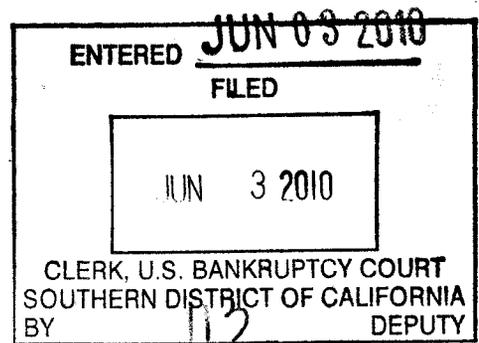


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy No. 08-06461-LT7
Jack Marvin Winick; Wendy K. Winick,) Adversary No. 08-90371-LT
Debtors.)

MEMORANDUM DECISION

Marlys Krietzman, as Trustee of the)
Sheldon and Marlys Krietzman Family)
Trust; Andrea D. Bellamy, as Trustee of)
the Andrea D. Bellamy Trust for the)
Benefit of Jessica T. Bellamy; and)
Goldynne Booth,)
Plaintiffs,)
v.)
Jack Marvin Winick and Wendy K. Winick)
Defendants.)

Plaintiffs Marlys Krietzman, as Trustee of the Sheldon and Marlys Krietzman Family Trust, Andrea D. Bellamy, as Trustee of the Andrea D. Bellamy Trust for the Benefit of Jessica T. Bellamy, and Goldynne Booth (collectively, the "Plaintiffs") commenced this adversary proceeding against chapter 7 debtors Jack Marvin Winick ("Winick") and Wendy K. Winick ("Mrs. Winick," and together with Winick, the "Debtors") seeking to

1 deny the Debtors' discharges. Each one of the three Plaintiffs holds a pre-petition state court
2 stipulated judgment against Winick stemming from certain loan guarantees.

3 The operative complaint (the "Complaint")¹ alleges two statutory bases for denial of
4 discharge. First, Plaintiffs allege that Debtors fail to satisfactorily explain the loss or
5 deficiency of assets in violation of 11 U.S.C. § 727(a)(5).² The Complaint alleges that
6 Debtors "have not adequately explained what happened to the large amount of money which
7 flowed into their hands prior to the filing of the petition, largely without any offsetting
8 expenses . . ."

9 The second claim is based on section 727(a)(4)(A); Plaintiffs allege that Debtors
10 fraudulently and knowingly made false oaths in connection with their bankruptcy case. The
11 Complaint contains multiple specific alleged false oaths made in the original and amended
12 schedules and statements of financial affairs and in testimony at the 341a hearing.

13 The Complaint describes Winick as dishonest and manipulative and alleges that he
14 improperly shielded himself from debt collection on account of his multiple personal
15 guarantees of loans to a business, Creative Capital Leasing Group, LLC ("Creative
16 Capital"). The Complaint further alleges an elaborate and long-established pattern of
17 improper conduct that commenced at least as far back as the 1994 formation of Creative
18 Capital. Plaintiffs assert that the scheme included Winick's lack of an official ownership
19 interest in Creative Capital (limiting exposure to creditors' judgments); disguise of his
20 compensation as predominantly loans, not salary (thus reducing income tax obligations as
21 well as exposure to creditors' judgments); and disguised compensation through the free use
22 of company-owned residences, a Mercedes, and credit cards (thus, reducing living
23

24 ¹ The Fourth Amended Complaint was filed and docketed (docket #60-2) on April 14, 2009 as
25 an attachment to Plaintiffs' Notice of Motion and Motion [for Leave] to File Fourth Amended
Complaint. Leave was granted after hearing held on May 19, 2009.

26 ² Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy
27 Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037,
28 as revised by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-
8, 119 Stat. 23. All references to the transcript of the trial and admitted exhibits in this adversary
proceeding, shall be cited as "Tr ___ : ___", and "Ex ___", respectively.

1 expenses). Plaintiffs argue that this scheme should have resulted in an accumulation of
2 assets with a value well beyond that disclosed in Debtors' schedules, and that Debtors failed
3 to satisfactorily explain this alleged deficiency.³
4

5 PROCEDURAL BACKGROUND

6 This Court held trial on October 20 and 21, 2009 ("Trial"). During Trial, Debtors
7 moved for admission into evidence of a box of documents collectively designated as Exhibit
8 A. In response to Plaintiffs' objection and after review of post-trial briefing on the issue, the
9 Court issued its Order Re: Admission Into Evidence of Defendants' Exhibit A ("Exhibit A
10 Order", docket #139). Pursuant to the Exhibit A Order, Plaintiffs filed a Request for
11 Limited Further Discovery,⁴ which the Court granted ("Further Discovery Order").⁵
12 Plaintiffs served and filed post-trial interrogatories on February 17, 2010 (docket #144), and
13 Debtors served and filed post-trial responses on March 15, 2010 (docket #146). Although
14 not provided for in the Further Discovery Order, Plaintiffs filed a response to Debtors'
15 responses on March 16, 2010 (docket #147-2).

16 Pursuant to the Further Discovery Order, evidence was deemed closed on March 19,
17 2010, and the Court took the matter under submission.

18 The Court has considered the testimony of the witnesses, the documentary evidence
19 submitted, including the papers authorized to be filed after Trial,⁶ and the arguments of
20 counsel. For the reasons set forth in this Memorandum Decision, the Court finds that
21

22
23 ³ Debtors' scheduled assets include their residence in University City, valued at \$980,000
24 (with a mortgage balance of \$312,749.72, and tax and judgment liens totaling in excess of
\$2 million); and miscellaneous personal property valued at \$49,972.64.

25 ⁴ See docket #141.

26 ⁵ See Order Allowing Limited Further Discovery by Plaintiffs, docket #142.

27 ⁶ As discussed in detail below, the Court reviewed these documents because they were
28 admitted, however the Court does not find them necessary to this decision due to the Court's
conclusion that Plaintiffs failed to carry their initial burden to identify missing assets.

