

AUG 30 2007

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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NOT FOR PUBLICATION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

6	In re:)	BAP No.	NC-06-1437-DKS
7	HANFORD NICHOLS LOCKWOOD, JR.,)	Bk. No.	05-31424
8	Debtor.)	Adv. No.	05-03376
9	_____)		
10	HANFORD NICHOLS LOCKWOOD, JR.,)		
11	Appellant,)		
12	v.)	MEMORANDUM ¹	
13	JMS LABS LIMITED (USA) L.L.C.,)		
14	Appellee.)		
15	_____)		

Argued and Submitted on June 22, 2007
at San Francisco, California

Filed - August 30, 2007

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Before: DUNN, KLEIN and SMITH, Bankruptcy Judges.

¹ 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.

1 In this case of a debtor who apparently tripped on the
2 threshold of insolvency planning, the bankruptcy court found that
3 the debtor failed to disclose the transfer of his interest in a
4 patent application within one year preceding his bankruptcy
5 filing on his statement of financial affairs and denied debtor's
6 discharge under § 727(a)(4)(A).² Debtor timely appealed. We
7 AFFIRM.

8 9 I. FACTS

10 A. Pre-Bankruptcy

11 In December 1998, Hanford Lockwood, Jr. ("Lockwood") and JMS
12 Labs Limited (USA), LLC ("JMS") entered into an "Assignment of
13 the Patent and Know-How Purchase Agreement" ("Know-How Purchase
14 Agreement") in which Lockwood assigned his patent for the MaxAir
15 Nasal Dilator, a skin stabilization and nasal dilator system, to
16 JMS. Over time, disputes between JMS and Lockwood arose
17 concerning the patent and Know-How Purchase Agreement.
18 Ultimately, arbitration ensued, and an award of \$231,103.74 plus
19 attorney's fees and costs was granted in JMS's favor. The
20 arbitration award was entered as a final judgment in San
21 Francisco Superior Court on December 3, 2004.

22 Prior to the entry of the judgment, on May 9, 2003, Lockwood
23 filed with the U.S. Patent and Trademark Office ("USPTO") a
24 provisional application, number 60/469,348, entitled "Improved

25 ² 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 (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 Nasal Strip with Variable Spring Rate" (the "2003 Application").³
2 On February 19, 2004, Lockwood agreed to sell his 500 shares of
3 stock in Silver Eagle Labs, Inc. ("Silver Eagle Labs") to his
4 wife, Michele Lockwood ("Michele"), and to assign the 2003
5 Application to Silver Eagle Labs (the "Agreement").⁴ As
6 consideration, Michele agreed to pay Lockwood's attorney fees in
7 CNS, Inc. v. Silver Eagle Labs, Inc., a pending infringement
8 lawsuit case concerning the Improved Nasal Strip with Variable
9 Spring Rate.⁵

10 On May 5, 2004, Lockwood filed another patent application,
11 number 10/839,879, for the Improved Nasal Strip with Variable
12 Spring Rate (the "2004 Application"). He assigned the Improved
13 Nasal Strip with Variable Spring Rate and the 2004 Application to
14 Silver Eagle Labs on July 9, 2004 (the "Assignment"). The
15 Assignment was recorded on July 22, 2004.

18 ³ The MaxAir Nasal Dilator and the Improved Nasal Strip with
19 Variable Spring Rate are competing nasal strip products.

20 ⁴ Silver Eagle Labs is a Nevada corporation organized by
21 Lockwood and Michele. At the time of Silver Eagle Labs'
22 incorporation, 500 shares of stock were issued each to Lockwood
23 and Michele. Following the transfer of Lockwood's shares to
24 Michele, Michele and Lockwood surrendered their two certificates
25 of ownership to Silver Eagle Labs, which then issued a new
26 certificate to Infinite Financial Solutions, LLC. Infinite
27 Financial Solutions, LLC, which is owned by Integrated Power,
28 Inc., is the sole owner of Silver Eagle Labs. Michele has sole
control over Integrated Power, Inc.

