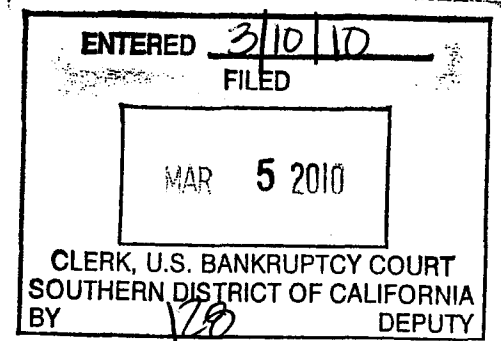


WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re:	}	Bankruptcy No. 08-09182-LT7
Jay Gedanken and Mara Boras-Gedanken		Adversary No. 08-90511-LT
Debtors.		
<hr/>		
Gayle Griffith	}	MEMORANDUM DECISION
Plaintiff,		
v.		
Jay Gedanken and Mara Boras-Gedanken		
Defendants.		

Gayle Griffith ("Plaintiff") seeks a determination that her claim against debtors Jay Gedanken and Mara Boras-Gedanken (collectively, "Debtors") is nondischargeable under 11 U.S.C. § 523(a)<sup>1</sup> because it arises out of prepetition fraud and/or willful and malicious injury by Debtors and/or that Debtors are not entitled to a discharge under 11 U.S.C.

<sup>1</sup> Hereinafter, references to code sections refer to Title 11 of the United States Code, also referred to as the "Bankruptcy Code", unless otherwise specified. References to rules refer to the Federal Rules of Bankruptcy Procedure, unless otherwise specified. References to the transcript of the trial in this matter, docket ##\_\_ and \_\_\_, are abbreviated "Tr. \_\_\_\_:\_\_\_\_-\_\_\_\_."

1 § 727(a) as a result of their failure to properly disclose assets and liabilities, maintain  
2 records, and/or based on false oaths.

3 The Court heard over three days of testimony in this matter, received significant  
4 evidence both oral and documentary, reviewed the arguments of the parties both written and  
5 oral, including written post-trial closing argument from each party ("Closing Argument"),  
6 and now determines that judgment for the Debtors is appropriate.

### 8 BACKGROUND

9 Debtor Jay Gedanken ("Mr. Gedanken") was the 100% shareholder, sole officer, and  
10 sole director of a mortgage brokerage, Amerifund USA, Inc. ("Amerifund, Inc.").  
11 Amerifund, Inc. utilized several dbas and employed numerous individuals. Mr. Gedanken  
12 freely admits, however, that he made operational errors in connection with Amerifund, Inc.  
13 Such errors, coupled with a downturn in the general economy and the mortgage industry in  
14 particular, caused Amerifund, Inc. to fail in 2007.

15 On June 15, 2007, Mr. Gedanken as the sole shareholder, officer, and director  
16 authorized Amerifund, Inc. to terminate all employees, close the office, and liquidate all  
17 physical assets. The bank records of Amerifund, Inc. produced at trial are consistent with  
18 this directive as the records of three bank accounts, including the payroll account, last show  
19 activity in May of 2007 and the other, an escrow account, shows limited activity thereafter  
20 and no activity shortly thereafter. Mr. Gedanken liquidated Amerifund, Inc.'s personal  
21 property assets, collected Amerifund, Inc.'s monies, and paid certain liquidation proceeds to  
22 himself.

23 Plaintiff was a contract employee of Amerifund, Inc. and received commission based  
24 compensation. The exact commission percentage varied during the time of her employment.  
25 It is clear, however, that she was not a salaried employee at any relevant time. It is also  
26 clear that Amerifund, Inc. paid some commissions, but failed to timely and appropriately  
27 perform its contractual obligations to Plaintiff on occasion. In particular, Amerifund, Inc.  
28 failed to pay Plaintiff commissions of \$17,718.75 on account of two transactions.

1 Amerifund, Inc. also failed to pay some employee withholding taxes for at least one  
2 employee, Laura Reyes Navarra.

3 In 2005, Amerifund, Inc. borrowed money from Plaintiff. The loan (the "Loan") was  
4 evidenced by a promissory note dated March 30, 2005 and in the original principal amount  
5 of \$25,000 (the "Note"). The Note provided for an initial interest payment of \$5,000. Thus,  
6 the stated face amount of the Note was \$30,000. Mr. Gedanken executed and delivered a  
7 guaranty also dated as of March 30, 2005 (the "Guaranty"), and thereby personally  
8 guaranteed Amerifund, Inc.'s obligations under the Note.

9 The parties introduced conflicting testimony as to whether Mr. Gedanken provided  
10 Plaintiff with finalized documents in connection with this transaction or whether Plaintiff  
11 finalized form documents provided by Mr. Gedanken. As a result of this Court's  
12 determination that the debt arising from this transaction is fully dischargeable, it is  
13 unnecessary for the Court to resolve this evidentiary debate. In particular, it has relevance  
14 only to the extent the Note remains collectable and, even then, only in that the effective  
15 interest rate may be usurious.

16 Plaintiff's complaint in this adversary proceeding (the "Complaint") and later filed  
17 documents state on numerous occasions that neither Mr. Gedanken nor Amerifund, Inc.  
18 made any payment on the Note or the Guaranty; the evidence is to the contrary. In  
19 particular, payments were made in amounts which reflect Note payments, and the  
20 documentary evidence establishes that, as of April 30, 2006, Plaintiff agreed that only  
21 \$12,000 remained owing on the Note. Further, while Plaintiff testified that Amerifund, Inc.  
22 and the Debtor owed her on account of various obligations and that, as a result, she is not  
23 sure of the intended purpose of most payments, the testimony ultimately resulted in  
24 Plaintiff's agreement that at least one \$5,000 payment represented a payment on the Note.

25 A review of Amerifund, Inc. bank records indicates an extremely close relationship  
26 between Mr. Gedanken and Amerifund, Inc. As noted, he was a sole shareholder, sole  
27 officer, and sole director. Further, these bank records evidenced numerous instances of  
28 admitted use of the corporate accounts for personal expenses of Mr. Gedanken and his

1 family. The Debtors admitted that certain expenses were personal, such as expenses for  
2 Ms. Gedanken's hairdresser. In connection with many other transactions that strongly  
3 suggest personal use, the Debtors did not deny that this was the case, but instead stated that  
4 they did not know if the expenses were personal. The Court finds this testimony lacking in  
5 credibility and concludes that Debtors made significant personal use of Amerifund, Inc.  
6 assets. Whether this was compensation properly paid to Mr. Gedanken, as he testified, and  
7 properly reported for tax purposes, the Court need not decide.

