

MAR 29 2016

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|                             |   |                               |                  |
|-----------------------------|---|-------------------------------|------------------|
| In re:                      | ) | BAP No.                       | ID-15-1065-KiFJu |
| JAY P. CLARK,               | ) | Adv. No.                      | 13-06042-TLM     |
|                             | ) | Bk. No.                       | 12-00649-TLM     |
| Debtor.                     | ) |                               |                  |
| _____                       | ) |                               |                  |
| JAY P. CLARK,               | ) |                               |                  |
|                             | ) |                               |                  |
| Appellant,                  | ) |                               |                  |
| v.                          | ) | <b>MEMORANDUM<sup>1</sup></b> |                  |
| JEREMY J. GUGINO, Chapter 7 | ) |                               |                  |
| Trustee,                    | ) |                               |                  |
|                             | ) |                               |                  |
| Appellee.                   | ) |                               |                  |
| _____                       | ) |                               |                  |

Argued and Submitted on March 17, 2016,  
at Pasadena, California

Filed - March 29, 2016

Appeal from the United States Bankruptcy Court  
for the District of Idaho

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Appellant Jay P. Clark argued pro se; Matthew Todd  
Christensen of Angstman Johnson & Associates, PLLC  
argued for appellee Jeremy J. Gugino, Chapter 7  
Trustee.

Before: KIRSCHER, FARIS and JURY, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Appellant, chapter 7<sup>2</sup> debtor Jay P. Clark, appeals the  
2 bankruptcy court's judgment denying his discharge under  
3 § 727(a) (2) (B), (a) (3), (a) (4) (A) and (a) (6) (A). We AFFIRM.

#### 4 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

##### 5 A. Prepetition events

6 Debtor has been in the farming business with his family in  
7 Idaho for a number of years. In February 2008, he formed the  
8 entity Clark's Crystal Springs Ranch, LLC (the "LLC") for his  
9 farming operation. The LLC is owned by the Clark Farm Family  
10 Trust, also created in 2008 by Debtor, which names Debtors' two  
11 children as beneficiaries. Debtor has no ownership interest in  
12 the LLC. Until May 31, 2013, Debtor was the manager of the LLC  
13 and trustee of the Trust. After that, Robert Jones took over  
14 those roles, followed by Debtor's sister, Judith Appleby.

15 In 2010, Debtor entered into a written lease agreement with  
16 the Hilliards (who were former clients in Debtor's former law  
17 practice) to farm 4000 acres of the Hilliards' land known as  
18 Crystal Springs Farm. Thereafter, the Hilliards sold the Farm to  
19 Murphy Land and gave notice to Debtor that the lease was  
20 terminated, demanding that Debtor quit and vacate the property.  
21 When Debtor failed to vacate, both Murphy Land and the Hilliards  
22 filed separate civil actions, seeking to evict Debtor from the  
23 property and have the lease voided and expunged from county  
24 records ("Lease Litigation"). Debtor contended he had an interest  
25 in the wheat and alfalfa crops growing on the Farm and a right to

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26  
27 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 be paid for the labor expended to produce them.

2       Murphy Land and the Hilliards prevailed in their respective  
3 lawsuits on summary judgment in March 2012. In the Hilliard case,  
4 the state court found that Debtor had breached his fiduciary duty  
5 to the Hilliards as his clients and, based on that breach, ruled  
6 that the 2010 written lease agreement was void ab initio. Based  
7 on the findings in the Hilliard case, the state court determined  
8 in the Murphy Land case that Debtor had no possessory right or  
9 interest in the Farm and awarded immediate possession to Murphy  
10 Land. Debtor appealed the Murphy Land decision but not the  
11 Hilliard decision.

12 **B. Postpetition events**

13 **1. Events leading to the § 727 action**

14       Faced with eviction from the Farm, Debtor<sup>3</sup> filed a skeletal  
15 chapter 12 bankruptcy petition on March 27, 2012. Forrest Hymas  
16 was appointed as chapter 12 trustee. The case was assigned to  
17 Judge Pappas.

18       On April 4, 2012, even though facing imminent eviction from  
19 the Farm, Debtor (and/or the LLC) entered into a contract with  
20 DeVries Family Farm to sell DeVries 1500 tons of alfalfa hay still  
21 growing on the Farm for \$270,000. DeVries paid Debtor \$135,000 as  
22 a down payment, which Debtor deposited in the LLC's bank account.  
23 DeVries was not aware of the Lease Litigation, the avoidance of  
24 the Hilliard lease or of Debtor's pending eviction.

25       On April 12, 2012, Murphy Land was granted relief from the  
26

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27 <sup>3</sup> Debtor's petition was filed as "Jay P. Clark DBA Crystal  
28 Springs Ranch," which apparently caused confusion as to whether he  
was claiming LLC assets as his own.

1 automatic stay to continue with its eviction proceeding against  
2 Debtor.

3       On April 18, 2012, Debtor sent a letter to DeVries, notifying  
4 them of the bankruptcy and of an upcoming hearing in the Lease  
5 Litigation on April 23 that could potentially affect Debtor's  
6 possession of the hay crop DeVries had already purchased. Debtor  
7 opined that the hay crop was the most valuable asset of **his**  
8 bankruptcy estate at \$1.5 million. Debtor requested that DeVries  
9 help in his efforts to remain on the Farm so that he could harvest  
10 the profitable crop within the next two weeks.

11       On May 3, 2012, Debtor filed his initial schedules, statement  
12 of financial affairs ("SOFA") and declarations verifying under  
13 penalty of perjury that they were true and correct to the best of  
14 his knowledge, information and belief. The documents were  
15 prepared and filed by his then bankruptcy attorney, Brent  
16 Robinson.