⁵ The CNS infringement case was initiated a day before
Lockwood and Michele entered into the Agreement. As of the end
of 2005, Michele had paid roughly \$380,000 in attorney fees and
costs defending against the infringement suit.

1 B. The Bankruptcy

2 On May 9, 2005, Lockwood filed for chapter 13 relief.
3 Shortly thereafter, he converted his case to chapter 7.
4 Lockwood's schedules indicated that he owned no real property,
5 held \$489,538.11 in personal property assets, and had only one
6 creditor - JMS, which held a \$289,584.77 general unsecured claim
7 based on its state court judgment. On his statement of financial
8 affairs (the "Statement"), Lockwood disclosed only the transfer
9 of an automobile during the year prior to his bankruptcy filing.

10 JMS timely commenced an action against Lockwood seeking
11 denial of his discharge under § 727(a)(2) and (a)(4), as well as
12 nondischargeability of its debt under § 523(a)(6). As to the
13 § 727(a)(4) claim, JMS alleged that Lockwood had knowingly and
14 fraudulently failed to disclose his interests in various business
15 entities, including Macondray Trust, Silver Eagle Labs,
16 Integrated Power, Inc., HNL Technologies, Inc., JMS Labs Limited,
17 IBC, and Aegis Financial Service.

18 Following trial, the bankruptcy court ruled in Lockwood's
19 favor on the § 523 claim, but took the § 727 matters under
20 submission. Post-trial briefs concerning Lockwood's alleged
21 undisclosed assignment of patent rights to Michele were filed by
22 both parties.

23 On July 19, 2006, the court issued its oral ruling. In
24 concluding that Lockwood's discharge should be denied pursuant to
25 § 727(a)(4) only, the court found that an assignment of
26 Lockwood's patent rights in the Improved Nasal Strip with
27 Variable Spring Rate (the "Invention") had indeed occurred within
28 one year preceding his bankruptcy filing. While the court

1 recognized that there was some confusion as to the difference
2 between the 2003 Application disclosed in the Agreement and the
3 2004 Application transferred in accordance with the Assignment
4 (both of which dealt with the Invention, but had different patent
5 application numbers), it determined that whether the Invention
6 and patent application(s) were transferred pursuant to the
7 Assignment or the Agreement was irrelevant. Either they were
8 transferred "absolutely of one asset" to Silver Eagle Labs under
9 the Assignment or Lockwood performed his future obligation to
10 assign his interest in the Invention and patent application(s) as
11 contemplated by the Agreement in July 2004 through the
12 Assignment.

13 The bankruptcy court further held that Lockwood's failure to
14 disclose the transfer on the Statement was "certainly a
15 materiality element of non-disclosure[.]" Hr'g Tr. 7:23-25, July
16 19, 2006. Lockwood had agreed to assign his interest in Silver
17 Eagle Labs and his interest in the Invention and patent
18 application(s) for no less than \$380,000 - the amount expended by
19 Michele in defending against the CNS litigation. Therefore, the
20 property transferred had significant value.

21 Based on the foregoing, the court concluded

22 that there was a materiality element in the sense that
23 a non-disclosure of what occurred supports the
24 conclusion that for purposes of Section 727(a)(4), Mr.
25 Lockwood did make a false oath in connection with
26 concealment of the transaction that was material, and .
27 . . therefore . . . he has to be denied his discharge.

28 Hr'g Tr. at 9:4-12. A judgment ("Judgment") memorializing the
court's ruling was entered on November 27, 2006, incorporating
the following statement:

1 [T]he discharge of Debtor under the Fourth Claim for
2 Relief should be, and hereby is, denied under the
3 Bankruptcy Code Section 727(a) (4) (A), based upon the
4 Debtor's having knowingly and fraudulently made a false
5 oath by a concealment of a material transaction, all as
6 more particularly set forth in the findings of fact and
7 conclusions of law stated by the Court on the record
8 July 19, 2006.