8 Ms. Gedanken had no direct involvement in the operations of Amerifund, Inc., but  
9 she had signing authority on the various bank accounts and use of the corporate credit or  
10 debit cards. She primarily worked to raise the Debtors' sons and to maintain the family  
11 home. At some point, however, she decided to utilize her interior design training and,  
12 therefore, created a business name, MB Designs, and opened bank accounts in that name  
13 (the "MB Designs Accounts"). MB Designs was not an active business. Its sole business  
14 activity consisted of a single purchase of patio furniture for a neighbor. As a result of this  
15 lack of activity, the MB Designs Accounts were closed during the twelve months prior to  
16 the Petition Date.

17 On September 19, 2008 (the "Petition Date"), Debtors filed their chapter 7 case.  
18 They were not represented by counsel in connection with the preparation of their schedules  
19 (the "Schedules") and Statement of Financial Affairs ("SOFA"). Debtors properly identified  
20 Amerifund, Inc. in their SOFA and listed Amerifund as a dba used by Mr. Gedanken  
21 personally. They did not identify Amerifund, Inc.'s dbas or its bank accounts in either the  
22 Schedules or the SOFA. They also listed three personal bank accounts with small balances,  
23 two cars, and \$2,500 of office equipment and supplies owned by Mr. Gedanken. They did  
24 not identify MB Designs and the closed MB Designs Accounts in the Schedules or SOFA  
25 filed on the Petition Date.

26 The 341a meeting revealed that Debtors had failed to schedule an asset, a \$26,889.75  
27 real estate commission that was earned pre-petition but paid post-petition. It appears that  
28 Mr. Gedanken testified honestly regarding this asset at the 341a meeting as the Trustee

1 apparently worked with him to allow a revision of the Schedules. Further, at the Trustee's  
2 suggestion, Mr. Gedanken also modified the Schedule C claim of exemptions with the result  
3 that the commission was largely exempted.

4 On November 17, 2008, Plaintiff initiated this adversary proceeding. In the course of  
5 the long litigation that followed, her counsel raised some additional issues in connection  
6 with the Schedules and SOFA. The Debtors made Schedules and SOFA amendments in  
7 connection with some of the issues Plaintiff identified and made other corrections, including  
8 an amendment to add MB Designs and the MB Designs Accounts. The Debtors, thus,  
9 modified their Schedules and/or SOFA on three occasions.

## 11 DISCUSSION

### 12 A. The Court Must Strictly Construe Plaintiff's Objections To Debtors' Discharge 13 And Objections To Dischargeability Of Her Claim.

14 A central purpose of the Bankruptcy Code is to provide an honest but unfortunate  
15 debtor with a fresh start free of pre-bankruptcy debt and its pressures. *Grogan v. Garner*,  
16 498 U.S. 279, 286-287 (1991). Thus, exceptions to discharge are confined to those plainly  
17 set out in the Code. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). And a Court in  
18 evaluating discharge objections must strictly construe them in favor of a debtor's fresh start.  
19 *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1104 (9th Cir. 2005) [citing *Industrie*  
20 *Aeronautiche v. Kasler (In re Kasler)*, 611 F.2d 308, 310 (9th Cir. 1979)]. Thus, Plaintiff  
21 bears the burden of proof here, and it is a high one.

### 22 B. Plaintiff Fails To Prove That Her Objections to Dischargeability Are 23 Appropriate.

24 Plaintiff seeks to have her claim deemed non-dischargeable under section 523(a).  
25 She clearly asserts that the claim based on the Loan arose as a result of fraud and that the  
26 failure to repay the Loan willfully and maliciously caused injury. It is less clear as to the  
27 precise nature of her section 523(a) claim as it relates to the unpaid commissions, but her  
28

arguments, at most, again are based on an alleged willful and malicious injury and fraud.  
Thus, the Court analyzes both components of her claim under 11 U.S.C. § 523(a)(2) and (6).

1. 11 U.S.C. § 523(a)(2)(A).<sup>2</sup>

Section 523(a)(2)(A) provides that:

- (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt - . . .
- (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by -
- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Thus, to prove actual fraud for section 523(a)(2)(A) purposes, a creditor must establish each of the following elements:

- (1) that the debtor made the representations;
- (2) that at the time he knew they were false;
- (3) that he made them with the intention and purpose of deceiving the creditor;
- (4) that the creditor relied on such representations; [and]
- (5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

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<sup>2</sup> While the Complaint references section 523(a)(2), it fails to cleanly plead a cause of action thereunder. First, there is no cause of action directly asserted under this Bankruptcy Code section. Second, the prayer for relief seeks a "Judgement [sic] Denying Discharge, or in the alternative, deny the discharge of the defendants with prejudice." As a section 523(a)(2) claim seeks to avoid dischargeability of a specific creditor's claim rather than a complete denial of discharge, the prayer fails to cleanly request relief under section 523(a)(2). Finally, the Complaint fails to specify whether Plaintiff asserts a claim under section 523(a)(2)(A) (money, credit, etc. obtained by false pretenses, false representations, or actual fraud) or 523(a)(2)(B) (money, credit, etc. obtained by use of a false financial statement).

Notwithstanding the above, the Complaint contains allegations that could be construed as assertions of fraud in obtaining the Loan, the Plaintiff discussed fraud in her trial brief and Closing Argument, and the Plaintiff and Defendants introduced evidence relevant to such claims at trial. Further, prior to trial Plaintiff filed her Request for Leave of Court to Amend Pleadings According to Proof [at the time of trial.] ("Request for Leave to Amend") Dkt. No. 148. Thus, the Court concludes that section 523(a)(2) issues must be considered by the Court as they were tried with the implied consent of the Defendants. See Fed. R. Civ. P. 15(b)(2) and Rule 7015.

The Court also concludes that Plaintiff's claim rises only under section 523(a)(2)(A) as there is no evidence that Mr. Gedanken provided Plaintiff with a financial statement of any type.

1 *Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991); *see also, Defined Benefit*  
2 *Pension Plan v. Kirsh (In re Kirsh)*, 973 F.2d 1454, 1457 (9th Cir. 1992). The creditor must  
3 prove each element of fraud by a preponderance of the evidence. *Grogan*, 498 U.S. at 290.