17       The initial schedules contained several assets which belonged  
18 to the LLC. Debtor testified that Robinson felt it prudent to  
19 include LLC assets because there was so much overlap in his  
20 property and the LLC property and also in the LLC debts and his  
21 debts, based on his guarantees. For example, in his Schedule B,  
22 Debtor listed several checking accounts belonging to the LLC. At  
23 the same time, Debtor claimed he had no ownership interest in the  
24 LLC, asserting it was owned by the Trust. Schedule B also  
25 disclosed that Debtor owned approximately \$1,284,000 in crops.  
26 Debtor admitted at trial that this disclosure was not accurate and  
27 that the crops were actually an asset of the LLC. However, Debtor  
28 testified that he listed the crops because he hoped to pay all

1 lien creditors with the crop proceeds he anticipated receiving.

2 Debtor disclosed seven motor vehicles, including a 1995 Chevy  
3 truck, a 2007 GMC truck and a 2001 "Nort PM" camper. Debtor also  
4 disclosed receivables owed to him by Owyhee Farming Company, Dan  
5 Carter and Lance Funk, collectively worth \$326,000. However, the  
6 contract with Owyhee Farming Company/Lance Funk indicates that the  
7 receivable was an asset of the LLC. A later amendment reflected  
8 this fact.

9 Debtor's initial SOFA disclosed that he received no income in  
10 the three months before filing, but he earned \$2.4 million in 2011  
11 and approximately \$1.3 million in 2010. This income was actually  
12 the putative gross income of the LLC. Debtor's actual income  
13 drawn from the LLC was reflected in a QuickBooks account of the  
14 LLC (labeled "Jay's Income: owner draws"), which was maintained by  
15 Debtor's former bookkeeper, Jennifer Epis. In SOFA question 14,  
16 Debtor indicated he was holding or in control of farm equipment  
17 owned by either the LLC or his parents, valued at \$1 million.  
18 Debtor stated at trial that errors existed in the itemized farm  
19 equipment list attached to his SOFA because that list was created  
20 in 2007 (five years before his bankruptcy filing) and several  
21 items had since been bought and sold.

22 In May and June 2012, Debtor, on behalf of himself and the  
23 LLC, recorded labor and seed liens against the Farm, asserting  
24 that he and/or the LLC had an interest in the crops grown on the  
25 Farm ("Lien Claims"). Debtor valued the Lien Claims at  
26 approximately \$600,000. Litigation ensued between Debtor and  
27 Murphy Land over the Lien Claims ("Lien Litigation"). Debtor's  
28 initial schedules and SOFA did not disclose any claims or

1 counterclaims against Murphy Land, though the existence of the  
2 Lease Litigation was disclosed in the initial SOFA. None of the  
3 original or subsequently amended schedules reflected the existence  
4 of the Lien Claims, although Debtor testified that disclosing his  
5 interest in "crops" effectively disclosed them. Ultimately, the  
6 state court ruled in July 2013 that the crops belonged to Murphy  
7 Land, which Debtor claims was the result of a default judgment  
8 entered against him because appellee, chapter 7 trustee Jeremy  
9 Gugino ("Trustee"), failed to defend.

10 On March 18, 2013, DeVries moved to convert Debtor's case to  
11 chapter 7; the motion was joined by another creditor. After a  
12 two-day evidentiary hearing, Judge Pappas granted the motion on  
13 May 31, 2013, finding that under § 1208(b), Debtor had committed  
14 fraud "in connection with the case" stemming from the hay contract  
15 with DeVries. After the conversion to chapter 7, Judge Pappas  
16 recused himself from Debtor's case and it was reassigned to  
17 Judge Myers. The district court affirmed the conversion order.  
18 Debtor has appealed that ruling to the Ninth Circuit Court of  
19 Appeals, but no decision has been rendered.

20 Meanwhile, on May 23, 2013, on the eve of his case being  
21 converted to chapter 7, Debtor filed an amended Schedule B and  
22 amended SOFA. Debtor added several business entities in which he  
23 had an interest in the previous six years. Debtor testified that  
24 the impetus for this amendment was creditors' counsel identifying  
25 the omission.

26 On August 7, 2013, Debtor filed amended Schedules B, C, D, E  
27 and F and the corresponding verifications. In this amendment:  
28 (1) Debtor's list of vehicles no longer included the 2007 GMC

1 truck, the 2001 camper or the 1995 Chevy truck; (2) Debtor no  
2 longer asserted an interest in the Trust, in which he had  
3 originally claimed a \$150,000 interest; (3) Debtor claimed a  
4 one-third interest in the disclosed crops instead of the full  
5 value as before; and (4) the farm equipment listed in Schedule B  
6 was amended to show the LLC as owner, not Debtor.

7 At trial, Debtor admitted selling the 2007 GMC truck and a  
8 2011 Arctic Fox camper (that was apparently never disclosed or was  
9 confused with the 2001 Nort PM camper) during the chapter 12 case.  
10 He sold the 2007 GMC truck in September 2012 in exchange for  
11 \$12,000 in wheat seed, which benefitted the LLC. A debt to Chase  
12 Bank secured by the truck was paid off. The sale of the 2007 GMC  
13 truck and satisfaction of the debt were not disclosed to or  
14 approved by the court, although Debtor testified that his attorney  
15 Robinson told him it was okay to sell it. The 2011 Arctic Fox  
16 camper was sold in April 2013 for \$22,000, which satisfied the  
17 outstanding secured debt and provided \$500 to Debtor. This  
18 transaction was also not disclosed to or authorized by the court,  
19 but Debtor testified that Robinson told him it was a good idea to  
20 sell it.

21 On August 8, 2013, Debtor filed amended Schedules A, B, C and  
22 F and the corresponding verifications. These amendments disclosed  
23 three assets for the first time. The first was a one-third  
24 tenancy-in-common interest in vacant land in Elmore County worth  
25 \$42,000. The documents regarding this interest included warranty  
26 deeds recorded on March 27, 2012, less than two hours prior to  
27 Debtor's bankruptcy filing, conveying a one-third interest to  
28 Debtor and a two-thirds interest to his parents. Debtor testified

1 that his one-third property interest was paid for by his parents.  
2 A title commitment in favor of Debtor and his parents for this  
3 property was dated three weeks prior to the recording. A  
4 settlement statement signed by Debtor was dated March 22, 2013.  
5 Debtor testified that the one-third property interest was not  
6 listed previously by mistake.