9 Judgment at 2-3.

10 Lockwood filed a notice of appeal on December 1, 2006.⁶

11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
13 and § 157(b) (1) and (b) (2) (J). We have jurisdiction under 28
14 U.S.C. § 158.

15 **III. ISSUE**

16 Whether the bankruptcy court erred in denying Lockwood's
17 discharge under § 727(a) (4) (A).

18 **IV. STANDARD OF REVIEW**

19 A judgment denying a debtor's discharge is reviewed so that:

20 (1) the court's determinations of the historical facts
21 are reviewed for clear error; (2) the selection of the
22 applicable legal rules under § 727 is reviewed de novo;
23 and (3) the application of the facts to those rules

24 ⁶ Attached as an exhibit to Lockwood's reply brief is a
25 declaration of J. George Seka dated March 28, 2007, and
26 attachments related thereto. JMS has moved to strike this
27 exhibit as being outside the trial record and the designation on
28 appeal. The motion is granted. "An appellate court may not
consider evidence not presented to the trial court which is thus
not part of the record on appeal." Smyrnos v. Padilla (In re
Padilla), 213 B.R. 349, 354 n.3 (9th Cir. BAP 1997). See also
Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir.
1988).

1 requiring the exercise of judgments about values
2 animating the rules is reviewed de novo.

3 Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP
4 2004).

6 V. DISCUSSION

7 Section 727(a)(4)(A) provides that a debtor's discharge
8 shall be denied if "the debtor knowingly and fraudulently . . .
9 made a false oath" in the course of the bankruptcy proceedings.
10 Denial of discharge under this section requires the plaintiff to
11 prove by a preponderance of the evidence that: "(1) the debtor
12 made a false oath in connection with the case; (2) the oath
13 related to a material fact; (3) the oath was made knowingly; and
14 (4) the oath was made fraudulently." Roberts v. Erhard (In re
15 Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005).

16 The fundamental purpose of § 727(a)(4) is to ensure that
17 dependable information is supplied to those interested in the
18 administration of the bankruptcy estate without the trustee or
19 other interested parties having to conduct costly investigations.
20 Fogal Legware of Switz., Inc. v. Wills (In re Wills), 243 B.R.
21 58, 63 (9th Cir. BAP 1999); Aubrey v. Thomas (In re Aubrey), 111
22 B.R. 268, 274 (9th Cir. BAP 1990). Thus, a debtor's ability to
23 obtain a fresh start is conditioned upon truthful disclosure.
24 Aubrey, 111 B.R. at 274.

25 Courts are to construe a § 727 claim liberally in favor of
26 the debtor and strictly against the person objecting to the
27 discharge.

1 A denial of a discharge is an act of mammoth proportions,
2 and must not be taken lightly. In light of this gravity,
3 this Court and many others have stated that Section 727 must
be construed liberally in favor of the debtor and against
the objector.

4 Gordon's Jewelry Co. v. Goldstein (In re Goldstein), 66 B.R. 909,
5 917 (W.D. Pa. 1986). See First Beverly Bank v. Adeeb (In re
6 Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986); see also Roberts,
7 331 B.R. at 882.

8 The party seeking to deny the debtor's discharge generally
9 bears the burden of proof. However, since the Supreme Court's
10 decision in Grogan v. Garner, 498 U.S. 279 (1991), the burden of
11 proof standard for denial of discharge actions under § 727 of the
12 Bankruptcy Code is preponderance of the evidence. Id. at 286-91;
13 Stanley v. Hoblitzell (In re Hoblitzell), 223 B.R. 211, 215
14 (Bankr. E.D. Cal. 1998); Garcia v. Coombs (In re Coombs), 193
15 B.R. 557, 560 (Bankr. S.D. Cal. 1996).

