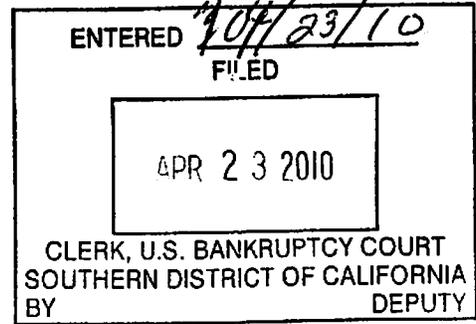


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: ) Bankruptcy No. 08-07659-LT7  
Samuel E. Singh, ) Adversary No. 08-90513-LT  
Debtor.

Marcus Family Law Center, PLC, )  
Plaintiff, ) MEMORANDUM DECISION  
v. )  
Samuel E. Singh, )  
Defendant.

Samuel E. Singh, )  
Cross-Claimant, )  
v. )  
Marcus Family Law Center, PLC and )  
Ethan Marcus, )  
Cross-Defendants.

1 **INTRODUCTION**

2 Plaintiff Marcus Family Law Center (hereinafter, "Creditor") seeks a determination  
3 that its claim against debtor Samuel Singh ("Debtor") is non-dischargeable under 11 U.S.C.  
4 § 523(a)(2)(A).<sup>1</sup> Creditor alleges that Debtor obtained legal services from Creditor through  
5 fraud. Creditor also seeks a determination that Debtor is not entitled to a discharge in his  
6 chapter 7 case under 11 U.S.C. § 727 (a)(2), (4), and (5). Creditor alleges that Debtor  
7 transferred assets in fraud of creditors, made false oaths in connection with this case, and  
8 failed to satisfactorily explain a loss of assets.

9 Debtor answered the complaint and filed a separate pleading captioned "Cross Claim  
10 to Determine Nondischargeability of Debt" (the "Cross Claim," docket #6). The Cross  
11 Claim purports to be an action under the Truth in Lending Act and seeks a damage award.  
12 Debtor alleges that Creditor and Ethan Marcus ("Marcus", and together with Creditor,  
13 "Cross-Defendants") failed to make allegedly required financial disclosures in connection  
14 with the Fee Agreement attached as Exhibit A to the complaint. The Cross-Claim alleges  
15 that the Fee Agreement contains a provision that requires payment of 1.5% interest on  
16 unpaid legal fees incurred during Creditor's legal representation of the Debtor.

17 Trial was held on November 19, 2009. Closing arguments were made in writing by  
18 post-trial briefs ("Closing Briefs"), and the Court took the matter under submission. The  
19 Court has considered the testimony and demeanor of witnesses at trial, the documentary  
20 evidence submitted, and the arguments of counsel in the Closing Briefs. For the reasons set  
21 forth in this Memorandum Decision, the Court now determines that Debtor's discharge must  
22 be denied under 11 U.S.C. § 727(a)(5). The Creditor has shown by a preponderance of the  
23 evidence that Debtor received a substantial cash payment on the eve of bankruptcy and that  
24

25  
26 <sup>1</sup> 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 –  
28 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 Debtor has not provided evidence of the use and/or location of a significant portion of such  
2 funds.

3 As to the Cross Claim, the Court declines to grant judgment for the reasons and  
4 grounds discussed below.

### 5 BACKGROUND

6 On August 28, 2006, Debtor retained the Creditor to represent him in connection  
7 with the dissolution of his marriage. In connection therewith, Debtor executed a Fee  
8 Agreement dated August 28, 2006. *See* Ex. 1. The Fee Agreement provides for monthly  
9 billing and payment of legal services at rates purportedly set forth in attached "Fee  
10 Schedules." Neither party submitted Fee Schedules at trial. The single-page Fee Agreement  
11 was signed solely by Debtor and provides that "[a]ny balance over one month past due shall  
12 be subject to a finance charge pursuant to Schedule J (which is subject to reasonable change  
13 without prior notice)." Neither party offered "Schedule J" at trial. The Fee Agreement also  
14 provides that Creditor "shall have a lien upon any money or property awarded or payable to  
15 [Debtor] in this proceeding for any sums due under this Agreement." Debtor provided a  
16 retainer of \$3,060, which he obtained through a credit card cash advance.

17 The dissolution was apparently acrimonious. Ultimately, Debtor advised Creditor  
18 that Debtor could no longer afford legal representation and terminated the relationship on  
19 approximately June 5, 2007. By this time, Debtor had paid all fees and costs to Creditor and  
20 had no outstanding balance owed. Ex. 2.

