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**NOT FOR PUBLICATION**

FILED  
OCT 12 2006  
CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_ DEPUTY

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re  
HARRY L. HAUBERT,  
  
Debtor.  
  
ELLEN EVANS and CHRISTINA  
TURPELA,  
  
Plaintiffs,  
  
v.  
HARRY L. HAUBERT,  
  
Defendant.

Bankruptcy No. 05-12816-M7  
Adversary No. 06-90080-M7

MEMORANDUM DECISION

I

Harry L. Haubert ("Debtor") filed a Chapter 7 bankruptcy petition on October 13, 2005. Ellen Evans and Christina Turpela ("Plaintiffs") were listed as creditors holding a claim for \$12,000.00. Their claim arises from two orders entered in the State Court; a Judgment filed on June 29, 2004, for \$7,977.15 for breach of contract, and a sanctions award filed on September 6, 2005, by the State Court of Appeals for \$2,860. The Plaintiffs filed this adversary proceeding

1 seeking to have their debt declared nondischargeable pursuant to §  
2 523(a) and for a denial of the Debtor's discharge under various  
3 subsections of § 727. After a motion for summary judgment, the  
4 sanctions portion of the debt of \$2,860 was determined non  
5 dischargeable. The remaining issues were tried on June 5, 6 and 15,  
6 and the matter was taken under submission. For the following reasons,  
7 the Debtor's discharge is denied.<sup>1</sup>

8  
9 **II**

10 **FACTS**

11 The schedules and statement of affairs filed with the Debtor's  
12 petition disclose that he is a single, retired man with income of  
13 \$870/month and expenses of \$810/month. He listed nominal assets and  
14 claimed them all as exempt. Besides the judgment debt owing to the  
15 Plaintiffs, the only other claim listed in the schedules was a debt  
16 to American Express for \$300. On November 16, 2005, Plaintiffs'  
17 counsel attended the § 341(a) meeting of creditors to question the  
18 Debtor about his income and various trusts and escrows in which he was  
19 involved. He was evasive in his answers, claiming the information was  
20 protected by attorney client privilege. The Chapter 7 Trustee  
21 instructed the Debtor to review and amend his schedules to the extent  
22 they were inaccurate.

23 Plaintiffs filed this adversary proceeding on January 17, 2006,  
24 and conducted a deposition of the Debtor on June 15, 2006. The Debtor  
25 was again very evasive in his answers and again refused to provide any  
26 meaningful information concerning the trusts with which he was

27 \_\_\_\_\_  
28 <sup>1</sup> Because the Debtor's discharge is denied in it's entirety, the Court declines to further review  
the dischargeability of his debt to the Plaintiffs.

1 involved.

2       The Debtor eventually filed amended schedules and statement of  
3 affairs on September 22, 2006. The amended documents showed the  
4 Debtor was married, that he was a semi-retired attorney and real  
5 estate broker with net income from business of \$36/month, \$466/month  
6 in disability income and \$302/month from his spouse. He added a list  
7 of property held for others, which included a mobile home, automobile,  
8 several trusts which own real estate, and bank accounts.

9       The evidence at trial disclosed a far different scenario than  
10 that painted by the schedules. The Debtor is licensed as a California  
11 attorney and real estate broker. He is the corporate broker for  
12 Heritage Homes, maintains an escrow company, and is the president and  
13 secretary for the corporation Casa Suenos de Oro. He receives income  
14 as a real estate broker and escrow agent, but he conceals the amount  
15 he receives by cashing checks through accounts held in the names of  
16 others rather than using his own bank account. He testified that from  
17 the escrow accounts, the amount he is entitled to earn is whatever  
18 remains after various expenses are paid from the escrow. He did not  
19 present adequate records to determine what his actual income has been  
20 from these escrow accounts. The amended schedules indicate that he  
21 had control over fifty open escrows, yet he claims to have only earned  
22 an escrow fee on a fraction of that number.

23       In addition, he is the Trustee for several trusts. Much of the  
24 trial testimony involved the Levering-McChesney Trust ("LM Trust"),  
25 which owns real property in Vista, Ca. The LM Trust was initially  
26 funded through an exchange with Debtor's brother of the Vista property  
27 for \$80,000 the Debtor was to receive from their parents. This  
28 exchange occurred shortly before the Debtor filed his first Chapter

1 7 petition in 1998. The LM Trust documents indicate that the primary  
2 beneficiaries of the LM Trust are the Debtor's six adult children,  
3 with Debtor as a contingent reversionary beneficiary. The Debtor has  
4 control over the real property and its equity. He uses part of the  
5 property for his residence and office without paying rent. The  
6 property cannot be sold without his consent, so he essentially holds  
7 a life estate in the Vista property. He is the sole borrower in his  
8 individual name on a credit line of \$250,000 secured by the Vista  
9 property. The records concerning the funds withdrawn from and repaid  
10 to the credit line account are as inadequate as those regarding his  
11 income. The funds go to his escrow account or others rather than  
12 directly to his children and are repaid from entities associated with  
13 the Debtor, not his children. The Debtor has also veiled his  
14 reversionary interest and involvement in the Krosscent Family Trusts  
15 and the Ott Family Trust.