16 The relatively lenient burden of proof standard compared
17 with the consistent admonition to construe the standards for
18 denial of discharge strictly in favor of debtors creates a
19 tension that informs the decisionmaking of bankruptcy courts in
20 § 727 cases. Yet, in spite of whatever weight on the scale
21 favors the debtor's discharge, a party seeking denial of the
22 debtor's discharge under § 727 likely will prevail if the
23 evidence establishes that it is more likely than not that the
24 objecting party's case is justified. This result is consistent
25 with the principle that the discharge provisions of the
26 Bankruptcy Code are designed for the benefit of the "honest but
27 unfortunate debtor." See Marrama v. Citizens Bank, ___ U.S. ___,
28 127 S.Ct. 1105, 1111 (2007); Adeeb, 787 F.2d at 1345; Devers v.

1 Bank of Sheridan, Montana (In re Devers), 759 F.2d 751, 754-55
2 (9th Cir. 1985). The corollary to that principle is that the lot
3 of the less than honest debtor in bankruptcy is apt to be highly
4 unfortunate.

5
6 A. Application of § 727(a)(4)(A) Elements in This Case

7 1. False Oath

8 A false oath may involve either a false statement in or an
9 omission from the debtor's schedules or statement of financial
10 affairs. Roberts, 331 B.R. at 882; Wills, 243 B.R. at 62. Here,
11 whether Debtor made a false oath is dependent upon when the
12 transfer of the patent application⁷ and Invention occurred.

13 Lockwood contends that the bankruptcy court erred in finding
14 that he made a false oath in responding to question 10⁸ in the

15
16 ⁷ 35 U.S.C. § 111(b) states that a "provisional application
17 shall be regarded as abandoned 12 months after the filing date of
18 such application and shall not be subject to revival after such
19 12-month period." Pursuant to 35 U.S.C. § 119(e)(1), a
20 provisional patent application may be converted into a regular,
non-provisional patent application if the regular patent

21 Here, the 2004 Application, dated May 5, 2004, was filed
22 during the 12-month period while the 2003 Application was
23 pending. Hence, some evidence exists to suggest that the 2003
24 Application may have been converted into the 2004 Application as
a non-provisional patent application.

25 For convenience purposes, the 2003 and 2004 Applications are
collectively referred to as the "patent application" henceforth.

26 ⁸ Question 10 requires a debtor to "[l]ist all . . .
27 property . . . transferred either absolutely or as security
28 within one year immediately preceding the commencement of [the
debtor's] case."

1 Statement when he failed to disclose the transfer of the
2 Invention and patent application. He maintains that the transfer
3 was made in February 2004, when he entered into the Agreement
4 with Michele, and not on July 9, 2004, as the bankruptcy court
5 found.⁹ Debtor argues that because the transfer was made more
6 than a year prior to his bankruptcy filing, he was not required
7 to disclose it on the Statement.

8 A patent is "a creature of federal statute" which can only
9 be transferred and assigned according to the terms of the patent
10 statutes (35 U.S.C. § 1 et seq.). United States v. Solomon, 825
11 F.2d 1292, 1296 (9th Cir. 1987). The rules governing assignment
12 provide that patents "shall be assignable in law by an instrument
13 in writing." 35 U.S.C. § 261. "[T]he instrument of transfer
14 must be unambiguous and show a clear and unmistakable intent to
15 part with the patent; it must express intention to transfer
16 ownership." Solomon, 825 F.2d at 1296 (citing 5 Lipscomb's
17 Walker on Patents § 19:7 (3d ed. 1986)).

18 In this case, the Agreement states, in relevant part, that
19 [Lockwood] further agrees to assign his invention
20 entitled "Improved Nasal Strip with Variable Spring
21 Rate" and the application for the United States patent
22 (provisional USPTO serial number 60/469,348 filed 09
23 May 2003) to Silver Eagle Labs Inc. prior to the date
24 the patent issues.

23 Agreement at 1, Feb. 19, 2004 (emphasis added). Though the

25 ⁹ In Lockwood's opening brief, he asserts that the
26 bankruptcy court erred in finding May 5, 2004, the date the
27 change of ownership on the patent application was registered with
28 the USPTO, to be the transfer date. This is an inaccurate
statement of the court's finding. During its July 19 oral
ruling, the court determined that the transfer occurred on July
9, 2004. Hr'g Tr. 7:1-3.

