affairs requires
16 disclosure of transfers not made during the ordinary course of
17 business during the prior two-year period.

18 The Debtor rejoins that he "likely did not consider payment
19 of attorneys['] fees as billed as transfers [outside] the
20 ordinary course of business or financial affairs that should be
21 disclosed in Question Number 10" Aplt. Op. Br. p. 16
22 (emphasis added). This is an interesting choice of words by the
23 Debtor and undercuts his contention that an accurate disclosure
24 of these payments is not required or material. Merely contending
25 a hypothetical belief by the Debtor and not directing the
26 bankruptcy court, and now the Panel, to actual evidence of what
27 the Debtor actually intended to do will not carry the day.

28 The Debtor also argues that since there is no clear place on

1 the statement of financial affairs to disclose the payment of
2 attorneys' fees, his nondisclosure is a reasonable omission which
3 should not serve as a basis for a finding of a false oath. This
4 argument is unconvincing. The Debtor has a duty to prepare the
5 petition, statements, and schedules carefully, completely, and
6 accurately. Cf. Cusano v. Klein, 264 F.3d 936, 945-946 (9th Cir.
7 2001) (holding that a debtor has a duty to prepare schedules
8 carefully, completely, and accurately) (quoting In re Mohrig, 142
9 B.R. 389, 394 (Bankr. E.D. Cal. 1992)). To allow a debtor to
10 ignore this duty because he or she believes there is "no clear
11 place" for the disclosure would render this basic obligation of a
12 debtor a nullity, turning the bankruptcy process on its head.
13 Schedules and statements of financial affairs are sworn
14 statements, signed by debtors under penalty of perjury.
15 "Adopting a cavalier attitude toward the accuracy of the
16 schedules and expecting the court and creditors to ferret out the
17 truth is not acceptable conduct by debtors or their counsel."
18 AT&T Universal Card Servs. Corp. v. Duplante (In re Duplante),
19 215 B.R. 444, 447 (9th Cir. BAP 1997). This Debtor was
20 represented by counsel throughout the entire bankruptcy case. He
21 did not have to "guess" as to what information is required – he
22 was advised by knowledgeable bankruptcy counsel every step of the
23 way. For whatever reason, he decided to omit this information.

24 Moreover, the Debtor had a clear duty to disclose the
25 payments in response to Questions 3 and 10 on the statement of
26 financial affairs. The evidence at trial demonstrated that the
27 Debtor was a medical doctor involved in extensive litigation
28 during the two years prior to the filing of the petition. Though

1 the Debtor suggests that whatever payments he made to attorneys
2 were in the ordinary course of business, at least those payments
3 made to a criminal-defense attorney could not have been in the
4 ordinary course of business. Further, the Debtor was embroiled
5 in the litigation which resulted in the two judgments against him
6 that were being aggressively enforced and resulted in the filing
7 of this bankruptcy case. As the Debtor did not meet his duty in
8 responding to Question 10, the bankruptcy court's determination
9 was proper.⁹

10 **G. The Bankruptcy Court Incorrectly Relied on the Debtor's**
11 **Purported Nondisclosure of Executory Contract with His Ex-Wife on**
12 **Schedule G**

13 Finally, the Debtor argues that the bankruptcy court
14 improperly concluded that Schedule G did not disclose an
15 executory contract under which the Debtor was making payments of
16 \$2,500 to \$3,500 a month to Sang Song. The Debtor contends that
17 this is improper because the bankruptcy court subsequently
18 determined that Sang Song did not have a claim in the case and,
19 therefore, there was no executory contract for him to list on
20 Schedule G. This presents a question of law which the Panel
21

22
23 ⁹ This also raises an issue as to what payments should also
24 have been disclosed in response to Question 3(b), payments made
25 to any creditor which exceeds \$5,475 to any one creditor within
26 ninety days of the commencement of the bankruptcy case or any
27 payments made within one year to an insider. The Debtor's
28 Original and Amended Schedule J lists business expenses of
\$19,152 per month. This includes \$7,277 for payroll, \$3,809 for
rent, and \$3,619 for professional fees. None of these are listed
in response to Question 3(b), though clearly the rent (and most
likely some payments to employees and professionals) exceed
\$5,475 in the ninety-day period prior to the bankruptcy filing.

1 reviews de novo.