7 The other two newly-listed assets were a 2008 Chevy truck and  
8 a 2008 Arctic Cat ATV, which were titled to both Debtor **or** the  
9 LLC.<sup>4</sup> The cause of Debtor's late disclosure of these items was  
10 disputed. He contended that just before the first § 341(a)  
11 meeting with Trustee, his parents' attorney, Doug Mushlitz,  
12 informed Trustee of these vehicles after reviewing 22 titles given  
13 to Mushlitz by Debtors' parents. The two titles at issue showed  
14 both Debtor and the LLC as owners, whereas the remaining  
15 20 vehicles were titled only in the name of the LLC. Trustee  
16 testified that Debtor only disclosed the two omitted vehicles  
17 after Trustee discovered their existence.

18 On August 14, 2013, Debtor filed an amended Schedule A and  
19 the corresponding verification. Here, Debtor added two "interests  
20 in mineral rights" on parcels of property located in Canyon  
21 County, Idaho, which he valued collectively at \$1,140. Debtor  
22 stated at trial that he had forgotten about these rights because  
23 his parents owned the parcels and had always paid the property  
24 taxes on them. It is undisputed that this amendment resulted from  
25 Trustee's independent investigation.

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26  
27 <sup>4</sup> Debtor now also asserted that the 2001 "Nort PM" camper  
28 was "sold - traded in" in May 2011 prior to Debtor's bankruptcy  
filing, so it is unclear why this camper was even disclosed.

1           **2.     The § 727 action**

2           Trustee sought to deny Debtor's discharge under  
3 § 727(a)(2)(B), (a)(3) and (a)(4). Trustee alleged that both  
4 before and after the petition date, Debtor entered into leases of  
5 property or sale agreements for property, asserting at times that  
6 these agreements were with him personally and at other times  
7 asserting that the agreements were with the LLC. Debtor would  
8 also routinely receive payments (for sales of property or crops)  
9 that were made to him directly and would deposit those payments  
10 into the LLC bank account and treat the payments as payments to  
11 the LLC. Trustee alleged that Debtor would take "draws" from the  
12 LLC, notwithstanding that he was not a member of the LLC entitled  
13 to draws. The "draws" were considered Debtor's income from  
14 managing the LLC.<sup>5</sup>

15           In addition to the items discussed above that were either not  
16 disclosed or disclosed only after prompting, Trustee alleged that  
17 Debtor never disclosed in his SOFA a disciplinary action against  
18 him by the Idaho State Bar, which had occurred within the year  
19 prior to his bankruptcy filing. While disclosing the \$20,000  
20 retainer Debtor paid to Robinson, he never disclosed that the  
21 funds were paid by the LLC. Debtor also never disclosed in his  
22 Schedule G any alleged oral leases he had with the Hilliards to  
23 farm various properties. Finally, Trustee alleged that before and

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24  
25           <sup>5</sup> Trustee also sued the LLC and the Trust, seeking a  
26 determination that they were invalid at formation, treated as  
27 Debtor's alter ego, and that they be substantively consolidated  
28 with Debtor's estate ("LLC Action"). See Adv. No. 13-06016-TLM.  
Prior to issuing its decision on the § 727 action, the bankruptcy  
court entered a judgment in the LLC Action in favor of Trustee on  
the substantive consolidation claim. That decision has been  
appealed to the BAP, case no. 15-1010.

1 after the petition date, Debtor had an interest in a \$350,000  
2 check paid on account of a crop insurance claim for crops grown in  
3 2013 by Debtor and/or the LLC which was never disclosed. However,  
4 Debtor testified that he never claimed an interest in the crop  
5 insurance proceeds.

6 **a. The parties' pretrial briefing**

7 In his pretrial brief, Debtor first contended that the  
8 bankruptcy court was divested of jurisdiction over the § 727  
9 action because many of the same matters at issue had already been  
10 litigated in the conversion action, which was on appeal to the  
11 Ninth Circuit. In addition, Debtor contended that many of the  
12 allegations Trustee asserted to support his § 727 claims, namely  
13 the issues surrounding the state court litigation with Murphy Land  
14 and the Hilliards, had been settled by Trustee in September 2013.  
15 Accordingly, Debtor argued that Trustee was precluded from raising  
16 issues and claims that were previously compromised.

17 As for the sales of the 2007 GMC truck and camper, Debtor  
18 asserted that the chapter 12 trustee Hymas knew of the sales at  
19 the time and never objected. On his alleged concealment of the  
20 2008 Chevy truck and the 2008 ATV, Debtor contended that he timely  
21 disclosed his ownership interest in those vehicles and provided  
22 titles when requested at one of his five § 341(a) meetings.  
23 Respecting the mineral rights and the one-third property interest,  
24 Debtor contended that Trustee had no evidence that he intended to  
25 conceal those interests for the purpose of hindering, delaying or  
26 defrauding creditors. Once Trustee discovered the mineral rights,  
27 which Debtor had forgotten about, Debtor's then bankruptcy  
28 attorney, Don Gadda, immediately prepared an amended schedule to

1 correct the error. Further, since they were valued at only \$500,  
2 Debtor contended that it made no sense that he would try to  
3 conceal their existence. As for the one-third property interest,  
4 Debtor disputed Trustee's ability to raise that claim since  
5 Trustee had settled the matter with Debtor's parents, who had  
6 initially purchased and paid for the property. Alternatively,  
7 Debtor contended that Trustee had no evidence that Debtor actually  
8 intended to conceal that property, which he argued had no equity  
9 available for creditors in any event.

10 Lastly, since many of the same issues in the § 727 action  
11 were about to be litigated first in the LLC Action, Debtor asked  
12 the bankruptcy court to take judicial notice of any findings it  
13 made in the LLC Action as they may relate to Trustee's allegations  
14 in the § 727 action, to avoid litigating the same issues twice in  
15 two weeks.

16 **b. The trial**

17 During the two-day trial on the § 727 action, Appleby  
18 (Debtor's sister), Debtor and Trustee testified. On request of  
19 the parties, the bankruptcy court admitted the testimony of Jones  
20 (former trustee of the Trust and LLC Manager), Epis (Debtor's  
21 bookkeeper) and Ed Gabriel (Debtor's CPA), given in the LLC Action  
22 the week prior.