1 Plaintiffs have failed to carry their burden on either statutory ground for denial of discharge.
2 Thus, the Court will award judgment to the Debtors and grant them discharges.

3
4 **FACTS⁷**

5 **A. Winick's Income and Resources**

6 In late 1994, Winick began working at Creative Capital where he acted in several
7 capacities, including as general counsel. Creative Capital was a limited liability company
8 that initially did equipment leasing and later also invested in real estate. Its original two
9 members were David and Daniel Winick, two of Debtors' three sons. The third son,
10 Michael, joined Creative Capital in 1998. Daniel Winick left the company in 1999.

11 From early on, and up until March 31, 2006 when his sons terminated his
12 employment,⁸ Winick received compensation from Creative Capital through a combination
13 of direct salary plus putative loans funded through David Winick's personal bank account.⁹
14 Winick testified that in the early 2000's the amount of the monthly loans ranged from
15 \$5,000 to \$7,000. By 2005, Winick's compensation had increased to \$10,000 per month in
16 loans plus \$4500 per month in salary. Winick offered inconsistent testimony regarding
17 whether the loans were to be repaid. When questioned by the Court about the interest rate
18 and terms for repayment, Winick was clearly surprised. He testified that he could not recall
19 if the loans included an interest rate provision and that the understanding was that the
20 obligation would have to be paid when Winick or one of his sons left Creative Capital.
21 Tr.257:21-25, 258:1-6.

22 The parties do not disagree that the total amount of compensation received by Winick
23 in the form of putative loans was slightly in excess of \$1,400,000 over the life of Winick's

24
25 ⁷ The following facts and discussion constitute the Court's findings of fact and conclusions of
law pursuant to Federal Rule of Bankruptcy Procedure 7052(a).

26 ⁸ Creative Capital itself filed a voluntary chapter 11 petition on September 10, 2007; and the
27 case was converted to chapter 7 on October 10, 2008.

28 ⁹ David Winick was not called as a witness at Trial.

1 association with Creative Capital from late 1994 to March 31, 2006, a span of 11 ¼ years.
2 Further, the parties agree that Plaintiffs' Exhibit 5 accurately represents a portion of the total
3 loan amount funded through David Winick's bank account over a 4 ¼ year period: \$26,145
4 in 2002; \$143,000 in 2003; \$204,000 in 2004; \$130,000 in 2005; and \$30,000 in the first
5 3 months of 2006; totaling \$533,145.

6 In addition, Plaintiffs questioned Winick at Trial about three promissory notes signed
7 by Winick in favor of David Winick dated 1996, 1997, and 1998, respectively.¹⁰ Plaintiffs
8 argue that these notes evidence an additional \$388,000 in loan proceeds for which Winick's
9 schedules do not account. Winick testified that he signed the documents, but that there was
10 no agreement that he would pay the amounts to David. Instead, "David needed it for a
11 purpose." Tr.163:5-6.

12 At Trial, Winick's counsel led Winick through a mathematical exercise of dividing
13 \$533,000 (evidenced in Exhibit 5) by 5 [years], to arrive at \$106,000 per year in loan
14 amount. Winick then testified that including his salary from Creative Capital (as to which
15 neither he nor Plaintiffs submitted evidence other than Winick's testimony that it was \$4500
16 per month in 2005 and 2006), he received an estimated \$150,000 to \$160,000 per year from
17 Creative Capital.

18 Based on Exhibit 5 and testimony during Trial (which is corroborated by Exhibit A),
19 the Court finds that the Debtors received at least the following amounts of compensation
20 and income:¹¹

21
22 ¹⁰ Plaintiffs did not present for review, nor seek admission of, the alleged promissory notes as
evidence at Trial.

23 ¹¹ Testimony and evidence for the time period 1994 to 2002 was very minimal and/or
24 generalized and the Court refuses to speculate in connection therewith. Exhibit A contained only
25 3 months of bank statements as to one USAA bank account for 2002. Exhibit A, however,
26 contained: 12 months of bank statements and checks on the USAA bank account for 2003; copies of
27 checks on the USAA bank account for 12 months in 2004; copies of some checks on the USAA
28 bank account for 2005; and four USAA bank statements for 2006. Plaintiffs argued that these
records are incomplete in themselves, only pertain to account(s) at USAA, and therefore should not
be relied upon by the Court as evidence that these were the only bank accounts of the Debtors
during this time period. Plaintiffs did not, however, submit evidence of any other bank accounts
held by the Debtors during this time period, nor did Plaintiffs attempt to provide "complete" records
themselves.

Year	Source	Amount
2003	Loans (from David)	\$143,000
	Salary (Creative Capital)	\$ 17,168 (net)
	Total	\$160,168
2004	Loans (from David)	\$204,000
	Salary (Creative Capital)	Unknown
	Soc Security	\$ 2,392
	Total	\$206,392
2005	Loans (from David)	\$130,000
	Salary (Creative Capital)	\$ 54,000 ¹²
	Soc Security	\$ 1,200
	Total	\$185,200
2006 (up to 3/31)	Loans (from David)	\$30,000
	Salary (Creative Capital)	\$11,392 (net)
	Total	\$41,392

The evidence submitted regarding Debtors' income¹³ for the balance of 2006, all of 2007, and the first half of 2008 (before the Petition Date) is contained primarily in Debtors' schedules ("Schedules") and statement of financial affairs ("SOFA"). Debtors disclosed in their original SOFA that in 2006, they received social security benefits of \$27,769, rent of \$34,800, and loans/gifts from family of an estimated \$120,000 – for a total of \$182,569. The amendments to the SOFA omitted information for 2006 entirely and showed a total of \$72,000 for 2007 from family loans and gifts (the original SOFA showed \$85,000); and for 2008: Adrian Winick loans of \$51,000, and \$9,000 loans from family, as of 6/30/08. Debtors also amended their Schedule I, to show social security benefits of \$14,600, unemployment benefits of \$3,468, and rental income of \$1500 for the same six-month period in 2008 – bringing the total for the first six months of 2008 to \$79,568.