21 On approximately June 29, 2007, Debtor again contacted Creditor and requested  
22 assistance. Debtor was in critical need of legal services as his ex-wife had leveled charges  
23 of child abuse against him and, as a result, his access to his daughter had been severely  
24 limited. On July 2, 2007, Debtor paid another retainer to Creditor, this time in the amount  
25 of \$10,000. Once again, Debtor obtained these funds through a credit card cash advance.

26 Debtor's second retainer was depleted by October of 2007, and he made only small  
27 and infrequent payments thereafter due to his poor financial condition. Thus, the unpaid fee  
28 balance owed to Creditor grew. Debtor did, however, borrow \$6,200 from his brother in

1 order to pay the doctors making the evaluations and determinations regarding the child  
2 abuse charges. Based on the testimony of witness Cynthia Vallejo, one of Creditor's  
3 employees, the Court finds that Creditor knew that Debtor borrowed this amount from his  
4 brother. The evidence also is clear that at all relevant times the Debtor was candid with  
5 Creditor regarding his poor financial condition and his inability to pay Creditor's fees on an  
6 as-incurred basis.

7 As noted above, Debtor only made small payments during the course of the  
8 dissolution litigation whenever advance retainers had been exhausted. Creditor claims that  
9 Debtor accrued \$12,947.98 in unpaid fees. At some point in the representation, Ms. Vallejo  
10 discussed with Debtor the payment of legal fees through an assignment of an equalization  
11 payment owed to Debtor by his ex-wife (the "Equalization Payment"). The evidence of  
12 these conversations is murky,<sup>2</sup> but, at the earliest, it appears that the discussions occurred in  
13 February or March of 2008. By that time, the balance of unpaid legal fees was between  
14 \$9,900.59 and \$11,716.58. Ex. 2.<sup>3</sup> There is no evidence that Creditor had any prior  
15 discussions with Debtor regarding the Equalization Payment as a source of payment of fees  
16 incurred. After this discussion, Creditor provided additional legal services in an amount  
17 most likely between \$3,047.39 and \$1,231.40.<sup>4</sup>

18 Debtor received the Equalization Payment on June 27, 2008 in the amount of  
19 \$28,686.50. He used these funds to repay \$6,200 to his brother shortly after June 27, 2008;  
20 to make a down payment of \$12,500 on a new vehicle on July 4, 2008; and to pay a \$2,190  
21 retainer to his bankruptcy attorney on July 9, 2008. Debtor testified that any amounts in his  
22 bank account at the time of the filing were Equalization Payment proceeds as he did not  
23

24  
25 <sup>2</sup> Ms. Vallejo testified that she believed the discussion took place right before going to trial in  
April of 2008.

26 <sup>3</sup> The pages of Ex. 2 are not numbered. The amounts represent the ending balances shown as  
27 of February 29, 2008 and March 31, 2008, respectively.

28 <sup>4</sup> The amount differs depending on the actual date of the discussion.

1 have any other source of funds in excess of expenses. Consistent with this testimony, his  
2 schedule J reflects a net monthly income of negative \$195.61 ("Excess Expense Amount").

3 Debtor initiated his chapter 7 case on August 12, 2008 (the "Petition Date"). He  
4 scheduled a total of \$2,682.90 in his checking and savings accounts.

5 He also scheduled a retirement asset (the "QDRO") with an "unknown" value. Post-  
6 petition, Debtor informally negotiated a settlement of the QDRO asset with his ex-wife.  
7 The evidence establishes that under this settlement Debtor waived his right to any portion of  
8 his wife's retirement assets in exchange for her agreement that he retain 100% of his own  
9 retirement assets. The evidence also establishes that this settlement was favorable to his ex-  
10 wife and was not approved by the Court.

11 If one assumes that the entire amount in Debtor's accounts consists of Equalization  
12 Payment proceeds (after payment of all the foregoing itemized amounts, including two  
13 months of the Excess Expense Amount), then \$4,722.38 of the Equalization Payment  
14 remains unaccounted for by Debtor.

## 15 16 SECTION 727 DISCHARGE OBJECTIONS

### 17 A. Legal Standards for Denial of Discharge for Failure to Satisfactorily Explain 18 Loss of Assets – 11 U.S.C. § 727(a)(5).

19 Section 727(a)(5) provides that the court shall grant the debtor a discharge, unless:  
20 ". . . the debtor has failed to explain satisfactorily, before determination of denial of  
21 discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's  
22 liabilities." 11 U.S.C. § 727(a)(5). The objecting party bears the burden of proving that the  
23 debtor's discharge should be denied by a preponderance of the evidence. *Khalil v.*  
24 *Developers Sur. & Indem. Co. (In re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007);  
25 Fed. R. Bankr. Proc 4005.