2 The bankruptcy court determined that the Debtor did not list
3 the executory contract which was presented in Exhibit 247 at
4 trial. Exhibit 247 is Sang Song's limited opposition to an
5 objection to her proof of claim for priority spousal support
6 debt. The exhibit includes the declarations of Sang Song and the
7 Debtor, as well as the Exhibit A described in the bankruptcy
8 court's decision. Exhibit A is a one-page, handwritten document
9 purportedly signed by Sang Song and the Debtor. The terms of
10 this agreement state that when the Debtor needs financial
11 assistance to operate his medical practice, Sang Song agrees to
12 help him in unstated amounts, if she has enough money, and the
13 Debtor agrees to repay her, on unstated terms, when he is able to
14 do so. Further, they agree that the Debtor will pay Sang Song
15 \$2,500 to \$3,000 a month, when the Debtor is able to do so.
16 Finally, the Debtor agrees to provide undefined help to Sang
17 Song, who is stated to have rheumatoid arthritis and chronic
18 bronchiectasis, when she needs medical help and has problems with
19 daily activities. Exhibit B to the opposition included in Trial
20 Exhibit 247, which Sang Song identifies as a handwritten ledger
21 of payments from the Debtor, states that the \$2,500 to \$3,000 a
22 month is for living expenses, and that if the Debtor does not
23 have enough money to pay the living expenses, they can be paid
24 later (on unstated terms and at an unstated time) as a loan.

25 The decision of the bankruptcy court does not include the
26 basis for the determination that the Debtor knew or should have
27 known that he had an executory contract to be listed on
28 Schedule G, rather than listing Sang Song as a creditor on

1 Schedule F. Neither of the parties address this issue, but
2 assume that there was an executory contract, with the Debtor
3 contending that since the claim of Sang Song was denied there
4 could not be misstatement under oath.

5 The analysis of this issue begins with § 365, which provides
6 for the treatment of executory contracts and leases, but does not
7 provide for a definition of either. The case law has adopted
8 what is commonly referred to as the "Countryman Definition" that:

9 a contract is executory if "the obligations of both
10 parties are so unperformed that the failure of either
11 party to complete the performance would constitute a
material breach and thus excuse the performance of the
other."

12 Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L.
13 Helms Constr. & Dev. Co.), 139 F.3d 702, 705 (9th Cir. 1998)
14 (citation omitted) ("Helms"). The contract will not be
15 considered executory if performance does not remain due on both
16 sides to some extent. In Helms the Ninth Circuit concluded that
17 an option to purchase property which was not exercised prior to
18 the commencement of the bankruptcy case was not an executory
19 contract because the duties between the parties remained too
20 speculative. Id. For the purposes of federal law, it is well
21 established that a contract is executory if the failure of one
22 party to perform would constitute a material breach under
23 applicable state law. In re Rega Properties, Ltd., 894 F.2d
24 1136, 1139 (9th Cir. 1990) (quoting Hall v. Perry (In re Cochise
25 College Park, Inc.), 703 F.2d 1339, 1348 n.4 (9th Cir. 1983)).

26 Though the conduct of the Debtor in this case may well have
27 been grounds for the bankruptcy court to question the veracity of
28 his statements and the true intentions of listing Sang Song on

1 Schedule F, the Panel cannot conclude that there was an alleged
2 executory contract sufficient that the failure to include Sang
3 Song on Schedule G constitutes a violation of § 727(a)(4)(A).

4 Both parties must have an obligation to perform for the
5 contract to be executory. Helms, 139 F.3d at 706. The contract
6 is not an executory contract for purposes of the Bankruptcy Code
7 if the continuing duties between the parties are too speculative.
8 Performance due in the future only at the discretion of one party
9 is not sufficient. Id.

10 For the obligation owed to Sang Song, neither the record nor
11 the bankruptcy court's decision establish what obligations either
12 the Debtor or Sang Song were required to perform in the future.
13 The Debtor was not required to continue to live in Sang Song's
14 home or to pay any amounts at a specific time. The Debtor could
15 pay when he thought he had enough money. Sang Song was not
16 committed to allow the Debtor to live at her house and for her to
17 provide the Debtor with other living necessities for any
18 specified period in the future. Both could just walk away from
19 their understanding.

20 The record does not establish that there was so clearly an
21 executory contract to warrant finding that the Debtor made a
22 false oath by not listing it on Schedule G. Nevertheless, this
23 error is harmless as the weight of the other factual findings
24 support the bankruptcy court's conclusion. See Yadidi, 274 B.R.
25 at 853.

26 VI. CONCLUSION

27 In addition to the unchallenged material nondisclosures and
28 inaccurate disclosures which are sufficient, in and among

1 themselves, to affirm the bankruptcy court ruling, the Panel
2 determines that all but one of the challenged findings are
3 supported by the record. For the one finding which is not
4 supported by the record, the error is harmless.

5 We conclude that bankruptcy court correctly applied the
6 provisions of § 727(a)(4)(A) and its decision determining that
7 the Debtor knowingly and fraudulently made false statements under
8 oath in his schedules and statements of financial affairs is not
9 clearly erroneous.

10 The decision of the bankruptcy court is **AFFIRMED**.