¹² This number is based on Winick's testimony that he received \$4500 (gross) per month salary during 2005. The salary numbers for 2003 and 2006 were gleaned from the Creative Capital automatic deposits shown in Exhibit A.

¹³ The term "income" is used here simply for ease of reference, but a more accurate title might be "receipts" due to the inclusion of loans and gifts.

1 Presented in table form, these numbers are summarized as follows:

2

3

Year	Source	Amount
2006 (4/1 to 12/31)	Social Security	\$27,769
	Rent	\$34,800
	Family Loans/Gifts	\$120,000
	Total	\$182,569
2007	Family Loans/Gifts	\$72,000
2008 (to 6/30)	A. Winick Loans	\$51,000
	Family loans	\$ 9,000
	Social security	\$14,600
	Unemployment	\$ 3,468
	Rental	\$ 1,500
Total	\$79,568	

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14 As will be discussed below, the Plaintiffs argue that the Debtors fraudulently
15 disclosed the source of the family loans in 2007 and 2008 as coming from Adrian Winick.
16 There is no dispute that Debtors received no income from employment after the termination
17 of Winick's employment at Creative Capital as of the end of March 2006.¹⁴

18 **B. Other Financial Benefits From Creative Capital**

19 In addition to the compensation arrangement discussed above, Creative Capital also
20 provided compensation to Debtors by providing use of company real estate, a company car,
21 and a company credit card. Michael Winick testified convincingly that Creative Capital
22 paid for the purchase of a 2003 Mercedes Benz at Winick's request. Winick concedes that
23 Debtors paid nothing for the Mercedes, but testified that the previously owned vehicle
24 belongs to his wife despite the condition of title when Debtors filed their petition on July 15,
25 2008 (the "Petition Date"). Originally, both Creative Capital and Michael Winick were
26 named on title. Michael Winick testified that he gave the pink slip to Mrs. Winick in mid-

27

28 ¹⁴ Both Debtors appear to be of retirement age and on the Petition Date were receiving social security retirement benefits.

1 2007. Winick testified that title was not actually formally put into Mrs. Winick's name until
2 sometime after the Petition Date.

3 Michael Winick also testified that Creative Capital purchased two properties in its
4 name that his parents used as their residences for unspecified periods of time. In their
5 original SOFA, Debtors listed one of the properties, located at 500 West Harbor Dr.,
6 San Diego (the "City Front Condo"), as their residence from March 2002 to November
7 2006. Tovi Mosey, a witness called by Plaintiffs, testified that in her capacity as Office
8 Manager for Creative Capital from March 2003 to June 2006, she drafted (at Winick's
9 direction in 2004) a residential lease of the City Front Condo to the Debtors for one year
10 commencing January 2003. The lease payment was \$4500 per month. Creative Capital
11 evicted Debtors from the City Front Condo in late 2006 for non-payment of the rent.
12 Testimony at Trial established that over their nearly five-year occupancy of the City Front
13 Condo, Debtors made only thirteen \$4500 payments to Creative Capital.

14 Plaintiffs presented no evidence as to the dollar amount of personal expense charges
15 made by Winick to Creative Capital's credit card, nor the amount of reimbursements made.
16 On this topic, Plaintiffs' witness Ms. Mosey testified that if Winick used "something for
17 personal," it was included in a note that Winick would repay. Tr.77:8-12. Thus, while it
18 was argued that Winick received compensation in the form of unreimbursed use of a
19 company credit card, there was no evidence of any quantifiable benefit in this regard.

20 **C. The Debtors' Expenses**

21 Plaintiffs presented credible evidence that Debtors did not spend money traveling and
22 that their housing and car expenses were largely paid by Creative Capital. From there,
23 Plaintiffs conclude and argue that Debtors paid virtually no expenses out of the substantial
24 compensation from Creative Capital and, therefore, must have undisclosed assets. The only
25 evidence submitted as to the Debtors' expenses, other than testimony from Winick that he
26 and Mrs. Winick spent most of his annual earnings every year, is the box of bank documents
27 Debtors submitted as Exhibit A. Neither Plaintiffs nor Debtors provided any summary or
28 analysis of the Exhibit A documents, but left the Court to do its own review and evaluation.

1 The Plaintiffs, in their unauthorized response to the Debtors' responses to post-trial
2 interrogatories,¹⁵ correctly point out that the bank documents are only partial records, at
3 best. The balance of the Plaintiffs' final word on Exhibit A does not address expenses at all.
4 Instead it presents the mathematical route that Plaintiffs took, to conclude that there is
5 \$750,000,¹⁶ received over an eleven year pre-petition period, not accounted for by the
6 Debtors. Plaintiffs arrived at this number by allegedly averaging the amount of deposits
7 shown in Exhibit A to the USAA bank account for the years 2002, 2003 and 2006, roughly
8 \$150,000 annually, multiplying by 11 years; and subtracting the resulting \$1,650,000 total
9 from \$2,400,000 (which Plaintiffs arrived at by adding \$1,423,000 total loans from Creative
10 Capital, to estimated salary of another one-third,¹⁷ \$700,000, plus another estimated
11 \$400,000 from the three notes issued to David Winick).

12 As discussed in detail below, the Plaintiffs' assumptions and estimations, and the
13 mathematical conclusions based thereon, are speculative, at best, and do not meet their
14 heavy evidentiary burden to show the existence of missing assets.

15 **D. The Debtors' Bankruptcy Filing and Amendments**

16 Plaintiffs allege that Debtors knowingly and fraudulently made false oaths or
17 accounts in their original and amended Schedules and SOFAs and in Winick's testimony at
18 the first meeting of creditors. Specifically, the Plaintiffs argue that Debtors: understated
19 Winick's wages earned in 2006 by \$30,000; misstated ownership of the 2003 Mercedes
20 Benz; overstated monthly mortgage payments on Debtors' San Diego residence; grossly
21 inflated liabilities by inclusion of Creative Capital's liabilities;¹⁸ misrepresented the source

22 _____
23 ¹⁵ See Procedural Background, *supra*.