23 Before hearing from any witnesses, the bankruptcy court  
24 addressed Debtor's jurisdictional argument. The court determined  
25 that the appeal of the conversion order did not impede its ability  
26 to hear the § 727 action, either as a matter of jurisdiction or  
27 otherwise. While some of the same facts in the prior action could  
28 be relevant in the § 727 action, the court did not view this as a

1 matter where the pendency of the appeal divested jurisdiction or  
2 constrained the court in considering whatever evidence the parties  
3 planned to present.

4       Respecting his finances and record keeping, Debtor admitted  
5 that some of his personal expenses (student loans, travel, child  
6 support payments, medical bills) were paid for by the LLC.  
7 However, Debtor explained that while the items Trustee raised  
8 might have been paid out of an LLC account, Epis would go through  
9 all of those charges and determine which ones were considered  
10 personal and which ones were considered business. Epis testified  
11 that all of the income and expenses for Debtor and the LLC were  
12 run through the same set of QuickBooks for the LLC. However,  
13 Debtor's expenses or draws were categorized as personal, apart  
14 from business expenses. Epis testified that to her knowledge  
15 Debtor properly accounted for all of his income. When questioned  
16 about hiding assets, Epis testified that Debtor never attempted to  
17 hide income or assets from anyone, including any taxing agencies  
18 or his accountants.

19       Gabriel, Debtor's accountant and tax preparer since at least  
20 2008, testified that because the LLC is a single member LLC, its  
21 income flowed through to its member, the Trust, and because Debtor  
22 was grantor of the Trust, the Trust's income flowed through to  
23 Debtor. Gabriel testified that it was set up that way for  
24 simplicity, because only one tax return needed to be filed, which  
25 was the personal return for Debtor, and it was typical to use LLCs  
26 in a farming operation for liability protection. Gabriel  
27 testified that his firm never saw anything in Debtor's financial  
28 records that indicated fraud or required reporting. He further

1 testified that the tax returns filed for Debtor complied with  
2 state and federal law.

3 Debtor testified that he had no intent to hinder, delay or  
4 defraud creditors; "it was the furthest thing from [his] mind."  
5 Trial Tr. (Aug. 26, 2014) at 180:25-181:1. He also testified that  
6 he never concealed or destroyed property from a creditor or  
7 Trustee. Debtor testified that he discovered the "quite sloppy"  
8 nature of the original schedules during the conversion hearing in  
9 May 2013. Id. at 186:14. Debtor admitted that he should have  
10 worked more closely with Robinson's office to ensure the schedules  
11 were complete and accurate. Debtor took the blame for any errors,  
12 admitting that he is not detail-oriented and that he "screwed up."  
13 Id. at 937:13.

14 Once the parties rested, Trustee orally moved to amend his  
15 complaint to include a claim under § 727(a)(6)(A) for Debtor's  
16 alleged failure to comply with an injunction entered in the LLC  
17 Action on June 24, 2013.<sup>6</sup> The injunction's purpose was to protect  
18 the LLC's assets pending that litigation. During the trial,  
19 Appleby testified that Debtor was dryland farming in the summer of  
20 2013. Debtor agreed he was doing dryland farming at that time.  
21 Debtor further testified that he had been helping his father farm  
22 from November 2013 until the spring of 2014, using the LLC's

23  
24 <sup>6</sup> The injunction provided, in pertinent part:

25 IT IS HEREBY FURTHER ORDERED, that the [LLC] as well as  
26 the Trust, as well as any and all agents of the same,  
27 are RESTRAINED and PROHIBITED from transferring any of  
28 the assets of those entities, including any funds from  
the bank accounts of the same, absent either express  
written permission by the Trustee or express Order of  
this Court.

1 equipment. Debtor admitted he had not asked the court's or  
2 Trustee's permission prior to using the LLC's equipment to farm  
3 his dad's land. Debtor said he understood that only transfers or  
4 sales of the equipment were prohibited by the injunction, not use  
5 by his dad.

6 In response to Trustee's oral motion to amend, Debtor stated  
7 he did not know that use of the equipment was going to be an  
8 allegation against him, and with the close of evidence, he was  
9 prejudiced by not being able to present evidence to rebut  
10 Trustee's claim. Debtor stated that had he known about this new  
11 allegation, he would have had an employee testify to disprove any  
12 violation of the injunction. The bankruptcy court agreed to take  
13 Trustee's oral motion under advisement with all other matters once  
14 post-trial briefs were received.

15 **c. The bankruptcy court's ruling on the § 727 action**

16 After the parties submitted post-trial briefs presenting  
17 their closing arguments, the bankruptcy court issued its  
18 Memorandum Decision and Judgment. The court granted Trustee's  
19 oral motion to amend his complaint to add the § 727(a)(6)(A) claim  
20 and determined that Debtor's discharge was denied under  
21 § 727(a)(2)(B), (a)(3), (a)(4)(A) and (a)(6)(A).

22 **II. JURISDICTION**

23 We conclude, as discussed below, the bankruptcy court had  
24 jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(J). We have  
25 jurisdiction under 28 U.S.C. § 158.

26 **III. ISSUES**

27 1. Did the bankruptcy court err in denying Debtor's discharge  
28 under § 727(a)(2)(B)?

1 2. Did the bankruptcy court err in denying Debtor's discharge  
2 under § 727(a) (4) (A)?

3 3. Did the bankruptcy court err in denying Debtor's discharge  
4 under § 727(a) (3)?

5 4. Did the bankruptcy court err in denying Debtor's discharge  
6 under § 727(a) (6) (A)?

7 **IV. STANDARDS OF REVIEW**

8 In an action for denial of discharge, we review: (1) the  
9 bankruptcy court's determinations of the historical facts for  
10 clear error; (2) its selection of the applicable legal rules under  
11 § 727 de novo; and (3) its application of the facts to those rules  
12 requiring the exercise of judgments about values animating the  
13 rules de novo. Searles v. Riley (In re Searles), 317 B.R. 368,  
14 373 (9th Cir. BAP 2004), aff'd, 212 F. App'x 589 (9th Cir. 2006).