1 provision evidences Debtor's intent to assign the patent
2 application and Invention to Silver Eagle Labs at some future
3 date, it does not support Debtor's contention that the assignment
4 actually occurred on the date of the Agreement, i.e., February
5 19, 2004. Put another way, the language is insufficient to
6 establish Debtor's "clear and unmistakable intent" to part with
7 the patent application and Invention as of the Agreement's date.

8 We agree with the bankruptcy court that the Assignment
9 entered into on July 9, 2004, best reflects when the transfer
10 occurred. The Assignment provides:

11 For value received, [Lockwood] . . . hereby sells,
12 assigns, transfers, and sets over unto Silver Eagle
13 Labs Inc. . . . one hundred percent (100%) of the
14 following as of 09 July 2004:

15 (A) [Lockwood's] right, title and interest in and to
16 the invention entitled "Improved Nasal Strip with
17 Variable Spring Rate" invented by [Lockwood];

18 (B) the application for United States patent therefor,
19 assigned by [Lockwood] on 05 May 2004, U.S. Patent and
20 Trademark Officer [sic] Serial Number 10/839,879; Filed
21 05 May 2004;

22 (C) any patent or reissues of any patent that may be
23 granted thereon; and

24 (D) any applications which are continuous,
25 continuations-in-part; substitutes, or divisions of
26 said application.

27 Assignment at 1, July 9, 2004 (emphasis added). In our view, the
28 terms of the Assignment clearly establish that Debtor did not
actually transfer the patent application and Invention until July
9, 2004 - only ten months prior to his bankruptcy filing.

Because Lockwood transferred the patent application and
Invention within the year preceding the commencement of his
bankruptcy case, the court did not err in finding that Lockwood

1 made a false oath as to this nondisclosure on the Statement.

2 2. Materiality

3 Materiality is broadly defined. A false statement or
4 omission "is material if it bears a relationship to the debtor's
5 business transactions or estate, or concerns the discovery of
6 assets, business dealings, or the existence and disposition of
7 the debtor's property.'" Roberts, 331 B.R. at 883 (quoting
8 Wills, 243 B.R. at 62). Weiner v. Perry, Settles & Lawson, Inc.
9 (In re Weiner), 208 B.R. 69, 72 (9th Cir. BAP 1997); LaVangie v.
10 Mazzola (In re Mazzola), 4 B.R. 179, 183 (Bankr. D. Mass.
11 1980) ("The duty is on the debtor to answer not to evaluate.").

12 Although a false statement or omission need not cause direct
13 financial prejudice to creditors for it to be material, the
14 misstatement or omission must detrimentally affect the
15 administration of the estate for a denial of discharge to be
16 warranted. Wills, 243 B.R. at 63. An omission may also be
17 considered material if it "interferes with the possibility of a
18 preference or fraudulent conveyance action." Id. (citing 6 King,
19 Collier on Bankruptcy ¶ 727.04[1][b] (15th ed. Rev. 1998)).

20 The bankruptcy court found that Debtor assigned his interest
21 in Silver Eagle Labs and the patent application for no less than
22 \$380,000 - the amount of attorneys fees incurred in the state
23 court infringement lawsuit. This is a significant amount which,
24 if found in conjunction with a fraudulent transfer, would
25 unquestionably affect the administration of Debtor's estate.
26 Debtor does not object to the value the court placed on the
27 patent application nor that the transfer was material. We are

1 persuaded that the court did not err in finding Debtor's omission
2 of the transfer on the Statement to be material.

3
4 3. Knowledge

5 For a person to have acted knowingly, his or her acts must
6 be deliberately and consciously committed. Roberts, 331 B.R. at
7 883; Black's Law Dictionary 888 (8th ed. 2004). An omission
8 resulting from negligence (i.e., ignorance or carelessness) or
9 recklessness does not rise to the level of knowing. Roberts, 331
10 B.R. at 884.