4 And where the fraud allegedly arises at loan or debt origination the Court must be careful as:

5 . . . courts naturally are concerned lest every breach of contract  
6 be levered into fraud by the too-facile expedient of asking the  
7 jury to infer from the fact that the defendant did not perform his  
8 promise that he never intended to perform it. So the rule has  
grown up that nonperformance is not enough to ground such an  
inference; there must be additional evidence of the defendant's  
intentions at the time he made the promise.

9 *Milwaukee Auction Galleries, Ltd. et al. v. Chalk*, 13 F.3d 1107, 1109 (7th Cir. 1994).

10 Having said this, however, fraud can be found where the debtor obtains a loan or debt with a  
11 fixed intention not to pay. *Id.*

12 Plaintiff initially argues that Mr. Gedanken obtained the Loan from her under false  
13 pretenses. In particular, she initially asserted that he obtained the Loan, made no payment  
14 thereon, and intended at the time he solicited the Loan to discharge the same in bankruptcy  
15 prior to payment. The Court concludes to the contrary, and, thus, Plaintiff's claim under  
16 section 523(a)(2)(A) in relation to the Loan fails. In short, she holds a claim for breach of  
17 contract – not a claim for damages as a result of fraud.

18 First, the evidence is clear, contrary to Plaintiff's assertion, that Amerifund, Inc. made  
19 payments to Plaintiff, including payments on account of late charges. Indeed, Plaintiff  
20 conceded in pre-bankruptcy correspondence that the Note balance was \$12,000.00.<sup>3</sup> Next,  
21 Amerifund, Inc. obtained the Loan in 2005, but Debtors did not file bankruptcy until 2008.  
22 And, again, Plaintiff received interim payments on the Note. This timing is inconsistent  
23 with Plaintiff's theory. Plaintiff alleged prior to trial that she would provide evidence  
24

25 <sup>3</sup> Indeed, if the Note's interest rate is usurious, Amerifund, Inc. may have reduced the Note  
26 balance more significantly. A note provision requiring payment of usurious interest is void and  
27 uncollectible. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 622 (1927). As interest in the  
28 amount of \$5,000 is included in the Note balance, the Note balance may be reduced by some  
amount. Principal would remain payable, however, as well as post-maturity interest at the legal  
rate. *Epstein v. Frank*, 125 Cal. App. 3d 111, 123 (Cal. App. 2d Dist. 1981). Treble damages for  
receipt of usurious interest are not recoverable here as the one year statute of limitations period  
expired prior to the Petition Date. See Cal. Civ. Code § 1916.12-3(a).

1 establishing that Mr. Gedanken made statements supportive of her fraud allegation, but such  
2 evidence did not materialize at trial. In contrast, Mr. Gedanken provided highly credible  
3 evidence that he intended repayment in full at Loan origination. The Court, thus, finds  
4 credible Mr. Gedanken's assertions that he actually intended to repay the Loan and that he  
5 did not obtain the Loan through fraud.

6 In her Closing Argument, Plaintiff also briefly asserts that Mr. Gedanken acted with  
7 fraudulent intent when he asked Plaintiff to hold an Amerifund, Inc. check and then stopped  
8 payment. Plaintiff does not develop this argument, and it is unclear whether Plaintiff  
9 intends the point as an additional act of fraud or as supportive of her assertion that the Loan  
10 was obtained through fraud. The Court, however, rejects the argument entirely. First, these  
11 actions occurred long after Loan initiation and after Plaintiff received other payments; they  
12 in no way prove or even support a fraud in the inducement claim. Second, the elements  
13 necessary for finding this to be an independent claim of fraud do not exist. Mr. Gedanken's  
14 testimony, in essence, is that he presented the check as a token of good will and stopped  
15 payment when Plaintiff stated an intention, notwithstanding, to commence litigation. The  
16 Court believes Mr. Gedanken on this point and notes that there is no evidence that  
17 Mr. Gedanken provided the check with the then present intent of dishonor.<sup>4</sup>

18 As to the unpaid commissions, there is no developed theory or evidence of fraud at  
19 contract initiation. Clearly, Amerifund, Inc. paid Plaintiff other commissions. On this  
20 record, the Court finds that Plaintiff's claim on account of unpaid commissions also arises  
21 from breach of contract – not from fraud.

22 **2. 11 U.S.C. § 523(a)(6).**

23 The Plaintiff also argues for the first time in her Closing Argument that the non-  
24 payment of the Note and commissions owed creates a non-dischargeable claim under

25  
26 <sup>4</sup> In the background of this dispute is a question of whether Plaintiff advanced the Loan  
27 to Amerifund, Inc. or to Mr. Gedanken. The Court finds it unnecessary to resolve this issue  
28 as Mr. Gedanken guaranteed the Loan. Thus, Mr. Gedanken was personally liable for the  
Loan in all respects, and it is irrelevant whether the Loan funded to him personally or to  
Amerifund, Inc. or whether he has an additional obligation to repay the Loan as the alter ego  
of Amerifund, Inc.



1 section 523(a)(6).<sup>5</sup> Section 523(a)(6) provides that a debtor cannot discharge any debt that  
2 arises from willful and malicious injury by the debtor to another entity or to the property of  
3 another entity.

4 A willful injury is a deliberate or intentional *injury*, not merely a deliberate or  
5 intentional *act* that leads to injury. *Albarran v. New Form, Inc. (In re Barboza)*, 545 F.3d  
6 702, 706 (9th Cir. 2008) (citing *Kawaauhau v. Geiger*, 523 U.S. at 61). The willful injury  
7 requirement of section 523(a)(6) is met when a claimant shows either that the debtor had a  
8 subjective motive to inflict the injury or that the debtor believed that injury was substantially  
9 certain to occur as a result of his conduct. *Petralia v. Jercich (In re Jercich)*, 238 F.3d  
10 1202, 1208 (9th Cir. 2001). Thus, a debtor is charged with the knowledge of the natural  
11 consequences of his actions. *Ormsby v. First Title (In re Ormsby)*, 591 F.3d 1199, \_\_\_\_,  
12 2010 U.S. App. LEXIS 423, \*12 (9th Cir. 2010).