16 In addition to the omission and mischaracterization of  
17 information concerning the Trusts, the Debtor completely omitted other  
18 assets. Despite amending his schedules in September 2006, he failed  
19 to include the monthly social security income he began receiving in  
20 February 2006. He made no disclosure or reference to a potential  
21 claim against the Hitt Trusts, for fees he earned as Trustee of the  
22 Hitt Trusts. He had sent a letter to Mr. Hitt resigning as Trustee  
23 and requesting payment for services in March 2005, just seven months  
24 before he filed this petition. The Debtor also failed to include any  
25 reference to a claim against Asset Escrow Services ("Asset Escrow")  
26 for consulting services which arose in 2002. After filing his  
27 bankruptcy petition, the Debtor filed a small claims suit against  
28 Asset Escrow for this prepetition claim and obtained a judgment in his

1 favor. He was obligated to include that claim in his original  
2 schedules, and should certainly have added it as an asset in an  
3 amendment when he located the documents supporting the claim and  
4 before filing the small claims lawsuit. Although the small claims  
5 judgment was later reversed on appeal, this does not excuse the  
6 Debtor's failure to amend his schedules to include the asset or to  
7 inform the Chapter 7 Trustee of its existence.

8 The Debtor testified in an attempt to explain these omissions and  
9 misstatements. The Debtor's testimony was not credible. The Debtor  
10 has been an attorney for many years, has been through a prior  
11 bankruptcy proceeding and has represented clients in bankruptcy  
12 matters. The Debtor tries to explain his finances by stating that he  
13 lives simply and requires minimal assets. Even if that is true, it  
14 is not a sufficient reason to excuse his failure to accurately  
15 disclose his assets, income, marital status and expenses. He is  
16 actively engaged in business, yet claims to receive almost no income  
17 from these services. He has structured his affairs for years to make  
18 it difficult to trace his income and assets. His testimony was not  
19 directed to providing the truth, but to continue his attempts to  
20 remain judgment proof.

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### III

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### DISCUSSION

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To obtain the right to a discharge, the Debtor is required to be  
forthright and transparent in his financial transactions. The Court  
may deny the Debtor's discharge if the Debtor, with intent to hinder,  
delay, or defraud a creditor or officer of the estate concealed  
property of the estate; failed to keep or preserve recorded

1 information from which the Debtor's financial condition or business  
2 transactions might be ascertained, (unless the failure was justified  
3 under all of the circumstances of the case); or the Debtor knowingly  
4 and fraudulently made a false oath in connection with the case.  
5 §727(a)(2), (3) & (4). The purpose of these sections is "to ensure  
6 that a debtor provides reliable information so interested parties do  
7 not have to dig out the facts in examination or investigations." In  
8 re Hansen, 368 B.R. 868, 877 (9<sup>th</sup> Cir. BAP 2007), In re Aubrey, 111  
9 B.R. 268, 274 (9<sup>th</sup> Cir. BAP 1999).

10 The Court recognizes that claims to deny the discharge are  
11 construed liberally in favor of the Debtor and strictly against the  
12 Plaintiffs. In re Adeeb, 787 F.2d 1339, 1342 (9<sup>th</sup> Cir. 1986).  
13 Keeping that construction in mind, the Court finds that the  
14 Plaintiffs have submitted more than sufficient evidence to carry their  
15 burden through a preponderance of the evidence. See, In re Beverly,  
16 \_\_\_ B.R. \_\_\_, 2007 WL 2200930 (9<sup>th</sup> Cir. BAP July 24, 2007).  
17 Plaintiffs have established that the Debtor violated the provisions  
18 of § 727 paraphrased above by concealing assets and making false  
19 statements in connection with his Chapter 7 case with the to hinder  
20 the creditors and the Chapter 7 Trustee in discovering and evaluating  
21 his financial condition.