26 A claim for denial of discharge under section 727 is construed liberally in favor of  
27 the debtor and strictly against those objecting to discharge. *Lansdowne v. Cox (In re Cox)*,  
28 41 F.3d 1294, 1297 (9th Cir. 1994). Nonetheless, the bankruptcy discharge is equitable in

1 nature and is intended only for honest debtors. *In re Adeeb*, 787 F.2d 1339, 1345 (9th Cir.  
2 1986). As one court noted: "The case authorities have frequently repeated the aphorism  
3 that bankruptcy entitles honest debtors to a fresh start, not a head start. And it is perhaps for  
4 that reason that the governing statute regards 'any loss . . . or deficiency of assets' (emphasis  
5 added) which is insufficiently explained to constitute a ground for denial of discharge."  
6 *In re Hacker*, 90 B.R. 994, 997 (Bankr. W.D. Mo. 1987).

7 The objecting party has the initial burden of showing the disappearance of  
8 identifiable assets no longer available for the debtor's creditors. *Nuvell Credit Corp. v. Ross*  
9 (*In re Ross*), 359 B.R. 690, 700 (Bankr. N.D. Ill. 2007). The burden then shifts to the debtor  
10 to satisfactorily explain the loss of those assets. *Id.* A bankruptcy court has broad power to  
11 deny discharge where the debtor does not satisfactorily explain a shortage, loss, or  
12 disappearance of assets. *Matter of D'Agnese*, 86 F.3d 732, 734 (7th Cir. 1996). Fraudulent  
13 intent need not be shown when a debtor fails to provide a satisfactory explanation.  
14 *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 365 (Bankr. N.D. Ill. 2002).

15 What constitutes a "satisfactory" explanation is left to the discretion of the court.  
16 *In re Ross*, 359 B.R. at 700. To be satisfactory, "a debtor's explanation must be a good faith  
17 explanation of what really happened to the assets in question." *Olson v. Potter (In re*  
18 *Potter)*, 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988); *and see In re Bostrom*, 286 B.R. at 364  
19 ("The court is not concerned with the wisdom of a debtor's disposition of assets, but is  
20 concerned with the truth, detail and completeness of the debtor's explanation of the loss.")

21 A debtor's explanation can only be satisfactory if it is "plausible enough to 'eliminate  
22 the need for the court to speculate as to what happened to all the assets.'" *D'Agnese*, 86 F.3d  
23 at 734. Thus, the debtor's explanation must consist of more than a "vague, indefinite and  
24 uncorroborated hodgepodge of financial transactions." *In re Baum*, 359 F.2d 811, 814  
25 (7th Cir. 1966). But, a debtor's explanation can be satisfactory without documentation  
26 corroborating the loss; although, the absence of records is relevant to the credibility of the  
27 explanation. *Strzesynski v. Devaul (In re Devaul)*, 318 B.R. 824, 840 (Bankr. N.D. Ohio  
28 2004).

1 **B. Creditor Has Established The Disappearance Of Identifiable Assets Of The**  
2 **Debtor.**

3 The Court finds that Creditor met its burden of proof and established that Debtor had  
4 identifiable assets of at least \$4,722.38 of cash proceeds that are no longer available for  
5 creditors. Creditor established this loss of Debtor's assets through the following: On  
6 June 27, 2008 – only 46 days prior to the Petition Date – Debtor received an Equalization  
7 Payment of \$28,686.50 from his ex-wife. At trial, Debtor admitted to making the following  
8 payments from the Equalization Payment: \$6,200 repayment to his brother; \$12,500 to  
9 Wachovia Dealer Services toward the purchase of a new truck; and \$2,190 to Debtor's  
10 bankruptcy attorney. The Court assumes that Debtor made two payments equal to Debtor's  
11 monthly budget shortfall and that all amounts in Debtor's two bank accounts (listed in  
12 Schedule B as \$5.00 and \$2,677.90) were paid from the Equalization Payment.

13 After deducting all of these payments and bank account balances from the  
14 Equalization Payment, the Court finds that the Debtor should have had at least \$4,722.38  
15 (the "Missing Money") remaining from the Equalization Payment. Therefore, the Court  
16 finds the Creditor has met its burden of establishing the loss of identifiable assets of Debtor.