15 The bankruptcy court's determinations concerning the debtor's  
16 intent are factual matters reviewed for clear error. Beauchamp v.  
17 Hoose (In re Beauchamp), 236 B.R. 727, 729 (9th Cir. BAP 1999).

18 Factual findings are clearly erroneous if they are illogical,  
19 implausible or without support in the record. Retz v. Samson  
20 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). We give great  
21 deference to the bankruptcy court's findings when they are based  
22 on its determinations as to the credibility of witnesses. Id.  
23 (noting that as the trier of fact, the bankruptcy court has "the  
24 opportunity to note variations in demeanor and tone of voice that  
25 bear so heavily on the listener's understanding of and belief in  
26 what is said."). If two views of the evidence are possible, the  
27 trial judge's choice between them cannot be clearly erroneous.  
28 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-75

1 (1985); Ng v. Farmer (In re Ng), 477 B.R. 118, 132 (9th Cir. BAP  
2 2012).

### 3 V. DISCUSSION

#### 4 A. The bankruptcy court had jurisdiction over the § 727 action.

5 As a preliminary matter, Debtor contends the bankruptcy court  
6 lacked subject matter jurisdiction to determine the § 727 action.  
7 Trustee entirely fails to address this issue. We review de novo  
8 whether the bankruptcy court had jurisdiction. Dunmore v. United  
9 States, 358 F.3d 1107, 1111 (9th Cir. 2004).

10 A timely filed notice of appeal divests a bankruptcy court of  
11 jurisdiction "over those aspects of the case involved in the  
12 appeal." Sherman v. SEC (In re Sherman), 491 F.3d 948, 967 (9th  
13 Cir. 2007). See Griggs v. Provident Consumer Disc. Co., 459 U.S.  
14 56, 58 (1982) (proper notice of appeal generally "confers  
15 jurisdiction on the court of appeals and divests the district  
16 court of its control over those aspects of the case involved in  
17 the appeal"). The bankruptcy court retains jurisdiction over all  
18 other matters in the case. The only caveat is that the court  
19 "'may not alter or expand upon the judgment.'" In re Sherman,  
20 491 F.3d at 967 (citation omitted). "This judge-made principle is  
21 designed to promote judicial economy and prevent the confusion  
22 that would result from two courts addressing the same issue."  
23 Marino v. Classic Auto Refinishing, Inc. (In re Marino), 234 B.R.  
24 767, 769 (9th Cir. BAP 1999).

25 Debtor contends the bankruptcy court relied upon its previous  
26 decision in the LLC Action, where it determined that the assets of  
27 the LLC and the Trust should be consolidated with Debtor's assets,  
28 to determine in the § 727 action that Debtor failed to keep

1 adequate financial records. He argues that because the  
2 appropriateness of the bankruptcy court's decision to order  
3 substantive consolidation is pending on appeal, the basis for its  
4 decision respecting the state of Debtor's financial records in the  
5 § 727 action would be uncertain if reversed on appeal. As a  
6 result, Debtor contends the bankruptcy court lacked jurisdiction  
7 over this issue, which requires our reversal.

8 Even if we agreed with Debtor, which we do not, the  
9 bankruptcy court's findings respecting Debtor's financial records  
10 go only to Trustee's claim under § 727(a)(3). Any such reversal  
11 would not affect the judgment denying his discharge under  
12 § 727(a)(2)(B) or (a)(4)(A) or (a)(6)(A). Further, contrary to  
13 Debtor's assertion, the bankruptcy court was free to rely on  
14 previous findings of fact it made in the LLC Action for the § 727  
15 action, when the findings made in the latter case in no way  
16 altered or expanded on the prior judgment currently on appeal.  
17 Accordingly, the bankruptcy court had jurisdiction over the § 727  
18 action.

19 **B. Denial of discharge under § 727 generally**

20 The party objecting to a debtor's discharge under § 727(a)  
21 bears the burden of proving by a preponderance of the evidence  
22 that the debtor's discharge should be denied. In re Retz,  
23 606 F.3d at 1196. Courts are to "'construe § 727 liberally in  
24 favor of debtors and strictly against parties objecting to  
25 discharge.'" Id. (quoting Bernard v. Sheaffer (In re Bernard),  
26 96 F.3d 1279, 1281 (9th Cir. 1996)).

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1           **1. The bankruptcy court did not err in denying Debtor's**  
2           **discharge under § 727(a)(2)(B).**

3           Section 727(a)(2)(B) provides that a debtor shall not be  
4 granted a discharge if "the debtor, with intent to hinder, delay,  
5 or defraud a creditor or an officer of the estate charged with  
6 custody of property under this title, has transferred, removed,  
7 destroyed, mutilated, or concealed . . . property of the estate,  
8 after the date of the filing of the petition." Under § 727(a)(2),  
9 a party objecting to a debtor's discharge must prove the following  
10 elements by a preponderance of the evidence: (1) disposition of  
11 property, such as a transfer or concealment, and (2) a subjective  
12 intent on the debtor's part to hinder, delay or defraud a creditor  
13 or the trustee through the act of disposing of or concealing the  
14 property. In re Retz, 606 F.3d at 1200. This provision requires  
15 actual, not constructive, intent. Devers v. Bank of Sheridan  
16 (In re Devers), 759 F.2d 751, 753 (9th Cir. 1985). The intent of  
17 a debtor in making a transfer or concealment of property is a  
18 question of fact that "may be established by circumstantial  
19 evidence, or by inferences drawn from a course of conduct." Id.  
20 at 753-54; see also Adeeb v. Adeeb (In re Adeeb), 787 F.2d 1339,  
21 1342 (9th Cir. 1986). The basis of intent is disjunctive and,  
22 thus, a finding of intent to hinder **or** delay **or** defraud is  
23 sufficient to deny discharge under § 727(a)(2). In re Retz,  
24 606 F.3d at 1200 (emphasis added).

