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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NOT FOR PUBLICATION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 Nos.	CC-07-1164-KPaBa
	)		CC-07-1171-KPaBa
EYAD KHALIL,	)		(cross-appeal)
	)		
Debtor.	)	Bk. No.	SA 05-12795-ES
_____	)		
	)	Adv. No.	SA 05-01621-ES
EYAD KHALIL,	)		
	)		
Appellant and Cross-Appellee,	)		
	)		
v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
	)		
DEVELOPERS SURETY AND	)		
INDEMNITY COMPANY,	)		
	)		
Appellee and Cross-Appellant.	)		
_____	)		

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

Filed - November 6, 2007

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and BARDWIL,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Robert S. Bardwil, Bankruptcy Judge for the Eastern District of California, sitting by designation.

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

7 Debtor alleges that the bankruptcy court applied an  
8 incorrect standard for determining his intent: reckless  
9 indifference to the accuracy of bankruptcy schedules and  
10 statement of financial affairs, rather than knowing and  
11 fraudulent intent. Debtor also argues that the bankruptcy court  
12 was required to find a motive for his misstatements and  
13 omissions. We disagree on both counts, and also reject DSI's  
14 challenges to the judgment in its cross-appeal. Accordingly, we  
15 AFFIRM.

#### 16 I. FACTS

17 Debtor filed his voluntary Chapter 7 petition on April 25,  
18 2005 (the "Petition Date") and his bankruptcy schedules and  
19 statement of financial affairs on May 10, 2005. DSI filed a  
20 complaint objecting to Debtor's discharge and trial was held  
21 October 25 and 26, 2006. Debtor's direct testimony was presented  
22 by declaration. Much of DSI's evidence consisted of excerpts  
23 from Debtor's deposition testimony that were read into the record

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24  
25 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
119 Stat. 23, because the case from which this appeal arises was  
filed before its effective date (generally October 17, 2005).

1 and admitted without objection. See Tr., Oct. 25, 2007,  
2 pp. 89:20-90:25.

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

9 DSI focuses primarily on three transactions. First, Debtor  
10 did not disclose approximately \$100,000 that he received from his  
11 father in 2003. DSI argues that this was income that should have  
12 been listed in Debtor's statement of financial affairs, in  
13 response to questions 1 and 2 asking Debtor to state the amount  
14 of pre-petition "income" that he received in the current year and  
15 the two previous years. See Official Form 7. The initial source  
16 of the money was Atek Corporation ("Atek"), an S Corporation  
17 which has now ceased operations but was then engaged in  
18 construction focusing on public works projects. Debtor's father  
19 was the record owner of 50% of the shares and Debtor's uncle Ali  
20 Mohammed Taha ("Uncle") held the other 50%. Debtor testified  
21 that his father "was entrusted with my share in the company since  
22 [its] inception" and held it solely for Debtor's benefit; "I was  
23 the holder of [the] California Contractor's License"; and the 50%  
24 share "was transferred into my name eventually." Tr., Oct. 25,  
25 2006, pp. 32:11-24, 121:17-122:3 (quoting Ex. 16 p. 176:11-22).  
26 Atek distributed about \$111,699 to Debtor's father, who paid  
27 income taxes on that money and transferred the balance to Debtor.  
28 Id. pp. 32:24-33:9 (quoting Ex. 16 pp. 176:2-177:5). Debtor

1 testified that he did not consider this to be income. His  
2 counsel asked what Debtor understood to be income, which led to  
3 the following exchange:

4 A Income? Money you get for doing something,  
5 for doing work.

6 Q Okay, and if you receive income for doing  
7 work, do you report that on your tax return as  
8 income?

9 A Yes.

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

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

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

20 The second transaction involves Atek's sale of some  
21 unimproved residential real property (the "Big Bear Lot") in  
22 January of 2005 for \$148,642.70. Atek distributed \$40,000 to  
23 Debtor and another \$73,000 to Debtor's brother, Khalil Jaj Khalil  
24 ("Brother"). DSI alleges that some of this money was used to  
25 defray Debtor's personal expenses and repay a debt that Debtor  
26 owed Brother. Debtor did not disclose these transactions as  
27 income. Nor did Debtor disclose any payments of personal debts  
28 to Brother or other persons in response to question 3.a. of his  
statement of financial affairs, which requires Debtor to list all  
payments on loans and other debts aggregating more than \$600 to  
any "creditor" within 90 days before the Petition Date, or  
question 3.b., which requires Debtor to list all payments within  
one year prior to the Petition Date to or for the benefit of

1 "creditors" who are or were insiders. See Official Form 7.