17 **C. The Missing Money Is Substantial (If Substantiality Must Be Established).**

18 The Court recognizes that some jurisdictions require that the debtor's lost assets be  
19 substantial assets; while other jurisdictions make no reference to the substantiality of the  
20 assets in question. For those jurisdictions that do require that the assets be substantial in  
21 order to justify denial of discharge, no further guidance is provided as to what distinguishes  
22 substantial assets from non-substantial assets; the courts' only focus is on whether the  
23 debtor's explanation is satisfactory. The rare cases where substantiality is at issue tend to  
24 involve assets with no appreciable value. *See Farmers Nat'l Bank of Canfield v. Kolbfleisch*  
25 *(In re Kolbfleisch)*, 97 B.R. 351, 356 (Bankr. N.D. Ohio 1989).

26 Because section 727(a)(5) refers to "any" loss or deficiency of assets, this Court  
27 believes substantiality can be established, if necessary, with minimal difficulty in most  
28 cases. True, much of the case law involves lost assets of higher value than in the present

1 case. This Court, however, believes that a cash asset is substantial for section 727(a)(5)  
2 purposes unless the value of the lost assets is only nominal.

3 Here, the Court finds it particularly significant that the lost assets consisted of cash,  
4 which would have been immediately available to creditors and required little or no  
5 administrative expense to recover, liquidate, and distribute. Also, the Court notes that  
6 Debtor received this cash a very short time before filing this case. Thus, his inability to  
7 explain this loss of funds further supports a substantiality finding.

8 Decisions discussing the materiality requirements of section 727(a)(4) also suggest a  
9 low threshold for substantiality. "A false statement is a material fact if it bears a  
10 relationship to the debtor's business transactions or estate, or concerns the discovery of  
11 assets, business dealings, or the existence and disposition of the debtor's property." *Fogal*  
12 *Legware of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 58, 62 (9th Cir. BAP 1999). "A  
13 false statement or omission may be material even if it does not cause direct financial  
14 prejudice to creditors." *Id.* at 63. Applying a similar standard here, the Missing Money is  
15 clearly substantial, as it (or assets purchased with this cash) clearly would be part of  
16 Debtor's estate if identified.

17 For all the above reasons, plus the fact that Debtor's counsel bewilderingly  
18 acknowledges that case law holds that any amount over \$1,000 is substantial (although no  
19 citation is provided), this Court finds that the Missing Money is substantial for the purposes  
20 of a section 727(a)(5) analysis.

21 **D. Debtor Does Not Satisfactorily Explain The Loss Of Assets.**

22 The Court finally finds that Debtor fails to provide a satisfactory explanation for the  
23 loss of the Missing Money and is, therefore, appropriately denied discharge under  
24 section 727(a)(5). The Court does not deny discharge because Debtor improperly used these  
25 funds. Instead, discharge denial is appropriate because Debtor provides no evidence of the  
26 use and/or location of the Missing Money. Debtor provides no documentation establishing  
27 that he still holds these assets. Debtor fails to account for use of these assets. Debtor was  
28 provided the opportunity to explain the loss of assets at trial. The Court does not find

1 Debtor's explanation to be satisfactory as it is does not establish a good faith effort by  
2 Debtor to explain the loss of assets and is not plausible enough to no longer require the  
3 Court to speculate as to what happened to the assets.

4 At trial, Debtor admitted to three payments made from the Equalization Payment.  
5 When asked where the remaining funds were, Debtor testified that the remaining funds  
6 stayed in the account. Based on Debtor's account balance, they clearly did not. The only  
7 testimony Debtor provides as to further disposition of the Equalization Payment was that he  
8 repaid "multiple people" from whom he had borrowed money in the amounts of "a hundred  
9 here, forty there, but, no, it was nothing significant." Tr.46:1-2. Debtor then stated, "But  
10 the rest of the money was basically in the account." Tr.46:2-3.

11 The Court finds this explanation wholly unsatisfactory. As the Court has already  
12 noted, \$4,722.38 should have remained.<sup>5</sup> As to Debtor's claims that the remaining  
13 Equalization Payment funds were in his bank account, Debtor provides no records to that  
14 effect and his schedules are inconsistent with this assertion. While documentation is not a  
15 requirement of a satisfactory explanation, when a debtor claims missing assets are in a bank  
16 account the absence of documentary proof is a substantial impediment to giving credibility  
17 to the debtor's explanation. And the testimony regarding other payments is nothing more  
18 than a "vague, indefinite and uncorroborated hodgepodge of financial transactions." Even if  
19 Debtor made some of these indefinite small disbursements of funds, the Court finds that the  
20 Debtor's testimony indicates that more of the Missing Money should have remained in  
21 Debtor's possession.