24 ¹⁶ This is the first time Plaintiffs presented \$750,000 as the amount missing.

25 ¹⁷ Plaintiffs argued that Winick's compensation from Creative Capital consisted of 1/3 salary
26 and 2/3 loans over the duration of his employment, but provided no evidence in this regard. Winick
27 testified that in the early 2000's the loan amounts were \$5,000 to \$7,000 per month. There was no
testimony regarding salary amount except Winick's testimony that in 2005 and 2006 his salary was
\$4500 per month (and that he also received loans of \$10,000 per month).

28 ¹⁸ At Trial, Plaintiffs advised the Court that they would not pursue their argument that Debtors'
inclusion of Creative Capital's liabilities constitutes a false oath or account under section

1 of payments of \$120,000 in 2006 and \$85,000 in 2007 as loans from Winick's cousin,
2 Adrian Winick; understated the amount involved in a pre-petition Florida real property
3 transaction and mischaracterized the transaction as an option to purchase rather than a
4 purchase; and failed to include large amounts of cash that Debtors must have accumulated –
5 all with the intent to mislead creditors into believing the Debtors were impoverished.

6 As to the \$30,000 additional income in 2006, Winick testified that it was actually
7 three \$10,000 loans from Creative Capital funded through David Winick's account (as
8 shown in Exhibit 5). He further testified that when he completed his original Schedules, he
9 did not remember having received the \$30,000 in 2006, which was the year his sons
10 terminated his employment at Creative Capital, evicted the Debtors from the City Front
11 Condo, and demanded return of the Mercedes.¹⁹

12 The Mercedes was scheduled in Schedule B with the parenthetical "title from
13 Michael Winick – not registered," valued at \$16,795.

14 In Schedule J, Debtors disclosed their monthly home mortgage payment as
15 \$2,880.45. Plaintiffs argued that inclusion of the mortgage payment on their Renaissance
16 Avenue residence, the amount of which they did not dispute, constitutes a fraud because the
17 Debtors had not been paying their mortgage payments and were, in fact, 8 months
18 delinquent. Debtors did not deny the delinquent status of their mortgage payments.

19 In an attempt to support their contention that Debtors misrepresented that Winick's
20 cousin Adrian Winick was the exclusive source of loans totaling \$120,000 in 2006 and
21 \$85,000 in 2007, Plaintiffs read into the record excerpts of deposition testimony of Adrian
22 Winick, who lives in Chicago and was not available to attend Trial. Winick participated in
23 the deposition telephonically and had no opposition to admissibility of the excerpts. Adrian
24 Winick's testimony, and this Court's evaluation of its significance, will be discussed below.

25 _____
26 727(a)(4)(A). Therefore, this argument will not be addressed further.

27 ¹⁹ Winick testified that at some point Mrs. Winick and he turned the keys to the Mercedes over
28 to the rabbi at their sons' synagogue and obtained a ride home from him. The Court is not able to
determine from the testimony when the keys were turned over.

1 Plaintiffs' case with respect to the Florida property transaction consisted primarily of
2 argument that Debtors paid \$14,800 as a cash deposit in connection with an unsuccessful
3 attempt to purchase a \$615,000 home, that this deposit was not disclosed in the Schedules,
4 and that Debtors inconsistently claimed to have no source of income or assets to complete
5 the purchase.

6 As to the "large amounts of cash" allegedly not accounted for, Plaintiffs relied on the
7 testimony and evidence that Winick received substantial income over an extended period of
8 time (11 years); and argument that Debtors had "virtually no expenses" and therefore,
9 should have cash which is clearly not disclosed on the Schedules. Only in Plaintiffs'
10 response to the post-trial interrogatory responses in connection with Exhibit A did Plaintiffs
11 quantify this amount as \$750,000.

12 On October 22, 2008, Debtors filed amendments to some of their Schedules and their
13 SOFA. Among the amendments is a "Corrected" Attachment to Schedule I, Statement of
14 Income for the 6 month period January 1, 2008 through June 30, 2008; and four pages
15 (only) of the SOFA form marked "AMENDED" at the bottom of each page. The first page
16 shows "Corrected" at the top and responds only to question #2 – disclosing "income other
17 than from employment or operation of business for 2007 and 2008 (as of 6/30/08)," with no
18 information as to 2006. The fourth page shows "Added" and responds only to question #10
19 – "Other transfers," to disclose \$10,000 transferred to Susan Parelman in Florida for
20 "(Deposit for Option to purchase land in Florida) Kept by Seller after Debtors' default."

21 Although the Plaintiffs based their case for denial of discharge primarily on the
22 theory that Winick engaged in an eleven-year scheme to avoid exposure to debt collection
23 efforts and their argument that Debtors necessarily had an undisclosed stash of cash and
24 assets (worth as much as \$750,000), the Court will first address the false oath allegations
25 under section 727(a)(4).
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DISCUSSION

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2 On objections to discharge, debtors are entitled to a strict construction of the statutory
3 grounds for objection because of the policy of giving debtors a fresh start. *Lansdowne v.*
4 *Cox (In re Cox)*, 41 F.3d 1294 (9th Cir. 1994). "The Code is designed to afford debtors a
5 fresh start, and we interpret liberally its provisions favoring debtors." *Bugna v. McArthur*
6 *(In re Bugna)*, 33 F.3d 1054, 1059 (9th Cir. 1994). A claim for denial of a discharge is
7 construed liberally in favor of the discharge and strictly against a person objecting to the
8 discharge. *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342 (9th Cir. 1986).
9 A creditor who asks the court to deny a debtor a discharge bears the burden of proving each
10 of the elements of the applicable denial-of-discharge provision. *Watman v. Groman (In re*
11 *Watman)*, 458 F.3d 26, 32 (1st Cir. 2006); Fed. R. Bankr. P. 4005.

