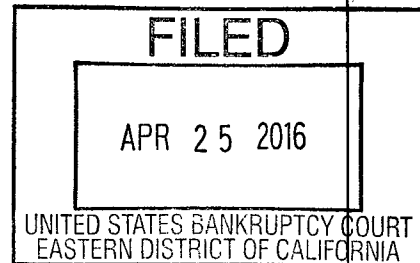


21



1 UNITED STATES BANKRUPTCY COURT  
 2 EASTERN DISTRICT OF CALIFORNIA

3  
 4 In re: ) Case No. 14-21946-B-7  
 5 DESIREE REBECCA LEWIS, ) Adversary No. 14-212~~2~~6  
 6 )  
 7 Debtor(s). )  
 8 J. MICHAEL HOPPER, Chapter 7 )  
 9 Trustee for the Bankruptcy )  
 10 Estate of Jack Burns, and SALLY )  
 11 WONG, )  
 12 Plaintiff(s), )  
 13 v. )  
 14 DESIREE REBECCA LEWIS, )  
 15 Defendant(s). )

16 DECISION AFTER TRIAL

17  
18 Introduction

19 This is an adversary proceeding (1) to have a debt excepted  
 20 from discharge under 11 U.S.C. § 523 and (2) objecting to  
 21 discharge under 11 U.S.C. § 727. The plaintiffs are the chapter  
 22 7 trustee appointed in In re Jack Burns, Case No. 10-22742, and  
 23 Sally Wong.<sup>1</sup> The defendant is Desiree Rebecca Lewis. Lewis is a  
 24 debtor in the underlying chapter 7 case filed and pending in this  
 25 court as In re Desiree Rebecca Lewis, Case No. 14-21946. The

26  
 27 <sup>1</sup>The original plaintiffs were John O. Brown and Sally Wong.  
 28 Pursuant to an order filed in this adversary proceeding on  
 November 20, 2015, the chapter 7 trustee appointed in the Burns  
 case referenced above was substituted as the plaintiff and real  
 party in interest for John O. Brown.

1 Petition, Schedules, and Statement of Financial Affairs were  
2 filed in Lewis' chapter 7 case on February 27, 2014.

3 The complaint in this adversary proceeding was filed on May  
4 9, 2014. It alleges five "Counts" as claims for relief: a claim  
5 under § 523(a)(2)(A) in Count I; a claim under § 523(a)(4) in  
6 Count II; a claim under § 523(a)(6) in Count III; a claim under  
7 § 727(a)(3) in Count IV; and a claim under § 727(a)(4)(A) in  
8 Count V. The summons was reissued on July 18, 2014, and,  
9 together with a copy of the complaint, was served on July 23,  
10 2014. Lewis answered the complaint on August 15, 2014.

11 A trial in this matter was held on April 11, 2016. Ronald  
12 Roundy, Esq., appeared for the Burns trustee and Wong. Brian  
13 Turner, Esq., appeared for Lewis. The court made several  
14 pretrial rulings on the record in open court which are  
15 incorporated herein by this reference. The court also takes  
16 judicial notice of the docket in this adversary proceeding and in  
17 the underlying chapter 7 case.

18 The court has heard and considered the testimony of  
19 witnesses and has also considered the documents admitted into  
20 evidence. The court now enters its findings of fact and  
21 conclusions of law pursuant to Federal Rule of Civil Procedure  
22 52(a) made applicable in this adversary proceeding by Federal  
23 Rule of Bankruptcy Procedure 7052.

#### 24 25 **Jurisdiction and Venue**

26 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
27 § 1334. This matter is a core proceeding that a bankruptcy judge  
28 may hear and determine. See 28 U.S.C. §§ 157(b)(2)(A), (I), (J),

1 and (0). To the extent it may ever be determined to be a matter  
2 that a bankruptcy judge may not hear and determine without  
3 consent, the parties nevertheless consent to such determination  
4 by a bankruptcy judge. See 28 U.S.C. § 157(c)(2). Venue is  
5 proper under 28 U.S.C. § 1409.

6  
7 **Findings of Fact**

8 Lewis worked for Brown at the King of Curls in Sacramento,  
9 California, in the months preceding and into March of 2006.