22 Further, the short time period between the payment of the Equalization Payment  
23 (June 27, 2008) and the Petition Date (August 12, 2008), leaves the Court further perplexed  
24 as to why Debtor is unable to provide *any* distinct details to explain the loss of cash. The  
25 Court finds it suspicious that the Debtor almost entirely depleted the Equalization Payment

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27 <sup>5</sup> It should again be emphasized that this amount could be larger as the Court only arrives at  
28 the amount of \$4,722.38 after generously assuming the Excess Expense Amount for two months  
came solely from the Equalization Payment.

1 immediately prior to filing for bankruptcy. The depletion is only made more suspicious by  
2 Debtor's inability to provide anything other than vague and uncorroborated descriptions of  
3 his financial transactions during this short period of time. The Court determines that the  
4 time period was short enough that Debtor should be able to recollect and provide, at the very  
5 least, some minimum detail as to where the Missing Money went.

6 Without the ability to show the Missing Money in his bank accounts and without any  
7 additional, even mildly detailed, explanation of where the assets may have gone, Debtor not  
8 only provides an unsatisfactory explanation for the disappearance, Debtor essentially fails to  
9 provide any explanation at all. And finally, the surrounding circumstances do not allow the  
10 Court to independently reach a reasonable inference as to where this Missing Money may  
11 have gone. For instance, in Debtor's Schedule J, he reports a monthly net income of  
12 negative \$195.61. This small monthly income negative does not allow the Court to infer  
13 that Debtor consumed the lost assets through ordinary living expenses over a period of less  
14 than two months.

15 Consequently, because the Court finds Debtor's explanation of loss of assets  
16 insufficient, the Court denies discharge to the Debtor pursuant to section 727(a)(5).

17 **E. Creditor's Claims Under 11 U.S.C. § 727(a)(2)(A) and (a)(4)(A) Fail.**

18 Due to the Court's decision to deny discharge under section 727(a)(5), determinations  
19 based on the section 727(a)(2)(A) and (a)(4)(A) grounds for denial of discharge have no  
20 effect on the outcome of this adversary proceeding. Nonetheless, the Court finds that the  
21 Creditor fails on these particular causes of action and provides a brief analysis.

22 The Court finds that the Debtor did not transfer property within one year before filing  
23 bankruptcy with the requisite intent to hinder, delay, or defraud creditors. Creditor alleges  
24 that Debtor paid his brother and purchased a new truck with the intent to hinder, delay, or  
25 defraud Creditor because both transfers occurred only a few months prior to the Petition  
26 Date. The Court does not agree.

27 There is nothing in the Bankruptcy Code that prevents the Debtor from spending  
28 money prior to the Petition Date. Creditor provides no evidence establishing that Debtor

1 had the requisite intent to hinder, delay, or defraud, other than the timing of these payments.  
2 Debtor contends that the payment made to his brother was an appropriate repayment for a  
3 loan and that the purchase of the truck was necessary to replace his old, broken down  
4 vehicle. The Court finds Debtor's testimony honest and credible in this regard and  
5 concludes that Debtor made these transfers for appropriate reasons and not with intent to  
6 hinder, delay, or defraud creditors.<sup>6</sup>

7 As to the Missing Money, the evidence is inconclusive. It is not clear that it was  
8 transferred. And intent to defraud was not shown. On this record, denial of discharge under  
9 section 727(a)(5) is more appropriate.

10 Creditor also alleges that Debtor made a false oath or account in connection with the  
11 case by listing the value of the QDRO as "unknown" in his bankruptcy schedule and by not  
12 accounting for the Missing Money in his schedules. The Court finds the evidence  
13 insufficient to establish that Debtor made either of these statements with the requisite  
14 fraudulent intent to deceive creditors as required by section 727(a)(4)(A). First, the Court  
15 has already stated its opinion with regards to the Missing Money in its discussion of  
16 Creditor's section 727(a)(5) cause of action. The Court found Debtor's explanation as to the  
17 whereabouts of the Missing Money to be unsatisfactory. But, the Court finds that Creditor  
18 did not prove the requisite fraudulent intent.

19 Second, the Court does not find Debtor's scheduled valuation of the QDRO payment  
20 as "unknown" to have been fraudulent and/or made with the intent to deceive. The Court  
21 finds that Debtor honestly did not know the value of the QDRO payment at the Petition  
22 Date. Although no specific date has been established, Debtor's testimony did provide that  
23 the QDRO payment was not received until sometime after Debtor filed for bankruptcy.  
24 Furthermore, absent the request of the trustee, Debtor has no ongoing duty to update the  
25 trustee as to the value of an asset listed as "unknown" in his schedules. *In re Adair*,

26

27

28 <sup>6</sup> The Court also notes that any harm to creditors from these pre-petition transfers can be reduced. See 11 U.S.C. § 547(b).