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

9 I was worried that the bonding companies  
10 would get a hold of the money in my company  
11 account and I put it in my brother's account so he  
12 can pay my bills . . . [m]y lawyer bills, my  
13 personal bills, and he used the money to do that.

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

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

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

27 A Yes.

28 Q And what type of expenses did you pay?

A Mostly when I, you know, buy material. When  
I am on sites I buy material for, you know, things  
that the project is missing. Workers needing  
tools, stuff like that, that hasn't been planned  
properly, you know, or things that came up because

1 of the size of our work that occurred almost daily  
2 or weekly.

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

7 A "Personal expenses" as in --

8 Q Mortgage, car payments, utilities?

9 A No, no.

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

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

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

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

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

27 A Yes.

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

A No.

Q No? Just free, huh?

A If my brother is paying --

1 Q I'm not asking about your brother, I'm just  
2 asking hypothetically.

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

5 Q Oh, I see. If it's a loan it's not income  
6 \* \* \*

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

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

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

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

27 The third transaction on which DSI focuses is Debtor's  
28 acquisition of Uncle's 50% interest in Atek at the end of 2003 or  
beginning of 2004 for an agreed purchase price of \$2 million.  
Tr., Oct. 25, 2006, p. 54:1-5. Debtor testified that transfers  
of \$50,000 and \$150,000 from Atek to Uncle in March of 2004 were  
in part payment of that \$2 million debt. Id. pp. 86:4-11, 88:5-  
7. DSI argues that these transfers were for Debtor's benefit and

1 should have been disclosed as part of his income. Debtor's  
2 counsel asked, did you understand that this \$200,000 transfer  
3 from Atek to Uncle was "income to you?" Id. p. 100:2. Debtor  
4 responded:

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

7 Q Income, as we discussed before.

8 A It's -- no.

9 Id. p. 100:3-7.

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

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

24 Direct Testimony Decl., ¶ 3.c.

25 At trial Debtor testified that he did not personally owe  
26 money to Uncle. Tr., Oct. 25, 2006, p. 98:19-24. According to  
27 Debtor, the written agreement for purchase and sale of Atek for  
28 \$2 million was supplemented by an oral agreement that the  
\$2 million would only be paid by Atek, not by Debtor personally.  
Tr., Oct. 25, 2006, pp. 136:14-19, 138:21-139:1; Tr., Oct. 26,  
2006, pp. 25:11-22, 26:16-25, 28:21-24, 58:24-59:7.

DSI also objects that Uncle and his wife are not listed as  
codebtors in bankruptcy Schedule H (codebtors) even though they

1 are jointly obligated with Debtor as guarantors of Atek's  
2 obligations to DSI and another bonding company. Debtor's direct  
3 testimony states:

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

12 Direct Testimony Decl. ¶ 3.b.

13 Debtor also acknowledges that he under-reported what he  
14 acknowledges to be income in 2003 through 2005. For 2003, Debtor  
15 explained that he "looked at the 2003 corporate tax return which  
16 included 'Shareholder's Share of Income, Credits, Deductions'  
17 which shows ordinary income for me at \$372,981 instead of the  
18 \$400,000+ figure from my personal 2003 return." Direct Testimony  
19 Decl. ¶ 3.h. (emphasis added). For 2004, Debtor's statement of  
20 financial affairs shows "Estimated gross income from [Atek]" of  
21 \$35,000 but in an examination by DSI Debtor admitted that this  
22 was only payroll and "I found out that I had . . . made some  
23 draws" that added another \$14,000 or so to his income. Tr., Oct.  
24 25, 2006, pp. 56:15-57:12 (quoting Ex. 14 p. 63:17-64:10).

25 The bankruptcy court gave its oral ruling on December 18,  
26 2006. After rejecting DSI's claims under § 727(a)(2), (3), and  
27

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

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

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

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

27 The bankruptcy court found that Debtor's omissions are  
28 "numerous and/or substantial in terms of dollar amount" and that  
29 Debtor's explanation "that these were relatives, [that] he didn't  
30 think that they would come after him, I really found not  
31 persuasive." Id. p. 13:10-14. The bankruptcy court noted that

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32 <sup>4</sup> Section 727(a)(4)(A) provides, "(a) The court shall grant  
33 the debtor a discharge, unless -- \* \* \* (4) the debtor knowingly  
34 and fraudulently, in or in connection with the case -- (A) made a  
35 false oath or account[.]"