11 In its oral ruling, the bankruptcy court found that "for
12 purposes of Section 727(a)(4), Mr. Lockwood did make a false oath
13 in connection with concealment of the transaction that was
14 material. . . ." Hr'g Tr. at 9:6-8 (emphasis added).

15 Black's Law Dictionary defines "concealment" as follows:

16 **concealment**, *n.* 1. The act of refraining from
17 disclosure; esp., an act by which one prevents or
18 hinders the discovery of something; a cover-up. 2. The
act of removing from sight or notice; hiding. . . .
19 . . .

20 "Concealment is an affirmative act intended or known to
21 be likely to keep another from learning of a fact of
22 which he would otherwise have learned. Such
23 affirmative action is always equivalent to a
24 misrepresentation and has any effect that a
25 misrepresentation would have. . . ." *Restatement*
26 *(Second) of Contracts* § 160 cmt. a (1979) (emphasis
27 added).

28 **active concealment.** The concealment by words or acts
of something that one has a duty to reveal.

fraudulent concealment. The affirmative suppression or
hiding, with the intent to deceive or defraud, of a
material fact or circumstance that one is legally (or,
sometimes, morally) bound to reveal.

Black's Law Dictionary 306 (8th ed. 2004) (emphasis added).

1 In light of these definitional standards, when the
2 bankruptcy court found that Lockwood concealed the transfer of
3 the patent application and Invention in failing to disclose the
4 Assignment in the Statement, the bankruptcy court necessarily
5 found that the Debtor acted knowingly. See, e.g., Keeney v.
6 Smith (In re Keeney), 227 F.3d 679, 685-86 (6th Cir. 2000)
7 (affirming the denial of debtor's discharge pursuant to
8 § 727(a)(4)(A), based upon the debtor's "continuing concealment"
9 and nondisclosure in his schedules of his beneficial interest in
10 real property.).

11 The bankruptcy court further stated in the Judgment that
12 the discharge of Debtor . . . is [] denied under
13 Bankruptcy Code Section 727(a)(4)(A), based upon the
14 Debtor's having knowingly and fraudulently made a false
15 oath by a concealment of a material transaction, all as
more particularly set forth in the findings of fact and
conclusions of law stated by the Court on the record
July 19, 2006.

16 Judgment at 2-3.

17 The bankruptcy court's oral finding of "concealment," as
18 satisfying the "knowing" element for denial of a discharge under
19 § 727(a)(4)(A) could have been more clearly stated. However, any
20 lack of clarity in the bankruptcy court's oral findings is
21 eliminated by the bankruptcy court's statement in the Judgment
22 that Lockwood "knowingly" made a false oath by concealing a
23 material transaction, treated as a supplemental finding.

24 Including findings in a judgment is procedurally
25 inappropriate and violates the separate document requirement of
26 Federal Rule of Civil Procedure 58(a). Fed. R. Civ. P. 58(a)(1),
27 incorporated by Fed. R. Bankr. P. 9021. However, after the 2002
28 amendment to Rule 58, the consequence of including findings in a

1 judgment is merely that the judgment is not deemed "entered" for
2 purposes of the federal rules of procedure until 150 days after
3 entry of the "judgment with findings" on the civil docket
4 maintained by the clerk of the court. Fed. R. Civ. P.
5 58(b)(2)(B), incorporated by Fed. R. Bank. P. 9021.

6 In this case, the Judgment was entered on the clerk's docket
7 on November 27, 2006. Treating the Judgment as containing
8 findings offending the separate document rule means that for
9 purposes of our analysis, it became "entered" 150 days later, on
10 April 26, 2007.¹⁰

11 We conclude that the bankruptcy court did find that Debtor's
12 omission to disclose the Assignment in the Statement was knowing.

13 14 4. Fraudulent Oath

15 Denial of discharge under § 727(a)(4)(A) requires a showing
16 that the debtor made a false oath with the actual intent to
17 defraud; constructive fraudulent intent is not sufficient.
18 Wills, 243 B.R. at 64; see Devers, 759 F.2d at 753 (discussing
19 type of intent required for § 727(a)(2) purposes).