1 253 B.R. 85, 89 (9th Cir. BAP 2000). Denial of discharge under section 727(a)(4)(A) is not  
2 appropriate.

3  
4 **SECTION 523(a)(2)(A) NON-DISCHARGEABILITY CLAIM**

5 **A. Debtor Did Not Intend To Defraud Creditor.**

6 The Court's denial of discharge under section 727(a)(5) renders a decision on the  
7 section 523(a)(2)(A) claim for non-dischargeability of debt unnecessary. Notwithstanding,  
8 the Court finds that the Creditor fails on its section 523(a)(2)(A) cause of action and, again,  
9 provides a brief analysis.

10 "A discharge under section 727 of this title does not discharge an individual debtor  
11 from any debt . . . for money, property, services, or an extension, renewal, or refinancing of  
12 credit, to the extent obtained by . . . false pretenses, a false representation, or actual  
13 fraud . . ." 11 U.S.C. § 523(a)(2)(A). To prove actual fraud in the Ninth Circuit, a creditor  
14 must establish each of the following elements: (1) that the debtor made the representations;  
15 (2) that at the time he knew they were false; (3) that he made them with the intention and  
16 purpose of deceiving the creditor; (4) that the creditor relied on such representations; [and]  
17 (5) that the creditor sustained the alleged loss and damage as the proximate result of the  
18 representations having been made. *Britton v. Price (In re Britton)*, 950 F.2d 602, 604  
19 (9th Cir. 1991). The creditor must prove each element by a preponderance of the evidence.  
20 *Grogan v. Garner*, 498 U.S. 279, 290 (1991).

21 Courts must be particularly concerned with promises made at debt origination as:  
22 "courts naturally are concerned lest every breach of contract be levered into fraud by the  
23 too-facile expedient of asking the jury to infer from the fact that the defendant did not  
24 perform his promise that he never intended to perform it. So the rule has grown up that  
25 nonperformance is not enough to ground such an inference; there must be additional  
26 evidence of the defendant's intentions at the time he made the promise." *Milwaukee Auction*  
27 *Galleries, Ltd. et al. v. Chalk*, 13 F.3d 1107, 1109 (7th Cir. 1994).

1           The debtor's intent to deceive may be inferred by circumstantial evidence under the  
2 "totality of the circumstances" test. Under the relevant test, the Court "may infer the  
3 existence of the debtor's intent not to pay if the facts and circumstances of a particular case  
4 present a picture of deceptive conduct by the debtor." *In re Eashai*, 87 F.3d 1082, 1087  
5 (9th. Cir. 1996). Neither the debtor's testimony about his subjective intent nor any objective  
6 inferences drawn from the circumstances is, by itself, legally dispositive. *In re Ettell*,  
7 188 F.3d 1141, 1145 (9th. Cir. 1999). The Court must balance the objective evidence  
8 against the witness's testimony and credibility. *Id.*

9           The Court finds that Creditor is unable to establish that Debtor intended to defraud  
10 Creditor at the time of making the alleged misrepresentations. Creditor relies on three  
11 instances of alleged misrepresentation: 1) Debtor agreed to and signed the Fee Agreement,  
12 agreeing to pay all fees incurred; 2) on multiple occasions, Debtor misrepresented that he  
13 would use the Equalization Payment to satisfy his debts to Creditor; and 3) Debtor  
14 misrepresented that he would use the QDRO payment to satisfy his debts to Creditor. The  
15 Court finds that none of the three scenarios, either individually or collectively, establish that  
16 Debtor intended not to pay Creditor at the time of making the alleged misrepresentations.

17           First, the Court finds that Debtor intended to pay Creditor at the time of signing the  
18 Fee Agreement on August 28, 2006. Immediately after signing the Fee Agreement, Debtor  
19 made payments to Creditor, and, as of July 31, 2007, Debtor had paid Creditor in full for all  
20 fees incurred. Ex. 2.<sup>7</sup> The Court finds the Debtor's payments and his trial testimony to be  
21 conclusive evidence that Debtor did not sign the Fee Agreement with an intent not to pay  
22 Creditor.

23           Second, the Court does not find that the Debtor intended not to pay Creditor at the  
24 times of making the various alleged representations that Debtor would use the Equalization  
25 Payment to satisfy his debts to Creditor. The Court is skeptical that any representations  
26 made by Debtor were affirmative promises that the Equalization Payment would be used to

27 \_\_\_\_\_  
28 <sup>7</sup> Invoices dated September 29, 2006 and July 31, 2007.

1 pay his debts. The representations seem to consist, more correctly, of Debtor being coaxed  
2 into acknowledging that the Equalization Payment could be used to pay his debts.