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

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

## 18 **II. JURISDICTION**

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

## 22 **III. STANDARDS OF REVIEW**

23 . . . the Ninth Circuit standard of review of a  
24 judgment on an objection to discharge is that:  
25 (1) the court's determinations of the historical  
26 facts are reviewed for clear error; (2) the  
27 selection of the applicable legal rules under  
§ 727 is reviewed de novo; and (3) the  
application of the facts to those rules requiring  
the exercise of judgments about values animating  
the rules is reviewed de novo.

28 Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP

1 2004) (citations omitted), aff'd, 212 Fed. App'x 589 (9th Cir.  
2 2006).

3 "When there are two permissible views of the evidence, the  
4 trial judge's choice between them cannot be clearly erroneous."  
5 Village Nurseries v. Gould (In re Baldwin Builders),  
6 232 B.R. 406, 410 (9th Cir. BAP 1999) (citation omitted).

#### 7 **IV. ISSUES**

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

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

#### 12 **V. DISCUSSION**

13 Section 727 provides, in relevant part:

##### 14 § 727. Discharge

15 (a) The court shall grant the debtor a discharge,  
16 unless --

17 \* \* \*

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

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

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

25 (3) the debtor has concealed, destroyed,  
26 mutilated, falsified, or failed to keep or  
27 preserve any recorded information, including  
28 books, documents, records, and papers, from  
which the debtor's financial condition or  
business transactions might be ascertained,  
unless such act or failure to act was

1 justified under all of the circumstances of  
2 the case;

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

5 (A) made a false oath or account;

6 \* \* \*

7 (5) the debtor has failed to explain  
8 satisfactorily, before determination of  
9 denial of discharge under this paragraph, any  
10 loss of assets or deficiency of assets to  
11 meet the debtor's liabilities[.]

12 § 727(a) (2), (3), (4) (A), and (5).

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

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

27 1. In general

28 Section 727(a) (4) (A) denies a discharge to a debtor who  
"knowingly and fraudulently" makes a false oath or account in the  
course of the bankruptcy case. § 727(a) (4) (A). A false  
statement or an omission in the debtor's bankruptcy schedules or

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

13 DSI must show by a preponderance of the evidence that:  
14 (1) Debtor made such a false statement or omission, (2) regarding  
15 a material fact, and (3) did so knowingly and fraudulently. See  
16 Searles, 317 B.R. at 377; Roberts, 331 B.R. at 882 (same test,  
17 broken down into four elements). The first of these three  
18 elements is satisfied. Debtor has cited no authority, either  
19 before the bankruptcy court or on this appeal, that his relatives  
20 were not creditors simply because they would not "come after" him  
21 for the money he had borrowed from them. Whatever Debtor  
22 allegedly believed, the definition of "creditor," incorporating  
23 the definition of "claim," is very broad and Debtor has shown no  
24 error in the bankruptcy court's conclusion that his relatives are  
25 in fact creditors. See § 101(5), (10). Nor has Debtor cited  
26 authority that transfers of money from Atek were anything but  
27 income within the meaning of the statement of financial affairs  
28 (Official Form 7), regardless of whether the money came to him

1 through his father or was used to pay his creditors (through him  
2 or through Brother).

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

13 The last element is intent. Debtor must have "knowingly and  
14 fraudulently" made a false oath or account. Section  
15 727(a)(4)(A). A debtor "acts knowingly if he or she acts  
16 deliberately and consciously." Roberts, 331 B.R. at 883  
17 (citation omitted). In this case Debtor admits that he made a  
18 deliberate and conscious choice to omit his family and  
19 transactions with them from his bankruptcy papers, but he claims  
20 to have done so through an honest belief that he was not required  
21 to list them, or through innocent oversight. As for acting  
22 fraudulently, we held in Roberts that the elements of common law  
23 fraud substantially overlap the elements of a claim under  
24 Section 727(a)(4)(A), except that "materiality replaces the  
25 elements of reliance and proximately caused damage," so that the  
26 creditor must show: "(1) [that] the debtor made the  
27 representations [e.g., a false statement or omission in  
28 bankruptcy schedules]; (2) that at the time he knew they were

1 false; [and] (3) that he made them with the intention and purpose  
2 of deceiving the creditors . . . ." Id. at 884 (citations  
3 omitted, emphasis added).

4 2. Recklessness

5 In Roberts we reversed a judgment denying a discharge under  
6 § 727(a)(4)(A) because the bankruptcy court only found that the  
7 debtor exhibited a "careless and reckless approach to the  
8 important duty of disclosure in sworn bankruptcy filings."  
9 Roberts, 331 B.R. at 883. We held that "recklessness does not  
10 measure up to the statutory requirement of 'knowing' misconduct."  
11 Id. at 884.