13 The "malicious" injury requirement in section 523(a)(6) is separate from the "willful"  
14 requirement. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002). A malicious  
15 injury requires: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes  
16 injury; and (4) is done without just cause or excuse. *Id.* at 1146-47 (citing *In re Jercich*,  
17 238 F.3d at 1209). The Court may infer malice based on the nature of the wrongful act.  
18 *Ormsby*, 2010 U.S. App. LEXIS at \*14. Again, the Court must find both willful injury and  
19 malicious injury to establish non-dischargeability under section 523(a)(6). *Barboza*,  
20 545 F.3d at 704.

21 Having concluded that Plaintiff's claims arise solely from breach of contract and not  
22 from fraud, her section 523(a)(6) claim fails. Intentional breach of contract cannot support a  
23 determination of nondischargeability under section 523(a)(6) unless it is accompanied by  
24 conduct that constitutes a tort under state law. *Lockerby v. Sierra*, 535 F.3d 1038 (9th Cir.  
25 2008).

26  
27  
28 <sup>5</sup> Given the Request for Leave to Amend, the Court again addresses a claim not raised  
in the Complaint by specific statutory reference – again in an abundance of caution.

1 The record also fails to otherwise support a finding of willfulness or malice. The  
2 Court finds credible Mr. Gedanken's testimony that he did not intend to injure Plaintiff and  
3 that Amerifund, Inc. attempted repayment. Amerifund, Inc. paid some late charges and did  
4 not challenge an interest rate that Mr. Gedanken, a mortgage broker, likely knew was  
5 questionable. Amerifund, Inc. paid other commissions and apparently raised the percentage  
6 paid to Plaintiff on at least one deal to compensate for the failure to immediately pay a  
7 commission on another. The Court concludes that the failure to repay Plaintiff was not the  
8 result of an unexcused intent to injure. Instead, it was a result of a business failure that  
9 Debtors did not desire and could not stop.

10 **3. Non-Dischargeability of Claims Against Mara Gedanken.**

11 There has never been any allegation that Ms. Gedanken made any representation in  
12 connection with the Loan, Note, or unpaid commissions. And Plaintiff provided no  
13 evidence of any involvement by Ms. Gedanken at any time in connection with the Loan,  
14 Note, and unpaid commissions. Thus, the non-dischargeability claims clearly fail to as to  
15 Ms. Gedanken for this additional reason.

16 **C. Plaintiff's Objections To Discharge Also Fail.**

17 Plaintiff clearly objects to discharge in the Complaint based on sections 727(a)(3)  
18 and (4)(A). The Complaint also requests relief generally under section 727(a) in connection  
19 with two claims for relief. Such claims contain allegations that appear to most properly  
20 raise claims under sections 523(a)(2) and 727(a)(3). But the precise section 727(a)  
21 subparagraphs are unclear; it is at least arguable that Plaintiff initially sought relief under  
22 section 727(a)(2), and Plaintiff's Closing Argument more specifically seeks  
23 section 727(a)(2) relief. Given Plaintiff's Request for Leave to Amend, and in an abundance  
24 of caution, the Court, thus, will discuss all three Code provisions herein.

25 **1. Alter Ego Assertions Do Not Mandate A Denial Of Discharge.**

26 Plaintiff's arguments under section 727(a) appear to arise in part from the assertion  
27 that Mr. Gedanken and Amerifund, Inc. are alter egos. The Court determines, however, that  
28 alter ego findings would not aid Plaintiff here.

1 First, the evidence is insufficient to support an alter ego finding. Under California  
2 law, there are two general requirements for "piercing the corporate veil":

3 "(1) that there be such unity of interest and ownership that  
4 separate personalities of the corporation and the individual no  
longer exist and

5 (2) that, if the acts are treated as those of the corporation alone  
6 an inequitable result will follow."

7 *Mesler v. Bragg Mgt. Co.*, 39 Cal. 3d 290, 300 (1985) (citation omitted). Here Debtors used  
8 corporate accounts and credit for personal purposes. Mr. Gedanken may have also  
9 improperly retained corporate liquidation proceeds on account of his equity position rather  
10 than paying these amounts to Amerifund, Inc.'s creditors. But contrary to Plaintiff's  
11 assertion, the evidence did not establish any confusion among creditor witnesses as to who  
12 they worked for, some evidence of corporate formalities exists, Debtors did not personally  
13 utilize all accounts (in particular the payroll account remained inviolate), and Amerifund,  
14 Inc. apparently maintained an active separate business. All the above aid Debtors in  
15 defending against alter ego attack under the first requirement. In the final analysis,  
16 however, it is the second requirement that renders an alter ego finding inapposite here.

17 An alter ego finding **does not** dissolve the corporation. *Id.* Instead, the corporate  
18 form will be disregarded only in narrowly defined circumstances and only when the ends of  
19 justice so require. Here at best for Plaintiff, unpaid Amerifund, Inc. creditors could have  
20 claims against Mr. Gedanken, in particular, based on alter ego theories if they do not already  
21 hold claims based on a guaranty or otherwise. But alter ego arguments do not require that  
22 the Court treat Amerifund, Inc. and Mr. Gedanken as the same for all purposes in reviewing  
23 his compliance with the Bankruptcy Code. Debtors properly identified Amerifund, Inc. in  
24 the Schedules – as they were required to do. But Debtors were not required to list  
25 Amerifund, Inc. bank accounts, creditors, and assets on their personal bankruptcy schedules  
26 except in those cases where they asserted an ownership interest at filing (personal property  
27 in the form of personal property business assets – listed) or were liable for the debt based on  
28 guaranty or otherwise (Plaintiff's claim based on guaranty listed albeit as a litigation claim).

1 Here, Debtors apparently listed some corporate debt in the Schedules where Mr. Gedanken  
2 had personal liability based on a guaranty. They did not list Mr. Gedanken's potential  
3 control person liability on account of unpaid employee withholding tax liability, but as  
4 discussed in Section 3(f) below this omission does not justify a denial of discharge. In  
5 short, there is insufficient evidence supporting an argument that equity requires that the acts  
6 of Mr. Gedanken and Amerifund, Inc. be treated as one and, in particular, nothing that  
7 requires a creation of Schedules and SOFA in this case that ignores the separate existence of  
8 Amerifund, Inc.