10 Lewis discussed her financial problems with other employees and  
11 with Brown during that time. Specifically, Lewis made it known  
12 that the mortgage on her residence at 4822 Mission Beach Court,  
13 Elk Grove, California, was in default and that the property was  
14 in foreclosure.

15 Lewis asked Brown for a loan to avoid foreclosure on the  
16 Mission Property. Lewis told Brown that she could repay the loan  
17 by refinancing another property she owned located at 3229 Babson  
18 Drive, Elk Grove, California. Lewis did not tell Brown that the  
19 Babson Property was previously refinanced numerous times. Lewis  
20 and Brown also discussed other ways that Lewis could make money  
21 to repay the loan such as by operating a daycare or laundry  
22 business out of one of her properties, or by selling the Mission  
23 Property. In any event, Brown was fully aware of Lewis'  
24 financial condition, he was aware that the Mission Property was  
25 in foreclosure, and he endeavored to help Lewis nonetheless.

26 Brown discussed extending a loan to Lewis with his wife,  
27 Wong, and they agreed to loan Lewis over \$18,000 to help Lewis  
28 avoid foreclosure on the Mission Property. Lewis provided Brown

1 with her bank information and Brown gave that information to  
2 Wong. During her lunch break on March 30, 2006, and at Brown's  
3 direction, Wong made a series of Western Union wire transfers to  
4 Lewis' bank. The funds for those transfers came from Wong's  
5 separate property account. Those funds were used to bring Lewis'  
6 mortgage current which allowed Lewis to avoid foreclosure on the  
7 Mission Property.

8 Wong had not met or talked with Lewis before she wired funds  
9 to Lewis' bank. Wong did not speak with Lewis until after the  
10 wire transfers were made. Wong spoke with Lewis afterwards  
11 because of transposed numbers on the account to which the funds  
12 were wired and to obtain the correct account information for  
13 Lewis' account.

14 Before she transferred funds from her separate property  
15 account to Lewis' bank, Wong did not inquire about Lewis'  
16 financial condition. Wong relied entirely on Brown's statements  
17 that one of his newer employees needed a loan to save her house  
18 from foreclosure. Wong also testified that she knew that real  
19 property values were depressed in 2006.

20 Five days after Wong transferred funds to Lewis' bank, on  
21 April 4, 2006, Brown met with Lewis and asked her to prepare a  
22 written agreement regarding the loan made on March 30, 2006, and  
23 repayment of that loan. Lewis provided Brown with a hand-written  
24 document, which she refused to sign. The document confirmed the  
25 loan, included Lewis' statement that she had a purchase agreement  
26 on the Mission Property, and also included Lewis' statement that  
27 she would repay the loan with proceeds from the sale of the  
28 Mission Property.

1 Several months later, on or about August 21, 2006, Brown and  
2 Wong sued Lewis in Sacramento County Superior Court. The  
3 complaint filed in that state court action alleged breach of  
4 contract and fraud claims. Three days later, on August 24, 2006,  
5 a deed of trust securing a \$36,000 promissory note executed by  
6 Lewis was recorded against the Babson Property. Those funds were  
7 not used to repay the loan.

8 The state court case was tried on April 20, 2007. On April  
9 24, 2007, Lewis recorded a homestead declaration on the Babson  
10 Property. Fourteen days later, on May 8, 2007, the state court  
11 entered judgment in favor of Brown and Wong and against Lewis in  
12 the amount of \$18,715.79. The extent of the state court judgment  
13 is as follows:

14 Evidence was presented by plaintiffs that funds in the  
15 amount of \$18,715.79 were paid by them to defendant's  
16 lender to stop the foreclosure on her home. Defendant  
17 contended that said funds were a gift. After  
18 considering the evidence, the court finds that said  
19 funds were not a gift to defendant.

20 The state court judgment was recorded with the Sacramento  
21 County Recorder on May 21, 2007. Shortly thereafter, Brown and  
22 Wong attempted to enforce the judgment by garnishing Lewis'  
23 wages. They were unsuccessful because they did not have Lewis'  
24 social security number.