12 On the other hand, recklessness can be probative of  
13 fraudulent intent. In Wills we stated in dicta that a court "may  
14 find the requisite intent where there has been a pattern of  
15 falsity or from a debtor's reckless indifference to or disregard  
16 of the truth." Wills, 243 B.R. at 64 (emphasis added) (citing  
17 Coombs, 193 B.R. at 564). We specifically left unresolved in  
18 Roberts whether "a reckless disregard of both the serious nature  
19 of the information sought and the necessary attention to detail  
20 and accuracy in answering may rise to the level of fraudulent  
21 intent necessary to bar a discharge . . . ." Roberts, 331 B.R.  
22 at 884 (quoting Mondore v. Mondore (In re Mondore), 326 B.R. 214,  
23 217 (Bankr. W.D.N.Y. 2005)). We now address that issue.

24 There is no Ninth Circuit authority deciding this issue, but  
25 numerous courts including five other circuit courts have held a  
26 reckless indifference to the truth can support denial of  
27 discharge under § 727(a)(4)(A). See, e.g., Boroff v. Tully (In  
28 re Tully), 818 F.2d 106, 111 (1st Cir. 1987) (debtor's omissions

1 evidenced "reckless indifference to truth equivalent to fraud for  
2 purposes of § 727(a)(4)(A)"; Salomon v. Kaiser (In re Kaiser),  
3 722 F.2d 1574, 1584 n. 4 (2d Cir. 1983) (citing authority that  
4 reckless indifference to truth is the equivalent of fraud, and  
5 that a pattern of reckless and cavalier disregard for truth can  
6 be serious enough to supply the necessary fraudulent intent  
7 required by § 727(a)(4)(A)); Beaubouef v. Beaubouef (In re  
8 Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992) (multiple  
9 falsehoods, combined with "failure to take advantage of the  
10 opportunity to clear up all inconsistencies and omissions when he  
11 filed his amended schedules," constituted "reckless indifference  
12 to the truth and, therefore, the requisite intent to deceive")  
13 (citation omitted); Keeney v. Smith (In re Keeney), 227 F.3d 679,  
14 686 (6th Cir. 2000) ("A reckless disregard as to whether a  
15 representation is true will also satisfy the intent requirement")  
16 (citation omitted); In re Chavin, 150 F.3d 726, 728 (7th Cir.  
17 1998) ("not caring whether some representation is true or false  
18 -- the state of mind known as 'reckless disregard' -- is, at  
19 least for purposes of the provisions of the Bankruptcy Code  
20 governing discharge, the equivalent of knowing that the  
21 representation is false and material") (citations omitted);  
22 Martin Marietta Materials Southwest, Inc. v. Lee (In re Lee), 309  
23 B.R. 468 (Bankr. W.D. Tex. 2004) (following Beaubouef). See  
24 generally Annotation, C.C. Marvel, False Oath or Account as Bar  
25 to Discharge in Bankruptcy Proceedings, 59 A.L.R.2d 791 (1958,  
26 updated weekly per Westlaw) ("Annotation, False Oath or  
27 Account"), § 9.5 (reckless disregard).

28

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

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

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

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

25           Coombs strikes the appropriate balance. It is critical of  
26 too easy a reliance on recklessness, but as we noted in Wills it  
27 also stands for the general proposition that a court "may find  
28 the requisite intent where there has been a pattern of falsity or

1 from a debtor's reckless indifference to or disregard of the  
2 truth." Wills, 243 B.R. at 64 (emphasis added) (citing Coombs,  
3 193 B.R. at 564). The Coombs court said it well:

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

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

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

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

21 Debtor claims that he did not know that his representations  
22 were false and he did not have the intention and purpose of  
23 deceiving creditors. According to Debtor, (1) he inadvertently  
24 used the wrong documents to measure his gross income in 2003 and  
25 2004, and he truly believed (2) that roughly \$100,000 he received  
26 from Atek (through his father) was not "income," (3) that his  
27 obligation to repay his family did not make them "creditors,"  
28 (4) that his agreement to acquire 50% of Atek from Uncle for

1 \$2 million did not make Uncle a "creditor," (5) that Uncle and  
2 his wife were not codebtors to DSI and another bonding company  
3 despite written guarantees, and (6) that payments of Debtor's  
4 debts through Brother and other transfers did not need to be  
5 reported in his bankruptcy schedules and statement of financial  
6 affairs. The bankruptcy court did not believe him.

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

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

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

26 According to Debtor, the above reference to a "reckless  
27 indifference to the truth" shows that the bankruptcy court  
28 applied a recklessness standard rather than requiring DSI to

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

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

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

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

26           the requisite intent is supported . . . by the  
27           number of omissions, by the magnitude of the  
28           omissions, by the . . . conscious exclusion of  
            information, even at the time of trial, and no  
            attempt to correct the inaccuracies.