3 The testimony by Ms. Vallejo is the only evidence suggesting that Debtor made any  
4 affirmative promise to use the Equalization Payment to satisfy his debts. But, Ms. Vallejo  
5 was uncertain as to when, specifically, Debtor made such representation, stating that she  
6 believed it was right before Debtor's dissolution trial, which occurred in April 2008.<sup>8</sup> The  
7 Creditor's only remaining evidence of Debtor's alleged misrepresentations consists of  
8 multiple accounts of the following: Debtor expressing concerns to Creditor regarding his  
9 ability to pay his legal fees; Debtor being reassured that the Equalization Payment would be  
10 available to pay any incurred fees; Debtor hesitantly agreeing/acknowledging that the  
11 Equalization Payment would be available. In fact, at trial Ms. Martinez, the attorney  
12 directly representing Debtor in the dissolution, admitted that Debtor never affirmatively  
13 promised to pay with the Equalization Payment, but rather she assumed that Debtor would  
14 use the Equalization Payment for such payment. Tr.139:19-25. Due to the lack of specific  
15 accounts of Debtor affirmatively promising to use the Equalization Payment to settle his  
16 account, the Court is of the opinion that the Debtor merely acknowledged the availability of  
17 the Equalization Payment to satisfy his debts. Furthermore, the Court believes, at most, that  
18 Debtor doubted his ability to pay his debts; but the Court finds this to fall far short of the  
19 requisite intent not to pay Creditor.

20 Third, the Court does not find that Debtor intended not to pay Creditor at the time of  
21 the alleged representation that Debtor would use the QDRO payment to satisfy his debts.  
22 The only evidence regarding the alleged QDRO representation involves a phone  
23 conversation between Debtor and Ms. Vallejo on June 10, 2008. There is conflicting  
24 evidence as to whether Debtor made a promise to use the QDRO to pay his debts or whether  
25 Debtor only asked the status of the QDRO payment recovery. Furthermore, the Creditor  
26 cannot establish detrimental reliance on this statement; Creditor ceased providing services to

27 \_\_\_\_\_  
28 <sup>8</sup> Given this timing, Plaintiff could establish detrimental reliance as to only \$759.75. All other fees were generated prior to any alleged fraudulent representation by Debtor.

1 Debtor prior to this time as no further charges were imposed on Debtor after the May 31  
2 2008 invoice. Ex. 2. Given these uncertainties, the Court finds the alleged representation  
3 regarding QDRO payment to be insufficient to establish non-dischargeability under  
4 section 523(a)(2)(A).

5 Thus, under the totality of the circumstances, the Court finds insufficient evidence  
6 from which to infer that Debtor intended not to pay Creditor. Further, Creditor cannot  
7 establish the requisite reliance. Therefore, the Court finds that Creditor's  
8 section 523(a)(2)(A) action fails.

## 10 ENFORCEABILITY OF FEE AGREEMENT AND CHARGING LIEN

### 11 A. Creditor's Fee Agreement Is Voidable At Debtor's Option.

12 The Court finds that Creditor's Fee Agreement fails to comply with California  
13 Business & Professions Code § 6148(a) due to Creditor's failure, at the time of contract, to  
14 provide Debtor with a duplicate copy of the contract signed by both the attorney [Creditor]  
15 and the client [Debtor]. Creditor admits its failure to sign the Fee Agreement. Therefore,  
16 the Court finds the Fee Agreement to be voidable at the option of Debtor. See Cal. Bus. &  
17 Prof. Code § 6148(c).

18 If Debtor opts to void the Fee Agreement, Creditor remains entitled to collect a  
19 reasonable fee. Cal. Bus. & Prof. Code § 6148(c). In light of the denial of Debtor's  
20 discharge, the Court believes that determination of the amount of a "reasonable fee" for  
21 Creditor's service would be best handled by the parties and, if necessary, by the state court.<sup>9</sup>

### 22 B. Creditor's Charging Lien Is Unenforceable.

23 The Court's determination that the Fee Agreement is voidable at Debtor's option  
24 renders moot the Creditor's alleged charging lien in the event Debtor exercises his option.  
25 Even if the Debtor were not to exercise this option, however, the Court finds that the

26  
27 <sup>9</sup> The chapter 7 trustee appointed in Debtor's bankruptcy case filed a Report of No  
28 Distribution, concluding that there are no assets to administer for the benefit of creditors of the  
estate, and rendering it unnecessary for any creditors to file proofs of claim. (Docket #10).  
Therefore, determination of the Creditor's fee amount would have no impact on the administration

1 Creditor's asserted lien is a lien adverse to the interest of the client, Debtor, and is, therefore,  
2 unenforceable based on Creditor's failure to comply with the requirements of California  
3 Rule of Professional Conduct 3-300 ("Rule 3-300"). See *Fletcher v. Davis*, 33 Cal. 4th 61  
4 (2004).