22 The Debtor has a continuing duty to assure the accuracy and  
23 completeness of the schedules. In re Searles, 317 B.R. 368, 378-379  
24 (9<sup>th</sup> Cir. BAP 2004), aff'd, 212 F.Appx. 589 (9<sup>th</sup> Cir. 2006). The  
25 Debtor's explanations regarding his failure to disclose his income,  
26 his potential claims against the Hitt Trusts and Asset Escrow, and his  
27 reversionary interests in the family trusts were not at all credible.  
28 His schedules and business records were wholly inadequate to provide

1 reliable information so "interested parties do not have to dig out the  
2 facts in examinations or investigations." Hansen, supra, 368 B.R. at  
3 877. As an attorney, broker and escrow holder, the Debtor was  
4 required to maintain records to verify appropriate use of client  
5 funds. The records presented were not adequate to trace funds, and  
6 the Debtor failed to show that the failure to maintain adequate  
7 records was justified under the circumstances. In re Cox, 41 F.3d  
8 1294, 1297 (9<sup>th</sup> Cir. 1994).

9 After examination by the Plaintiffs, Debtor did finally amend his  
10 schedules and statement of affairs - eleven months after the initial  
11 filing, ten months after the § 341(a) meeting, and 4 months after the  
12 deposition. The amendments were too little, too late, and still  
13 incomplete. Given that the scheduled claims against the estate only  
14 totaled \$12,300, the failure to disclose the potential claims against  
15 the Hitt Trust, Asset Escrow and his correct income and expenses was  
16 hardly immaterial. In any event, materiality based on value is not  
17 an element of a claim under § 727. In re Wills, 243 B.R. 58, 65 (9<sup>th</sup>  
18 Cir. BAP 1999). "A false statement is material if it bears a  
19 relationship to the debtor's business transactions or estate, or  
20 concerns the discovery of assets, business dealings or existence and  
21 disposition of the debtor's property." In re Roberts, 331 B.R. 876,  
22 883 (9<sup>th</sup> Cir. BAP 2005). There is substantial evidence to support  
23 denial of the Debtor's discharge, which Debtor has failed to rebut.

24 Although there is substantial evidence to support denial of the  
25 discharge, the Court is unable to provide Plaintiffs with the relief  
26 requested concerning a declaration that Vista property of the LM Trust  
27 should be considered property of the estate. The complaint filed in  
28 this case was for a determination of dischargeability of their claim

1 and denial of discharge. The only party named as a defendant was the  
2 Debtor. The case relied on so heavily by Plaintiffs concerning the  
3 validity of the repudiation of an interest in a trust, In re Kolb ,  
4 326 F.3d 1030 (9<sup>th</sup> Cir. 2003), was not filed against the Debtor, but  
5 against the trustee and beneficiaries of the trust at issue.

6 "Due process requires deprivation of property be preceded by  
7 notice and opportunity for hearing appropriate to the nature of the  
8 case." In re Maynard, 264 B.R. 209, 215 (9<sup>th</sup> Cir. BAP 2001). Despite  
9 all the indications that the Debtor controls the Vista property, there  
10 has been no showing that the legal title to the that property and  
11 other Trust assets is with anyone but the Trusts. Without naming the  
12 LM Trust and its beneficiaries as defendants, or including a claim in  
13 the complaint to declare ownership, the Court is not able to make a  
14 determination of the ownership as part of this complaint without  
15 violating the due process rights of the owners.

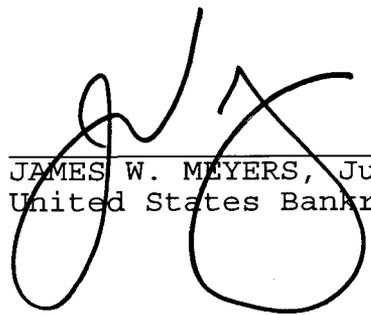
#### 16 17 IV

#### 18 CONCLUSION

19 The Debtor's discharge is denied under § 727(a)(2), (3) and (4)  
20 for concealing assets, concealing or failing to maintain adequate  
21 records, and making false oaths in connection with this Chapter 7 with  
22 the intent to hinder or delay the Plaintiffs. The Court is unable to  
23 make a determination of ownership of property through this complaint,  
24 which fails to name the legal owners of the property at issue. Any  
25 claims for sanctions or fees shall be brought by separate motion.  
26 This Decision constitutes the Court's findings of fact and conclusions  
27 of law. Plaintiffs' counsel shall submit a judgment which conforms  
28 to this Decision within 14 days of entry.

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Dated: **OCT 12 2007**



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JAMES W. MEYERS, Judge  
United States Bankruptcy Court