25 Brown and Wong made no other efforts to enforce or collect  
26 the state court judgment until seven years later when, on or  
27 about February 7, 2014, they initiated a debtor's examination in  
28 the state court. That debtor's examination surprised Lewis  
because, as she told Wong at the time, she believed that the  
absence of any collection activity or enforcement of the judgment

1 meant that the loan was forgiven. Wong confirmed Lewis' belief  
2 during trial.

3 During the debtor's examination, Lewis asked for a  
4 continuance. That request was granted; however, the state court  
5 judge also ordered Lewis to provide documents to Brown and Wong  
6 by February 11, 2014, and to return for further examination on  
7 February 28, 2014. Lewis did neither. Instead, on February 27,  
8 2014, Lewis filed a voluntary petition in the underlying chapter  
9 7 case.

10 Brown and Wong now seek to have their debt arising out of  
11 the state court judgment excepted from discharge under  
12 §§ 523(a)(2)(A), (a)(4), and (a)(6). They also object to Lewis'  
13 discharge under §§ 727(a)(3) and (a)(4)(A).<sup>2</sup>

14

15 **Conclusion of Law**

16 **I. The Nondischargeability Counts**

17 **A. Count I - § 523(a)(2)(A)**

18 Count I of the complaint alleges a claim under  
19 § 523(a)(2)(A). Section 523(a)(2)(A) states as follows:

20 (a) A discharge under section 727 . . . of this title  
21 does not discharge an individual debtor from any debt -

22 . . .

23 (2) for money, property, services, or an extension,  
24 renewal, or refinancing of credit, to the extent

---

25 <sup>2</sup>The trial brief filed by the Burns trustee and Wong states  
26 that relief is sought under §§ 727(c), (d), and (e). Section  
27 727(d) and (e) are inapplicable because they concern the  
28 revocation of a discharge, which has not yet been entered in the  
underlying chapter 7 case. Section 727(c) permits a creditor to  
object to a debtor's discharge under § 727(a). The only  
objections to Lewis' discharge under § 727(a) alleged in the  
complaint are, as noted, §§ 727(a)(3) and 727(a)(4)(A).

1 obtained by - (A) false pretenses, a false  
2 representation, or actual fraud, other than a statement  
3 respecting the debtor's or an insider's financial  
4 condition;

5 11 U.S.C. § 523(a)(2)(A).

6 A creditor seeking to except a debt from discharge under  
7 § 523(a)(2)(A) bears the burden of proving by a preponderance of  
8 the evidence five elements: (1) misrepresentation(s), fraudulent  
9 omission(s), or deceptive conduct; (2) knowledge of the falsity  
10 or deceptiveness of such representation(s), omission(s), or  
11 conduct; (3) an intent to deceive; (4) justifiable reliance by  
12 the creditor on the subject representation(s), omission(s), or  
13 conduct; and (5) damage to the creditor proximately caused by its  
14 reliance on such representation(s), omission(s), or conduct.

15 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.  
16 2010) (citation omitted); Oney v. Weinberg (In re Weinberg), 410  
17 B.R. 19, 35 (9th Cir. BAP 2009) (citations omitted). The Burns  
18 trustee and Wong have failed to meet their burden of proof on  
19 several of the § 523(a)(2)(A) elements.

20 Among other things, § 523(a)(2)(A) renders nondischargeable  
21 a debt for money "to the extent obtained by" misrepresentation,  
22 fraudulent omission, or deceptive conduct. The operative phrase  
23 here is "to the extent obtained by." To be actionable under  
24 § 523(a)(2)(A), the prescribed conduct must have occurred *before*  
25 the debtor obtains the money. In other words, the prescribed  
26 conduct must induce the creditor to act. See Shah v. Chowdaury  
27 (In re Chowdaury), 2014 WL 2938274 at \*3 (9th Cir. BAP 2014) ("a  
28 creditor must establish that it was induced . . . to enter into"  
the subject contract "by means of 'false pretenses, a false

1 representation, or actual fraud.'"). Prescribed conduct that  
2 occurs *after* the debtor obtains money does not count and will not  
3 support a nondischargeability claim under § 523(a)(2)(A). Houng  
4 v. Tatung, Co., Ltd. (In re Houng), 499 B.R. 751, 766 at n.49  
5 (C.D. Cal. 2013) ("Although the arbitrator found that Houng  
6 engaged in fraudulent transfers and diversions of funds from WDE,  
7 that conduct occurred after the parties had entered into the PSA.  
8 As a result, the arbitrator's findings of fraudulent transactions  
9 do not establish that Tatung relied on Houng's statements or  
10 conduct when it agreed to enter into the PSA."), aff'd, 2016 WL  
11 145841 (9th Cir. 2016). Here, only two events fall within these  
12 parameters and neither support the § 523(a)(2)(A) claim.