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

          These are exactly the sort of circumstances referred to in  
Coombs (and Lee) as supporting an inference of knowing and  
fraudulent intent. Debtor has shown no error in the bankruptcy

1 court's reliance on inferences.

2 4. Motive

3 Motive can support a finding of knowing and fraudulent  
4 intent, but it is not indispensable. A bankruptcy court might  
5 find that a debtor's reckless indifference to the truth is part  
6 of an attempt to fly "below the trustee's radar screen" (Searles,  
7 317 B.R. at 377), or to protect family or friends from intrusive  
8 discovery or preference or fraudulent transfer actions, or simply  
9 to make investigation difficult for the bankruptcy trustee or  
10 creditors. Alternatively, the court might never know the  
11 debtor's motive, but the number of misstatements or omissions, or  
12 the size or nature of a single one, might suffice to support a  
13 finding that a debtor knowingly and fraudulently made a false  
14 oath or account. See Hansen v. Moore (In re Hansen), 368 B.R.  
15 868, 878 (9th Cir. BAP 2007) ("The sheer number of material  
16 inaccuracies contained in schedules that debtor, an attorney,  
17 admittedly reviewed and revised twice suffices as circumstantial  
18 evidence to support the finding that the 'knowingly and  
19 fraudulently' element of § 727(a)(4) was proven.").

20 Debtor cites White v. Nielsen (In re Nielsen), 383 F.3d 922  
21 (9th Cir. 2004), for the proposition that the bankruptcy court  
22 must find a motive to defraud. That case did not involve an  
23 objection to discharge. It involved a creditor's attempt to  
24 revoke the debtors' discharge under § 727(d)(1), which applies if  
25 the discharge "was obtained through the fraud of the debtor."  
26 § 727(d)(1). The creditor in that case alleged that the debtors  
27 intentionally omitted her from their list of creditors, but she  
28 did not show how, even if she had known of the bankruptcy case in

1 time to object to the discharge, she would have had any grounds  
2 to do so. The Ninth Circuit recognized that debtors might  
3 "purposely leave a creditor off the list if that creditor would  
4 have knowledge of assets," or for other reasons. See id. p. 926.  
5 This implies that such a motive could be circumstantial evidence  
6 of grounds to deny the debtors' discharge, but the Ninth Circuit  
7 never held that a motive had to be proven. Debtor's reliance on  
8 Nielsen is misplaced.

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

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

22 Second, nondisclosure of creditors (and debts) can be just  
23 as important as nondisclosure of assets. Information regarding  
24 business and personal dealings can lead to discovery of assets,  
25 potentially avoidable transfers, or other relevant information  
26 such as grounds to deny a debtor's discharge. "A false statement  
27 or omission may be material even if it does not cause direct  
28 financial prejudice to creditors." Wills, 243 B.R. at 63 (citing

1 inter alia 6 King, Collier on Bankruptcy ¶ 727.04[1][b]). See  
2 generally Annotation, False Oath or Account, 59 A.L.R.2d 791,  
3 § 18 (omission of creditors or debts). Debtor cites our decision  
4 in Searles, which acknowledges that “the rules may be inexact  
5 about [the debtor’s] continuing duty to amend schedules to  
6 reflect property of the estate accurately,” but Searles focused  
7 on property because that was what was at issue in that case. See  
8 Searles, 317 B.R. at 378-79 and nn. 6-8 (emphasis added).  
9 Nothing in Searles held or implied that the duty to amend applies  
10 only to assets and not to liabilities.

11 For all of these reasons Debtor has shown no error in the  
12 bankruptcy court’s judgment. Debtor’s discharge was properly  
13 denied under § 727(a)(4)(A).

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

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

25 **VI. CONCLUSION**

26 Debtor’s discharge cannot be denied under § 727(a)(4)(A)  
27 unless his false statements or omissions were made “knowingly and  
28 fraudulently.” Recklessness by itself will not suffice, but

1 reckless combined with other circumstances can support an  
2 inference that he acted with knowing and fraudulent intent. The  
3 bankruptcy court found that Debtor made numerous, substantial,  
4 and conscious omissions from his bankruptcy schedules and  
5 statement of financial affairs, that Debtor's explanations were  
6 not persuasive, that he chose not to correct these inaccuracies  
7 when he had the opportunity, and that he had the requisite intent  
8 to deceive. Debtor has shown no error in these findings or the  
9 bankruptcy court's application of the law. The judgment denying  
10 his discharge under § 727(a)(4)(A) is AFFIRMED.

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