12 **A. Elements and Legal Standard For Denial Of Discharge Pursuant To Section** 13 **727(a)(4)(A) – False Oath Or Account.**

14 Section 727(a)(4)(A) provides that "[t]he court shall grant the debtor a discharge,
15 unless— . . . (4) the debtor knowingly and fraudulently, in or in connection with the case—
16 (A) made a false oath or account; . . . " 11 U.S.C. § 727(a)(4)(A).

17 The plaintiff/objecting party must show that (1) the debtor made a false oath in
18 connection with the case; (2) the oath related to a material fact; (3) the oath was made
19 knowingly; and (4) the oath was made fraudulently. *Roberts v. Erhard (In re Roberts)*,
20 331 B.R. 876, 882 (9th Cir. BAP 2005). A false oath may involve a false statement or
21 omission in schedules. *Id.* "Materiality" is broadly defined to include false statements or
22 omissions that bear "a relationship to the debtor's business transactions or estate, or
23 concern[] the discovery of assets, business dealings, or the existence and disposition of the
24 debtor's property." *Fogal Legware of Switz., Inc. v. Wills (In re Wills)*, 243 B.R. 58, 62
25 (9th Cir. BAP 1999). Materiality may be found even absent direct financial prejudice to
26 creditors. *In re Roberts*, 331 B.R. at 883.

27 "Knowingly" means that the debtor's actions were deliberate and conscious. *Id.*
28 "Fraudulently" here is similar to common law fraud, however materiality replaces the

1 elements of reliance and proximate causation of damages. *Id. at 884*. To establish fraud,
2 the "creditor must show that (1) the debtor made the representations; (2) that at the time he
3 knew they were false; (3) that he made them with the intention and purpose of deceiving the
4 creditors; . . ." *Id.* Finally, the level of intent must be actual, not constructive and may be
5 established by circumstantial evidence or by inferences from a course of conduct. *Id.* [citing
6 *Devers v. Bank of Sheridan (In re Devers)*, 759 F.2d 751, 753 (9th Cir. 1985)].

7 "The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors
8 have accurate information without having to conduct costly investigations." *In re Wills*,
9 243 B.R. at 63. "The entire thrust of an objection to discharge because of a false oath or
10 account is to prevent knowing fraud or perjury in the bankruptcy case. As a result, the
11 objection should not apply to minor errors or deviations in testimony under oath." *Id.*
12 [citing William L. Norton, Jr., *NORTON BANKRUPTCY LAW AND PRACTICE 2D*
13 §74.11(1997)].

14 **B. Plaintiffs Fail To Meet Their Burden To Show That Debtors' Schedules,**
15 **Amended Schedules And Testimony Regarding 2006 Income, The Mercedes, Mortgage**
16 **Payment Obligations, Source Of Funds In 2006 & 2007, And Florida Property**
17 **Transaction Constitute Material False Oaths Or Accounts Made With Actual Intent**
18 **To Deceive Creditors.**

19 **1. 2006 Income – Neither Intentionally Nor Materially Misstated.**

20 In Debtors' response to question #1 in the original SOFA, Debtors stated that
21 Winick's wages in 2006 were \$24,750. Plaintiffs presented evidence at Trial that Winick
22 also received three \$10,000 checks from David Winick, which Plaintiffs argue constituted
23 an additional \$30,000 in wages. Winick conceded at Trial that he received the last three
24 \$10,000 monthly "loans" from David Winick in 2006, immediately before Creative Capital
25 terminated his employment. He also testified that he had simply forgotten the exact timing
26 of receipt of these checks when he prepared the SOFA in July 2008.

27 Nothing in Winick's demeanor during testimony on this question leads this Court to
28 believe that the Debtors intentionally omitted the \$30,000, nor did Plaintiffs present

1 circumstantial evidence from which the Court could reasonably infer such intent. The Court
2 finds that this omission was merely an oversight in light of the time lapse between receipt of
3 the loans and the Petition Date and was not an intentional omission.

4 In addition, even if intent could be circumstantially shown, Plaintiffs fail to show that
5 the omission of the \$30,000 amount received by Debtors in early 2006 was a material
6 omission. Plaintiffs did not establish that receipt of this amount from this source, if
7 disclosed, would have had any impact on creditors' ability to understand the Debtors'
8 financial affairs or transactions or on creditors' ability to discover other assets or to fully
9 investigate pre-bankruptcy dealings. Based on the undisputed facts, Winick received these
10 checks shortly before he lost employment. Plaintiffs offered no evidence that the \$30,000
11 was not used by the Debtors to cover living expenses, or that it was unused and intact
12 immediately pre-petition (almost two and one-half years later). Debtors both testified
13 consistently with their Schedules and SOFA that after Creative Capital terminated Winick's
14 employment, the Debtors relied heavily on gifts and loans from family and friends to cover
15 their living expenses pre-petition. Based on the evidence presented, the Court cannot find
16 that disclosure of the \$30,000 received in 2006 would have any impact on the creditors'
17 ability to investigate or understand the Debtors' financial transactions and, therefore,
18 concludes that this omission was not a material.

19 Based on the Plaintiffs' failure to establish that the omission of the \$30,000 received
20 in 2006 was an intentional and material omission, the omission is not grounds for denial of
21 discharge.

22 **2. Debtors Made No Misstatement Regarding The Mercedes.**

23 Debtors' Schedule B – Personal Property ("Schedule B") includes a "2003 Mercedes
24 220 (title from Michael Winick – not registered)." Plaintiffs argue that the 2003 Mercedes
25 should not have been included among Debtors' assets because it was registered to Creative
26 Capital and Michael Winick. On its face, the Debtors' disclosure of their interest in the
27 Mercedes is not inconsistent with the Plaintiffs' stated understanding of the status of the
28 registration and the Court finds no misstatement. During Trial, Michael Winick (who was

1 not a friendly witness for the Debtors), provided corroborating testimony that the Mercedes
2 was in his name and that title has since been placed in Mrs. Winick's name. Based on the
3 lack of any misstatement as to the Mercedes, the Plaintiffs' objection to discharge on this
4 ground must be denied.