9       **2.     11 U.S.C. § 727(a)(3) Claim.**

10       The Ninth Circuit has stated that: "the purpose of § 727(a)(3) is to make discharge  
11 dependent on the debtor's true presentation of his financial affairs." *Caneva v. Sun*  
12 *Communications Operating Ltd. P'ship (In re Caneva)*, 547 F.3d 1082, 1087 (9th Cir.  
13 2008). Thus, the objecting creditor must show: "(1) that the debtor failed to maintain and  
14 preserve adequate records; and (2) that such failure makes it impossible to ascertain the  
15 debtor's financial condition and material business transactions." *Lansdowne v. Cox (In re*  
16 *Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994) [quoting *Meridian Bank. v. Altern*, 958 F.2d 1226,  
17 1232 (3d Cir. 1992)]. It is not necessary, however, that the objecting creditor demonstrate  
18 that the debtor intended to conceal his financial condition in order to satisfy the burden. *In*  
19 *re Cox*, 41 F.3d at 1297.

20       The objector bears the initial burden of proof, but after she shows inadequate or  
21 nonexistent records, the burden of proof then shifts to the debtor to justify the inadequacy or  
22 nonexistence of the records. *Caneva*, 547 F.3d at 1087. And justification for a debtor's  
23 failure to keep or preserve books or records will depend on whether similarly situated  
24 debtors would ordinarily keep them. *Id.* at 1089. Thus, a debtor must either produce such  
25 records as are customarily maintained or satisfy the court with adequate reasons why he was  
26 not duty bound to keep them. *Id.*

27       In this case, Plaintiff does not suggest that Debtors improperly maintained personal  
28 records except to the limited extent such an argument arises in relation to MB Designs. As

1 discussed below, the Debtors properly scheduled all relevant active personal accounts, and  
2 all bank records were available to Plaintiff through subpoena and presumably through  
3 2004 exam or discovery. While Plaintiff complains about a lack of cooperation in  
4 discovery, it appears that Plaintiff never requested personal account information through  
5 discovery in this adversary proceeding or through examination under Rule 2004. Instead,  
6 Plaintiff independently obtained bank records by subpoena – without notice to Debtors –  
7 prior to making any document production request.

8 Further, the Court does not find that the absence of business records related to  
9 MB Designs is problematic. MB Designs was, for all practical purposes, a single  
10 transaction rather than an operating business. And, MB Designs was not a separate  
11 corporation, but a dba of Ms. Gedanken in her capacity as an interior designer. The Court  
12 finds the lack of such business records reasonable, since the Court finds believable  
13 Ms. Gedanken's explanation regarding the extremely limited extent of MB Designs' business  
14 operations from inception through the Petition Date. Thus, the absence of MB Designs'  
15 records other than bank account records and the failure to initially disclose the closed  
16 MB Design Accounts also fail to support an objection to discharge.<sup>6</sup>

17 The main focus of the Plaintiff's section 727(a)(3) argument relates to the alleged  
18 absence of records relating to Amerifund, Inc. First, there is disputed testimony regarding  
19 whether Mr. Gedanken destroyed some or all Amerifund, Inc. business records. Mr. Bell, a  
20 paralegal for Plaintiff's attorney, Mr. Rolls, testified that Mr. Gedanken stated at a meeting  
21 during the course of the litigation that he had destroyed certain Amerifund, Inc. records  
22 years ago.

23 Mr. Gedanken strongly disputes this assertion. Mr. Gedanken admits, however, that  
24 certain records were lost when he failed to maintain payments on a storage facility and the  
25 contents were seized. Thus, one issue in relation to Amerifund, Inc. records is to what  
26 extent they existed as of the Petition Date. The Court finds, based on this admission, that  
27 some corporate records were destroyed.

1 The section 727(a)(3) issue also is clouded by the fact that Mr. Gedanken did not  
2 produce extensive records in connection with discovery or otherwise prior to trial, but  
3 claims that records not reviewed by Plaintiff exist. The Plaintiff clearly sought certain  
4 records in a document production request to which Mr. Gedanken asserted objections, but a  
5 review of the document production request is of little aid to the Court.

6 As to bank records, Debtors objected, at least in part, by stating that Plaintiff already  
7 had all bank records as a result of subpoena. Plaintiff did not seek to compel additional  
8 response. On this record, the Court concludes that Debtor did not fail to maintain  
9 Amerifund, Inc. bank records.

10 Plaintiff also requested Amerifund, Inc. payroll records for Plaintiff and two other  
11 individuals, formation and corporate governance documents, a lease, payment commission  
12 and loan generating information in relation to Plaintiff and two other individuals, and  
13 correspondence with Plaintiff. Debtors produced limited documents beyond the bank  
14 records. In particular, Mr. Gedanken produced minutes of the June 15, 2007 shareholder  
15 meeting that document the decision to close Amerifund, Inc.'s doors and liquidate its assets.  
16 Debtors, however, also interposed objections. Plaintiff also requested similar documents for  
17 Amerifund, Inc. dbas and another entity with a similar name. Debtors responded to these  
18 requests by stating that the entity was unknown and/or that no such documents existed as the  
19 named entity was a mere dba of Amerifund, Inc. The Plaintiff asserts that she did not seek  
20 additional production through a motion to compel based on Mr. Gedanken's assertion that he  
21 had "destroyed" relevant documents.

22 Finally, Mr. Gedanken provided only limited testimony regarding the quality and  
23 quantity of documents that do exist and would have otherwise been produced. In particular,  
24 Mr. Gedanken indicates that most of the business records at issue were in the form of bank  
25 records -- bank records that the Plaintiff already obtained by subpoena. There is, however,  
26 absolutely no testimony from Mr. Gedanken regarding what other records existed and would  
27 have been produced.

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28 <sup>6</sup> See Section 3(d) below for further discussion.

1       The Court, thus, is in a quandary. It believes, however, that the matter can best be  
2 resolved by looking at the kinds of records that reasonably could be anticipated in this  
3 situation, whether a chapter 7 individual debtor would necessarily have such records, and  
4 whether review of such records is necessarily required in order to ascertain Debtors'  
5 financial status. The Court ultimately concludes, after over three days of testimony, that  
6 there is no evidence that records critical to the evaluation of Debtor's personal finances were  
7 destroyed by Mr. Gedanken or otherwise unavailable to creditors. Even if some of  
8 Amerifund, Inc. records were destroyed, as Mr. Bell testified, there is no evidence indicating  
9 that such records would have provided any additional and meaningful ability to understand  
10 Debtors' personal finances.