25           After a two-day trial, where the bankruptcy court heard  
26 testimony from Debtor and received a substantial amount of  
27 documentary evidence relating to his original and amended  
28 schedules and SOFAs and the pre-existing state court litigation,

1 the bankruptcy court determined that Debtor concealed property of  
2 the estate with the intent to hinder or defraud creditors and  
3 Trustee. Specifically, the bankruptcy court found that Debtor  
4 initially failed to disclose, among other assets constituting  
5 property of the estate, the one-third property interest, the 2008  
6 Chevy truck, the 2008 Arctic Cat ATV, the mineral rights, and the  
7 Lien Claims and counterclaims against creditors. These assets  
8 were not disclosed until he filed his amended schedules on  
9 August 7 and 8, 2013, nearly 18 months after he filed his  
10 chapter 12 bankruptcy case, and only after Trustee had discovered  
11 most of the items from independent inquiry. The court found that  
12 the very nature and magnitude of the assets belied Debtor's  
13 "facile" defense that they were simply overlooked or forgotten.  
14 Mem. of Decision (Feb. 12, 2015) at 25.

15 In determining Debtor's actual intent, the bankruptcy court  
16 "carefully evaluated Debtor's testimony," finding that his  
17 "credibility was not strong" and that on important questions of  
18 nondisclosure of significant assets, his "explanations were not  
19 persuasive." Id. Debtor claimed to have poor memory on certain  
20 subjects, yet on other occasions, he professed firm recall and  
21 specific knowledge. When pressed by Trustee on cross-examination,  
22 previous unconditional responses became equivocal. The court  
23 further found that Debtor claimed to understand the importance of  
24 signing a document under the penalty of perjury, yet failed on  
25 "multiple accounts" to include assets on his schedules, knowing  
26 that the purpose of the schedules is to provide an accurate list  
27 of ownership in property. Id. Debtor's explanations as to why he  
28 failed to disclose these assets were "insufficient." Id. at 26.

1 That the assets were later disclosed in amended schedules, after  
2 Trustee's discovery, "provide[d] no absolute defense." Id.

3 Debtor disputes generally the bankruptcy court's factual  
4 findings, contending that the evidence did not support a claim  
5 under § 727(a)(2)(B). Debtor contends that finding he  
6 intentionally concealed the Lien Claims and counterclaims asserted  
7 in the Lien Litigation was erroneous because creditors were aware  
8 of these assets since that litigation was commenced after the  
9 petition date; thus, no further notice was necessary. We disagree  
10 with Debtor for a few reasons.

11 Unlike the Lien Litigation, the Lease Litigation was  
12 commenced just prior to Debtor's bankruptcy filing. Debtor was  
13 aware of any counterclaims (which ultimately became the Lien  
14 Claims) he had against Murphy Land at that time regarding his  
15 asserted interest in the growing crops. He disclosed the Lease  
16 Litigation in his SOFA, but failed to disclose his counterclaims  
17 of which he was fully aware on the petition date, particularly  
18 since Debtor is legally trained. Further, simply because  
19 creditors may be aware of pending litigation claims does not  
20 obviate a debtor's duty to disclose those claims on his schedules  
21 and SOFA, or to amend those documents as needed for their  
22 disclosure. In re Searles, 317 B.R. at 378 (every debtor has a  
23 continuing duty to assure the accuracy and completeness of  
24 schedules, which implies a duty to amend).

25 Debtor contends the bankruptcy court completely disregarded  
26 his unrefuted reliance upon legal counsel to list these assets.  
27 The bankruptcy court did not disregard it; its Memorandum of  
28 Decision reflects that the court carefully considered all of the

1 evidence. It simply was not persuaded by Debtor's contention,  
2 noting that neither attorney Robinson nor his staff were called to  
3 testify and finding that "given Debtor's intimate familiarity with  
4 (and sole control over) the operations of the LLC and the Trust,  
5 and because of his training as a lawyer, and in light of the whole  
6 of his testimony, the attempted deflection [that Robinson was to  
7 blame for any filing errors] was not persuasive. Mem. of Decision  
8 (Feb. 12, 2015) at 6-7 n.14. In any event, the bankruptcy court  
9 did accept Debtor's testimony, that he relied on Robinson's advice  
10 that selling the 2007 GMC truck and camper was proper, to conclude  
11 that Trustee had failed to establish the requisite intent for  
12 their transfers postpetition under § 727(a)(2)(B).

13 Debtor further contends that the finding he intentionally  
14 concealed the 2008 Chevy truck, the 2008 Arctic Cat ATV and the  
15 one-third property interest was contrary to the evidence.  
16 Specifically, Debtor points to the letter sent to Trustee by  
17 Mushlitz, his parents' counsel. Debtor contends it was Mushlitz  
18 who first made Trustee aware of the existence of these assets and  
19 their inadvertent omission in the schedules. The Mushlitz letter  
20 states that "You [Trustee] requested information relative to the  
21 purchase of [the Elmore property and Debtor's 1/3 interest in  
22 it]." This indicates Trustee discovered this omitted asset first.  
23 Trustee testified to this fact. Debtor also contends it was not  
24 reasonable to speculate he had any motivation to conceal this  
25 property interest because he never had any equity in it. It is  
26 true that lack of equity can negate a debtor's wrongful intent  
27 under § 727(a)(2). Baker v. Mereshian (In re Mereshian), 200 B.R.  
28 342, 346 (9th Cir. BAP 1996). However, the court was not required

1 to focus simply on each individual asset and the value thereof,  
2 but could consider all of the facts and circumstances to determine  
3 Debtor's fraudulent intent under § 727(a)(2)(B). Furthermore,  
4 contrary to Debtor's contention, the record indicates the one-  
5 third property interest was worth \$42,000 with no secured debt  
6 against it.