5 **3. Debtors' Mortgage Payment Obligations Are Not Misrepresented.**

6 Plaintiffs' argument on this point reflects a misunderstanding of Schedule J
7 requirements. Schedule J requires that Debtors disclose the monthly payment contractually
8 due under their residential mortgage, not, as Plaintiffs apparently believe, the monthly pre-
9 petition mortgage payments actually made by the Debtors. There is no dispute that Debtors
10 were delinquent on their mortgage payments and no dispute as to the amount of the monthly
11 payments. Debtors' representation of the amount of their mortgage payment on their
12 residence is not false and, therefore, cannot support denial of discharge under section
13 727(a)(4)(A).

14 **4. Adrian Winick As Debtors' Source Of Funds In 2006 And 2007.**

15 Winick testified that Adrian Winick was more like a brother to him, as they had
16 grown up and gone to school together, and now continue to talk at least twice a week by
17 telephone. Tr.187:25 and 188:1-2; 220:14-21. Mrs. Winick referred to Adrian Winick as
18 their "angel" and credited him with keeping them off the street financially. Tr.359:7-15.
19 The Debtors' amended Schedule I includes \$10,000 per month income, "Loans from Adrian
20 Winick and Gifts from Others," and discloses the estimated loans from Adrian Winick to be
21 "\$6,000 per month until Jack Winick has income."

22 Plaintiffs argued that Adrian Winick was not the source of \$120,000 to the Debtors in
23 2006 and \$85,000 in 2007. The Court understands the point of this argument to be that if, as
24 Plaintiffs contend, Adrian Winick did not fund the Debtors during the years after Winick's
25 employment was terminated, then the Debtors must have used undisclosed (and unlocated)
26 stores of cash and assets to pay their living expenses and enable them to enter into the
27 purchase agreement for the \$615,000 property in Florida. Plaintiffs' counsel read parts of
28 Adrian Winick's deposition testimony into the record in an attempt to support this argument.

1 Much of the deposition testimony pertains to Exhibit 1 of the deposition, entered into
2 evidence at Trial as Exhibit 29, a declaration by Adrian Winick signed and dated June 29,
3 2008, stating, in part, that he had not provided any money to the Debtors in the "last five
4 years." Ex. 29. The deposition excerpts highlight facially inconsistent statements.²⁰
5 Debtors' counsel read conflicting testimony from the transcript into the record as well,
6 which included Adrian Winick's statements that he could not recall if he had provided
7 \$120,000 to the Debtors in 2006 (Tr.346:21-24 and 347:2-6); he could not recall the details
8 but he provided approximately \$85,000 to the Debtors in 2007 (Tr.347:10-15); and he
9 "probably didn't understand the question" when he answered differently to the questions in
10 the declaration (Tr.350:24-25 and 351:1-9).

11 Adrian Winick's deposition testimony is anything but clear to the Court and because
12 he did not testify in person the Court lacked the opportunity to make any assessment of his
13 demeanor. As a result, the Court gives little weight to Adrian Winick's testimony.
14 Notwithstanding the partially contradictory evidence, the Court finds that the Debtors'
15 testimony regarding Adrian Winick's financial assistance is believable.

16 Moreover, even if Adrian Winick were not the source of all or part of the funds
17 Debtors lived off of in 2006 and 2007, the Court would not find it to be a material issue
18 here. The answer to this question does not relate to the Debtor's business transactions, nor
19 does it concern discovery of assets or business dealings. There is no evidence that Debtors
20 had other employment income during this period. There is credible evidence, however, that
21 they were accustomed to a very comfortable lifestyle that was suddenly negatively
22 impacted. Thus, even if the Plaintiffs had shown that the Debtors had managed to
23 accumulate any amount of cash prior to termination, eviction, and loss of salary, the Debtors
24 would have likely consumed such accumulated cash rapidly absent Adrian Winick's

25 _____
26 ²⁰ For instance, Adrian Winick confirmed his response to question number 1 in his 6/29/08
27 declaration (Exhibit 29) that he had not provided any money to the Debtors in 2008, and yet brought
28 with him copies of three cancelled checks he had written to Jack Winick in March, April and May
of 2008, totaling \$19,000 (plus two additional \$6,000 checks written in July and September to Jack
Winick). Tr.331:2-24; Ex. 29.

1 financial support. The Court finds it believable, as discussed below, that Debtors consumed
2 what they received during Creative Capital's heyday, and then relied upon family before
3 ultimately filing bankruptcy.

4 In short, the Court finds that the Plaintiffs fail to prove that Debtors made a material
5 misstatement of their source of gifts/loans in 2006 and 2007.

6 **5. Debtors Did Not Materially Misstate The Nature Of The Florida Property**
7 **Transaction And Did Not Intentionally Omit Disclosure.**

8 The Plaintiffs go far afield to argue that Debtors' disclosure regarding the nature of
9 the Florida Property Transaction supports denial of their discharges. Plaintiffs' analysis was
10 not included in their trial brief, nor clear from their presentation at Trial. Based on the
11 Complaint, it appears to the Court that Plaintiffs believe that the Florida Property
12 Transaction, when viewed as a purchase transaction entered into by the Debtors "months
13 before they filed their Chapter 7" (Complaint 5:17-18), shows that Debtors were, or at least
14 considered themselves to be, financially able to purchase a \$615,000 residence, rather than
15 in poverty as depicted in their Schedules and SOFA. The focus of testimony at Trial was
16 the parties' characterization of the transaction as an option to purchase (Winick's position)
17 versus a purchase and rental until close of escrow (Plaintiffs' argument).