13 The first is Lewis' representation that she could repay the  
14 loan by refinancing the Babson Property. Lewis made that  
15 representation to Brown, not Wong. However, Lewis did not obtain  
16 money from Brown. Inasmuch as the funds for the loan to Lewis  
17 came from Wong's separate property account, Lewis obtained money  
18 from Wong. Lewis and Wong did not speak before Wong loaned Lewis  
19 money from her separate property account. That means Lewis did  
20 not (and could not have) obtained money from Wong by a false  
21 statement or misrepresentation made to Wong.<sup>3</sup>

22 The second is the failure to disclose - or omission of  
23 information regarding - the Babson Property's refinance history.

---

24  
25 <sup>3</sup>Even assuming Lewis' statement to Brown regarding the use  
26 of the Babson Property could be imputed to Wong, the statement  
27 was neither false, a misrepresentation, nor deceptive.  
28 Refinancing the Babson Property was only one potential source of  
repayment. Brown and Lewis discussed several other options.  
Thus, while refinancing the Babson Property was discussed as a  
means of repayment it was not discussed as *the only* means of  
repayment.



1 Under California law, an omission is fraudulent only if there is  
2 a duty on the party making the omission to disclose. SCC  
3 Acquisitions Inc. v. Cent. Pac. Bank, 207 Cal. App. 4th 859, 864  
4 (Cal. Ct. App. 2012) (quoting Blickman Turkus, LP v. MF Downtown  
5 Sunnyvale, LLC, 162 Cal. App. 4th 858, 868 (Cal. Ct. App. 2008)).  
6 Here, the Burns trustee and Wong produced no evidence that Lewis  
7 was under any duty to disclose the refinance history of the  
8 Babson property to Brown or Wong.

9 California law also recognizes that in transactions that do  
10 not involve fiduciary or confidential relations, and thus a duty  
11 to disclose, a cause of action for non-disclosure of material  
12 facts may arise in at least three instances: (1) the defendant  
13 makes representations but does not disclose facts which  
14 materially qualify the facts disclosed, or which render the  
15 disclosure likely to mislead; (2) the facts are known or  
16 accessible only to defendant, and defendant knows they are not  
17 known to or reasonably discoverable by the plaintiff; (3) the  
18 defendant actively conceals discovery from the plaintiff.  
19 Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th  
20 603, 613 (1992) (citation omitted).

21 There was no need for Lewis to qualify for Wong any facts  
22 regarding the Babson Property as a possible source of repayment  
23 for the loan Lewis obtained from Wong because Lewis did not speak  
24 with Wong before Wong made the loan to Lewis. In other words,  
25 before Lewis obtained money from Wong she made no statements to  
26 Wong that required qualification in the first instance.

27 As to Brown, Lewis obtained no money from him which means  
28 that any statement Lewis made to Brown about the use of the

1 Babson Property as a source of repayment was not material.  
2 Lewis' statement to Brown about the potential use of the Babson  
3 Property is also immaterial for two additional reasons. First,  
4 Brown testified that he is the type of person that likes to help  
5 people. Second, in her testimony, Lewis alluded to an "affair"  
6 between her and Brown at the time the loan was made, and that  
7 testimony was unchallenged. Thus, the court is persuaded that  
8 Brown would have facilitated Wong's loan to Lewis regardless of  
9 any statement or omission about the Babson Property's refinance  
10 history.

11 As to both Brown and Wong, neither the Burns trustee nor  
12 Wong introduced any evidence that the Babson Property's refinance  
13 history was actively concealed. In fact, as the Burns trustee  
14 and Wong readily established through the introduction of numerous  
15 deeds of trust recorded against the Babson Property, the  
16 property's refinance history was a matter of public record. And  
17 that means that information was not solely available to or  
18 accessible by Lewis.