20 Actual fraudulent intent may be established by
21 circumstantial evidence or by inferences drawn from a debtor's
22 course of conduct. Devers, 759 F.2d at 753-54; Roberts, 331 B.R.
23 at 884; McCrary v. Barrack (In re Barrack), 217 B.R. 598, 607
24 (9th Cir. BAP 1998). The requisite intent may be found from the
25 surrounding circumstances and certain "badges of fraud"

26 _____
27 ¹⁰ Accordingly, the notice of appeal was filed after the
28 decision became a matter of public record but before the April
26, 2007, entry of judgment and is "treated as filed after such
entry and on the day thereof." Fed. R. Bankr. P. 8002(a).

1 including,

2 1) a close relationship between the transferor and the
3 transferee; 2) that the transfer was in anticipation of
4 a pending suit; 3) that the transferor [d]ebtor was
5 insolvent or in poor financial condition at the time;
6 4) that all or substantially all of the [d]ebtor's
7 property was transferred; 5) that the transfer so
8 completely depleted the [d]ebtor's assets that the
9 creditor has been hindered or delayed in recovering any
10 part of the judgment; and 6) that the [d]ebtor received
11 inadequate consideration for the transfer.

12 Emmett Valley Assocs. v. Woodfield (In re Woodfield), 978 F.2d

13 516, 518 (9th Cir. 1992). Not all of these factors need be
14 present in order to find that a debtor acted with the requisite
15 intent. Id. "A court may find the requisite intent where there
16 has been a pattern of falsity or from a debtor's reckless
17 indifference to or disregard of the truth." Wills, 243 B.R. at
18 64.

19 A number of "badges of fraud" in fact are present in this
20 case: Through the Agreement and the Assignment, Lockwood
21 transferred the patent application and the Invention to a
22 corporate affiliate of his wife. The Settlement Agreement and
23 the Assignment were effected under the cloud of the arbitration
24 award in JMS's favor against Lockwood. The Assignment
25 transferred a substantial asset from Lockwood, leaving little in
26 the way of assets in his bankrupt estate to fund a distribution
27 to his sole creditor.

28 As noted above, in its oral findings, the bankruptcy court
found that Lockwood made "a false oath in connection with
concealment of the transaction that was material[.]" Hr'g Tr. at
9:6-8. The bankruptcy court followed up its oral finding with a
statement in the Judgment that Lockwood "fraudulently made a

1 false oath by a concealment of a material transaction. . . ."

2 Judgment at 2.

3 We conclude that the bankruptcy court found that the Debtor
4 made a false oath with actual intent to defraud by omitting to
5 disclose the Assignment in the Statement.

6
7 B. The Record on Appeal Does Not Establish that the Bankruptcy
8 Court Clearly Erred in Finding that Lockwood Knowingly and
9 Fraudulently Omitted to Disclose the Assignment in the Statement

10 Lockwood has not raised any issue as to the bankruptcy court
11 having made inadequate findings to support a denial of his
12 discharge pursuant to § 727(a)(4)(A), but rather has argued that
13 "[w]hen the only creditor in a Bankruptcy has previous notice
14 that a valuable asset was transferred from Debtor to a third
15 party for valuable consideration prior to the filing of
16 Bankruptcy, the Debtor could never 'knowingly and fraudulently'
17 [have] made a false oath by concealment of a material
18 transaction." Statement of Issues on Appeal at 2, Dec. 12, 2006.

19 In this appeal, Lockwood has chosen to treat the oral
20 findings of the bankruptcy court and the Judgment as reflecting
21 determinations of knowledge and fraudulent intent and has
22 proceeded to address the correctness of the bankruptcy court's
23 denial of his discharge as a matter of fact on the merits. He
24 approached the issues in this fashion in both his opening and
25 reply briefs.

26 The problem for Lockwood is the standard for reversal of the
27 bankruptcy court's fact findings is clear error, and he has
28 crippled our ability to evaluate the record by neglecting to
include 60 of the 63 pages of his own testimony from the

1 transcript of the trial in his excerpts of record.