11       First, the Court focuses on the fact that Amerifund, Inc. closed its doors in mid-2007.  
12 Thus, there is some distance between Mr. Gedanken's operation of Amerifund, Inc. and his  
13 receipt of income therefrom. Consistent with this allegation, the bank records of  
14 Amerifund, Inc. show a cessation of business well before bankruptcy. In short, there is no  
15 evidence indicating that Mr. Gedanken continued to receive regular income or more than  
16 insignificant income from Amerifund, Inc. during a more than 12 month period prior to his  
17 bankruptcy filing. The Court finds the bank records that were available to be adequate for  
18 the purposes of evaluating the cash assets of Amerifund, Inc. and the transfer of such assets  
19 to Debtors.

20       Second, the Court obtained significant testimony regarding the tangible assets of  
21 Amerifund, Inc. Mr. Gedanken does not have records regarding his liquidation of these  
22 assets. Given his testimony, however, the Court finds that this is not material.  
23 Mr. Gedanken sold the limited personal property assets personally. He did not retain an  
24 auctioneer and he did not do a single sale to a single buyer such that a bill of sale would  
25 appropriately have been produced. His testimony, indeed, suggested that he was offering  
26 chairs at \$5.00 each and otherwise, to use a term from the retail world, blowing the  
27 inventory out the doors. Given the nature of the personal property liquidation, the Court  
28 does not find it surprising that records were not maintained. Further, Mr. Gedanken

1 candidly stated that he retained certain personal property and lists \$2,500 of business  
2 inventory and equipment owned only by Mr. Gedanken on the Schedules. Thus, to the  
3 extent such assets were not sold, they were scheduled.

4 It is also true that Mr. Gedanken does not have extensive corporate minutes, etc.  
5 Here, however, these are not necessarily the kind of records that section 727(a)(3)  
6 contemplates. Mr. Gedanken produced evidence of the decision to close Amerifund, Inc.  
7 There is no evidence that other Amerifund, Inc. records would reasonably aid in  
8 understanding Debtors' finances. Thus, the Court concludes that Mr. Gedanken's personal  
9 creditors would not be aided in any material respect in a review of corporate records for a  
10 fully liquidated closely held corporation.

11 Finally, there is no reasonably anticipated asset whose nondisclosure is unexplained.  
12 In some cases, a section 727(a)(3) objection is established by a lack of records necessary to  
13 explain the disappearance of an asset or the unavailability of income. Here there is no such  
14 situation. The Debtors' bank records do not reflect large cash withdrawals, but well  
15 evidence declining income and mounting debt through credit card advances. The  
16 Amerifund, Inc. bank records similarly fail to raise any such concerns. The Debtors explain  
17 the absence of a particular vehicle from their schedules – they traded it in on a new vehicle  
18 that was scheduled. And Plaintiff never requested documents in this regard.

19 The evidence is clear that all Amerifund, Inc. records were not properly maintained  
20 by Mr. Gedanken. The failure to properly pay for the storage facility may have resulted in  
21 an inadvertent destruction of some records, but inadvertence is not a full defense. To the  
22 extent corporate records were critical to an understanding of Mr. Gedanken's personal  
23 finances and under his control, denial of discharge might be appropriate notwithstanding  
24 inadvertent destruction. Having said that, however, the Court concludes that there is  
25 insufficient evidence to support a denial of Debtors' discharge under section 727(a)(3). Full  
26 bank records for Amerifund, Inc. exist. The failure to produce documentation related to the  
27 liquidation of the limited personal property was adequately explained. The Plaintiff failed  
28 to identify what other financial records necessary to an understanding of the Debtor's



1 personal finances were reasonably anticipated, but not available.<sup>7</sup> In summary, Plaintiff  
2 fails to meet her burden here as she fails to prove that specific records are needed to  
3 understand Debtors' finances, that the Court should conclude that such records reasonably  
4 should exist, and that such records do not exist.

5 **3. 11 U.S.C. § 727(a)(4) Claim.**

6 11 U.S.C. § 727(a)(4)(A) provides that the court shall grant the debtor a discharge,  
7 unless: (4) the debtor knowingly and fraudulently, in or in connection with the case – (A)  
8 made a false oath or account. In a case arising under 11 U.S.C. § 727(a)(4)(A) the objecting  
9 party has the burden of proof. Fed. R. Bankr. P. 4005. Thus, the objecting party must  
10 show:

- 11 (1) Debtor made a false oath in connection with the case;
- 12 (2) The oath related to a material fact;
- 13 (3) The oath was made knowingly; and
- 14 (4) The oath was made fraudulently.

15 *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882 (9th Cir. BAP 2005). A false oath  
16 may involve a false statement or omission in schedules. *Id.* And "materiality" may be  
17 found even absent direct financial prejudice to creditors. *Id.* at 883. "Knowingly" for  
18 purposes of this statute means deliberate and conscious while "fraudulently" has a meaning  
19 similar to that used in the context of common law fraud, but materiality replaces the  
20 elements of reliance and proximate causation of damages. *Id.* at 883-884. Thus, the  
21 creditor must show that the debtor made the representations with the intention and purpose  
22 of deceiving the creditors. *Id.* Further, a Debtor's intent must be actual, not constructive,  
23 and may be established by circumstantial evidence or by inferences from course of conduct.  
24 *Id.* [citing *Devers v. Bank of Sheridan (In re Devers)*, 759 F.2d 751, 753 (9th Cir. 1985)].

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25 <sup>7</sup>  
26 The records Plaintiff requested in discovery as to payroll, checks, and commissions for three  
27 employees might show the existence of a claim against Amerifund, Inc., but the evidence here is  
28 that Debtors admit certain claims by Plaintiff and do not understand the basis on which Ms. Reyes  
may hold a claim. The Court has no idea how Ms. Romero fits into the picture, as Plaintiff provides  
no explanation for this request. Thus, the Plaintiff fails to meet her burden of proving that these  
records are necessary to an evaluation of Debtors' finances.

1 Here, Plaintiff alleges numerous false oaths, but fails to meet her burden of establishing that  
2 any justify a denial of discharge.

3 **a. Failure to disclose real estate commission.**

4 The Debtors' initial Schedules failed to disclose a real estate commission of  
5 approximately \$26,000 on account of a commission earned pre-petition, but paid post-  
6 petition. This omission is material. In a discussion at the 341a meeting, Mr. Gedanken  
7 disclosed this commission to the chapter 7 Trustee who advised the Debtors that an  
8 amendment to the schedules was necessary. The Debtors subsequently amended their  
9 schedules to include the real estate commission.