19 Finally, the court is not persuaded that reliance by Brown  
20 or Wong on the representation that the Babson Property could be  
21 used to repay the loan to Lewis, even in the absence of any  
22 disclosure of the property's refinance history, was justifiable.  
23 See Field v. Mans, 516 U.S. 59, 74-75 (1995). Reliance falls  
24 below the justifiable standard when "red flags" are ignored.  
25 Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1286 (9th  
26 Cir. 1996) (citation omitted); see also Giovanni v. Grayson,  
27 Kubli & Hoffman (In re Giovanni), 324 B.R. 586, 594 (E.D. Va.  
28 2005) (citation omitted); Copper v. Lemke (In re Lemke), 423 B.R.

1 917, 924-925 (10th Cir. BAP 2010) (holding that reliance was not  
2 justifiable because plaintiff continued to lend money "after  
3 various red flags arose"). And here, numerous "red flags" were  
4 ignored.

5 Brown only knew Lewis for several months. Brown knew that  
6 Lewis had financial problems. He also knew that Lewis owned two  
7 houses, that one of those houses was on the brink of foreclosure,  
8 and that Lewis could not afford to cure that default and prevent  
9 foreclosure. Under those circumstances, the court is not  
10 persuaded that facilitating a last minute loan made to a new and  
11 financially distressed employee based solely on the  
12 representation of repayment from a refinance on one property  
13 knowing that the borrower's other property is pending foreclosure  
14 is justifiable.

15 Wong's reliance falls even further below the justifiable  
16 threshold. Wong relied entirely on Brown's representation that  
17 one of his newer employees who she did not know needed a loan of  
18 over \$18,000 to prevent a foreclosure on her home. Brown  
19 instructed Wong to wire funds to Lewis' bank. And without any  
20 question, Wong complied by leaving work on her lunch break to  
21 purchase and wire her own separate property funds to Lewis' bank  
22 through Western Union.

23 In sum, Count I of the complaint fails in at least three  
24 respects. First, the Burns trustee and Wong have failed to carry  
25 their burden of proving that the loan to Lewis was "obtained by"  
26 a false representation, false pretenses, or actual fraud.  
27 Second, they have failed to carry their burden of proving a  
28 fraudulent misrepresentation or omission. And third, they have

1 failed to prove their reliance on any omission, even if material,  
2 was justifiable. Therefore, based on the foregoing, judgment on  
3 Count I of the complaint will be entered in favor of Lewis and  
4 against the Burns trustee and Wong. The debt created by the  
5 state court judgment entered against Lewis will not be excepted  
6 from discharge under § 523(a)(2)(A).

7 B. Count II - § 523(a)(4)

8 Count II of the complaint alleges a claim under § 523(a)(4).  
9 Section 523(a)(4) states as follows:

10 (a) A discharge under section 727 . . . of this title  
11 does not discharge an individual debtor from any debt -

12 ...

13 (4) for fraud or defalcation while acting in a  
14 fiduciary capacity, embezzlement, or larceny[.]

15 11 U.S.C. § 523(a)(4).

16 There is no issue of a fiduciary relationship between Wong  
17 and/or Brown, on the one hand, and Lewis, on the other hand. Nor  
18 is there any issue regarding embezzlement.<sup>4</sup> Therefore, Count II  
19 of the complaint must stand on whether there was "larceny."

20 A debt can be nondischargeable for larceny under § 523(a)(4)  
21 without the existence of a fiduciary relationship. Littleton,  
22 942 F.2d at 555. Bankruptcy courts look to the federal common  
23 law to define larceny for purposes of § 523(a)(4). Ormsby v.  
24 First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1205

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25 <sup>4</sup>There is no evidence that Lewis used funds with which she  
26 was lawfully entrusted for an unauthorized purpose. See Transam.  
27 Comm'l Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551,  
28 555 (9th Cir. 1991). In fact, Lewis used the loan proceeds she  
received from Wong for the very purpose for which they were  
intended to be used, *i.e.*, to bring the mortgage on the Mission  
Property current. Thus, Lewis used the loan proceeds for an  
*authorized* purpose.