5 The Creditor's lien is a charging lien because it is a security interest in the proceeds  
6 of Debtor's litigation. Creditor, by securing payment of fees under the Fee Agreement  
7 through acquisition of a charging lien against Debtor's future judgment or recovery, thereby  
8 acquired an interest adverse to Debtor. Therefore, under governing California state law,  
9 Creditor is required to comply with the requirements of Rule 3-300 to have an enforceable  
10 lien.

11 Creditor failed to comply with requirement (B) of Rule 3-300, and, therefore,  
12 Creditor's lien against the proceeds of Debtor's litigation (in effect, the Equalization  
13 Payment) is unenforceable. Rule 3-300(B) requires that Creditor, *in writing*, advise Debtor  
14 that he may seek the advice of an independent lawyer. The Fee Agreement provided by  
15 Creditor and signed by Debtor contains no such provision. Creditor provides no other  
16 evidence of compliance with this requirement. Therefore, the Court finds that Creditor's  
17 charging lien is unenforceable against Debtor.

18 The Court briefly addresses Creditor's argument that the lien as to the retainer  
19 agreement should be evaluated solely under Rule 4-200 and the unconscionability standard,  
20 because Rule 3-300 makes reference to Rule 4-200. The Court finds that Creditor has  
21 misinterpreted Rule 3-300. In the discussion section following Rule 3-300, a comment  
22 states that: "Rule 3-300 is not intended to apply to the agreement by which the member is  
23 retained by the client, *unless* the agreement confers on the member an ownership,  
24 possessory, security, or other pecuniary interest adverse to the client. Such an agreement is  
25 governed, in part, by rule 4-200." Comment, Cal. Rules Prof'l Conduct, Rule 3-300 (2010)  
26 (emphasis added). Although compliance with Rule 4-200 is also required, this does not  
27 mean, as Creditor alleges, that Rule 3-300 no longer applies. Fees charged may never be

28 \_\_\_\_\_  
of the case.

1 unconscionable, and in addition, if an interest adverse to a client is undertaken, then the  
2 requirements of Rule 3-300 must be met. Here, Creditor never complied with at least one  
3 requirement of Rule 3-300. Argument that the fees are not unconscionable does not  
4 overcome this deficiency.

5  
6 **CROSS-CLAIM – ALLEGED TRUTH IN LENDING ACT VIOLATION**

7 Debtor presented no evidence at trial, and made no legal arguments, in either his trial  
8 brief or Closing Brief, to support the Cross-Claim. The Cross-Claim itself is a two-page  
9 minimal pleading.<sup>10</sup> Lacking evidence and/or legal argument, the Court finds no basis to  
10 award any judgment to Debtor on the Cross-Claim. Based on the Court's independent  
11 review, the Court concurs with the argument presented in Creditors' Closing Brief that the  
12 Truth in Lending Act is inapplicable to Creditor's business relationship with Debtor.<sup>11</sup>  
13 Creditor appears to have made this argument purely in an abundance of caution in light of  
14 the lack of evidence or argument advanced by Debtor at trial.

15  
16 **CONCLUSION**

17 Based on the foregoing, the Court finds that Creditor is entitled to judgment denying  
18 Debtor's discharge under 11 U.S.C. § 727(a)(5) and that Debtor is not entitled to judgment  
19 under the Cross-Claim. Creditor must provide a form of judgment to the Court within  
20 fourteen days of this Memorandum Decision.

21 DATED: April 23, 2010

  
22 LAURA S. TAYLOR, JUDGE  
23 United States Bankruptcy Court

24 <sup>10</sup> The factual allegation in the Cross-Claim that the Fee Agreement provides for payment of  
interest at the rate of 1.5% per month is not supported by the Court's review of Exhibit 1.

25 <sup>11</sup> Section 1602 of Title 15, in relevant part provides that: "creditor' refers only to a person  
26 who both (1) regularly extends, whether in connection with loans, sales of property or services, or  
27 otherwise, consumer credit which is payable by agreement in more than four installments or for  
28 which the payment of a finance charge is or may be required, and (2) is the person to whom the debt  
arising from the consumer credit transaction is initially payable on the face of the evidence of  
indebtedness or, if there is no such evidence of indebtedness, by agreement." 15 U.S.C. § 1602(f).  
Debtor presented no evidence that Creditor (a law firm) fits within this definition.