

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NOT FOR PUBLICATION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).<sup>1</sup> 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  
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26 <sup>1</sup> 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.<sup>2</sup>

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

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27  
28 <sup>2</sup> 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.<sup>3</sup>

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

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25  
26 <sup>3</sup> 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.<sup>4</sup> 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

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27  
28 <sup>4</sup> "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,<sup>5</sup> 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

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25  
26 <sup>5</sup> 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.<sup>6</sup> 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 <sup>6</sup> 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.<sup>7</sup> 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

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26  
27 <sup>7</sup> 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.<sup>8</sup> 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

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15 <sup>8</sup> 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.

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.<sup>9</sup>

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

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22  
23 <sup>9</sup> 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**.