1 (9th Cir. 2010). Federal common law defines larceny as a  
2 "felonious taking of another's personal property with intent to  
3 convert it or deprive the owner of the same." Id. (Quotation  
4 omitted). "Larceny is distinguished from embezzlement in that  
5 the original taking of the property was unlawful." Lucero v.  
6 Montes (In re Montes), 177 B.R. 325, 331 (Bankr. C.D. Cal. 1994).

7 The Burns trustee and Wong produced no evidence that Lewis  
8 obtained the loan from Wong by unlawful means. Brown knew that  
9 Lewis' mortgage was in default, he decided to help bring the  
10 mortgage current, he directed Wong to wire funds to Lewis' bank  
11 account, and Wong complied. Lewis used the funds for their  
12 intended and authorized purpose, *i.e.*, to bring her mortgage  
13 current and avoid foreclosure of the Mission Property. There is  
14 nothing unlawful about that.

15 In sum, the Burns trustee and Wong have failed to carry  
16 their burden of proving the debt created by the state court  
17 judgment entered against Lewis is nondischargeable under  
18 § 523(a)(4) based on larceny. Therefore, judgment on Count II of  
19 the complaint will be entered in favor of Lewis and against the  
20 Burns trustee and Wong. The debt created by the state court  
21 judgment entered against Lewis will not be excepted from  
22 discharge under § 523(a)(4).

23 C. Count III - § 523(a)(6)

24 Count III of the complaint alleges a claim under  
25 § 523(a)(6). Section 523(a)(6) states as follows:

26 (a) A discharge under section 727 . . . of this title  
27 does not discharge an individual debtor from any debt -  
28 . . .

1 (6) for willful and malicious injury by the debtor to  
2 another entity or to the property of another entity[.]

3 11 U.S.C. § 523(a)(6).

4 Both willfulness and maliciousness must be proven to block  
5 discharge under section § 523(a)(6). Kawaauhau v. Geiger, 523  
6 U.S. 57, 61-62 (1998). Each element is analyzed separately. See  
7 Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th  
8 Cir. 2008) (citation omitted).

9 "A willful injury is a deliberate or intentional injury, not  
10 merely a deliberate or intentional act that leads to injury."  
11 Id. (Quotation, internal emphasis, and quotations omitted). In  
12 other words, the "wilful injury requirement is met only when the  
13 debtor has a subjective motive to inflict injury or when the  
14 debtor believes that injury is substantially certain to result  
15 from his own conduct." Ormsby, 591 F.3d at 1206. A malicious  
16 injury is (1) a wrongful act, (2) done intentionally, (3) which  
17 causes injury, and (4) is done without just cause or excuse.  
18 Ormsby, 591 F.3d at 1207; Barboza, 545 F.3d at 706. Malice may  
19 be inferred from the wrongful act. See Ormsby, 591 F.3d at 1207  
20 (citation omitted). However, to infer malice it must first be  
21 established that the act was willful. Thiara v. Spycher Bros.  
22 (In re Thiara), 285 B.R. 420, 434 (9th Cir. BAP 2002).

23 The Burns trustee and Wong have failed to carry their burden  
24 of proving that Lewis obtained a loan - and then failed to repay  
25 it - with the specific intent of causing financial injury or that  
26 she believed that financial injury was substantially certain to  
27 result from the loan or its non-repayment. Brown, Wong, and  
28 Lewis all testified that Lewis obtained the loan in order to

1 bring the mortgage on her home current and avoid foreclosure, and  
2 the loan proceeds were used for that purpose. Lewis and Wong  
3 also testified that Lewis did not repay the loan because she  
4 believed that the absence of collection or enforcement activity  
5 for seven years meant the loan and debt created by the state  
6 court judgment was forgiven. The court believes Lewis and finds  
7 her testimony credible. Thus, inasmuch as the reason for the  
8 loan was to avoid foreclosure and the reason for its non-payment  
9 was a legitimate and corroborated belief that repayment was no  
10 longer necessary, the Burns trustee and Wong have failed to prove  
11 a willful injury by Lewis under § 523(a)(6).<sup>5</sup>

12 In sum, the Burns trustee and Wong have failed to carry  
13 their burden of proving the debt created by the state court  
14 judgment entered against Lewis is nondischargeable under  
15 § 523(a)(6). Therefore, judgment on Count III of the complaint  
16 will be entered in favor of Lewis and against the Burns trustee  
17 and Wong. The debt created by the state court judgment entered  
18 against Lewis will not be excepted from discharge under  
19 § 523(a)(6).