10 The Court finds here that the omission was not knowing and fraudulent. The Court  
11 believes the Debtors' explanation that, as lay persons and given that they were not  
12 represented by counsel at the time of their bankruptcy filing, they did not understand that the  
13 commission was properly included in their bankruptcy estate. The Court, in particular, finds  
14 that this mistake was not fraudulent given their candid identification of the asset upon  
15 questioning by the chapter 7 Trustee and their prompt amendment of the Schedules. The  
16 Court notes that such a result is appropriate; honest debtors should be allowed to rectify the  
17 result of an honest mistake in scheduling. Punishing an honest mistake through a denial of  
18 discharge improperly punishes honesty and discourages honest identification of assets  
19 throughout the bankruptcy process.

20 **b. Failure to disclose bank accounts.**

21 The Schedules initially identified three bank accounts. Through discovery, the  
22 Plaintiff identified numerous additional bank accounts in the names of Amerifund, Inc. or its  
23 dbas and accounts in the name of MB Designs. A close review of the information obtained,  
24 however, shows that none of these accounts were in active use at the time of the Bankruptcy  
25 filing and all but one contained no assets on the Petition Date. The Debtors similarly failed  
26 to list any of these accounts in the initial SOFA at paragraph 11 which requests information  
27 regarding accounts in Debtors' name closed within the one year prior to bankruptcy. A  
28 review of the information provided, however, indicates that no Amerifund, Inc. accounts

1 were closed by the Debtors or involuntarily closed by the bank within that time period. The  
2 Court concludes that, except as to the MB Designs Accounts, the information was not  
3 required and, thus, not material and that, as to all accounts, the failure of the Debtors to  
4 include the information was not fraudulent. The Amerifund, Inc. accounts remained in the  
5 name of Amerifund, Inc. and all but one was closed and left with a zero balance more than a  
6 year prior to bankruptcy. The only corporate account that remained open was inactive most  
7 of the year prior to the Petition Date and held 29 cents on the Petition Date. The Court finds  
8 no evidence of fraudulent intent in Debtors' determination not to list this long inactive,  
9 valueless corporate account. As discussed above, the Court finds that alter ego principals do  
10 not mandate inclusion of Amerifund, Inc. accounts. And even if they did, there is no  
11 evidence that Debtors failed to list the Amerifund, Inc. accounts in an attempt to defraud or  
12 disadvantage their creditors.

13 The Court discusses the MB Designs Accounts more thoroughly in Section 3(d)  
14 below, but notes here that the Debtor subsequently amended the Schedules in March of  
15 2009, clearly in response to this litigation, to identify these accounts. While this non-  
16 disclosure is material, there is, once again, no compelling evidence of fraudulent intent as  
17 opposed to honest mistake.

18 The Plaintiff also questioned the Debtors regarding accounts in the name of their  
19 minor children. Again, however, the only evidence is that such accounts were created and  
20 closed well outside the year prior to bankruptcy. This non-disclosure is neither required,  
21 material, nor fraudulent.

22 **c. Alleged failure to disclose Griffith wage claim and/or guaranty of Griffith**  
23 **debt.**

24 The Debtors disclosed a \$20,000 obligation to Gayle Griffith in their Schedule F  
25 identified as "2005 Lawsuit." Indeed, they disclosed the obligation in two places as they  
26 also disclosed the same obligation in the same amount as held by her attorney, K.R. Rolls.  
27 It is true that the exact nature of this obligation was not specified; Schedule F lists it as a  
28 litigation claim. The Court, however, finds the lack of detail on this disclosure to be neither

1 material nor fraudulent. The Debtors scheduled Plaintiff as a principal and undisputed  
2 creditor of this estate. Thus, she had notice of the bankruptcy and a more than adequate  
3 opportunity to protect her rights and interests including any dispute regarding the amount of  
4 debt owed.

5 **d. MB Designs.**

6 The Court finds that the Debtors' failure to initially schedule MB Designs and the  
7 bank accounts related thereto does not justify a denial of discharge. In connection with the  
8 MB Designs Accounts, the evidence establishes that all MB Designs Accounts were inactive  
9 on the Petition Date and closed prior to the Petition Date. The failure to schedule an  
10 inactive bank account with zero or negative balances by these unrepresented chapter 7  
11 debtors does not justify a denial of discharge. Having said this however, the SOFA required  
12 this information at paragraph 11. Thus, this non-disclosure was material. The evidence  
13 fails to establish, however, that the non-disclosure was fraudulent.

14 Ms. Gedanken testified persuasively that MB Designs was not an actively operating  
15 business at the time of the bankruptcy. Her testimony was that the enterprise consisted  
16 entirely of a single assignment where she obtained patio furniture for a neighbor. There is  
17 no evidence that the business had any assets, including receivables, or any activity at any  
18 time after 2007. While the SOFA and Schedules required a listing of MB Designs and  
19 information related to MB Designs, Ms. Gedanken persuasively testified that the failure to  
20 list MB Designs was an oversight and not intentional or fraudulent. The Court finds this  
21 testimony credible particularly given the lack of MB Designs business assets and activity.  
22 The Debtors also appropriately modified the Schedules and SOFA in relation to  
23 MB Designs. Thus, the failure to list MB Designs and related accounts in the initial  
24 Schedules and SOFA also is not sufficient to justify a denial of discharge.

25 **e. Tangible Personal Property.**

26 Plaintiff suggests that Debtors did not accurately schedule tangible personal property  
27 and, thus, concealed the same. The Court finds no evidence supporting this contention.  
28

1           **\*Failure to disclose Amerifund, Inc. tangible assets and their proceeds.**

2           The Debtors scheduled \$2,500 of "office equipment and supplies." While  
3           there is no evidence specifically identifying these assets, Mr. Gedanken testified that  
4           he liquidated Amerifund, Inc. tangible assets in 2007 and thereafter retained the  
5           proceeds and the remaining assets for himself. Given the many months between  
6           liquidation of these assets and the Petition Date, and given the nature of these assets,  
7           the Court finds believable the suggestion that such assets, if any, have little, if any,  
8           value and that if included in this category the value given is reasonable. In particular,  
9           while the Plaintiff elicited testimony regarding the identity of such assets, there was  
10          no expert testimony as to value and the testimony provided indicated that the assets  
11          consisted exclusively of used desks, work stations, computers, computer monitors,  
12          and a 20 year old telephone system that the Debtor bought on EBay.