18 Plaintiffs submitted Exhibit 20 at Trial, which is titled "Residential Sale and Purchase
19 Contract" signed by the Debtors as "Buyer" and dated January 30, 2008. Exhibit 20
20 provides for purchase of the property with a one-year "escrow," a \$10,000 non-refundable
21 deposit to be applied to the purchase price and delivered to the seller; and additional non-
22 refundable deposits of \$5,000 each required to be made on May 1, 2008, August 1, 2008 and
23 November 1, 2008. In addition, Exhibit 20 includes a one-year lease between the Debtors
24 and the seller for \$2400 per month.

25 Debtors testified that they paid the \$10,000 deposit plus \$4,800 to the seller (first and
26 last month's rent); the funds were provided by Adrian Winick; and that the Debtors were
27 counting on Adrian Winick to assist them with completing the purchase. Tr.184:10-25,
28 185:1-15. The Debtors, however, moved back to San Diego soon thereafter, and into their

1 Renaissance Avenue residence, without completing any other terms of the contract. The
2 Debtors' original Schedules did not disclose the Florida Property Transaction. After the
3 341a meeting, Debtors filed an amended answer to question #10 on the Statement of
4 Financial Affairs on October 22, 2008, which shows \$10,000 transferred on 2/8/08 to Susan
5 Parelman in Florida for "(Deposit for Option to purchase land in Florida) Kept by Seller
6 after Debtors' default."

7 The Court finds the Debtors' interpretation and explanation of the Florida Property
8 Transaction to be reasonable. Plaintiffs presented no evidence from which the Court could
9 reasonably infer that the Debtors intentionally and knowingly failed to disclose the Florida
10 Property Transaction in their original Schedules and/or SOFA for purposes of deceiving
11 their creditors. Further, Debtors timely amended their SOFA. Finally, Plaintiffs offered no
12 evidence to contradict the Debtors' representations that the deposit and initial rent payments
13 were funded by Adrian Winick, not by Debtors' funds. This delayed disclosure had no
14 impact on the bankruptcy case. An "omission that has no impact on a bankruptcy case is not
15 material and does not provide grounds for denial of discharge under section 727(a)(4)(A)."
16 *Khalil v. Developers Sur. & Indem. Co. (In re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP
17 2007). Thus, Plaintiffs failed to carry their burden of proof to establish that Debtors should
18 be denied their discharges under section 727(a)(4)(A) based on the Florida Property
19 Transaction.

20 **C. Elements And Legal Standards For Denial Of Discharge Pursuant To**
21 **Section 727(a)(5) – Failure To Explain Loss Of Assets.**

22 Section 727(a)(5) provides that "the court shall grant the debtor a discharge, unless—
23 . . . (5) the debtor has failed to explain satisfactorily, before determination of denial of
24 discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's
25 liabilities; . . . " 11 U.S.C. § 727(a)(5). The objecting party bears the burden of proving that
26 the debtor's discharge should be denied by a preponderance of the evidence. *In re Khalil*,
27 379 B.R. at 172; Fed. R. Bankr. Proc. 4005. The objector has the initial burden of showing
28 the disappearance of identifiable assets no longer available for the debtor's creditors. *Nuvell*

1 *Credit Corp. v. Ross (In re Ross)*, 359 B.R. 690, 700 (Bankr. N.D.Ill. 2007). Once the
2 objector has met this initial burden by producing evidence establishing the basis for the
3 objection, the burden shifts to the debtor to provide a satisfactory explanation for the
4 disposition of the assets. *Chalik v. Moorfield (In re Chalik)*, 748 F.2d 616 (11th Cir. 1984);
5 The debtor's explanation must be more than "vague, indefinite, and uncorroborated
6 hodgepodge of financial transactions." *Baum v. Earl Millikin, Inc. (In re Baum)*, 359 F.2d
7 811, 814 (7th Cir. 1966); *Chalik*, 748 F.2d at 619 ("vague and indefinite explanations of
8 losses that are based upon estimates uncorroborated by documentation are unsatisfactory").

9 Here, Plaintiffs failed to carry their initial burden. Plaintiffs produced no evidence
10 establishing the disappearance of identifiable assets and therefore the burden never shifted
11 to the Debtors to explain anything.

12 **D. Plaintiffs Have Not Carried Their Burden To Show The Existence Of Missing**
13 **Assets.**

14 The Plaintiffs focused their case presentation on the income received by Winick over
15 Winick's eleven-year²¹ span of association with Creative Capital and other Creative Capital
16 financial perks he enjoyed during that time, much of which appear to have been tax-free.²²
17 The undisputed evidence supports the Plaintiffs' argument that the Debtors had substantial
18 income and several years of free housing and vehicle use at the expense of Creative Capital.
19 Substantial income and free housing, however, do not automatically equate to accumulation
20 of substantial assets.

21 Plaintiffs' burden under section 727(a)(5) requires that Plaintiffs prove the existence
22 of substantial missing assets, not missing income. Plaintiffs offered no evidence regarding
23 Debtors' living expenses. During Trial, Plaintiffs did establish the following: Debtors paid
24 only 13 months' rent during the nearly 5 years that they occupied the City Front Condo;
25 Debtors occupied two other properties owned by Creative Capital for unspecified periods of
26

27 ²¹ Plaintiffs presented no legal authority supporting their eleven-year look-back period.

28 ²² It is beyond the current purview of this Court to opine as to the tax implications of Winick's
compensation arrangement with Creative Capital.

1 time, which the Debtors testified were brief periods; Creative Capital purchased the
2 previously owned 2003 Mercedes (no evidence established the date of purchase), which
3 Mrs. Winick continues to own and for which Debtors paid nothing; and Winick used a
4 business credit card for personal matters, but according to Creative Capital's former office
5 manager, Ms. Mosey, he also reimbursed Creative Capital for all such personal use.
6 Plaintiffs urge the Court to infer from this limited evidence that Debtors had "virtually no
7 expenses." In essence, the Plaintiffs ask the Court to infer that Debtors did not incur
8 expenses for food, utilities, clothing, toiletries, insurance, medical care, medicine,
9 recreation, gifts – all the ordinary and necessary consumer expenses of everyday living. The
10 Court does not concur with Plaintiffs' suggested inference. The alternative inference, that
11 Debtors spent all they received, is at least equally supported by the evidence—and Plaintiffs
12 bear the burden on this topic.