2 The appellant bears the "burden of convincing the appellate
3 court that the hearing before the lower court was either
4 inadequate or that the legal conclusions from the facts deduced
5 were erroneous." Gradner v. California, 393 U.S. 367, 370
6 (1969); Ashley v. Church (In re Ashley), 903 F.2d 599, 603-06
7 (9th Cir. 1990); Litton Loan Serv'g LP v. Garvida (In re
8 Garvida), 347 B.R. 697, 708 (9th Cir. BAP 2006); Khaligh v.
9 Hadaegh (In re Khaligh), 338 B.R. 817, 832 (9th Cir. BAP 2006).

10 As stated in the explanatory notes to 9th Circuit BAP Rule
11 8009(b)-1:

12 The Panel generally limits its review to an
13 examination of the excerpts of the record as provided
14 by the parties. The Panel is not obligated to examine
15 portions of the record not included in the excerpts.
16 See In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP
17 1995); In re Anderson, 69 B.R. 105, 109 (9th Cir. BAP
18 1986).

19 The parties are further referred to [Fed. R.
20 Bankr. P.] 8010(a)(1)(D) and (a)(2) which address the
21 related problem created by appellants who do not make
22 explicit references to the parts of the record that
23 support their factual allegations and arguments.
24 Opposing parties and the court are not obliged to
25 search the entire record unaided for error. See Dela
26 Rosa v. Scottsdale Memorial Health Systems, Inc., 136
27 F.3d 1241 (9th Cir. 1998); Syncom Capital Corp. v.
28 Wade, 924 F.2d 167, 169 (9th Cir. 1991); FRAP Rule
10(b)(2).

22 Also see the explanatory note to 9th Circuit BAP Rule 8006-
23 1:

24 In order to review a factual finding for clear
25 error, the record should usually include the
26 entire transcript and all other relevant evidence
27 considered by the bankruptcy court. See In re
28 Friedman, 126 B.R. 63, 68 (9th Cir. BAP 1991)
(failure to provide an adequate record may be
grounds for affirmance); In re Burkhart, 84 B.R.
658 (9th Cir. BAP 1988).

1 Failure to provide essential transcripts or portions
2 thereof can result in an adverse decision on the merits.
3 See Ehrenberg v. Cal. State Univ., Fullerton Found. (In re
4 Beachport Entm't), 396 F.3d 1083, 1087 (9th Cir. 2005);
5 Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187
6 (9th Cir. 2003). Without an adequate record, we are
7 entitled to conclude that the bankruptcy court did not err
8 and may affirm the bankruptcy court's judgment. See Massoud
9 v. Ernie Goldberger & Co. (In re Massoud), 248 B.R. 160, 163
10 (9th Cir. BAP 2000). We are entitled to conclude from
11 Lockwood's decision not to include most of the transcript of
12 his testimony at the trial before the bankruptcy court that
13 he does not believe his testimony would be helpful to his
14 efforts to demonstrate error. See Gionis v. Wayne (In re
15 Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994).

16 We do not have the bulk of Lockwood's testimony
17 available to us in order to evaluate whether the bankruptcy
18 court clearly erred in holding that Lockwood knowingly and
19 fraudulently omitted to disclose the Assignment in the
20 Statement. In these circumstances, there is no adequate
21 basis to determine that the bankruptcy court clearly erred
22 in its findings to support denying Lockwood his discharge,
23 and we conclude that with the bankruptcy court having found
24 from the evidence before it that all the elements for denial
25 of discharge pursuant to § 727(a)(4)(A) were satisfied, the
26 Judgment should be affirmed.

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1 **VI. CONCLUSION**

2 Based on the foregoing, we conclude that the bankruptcy
3 court made all of the required findings to deny Lockwood's
4 discharge pursuant to § 727(a)(4)(A), and Lockwood has not
5 established on appeal that the bankruptcy court clearly
6 erred in its findings. We AFFIRM.

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