7 As for the omitted vehicles, the Mushlitz letter is not clear  
8 as to who first discovered them, but in addition to Debtor's  
9 testimony that he and Mushlitz did, Trustee testified that he did,  
10 and that he made demand on Debtor to produce the titles, which  
11 Mushlitz enclosed with the responding letter. Ultimately, the  
12 bankruptcy court had to choose between the contradictory facts  
13 presented. Unfortunately for Debtor, the court did not choose his  
14 version of them. We cannot say, on this record, that the court's  
15 interpretation of that evidence was not plausible and, thus,  
16 clearly erroneous. Anderson, 470 U.S. at 574. This is  
17 particularly true given that the findings the court made for  
18 Trustee's claim under § 727(a)(2)(B) were partially based on  
19 Debtor's credibility. Id. at 576.

20 Accordingly, we do not discern any clear error with the  
21 bankruptcy court's determination that "[b]ased on the existence of  
22 pre-petition litigation, the nature of the disclosure in Debtor's  
23 initial schedules, Debtor's belated amendments to those schedules  
24 to disclose significant assets, and his insufficient explanations  
25 regarding the same," Debtor concealed these assets with the intent  
26 to hinder or defraud creditors of the estate and Trustee. Mem. of  
27 Decision (Feb. 12, 2015) at 26. Thus, the court did not err in  
28 denying Debtor's discharge under § 727(a)(2)(B).

1           **2.    The bankruptcy court did not err in denying Debtor's**  
2           **discharge under § 727(a) (4) (A) .**

3           Section 727(a) (4) (A) states: "The court shall grant the  
4 debtor a discharge, unless . . . the debtor knowingly and  
5 fraudulently, in or in connection with the case made a false oath  
6 or account." "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." Fogal Legware  
9 of Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir.  
10 BAP 1999) (citing Aubrey v. Thomas (In re Aubrey), 111 B.R. 268,  
11 274 (9th Cir. BAP 1990)).

12           To obtain a denial of discharge under § 727(a) (4) (A), the  
13 objector must show: "(1) the debtor made a false oath in  
14 connection with the case; (2) the oath related to a material fact;  
15 (3) the oath was made knowingly; and (4) the oath was made  
16 fraudulently." In re Retz, 606 F.3d at 1197.

17           **a.    False oath**

18           "A false statement or an omission in the debtor's bankruptcy  
19 schedules or statement of financial affairs can constitute a false  
20 oath." Khalil v. Developers Sur. & Indem. Co. (In re Khalil),  
21 379 B.R. 163, 172 (9th Cir. BAP 2007); see also In re Wills,  
22 243 B.R. at 62.

23           The bankruptcy court began by noting that the "concealment"  
24 of assets addressed under § 727(a) (2) (B) was largely relevant for  
25 this claim as well. The court found the evidence showed that  
26 Debtor omitted numerous items from his originally filed bankruptcy  
27 schedules – i.e., the Lien Claims; the counterclaims against  
28 Murphy Land later asserted in litigation; his interests in various

1 business entities; the claims to proceeds from a crop insurance  
2 policy; the one-third property interest; the 2008 Chevy truck and  
3 the 2008 Arctic Cat ATV; and the mineral rights. While Debtor  
4 eventually disclosed some of these items on amended schedules,  
5 those disclosures were only made after the omissions were  
6 discovered by creditors or Trustee.

7       The bankruptcy court rejected Debtor's reliance-on-counsel  
8 defense as not asserted in good faith. The court reasoned that  
9 Robinson had no apparent reason to know about the omission of  
10 information; all information originated from Debtor. In addition,  
11 Debtor had the opportunity to see how his counsel characterized  
12 the disclosed assets and information. He was intimately involved  
13 with the farming and the LLC's operations. If Robinson or his  
14 staff erred in preparing the documents, Debtor was required to see  
15 that those mistakes were corrected before signing and filing.  
16 Moreover, Debtor had signed the several declarations, verifying  
17 under the penalty of perjury that the statements were true and  
18 correct to the best of his knowledge and belief, but "[c]learly  
19 they were not true and correct." Mem. of Decision (Feb. 12, 2015)  
20 at 28. The court found Debtor's argument that he failed to read  
21 the schedules and SOFAs well or thoroughly, or merely forgot or  
22 overlooked assets, "lack[ed] credibility and persuasiveness." Id.  
23 at 29. As a result, the court found that Debtor's statements,  
24 made under oath, omitted assets and therefore constituted a false  
25 oath under § 727(a)(4)(A).

26       Debtor does not appear to contest the bankruptcy court's  
27 false oath finding, other than to suggest that his bookkeeper Epis  
28 was responsible for providing Debtor's financial information to

1 Robinson to complete the original schedules and SOFA and clearly  
2 made mistakes in preparing them. While Epis may have assisted  
3 Debtor in gathering his financial records for the purpose of  
4 filing for bankruptcy, as the bankruptcy court found, Debtor was  
5 ultimately responsible for the accuracy of the information  
6 presented in his schedules and SOFA, not Epis, Robinson or anyone  
7 else.

8 The evidence in this case established that Debtor made a  
9 false oath. Therefore, the bankruptcy court did not clearly err  
10 in finding that Debtor made a false oath in his original schedules  
11 and SOFA and his amended schedules and SOFA.

12 **b. Materiality**

13 A fact is material "'if it bears a relationship to the  
14 debtor's business transactions or estate, or concerns the  
15 discovery of assets, business dealings, or the existence and  
16 disposition of the debtor's property.'" In re Khalil, 379 B.R. at  
17 173 (quoting In re Wills, 243 B.R. at 62); see also In re Retz,  
18 606 F.3d at 1198. An omission or misstatement that "detrimentally  
19 affects administration of the estate" is material. In re Wills,  
20 243 B.R. at 63 (citing 6 Lawrence P. King et al., Collier on  
21 Bankruptcy ¶ 727.04[1][b] (15th ed. rev. 1998)).

22 The bankruptcy court found that Debtor's omitted assets were  
23 material. Specifically, the court found that several of the  
24 assets at issue, when finally disclosed in amended schedules,  
25 showed potential value for creditors. The one-third property  
26 interest alone was listed on the amended Schedule A as worth  
27 \$42,000 with no secured debt against it. In addition, the various  
28 alleged claims and counterclaims against creditors were relevant

1 and material to the bankruptcy process and Trustee's investigation  
2 and administration independent of Debtor's suggested values.