13 Winick testified that he deposited his compensation from Creative Capital and spent
14 it on living expenses. Tr.261:15-23. Debtors offered Exhibit A to corroborate his
15 testimony. Even without the banking records, the Court finds ample evidence that the
16 Debtors had a very comfortable lifestyle, consistent with the high-end properties purchased
17 by Creative Capital, re-decorated by Mrs. Winick, and occupied by the Winicks. Plaintiffs'
18 argument that the Debtors must have built up pools of cash is not consistent with the
19 evidence that Winick had judgment creditors actively pursuing collection efforts, including
20 the IRS, who clearly has the resources and tools to locate secreted cash reserves.
21 Mrs. Winick testified that she has had to stop certain consumer practices since the Creative
22 Capital funds ceased to be available. The Court finds her testimony very credible. The
23 Debtors lived very well while Winick was associated with Creative Capital, but when his
24 sons terminated his employment, the high living had to come to a halt.

25 Because Exhibit A was admitted into evidence, the Court conducted a review of the
26 documents contained therein (neither party provided any summary or analysis of the data).
27 The bank records are incomplete, however, they corroborate the Debtors' testimony and if
28 anything support the conclusions otherwise reached by this Court.

1 For 2003, Debtors submitted 12 months of cancelled checks and 12 months of bank
2 statements on their joint bank account at USAA Bank. The checks total approximately
3 \$123,182. The statements also reflect approximately \$50,000 in debit card transactions.
4 The combined debit transactions total \$173,182.

5 For 2004, Debtors submitted cancelled checks on the Debtors' joint bank account at
6 USAA Bank covering the 12-month period. The checks total \$145,675. The Debtors did
7 not submit their bank statements for 2004 and the Court was unable to determine the amount
8 of Debtors' debit card activity in 2004.

9 The balance of the bank records include various cancelled checks (with dates ranging
10 from 2005 through 2008), a few other bank statements for the Debtors' joint account at
11 USAA Bank, and some bank records on a USAA bank account held in Mrs. Winick's name,
12 which appears to have been used solely to accept automatic deposits of Mrs. Winick's
13 monthly social security benefits commencing in 2004.

14 The Court finds the bank records in Exhibit A wholly consistent with Winick's
15 testimony that they spent what he received annually. There is no evidence that the Debtors
16 were not candid with the Court, and the Court notes that Winick even candidly gave
17 testimony not in his best interest (from an income tax perspective). Winick's testimony that
18 they spent what he received from Creative Capital was believable, and the Court finds
19 unreasonable the inference urged by the Plaintiffs that the Debtors had virtually no
20 expenses.

21 As a final argument contained in Plaintiffs' final response regarding Exhibit A, the
22 Plaintiffs appear to argue that if the Court were to accept the total deposits evidenced in
23 Exhibit A as the average amount of deposits Debtors made to this account during Winick's
24 association with Creative Capital, then the Court should find that Debtors have not
25 accounted for another \$750,000 that Plaintiffs allege Debtors received during the same
26 period. Substantiation of this \$750,000 amount would require that the Court find: Creative
27 Capital loans totaled \$1,423,000; Winick's salary totaled \$700,000; and Winick borrowed
28 another \$400,000 from David personally.

1 The only part of this argument that is supported by the evidence is the total amount of
2 Creative Capital loans, which Winick conceded was probably an accurate number. There is
3 no evidence to support Plaintiffs' conclusion that Winick's salary totaled \$700,000. There is
4 only testimony that during 2005 and 2006, his salary was \$4,500 per month. Plaintiffs
5 argued, but presented no evidence, that the ratio of Winick's loans to salary from Creative
6 Capital was, at all times, 2 to 1. The Court cannot and will not speculate as urged by the
7 Plaintiffs. As to the personal borrowings from David, Plaintiffs did not offer the three notes
8 into evidence. Winick testified that he signed the notes because David needed them for
9 another purpose. Moreover, even if the Court could find that Winick had borrowed the
10 money purportedly represented by the three notes, there is no testimony (credible or
11 otherwise) that the alleged personal borrowings were actually disguised additional income.

12 Further, and more importantly, this argument by Plaintiffs turns the burden of proof
13 under section 727(a)(5) on its head. Plaintiffs want the Court to conclude that there are
14 substantial missing assets and Debtors should be denied their discharges if the Debtors fail
15 to account for the disposition of all funds Debtors may have received over an eleven-year
16 period—in effect, requiring Debtors to prove that they did not accumulate substantial assets
17 during this period. The Code does not so require. As discussed earlier in this Memorandum
18 Decision, receipts do not equate to assets – and Plaintiffs must present evidence of missing
19 assets. They have not.²³ The burden to substantiate the disposition of missing assets never
20 shifted to the Debtors because Plaintiffs failed to prove the existence of missing assets in the
21 first instance. Having failed to do so, Plaintiffs' objection to the Debtors' discharges under
22 section 727(a)(5) also fails.

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26 ²³ The eleven-year look-back period is also troubling to the Court. There is no limitations
27 period in section 727(a)(5) itself, "but courts have held that the assets in question must at least have
28 belonged to the debtor 'at a time not remote in time to case commencement.'" *Cohen et al. v. Olbur*
(*In re Olbur*), 314 B.R. 732, 741 (Bankr. N.D. Ill. 2004) (citation omitted). Due to the Plaintiffs'
failure to identify any missing assets, this Court need not determine exactly how far back, short of
eleven years, would be too remote under the circumstances here.

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CONCLUSION

For the reasons discussed above, the Court concludes that Plaintiffs fail to meet their burden of proof, even without consideration of Exhibit A, and that denial of the Debtors' discharge is not appropriate. The Debtors should file a judgment consistent with this Memorandum Decision within ten days of entry hereof.

DATED: June 3, 2010


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court