## 20 **II. The Discharge Objection Counts**

21 The party objecting to a debtor's discharge under § 727(a)  
22 bears the burden of proving by a preponderance of the evidence  
23 that the debtor's discharge should be denied. Retz v. Samson (In  
24 re Retz), 606 F.3d 1189, 1196 (9th Cir 2010). Courts are to  
25 "construe § 727 liberally in favor of debtors and strictly  
26 against parties objecting to discharge." Id. (Quotation and

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27 <sup>5</sup>In the absence of a willful injury, the court need not  
28 reach the malice issue.

1 internal quotation marks omitted).

2 A. Count IV - § 727(a)(3)

3 Count IV of the complaint is an objection to Lewis'  
4 discharge under § 727(a)(3). Section 727(a)(3) states as  
5 follows:

6 (a) The court shall grant the debtor a discharge,  
7 unless—

8 . . . .

9 (3) the debtor has concealed, destroyed, mutilated,  
10 falsified, or failed to keep or preserve any recorded  
11 information, including books, documents, records, and  
12 papers, from which the debtor's financial condition or  
business transactions might be ascertained, unless such  
act or failure to act was justified under all of the  
circumstances of the case[.]

13 11 U.S.C. § 727(a)(3).

14 In addressing the burdens of proof under § 727(a)(3), the  
15 Ninth Circuit has stated:

16 [T]he purpose of [section 727] is to make the privilege  
17 of discharge dependent on a true presentation of the  
debtor's financial affairs. The initial burden of  
18 proof under § 727(a)(3) is on the plaintiff. In order  
to state a prima facie case under section 727(a)(3), a  
19 creditor objecting to discharge must show (1) that the  
debtor failed to maintain and preserve adequate  
20 records, and (2) that such failure makes it impossible  
to ascertain the debtor's financial condition and  
21 material business transactions. Once the objecting  
party shows that the debtor's records are absent or are  
22 inadequate, the burden of proof then shifts to the  
debtor to justify the inadequacy or nonexistence of the  
records.

23 Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994)  
24 (citations, internal quotation marks, and quotations omitted).

25 Records that Lewis supposedly failed to maintain were not  
26 identified. They were not identified in the conclusory  
27 allegations of the complaint, they were not identified in the  
28 brief the Burns trustee and Wong filed shortly before trial, and



1 they were not established by evidence at trial.

2 Failure to identify the operative records means the Burns  
3 trustee and Wong cannot demonstrate difficulty in ascertaining  
4 Lewis' financial condition.<sup>6</sup> That means the Burns trustee and  
5 Wong have not established a prima facie case under § 727(a)(3).  
6 That also means burden of proof never shifted to Lewis to explain  
7 or justify the inadequacy or non-existence of any of her records.  
8 Therefore, judgment on Count IV of the complaint will be entered  
9 in favor of Lewis and against the Burns trustee and Wong. Lewis  
10 will not be denied a discharge under § 727(a)(3).

11 B. Count V - § 727(a)(4)(A)

12 Count V of the complaint alleges a claim under  
13 § 727(a)(4)(A). Section 727(a)(4)(A) states:

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

16 . . .

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

(A) made a false oath or account;

19 11 U.S.C. § 727(a)(4)(A).

20 Under § 727(a)(4)(A), the objector must show: "(1) the  
21 debtor made a false oath in connection with the case; (2) the  
22 oath related to a material fact; (3) the oath was made knowingly;  
23 and (4) the oath was made fraudulently." Retz, 606 F.3d at 1197  
24 (citation omitted); In re Hoblitzell, 223 B.R. 211, 215 (Bankr.  
25 E.D. Cal. 1998).

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26  
27 <sup>6</sup>The court notes that, based on the entry made on the docket  
28 in the underlying chapter 7 case on April 8, 2014, the chapter 7  
trustee had no difficulty determining Lewis' financial condition  
from the financial records she provided.