3 Certainly, the omitted assets bore a relationship to Debtor's  
4 business transactions and estate and concerned the discovery of  
5 assets and Debtor's business dealings. The only argument Debtor  
6 makes here is that the bankruptcy court failed to address whether  
7 the two mineral rights were of material value. Debtor contends  
8 these rights have no market value and, thus, were not material  
9 assets of the estate. As the bankruptcy court noted, value and  
10 equity are not required. The fact that this undisclosed asset may  
11 have lacked value, which contradicts the record before the  
12 bankruptcy court at the time, is of no consequence for purposes of  
13 § 727(a)(4)(A). An omission may be material even if it does not  
14 cause direct financial prejudice to creditors. In re Wills,  
15 243 B.R. at 63. And a lack of realizable value for creditors  
16 certainly does not negate a debtor's duty of full and candid  
17 disclosure of his financial condition. Palmer v. Downey  
18 (In re Downey), 242 B.R. 5, 17 (Bankr. D. Idaho 1999). Debtor was  
19 obligated to disclose all assets in which he held an interest,  
20 valuable or not.

21 The evidence in this case established that Debtor's false  
22 oaths related to material facts. We perceive no clear error with  
23 the bankruptcy court's finding of materiality.

24 **c. Knowingly made and fraudulent intent**

25 A debtor "'acts knowingly if he or she acts deliberately and  
26 consciously.'" In re Khalil, 379 B.R. at 173 (quoting Roberts v.  
27 Erhard (In re Roberts), 331 B.R. 876, 883 (9th Cir. BAP 2005));  
28 see also In re Retz, 606 F.3d at 1198. A debtor acts with

1 fraudulent intent when: (1) the debtor makes a misrepresentation;  
2 (2) that at the time he or she knew was false; and (3) with the  
3 intention and purpose of deceiving creditors. Id. at 1198-99.  
4 Fraudulent intent is typically proven by circumstantial evidence  
5 or by inferences drawn from the debtor's conduct. Id. at 1199.  
6 Circumstantial evidence may include showing a reckless  
7 indifference or disregard for the truth. In re Wills, 243 B.R. at  
8 64 (intent may be established by a pattern of falsity, debtor's  
9 reckless indifference, or disregard of the truth).

10 The bankruptcy court found that, after carefully considering  
11 Debtor's testimony, Debtor knew his omissions were false and that  
12 he acted with the intent and purpose of deceiving creditors and  
13 Trustee. The court gave "little weight" to Debtor's testimony  
14 insofar as he attempted to lay the blame for errors and omissions  
15 on his counsel or others. Mem. of Decision (Feb. 12, 2015) at 31.  
16 The court further found Debtor's credibility "tainted" not only  
17 because some of his testimony was impeached by Trustee, "but by  
18 the equivocations and qualifications Debtor attempted to overlay  
19 on prior testimony once contrary information was highlighted."  
20 Id. The court found that Debtor knew of the assets and failed to  
21 disclose them, and in fact "deliberately and consciously" signed  
22 multiple sworn schedules without disclosing the assets when he had  
23 ample opportunity throughout the chapter 12 process to do so. Id.  
24 The court considered, but rejected, Debtor's claim that he was  
25 confused or uncertain, or that he simply made mistakes based on  
26 lack of care, thought or time. The court was not persuaded by  
27 Debtor's "excuses" given the nature of the errors and omissions  
28 and their importance to the attempted reorganization. Id.

1 Debtor asserts essentially the same contentions on appeal as  
2 he did before the bankruptcy court: that he had no intent to  
3 hinder, delay or defraud creditors, but only to pay them with crop  
4 proceeds; that while mistakes and oversights were made in the  
5 schedules and SOFAs, none were made knowingly or with a fraudulent  
6 purpose; that Trustee presented no evidence from the chapter 12  
7 trustee Hymas that Debtor committed any malfeasance in connection  
8 with his chapter 12 case; that once the omissions in the schedules  
9 were realized, Debtor worked diligently with his parent's counsel  
10 Mushlitz and his second bankruptcy attorney Gadda to correct any  
11 errors; that Debtor's bad intent was negated because he disclosed  
12 two real properties he owned free and clear of any debt; that he  
13 had forgotten about his interest in the mineral rights because his  
14 parents owned the parcels and paid the taxes on them; and that the  
15 overall circumstances illustrate that at no point during his  
16 bankruptcy case did he ever have the intent to defraud creditors.

17 It is clear from the record the bankruptcy court considered  
18 all of Debtor's testimony regarding his intent, as well as his  
19 conduct and the surrounding circumstances. The court simply did  
20 not believe Debtor. Even if we were to conclude differently as  
21 the finder of fact, we cannot say the court's choice between the  
22 two views of the evidence here was clearly erroneous. Anderson,  
23 470 U.S. at 574. This is particularly true because of the great  
24 deference we must give the bankruptcy court's findings based on  
25 its assessment of Debtor's credibility at trial. In re Retz,  
26 606 F.3d at 1196. At a minimum, the record supports a finding  
27 that Debtor's reckless indifference to or disregard for the truth  
28 of his schedules and SOFAs provided sufficient circumstantial

1 evidence to prove fraudulent intent for purposes of  
2 § 727(a)(4)(A). In re Wills, 243 B.R. at 64. Thus, we see no  
3 clear error with the bankruptcy court's finding that Debtor's  
4 false oath was made knowingly and fraudulently.

5 The bankruptcy court did not err in finding that Debtor made  
6 a false omission in his schedules and SOFAs, that his false  
7 omission related to material facts, and that he omitted the  
8 information knowingly and fraudulently. Therefore, the bankruptcy  
9 court did not err in denying his discharge under § 727(a)(4)(A).

10 Because we conclude that the bankruptcy court did not err in  
11 denying Debtor's discharge under § 727(a)(2)(B) and (a)(4)(A), we  
12 need not determine whether it erred in denying his discharge under  
13 § 727(a)(3) and (a)(6)(A).

#### 14 **VI. CONCLUSION**

15 For the reasons stated above, we AFFIRM.  
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