13          **\*Alleged failure to disclose an Escalade.**

14          Plaintiff also suggests that Debtors may have owned an expensive automobile  
15          not listed on the schedules. The Debtors, however, dispute the allegation that they  
16          owned, leased, or ever drove a black Escalade as suggested by Plaintiff. Instead, the  
17          evidence establishes that the Debtors drove a black Explorer which was scheduled.  
18          Similarly, while the Debtors previously owned a Denali, the testimony indicates that  
19          the Denali was used as a trade-in on a GMC Envoy. The GMC Envoy is scheduled.

20          **\*Failure to include all dbas of Amerifund, Inc.**

21          The Debtors properly scheduled "Amerifund dba" as a name under which  
22          Mr. Gedanken personally did business. The Debtors also showed Amerifund, Inc., at  
23          paragraph 18 of the SOFA. The Schedules and SOFA do not contain the names of  
24          other dbas utilized solely by Amerifund, Inc. The Debtor's explanation, which the  
25          Court finds credible, is that the Debtors did not personally operate a business under  
26          these names and did not believe that it was necessary to schedule the dbas used solely  
27          by Amerifund, Inc. The Court finds it unnecessary to determine whether these names  
28          were properly included as the Court finds the omission, if in fact it was an omission,

1 to be neither intentional, fraudulent, nor material. First, by properly identifying the  
2 corporation itself, the Debtor provided the information necessary to obtain  
3 information regarding the corporation and its assets. Such investigation would have  
4 corroborated the SOFA which stated that Amerifund, Inc. ceased doing business  
5 under any name more than 12 months prior to the bankruptcy filing. Second, there is  
6 no evidence that Debtor or Amerifund, Inc. actively utilized these names in the year  
7 prior to the bankruptcy filing, that Amerifund, Inc. had bank accounts with assets  
8 held solely in these dba names, or that any personal or real property assets of any  
9 type were ever held solely in the name of these dbas. While the Debtor is responsible  
10 for providing information that qualitatively allows creditors and the trustee to  
11 identify assets, an omission of a corporate dba where there is no evidence that  
12 inclusion of the corporate dba would allow creditors of the individual owner of  
13 corporate stock to indentify any assets is not material. Further, the evidence is  
14 compelling that Debtors did not intentionally or fraudulently exclude these assets.

15 **f. Failure to disclosure control person liability.**

16 The Plaintiff also suggests that Debtors' failure to list certain control person  
17 employee tax withholding liability of Mr. Gedanken is also a failure justifying a denial of  
18 discharge. The Court disagrees. Mr. Gedanken, a layperson, testified convincingly that he  
19 did not believe he had any personal liability for Amerifund, Inc. employee withholdings that  
20 remained unpaid (and he convincingly claimed ignorance that such amounts remain unpaid).  
21 The Court is less certain. Mr. Gedanken was clearly not only a control person for  
22 Amerifund, Inc., he was the only control person as he was the 100% shareholder and the  
23 only officer and director. Ms. Reyes testified that Amerifund, Inc. did not appropriately  
24 withhold taxes. To the extent there were other salaried employees, they, too, may have such  
25 claims.

26 The Code, however, provides an otherwise adequate remedy in connection with such  
27 a claim. 11 U.S.C. § 523(a)(3) provides that a creditor's claim is not discharged if it is  
28 neither listed nor scheduled in time to permit an otherwise meritorious objection to

1 discharge under section 523(a)(2), (4), or (6). In short, if Mr. Gedanken failed to schedule  
2 such creditors, and, if they have otherwise non-dischargeable claims, then these claims are  
3 not discharged in this bankruptcy case, and Mr. Gedanken may remain liable for the same.  
4 Where the Code provides a remedy to these creditors, however, it is unnecessary and  
5 inappropriate for the Court to deny discharge for all other creditors who are not harmed in  
6 any respect by Mr. Gedanken's failure in this regard.

7 And again, the evidence establishes that Debtors failed to list such creditors as a  
8 result of mistake – not fraud.

9 **4. 11 U.S.C. § 727(a)(2)(A) Claims.**

10 Section 727(a)(2)(A) provides that the court shall grant the debtor a discharge,  
11 unless:

12 (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the  
13 estate charged with custody of property under this title, has transferred, removed,  
14 destroyed, mutilated, or concealed, or has permitted to be transferred, removed,  
destroyed, mutilated, or concealed—

15 (A) property of the debtor, within one year before the date of the filing of the  
petition; or

16 (B) property of the estate, after the date of the filing of the petition; . . .

17 The burden of proof is on the objecting party. Fed. R. Bankr. P. 4005. The preponderance  
18 of the evidence standard applies. *Grogan v. Garner*, 498 U.S. at 287; *In re Cox*, 41 F.3d at  
19 1297. Actual intent to hinder, delay or defraud creditors must be shown – constructive fraud  
20 may not serve as basis for denial of discharge. *Devers*, 759 F.2d at 753-54. The necessary  
21 fraudulent intent, however, may be established by circumstantial evidence or by inferences  
22 drawn from course of conduct. *In re Woodfield*, 978 F.2d 516, 518 (9th Cir. 1992); *Devers*,  
23 759 F.2d at 753-54.


24 As noted above, it was unclear whether Plaintiff sought a denial of discharge based  
25 on section 727(a)(2) in the Complaint. Given the Motion to Amend and reference to  
26 section 727(a)(2) in Closing Argument, however, and in an abundance of caution, the Court  
27 evaluated claims under this section. For the reasons discussed in detail above, however, the  
28

1 Court determines that an objection to discharge, if in fact based on this section, would fail.  
2 In short, there is no evidence that Debtor made any estate assets unavailable to his creditors  
3 during either of the relevant time periods. In particular, Debtors' bank records, the only  
4 relevant evidence before the Court indicate no unusual activity and, indeed, evidence only  
5 Debtors' precarious financial state.  
6

7  
8 **CONCLUSION**

9 For the reasons discussed above, the Court concludes that Plaintiff fails to meet her  
10 burden of proof and that neither a denial of discharge nor a determination that her claim is  
11 not dischargeable is appropriate. The Court will issue a judgment consistent with this  
12 Memorandum Decision promptly hereafter.

13 DATED: March 5, 2010

14   
15 LAURA S. TAYLOR, JUDGE  
16 United States Bankruptcy Court  
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