1 Schedules, Statements of Financial Affairs, and Petitions  
2 are all executed under oath and penalty of perjury. See Fed. R.  
3 Bankr. Pro. 1008; Hamo v. Wilson (In re Hamo), 233 B.R. 718, 725  
4 (6th Cir. BAP 1999). Thus, "[a] false statement or an omission  
5 in the debtor's bankruptcy schedules or statement of financial  
6 affairs can constitute a false oath." Khalil v. Developers Sur.  
7 & Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP  
8 2007); Wills v. Wills (In re Wills), 243 B.R. 58, 62 (9th Cir.  
9 BAP 1999). However, even where a debtor concedes a petition  
10 contains false statements, the court must still find the debtor  
11 acted with the requisite knowledge and intent, and that the false  
12 statements were material in order to deny a discharge. Wills,  
13 243 B.R. at 62.

14 The complaint identifies income from employment represented  
15 on Lewis' Statement of Financial Affairs filed in the underlying  
16 chapter 7 case as the false statement upon which the  
17 § 727(a)(4)(A) claim in Count V is based. In Question 1 of the  
18 Statement of Financial Affairs, Lewis stated that she made  
19 \$1,642.30 year-to-date in 2014, \$9,718.00 in 2013, and \$90,253.00  
20 in 2012. Lewis was questioned about the \$90,253.00 in the  
21 Statement of Financial Affairs. Lewis testified that she  
22 received that income from her former airline employer as a  
23 buy-out of her employment. The court finds Lewis' testimony  
24 credible, unchallenged, and consistent with what she stated in  
25 Question 1 of the Statement of Financial Affairs. In other  
26 words, Lewis did not falsely state her income.

27 The Burns trustee and Wong also maintain in their trial  
28 brief (but not in the complaint) that Lewis committed perjury

1 during the state court debtor's examination in January 2014.  
2 Specifically, Lewis asked for a continuance to obtain counsel and  
3 gather documents when, in fact, she did neither and, instead,  
4 filed the petition in the underlying chapter 7 case. The court  
5 has doubts as to whether Lewis' statement in that context even  
6 qualifies as a false oath under § 727(a)(4)(A). That statement  
7 was made before Lewis filed her chapter 7 petition and, thus,  
8 before a chapter 7 case existed. Put another way, Lewis'  
9 statement in the state court proceeding was not made "in  
10 connection" with her bankruptcy case because no bankruptcy case  
11 existed when Lewis made the state court statement.

12 The Burns trustee and Wong further maintain in their trial  
13 brief (and, again, not in the complaint) that Lewis committed  
14 perjury during her deposition in July 2015 when she denied  
15 knowing Wong. This too will not support an actionable  
16 § 727(a)(4)(A) claim for two reasons. First, Lewis' deposition  
17 testimony was not admitted into evidence. Second, even if the  
18 deposition testimony was admitted, the Burns trustee and Wong  
19 failed to establish how this statement was material. Only an  
20 omission or misstatement that "detrimentally affects  
21 administration of the estate" is material. Wills, 243 B.R. at 63  
22 (citation omitted). There is no evidence how, if at all, this  
23 statement had any impact on the administration of Lewis' chapter  
24 7 case.

25 In sum, the Burns trustee and Wong have failed to carry  
26 their burden of proving a claim under § 727(a)(4)(A). Therefore,  
27 judgment on Count V of the complaint will be entered in favor of  
28 Lewis and against the Burns trustee and Wong. Lewis will not be

1 denied a discharge under § 727(a)(4)(A).  
2

3 **Conclusion**

4 For the reasons stated hereinabove, judgment on each and  
5 every Count alleged in the complaint will be entered in favor of  
6 Lewis and against the Burns trustee and Wong. The debt created  
7 by the judgment entered against Lewis by the Sacramento County  
8 Superior Court on or about April 20, 2007, shall be discharged in  
9 Lewis' chapter 7 case and Lewis will not be denied a discharge in  
10 that chapter 7 case.

11 A separate judgment shall issue.

12 Dated: April 25, 2016.

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15 UNITED STATES BANKRUPTCY JUDGE  
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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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