



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re:

EDMUND ORTIZ,
Debtor.

BANKRUPTCY NO. 18-07247-CL7

LEA HERNANDEZ-SIOSON,
Plaintiff.

ADVERSARY NO. 19-90033-CL

v.

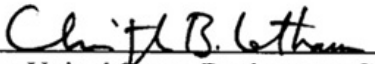
EDMUND ORTIZ,
Defendant.

Name of Judge: Christopher B. Latham

FINDINGS, CONCLUSIONS, AND ORDER AFTER TRIAL

IT IS HEREBY ORDERED as set forth on the continuation page(s) attached, numbered two (2) through twelve (12).

DATED: March 30, 2020



Judge, United States Bankruptcy Court

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HERNANDEZ-SIOSON V. ORTIZ

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Plaintiff Lea Hernandez-Sioson brought this adversary proceeding against Defendant Edmund Ortiz to except an alleged \$50,000 debt from discharge under 11 U.S.C. § 523(a)(6).¹ She also demanded that Mr. Ortiz's discharge be denied entirely under § 727(a)(4)(A) and that the court impose a constructive trust. After carefully considering the testimony and other admitted evidence at trial, the court finds Mr. Ortiz liable to Ms. Sioson in the nondischargeable amount of \$893.55. It denies all other requested relief.

Jurisdiction and Venue

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 157(b)(2)(I), (J). Venue is proper under 28 U.S.C. § 1409(a).

Factual Background

Beginning in 2015, Ms. Sioson and Mr. Ortiz operated a retail store selling vaping and other tobacco products. The business was named "Supreme One SD." In 2018, however, the parties' relationship soured. Without Ms. Sioson's knowledge or consent, Mr. Ortiz removed all of the inventory and furniture from the store. In response, Ms. Sioson terminated the shop's lease and emptied the parties' business checking account. Mr. Ortiz then went into business with his mother, operating a similar vaping shop out of the same suite as the earlier one. It was named "Supreme One Socal."

Procedural History

Mr. Ortiz's Bankruptcy

On October 17, 2018, Ms. Sioson sued Mr. Ortiz and his mother, Liberty Ortiz, in San Diego County Superior Court (case no. 37-2018-00052399-CU-BT-CTL). She alleged conversion and sought imposition of a constructive trust on the property that Mr. Ortiz's wrongly took. *Id.* That action was stayed when Mr. Ortiz filed for Chapter 7 bankruptcy (Bankr. ECF No. 1). In his schedules, he listed Ms. Sioson as an unsecured creditor. *Id.* at 22. He estimated her claim at zero dollars, giving it the description, "Former Unofficial Partner, Potential Debt, *Lea Hernandez Sioson v. Edmund Rocky*, 37-2018-00052399-CU-BT-CTL, amount prayed is \$50,000." *Id.* Mr. Ortiz also scheduled Supreme One SD's assets as estate property. *Id.* at 16. And he asserted various exemptions in them. *Id.* at 19. Later, he amended his schedules to add a "[p]otential claim against [Ms. Sioson] for [] defamation and business torts" (Bankr. ECF No. 13, p. 7).

¹ Unless otherwise noted, all statutory citations are to the Bankruptcy Code, Title 11 of the United States Code. And all "Rule" references are to the Federal Rules of Civil Procedure.

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Ms. Sioson's Adversary Proceeding

Ms. Sioson initially named both Mr. Ortiz and his mother as defendants in this adversary proceeding (ECF No. 1). At the initial pretrial status conference, the court questioned its jurisdiction over Ms. Ortiz (ECF No. 12). And after the second hearing, it issued an Order to Show Cause why she should not be dismissed (ECF No. 16). Ms. Sioson responded, stating that she would file an amended complaint excluding Ms. Ortiz (ECF No. 19). That mooted the court's Order to Show Cause (ECF No. 25). Mr. Ortiz is thus the sole remaining defendant in the case.

In preparation for trial, the court issued a scheduling order providing that lists of exhibits and proposed witnesses be filed by January 17, 2020 (ECF No. 31). It also required evidentiary objections by January 27, 2020, with optional briefing due that same day. *Id.* Ms. Sioson timely submitted exhibit and witness lists (ECF Nos. 35 & 36). Mr. Ortiz did not file any documents. The matter then proceeded to trial.²

Factual Findings

GVapes23

In 2015, Mr. Ortiz partnered with a friend, Gilboy Gutierrez, to operate a retail outlet selling vaping and other tobacco products. They named this business "GVapes23" and set up shop at 1454 Melrose Avenue, Suite 1, National City, CA 91910. In addition to vaping products, they sold high-end sneakers on consignment.³ After four or five months, Mr. Ortiz introduced his then-girlfriend, Ms. Sioson, to GVapes23. She was intrigued by the investment opportunity. So Mr. Ortiz allowed her to purchase half of his stake in the business for \$7,500 (Exhibit 30). At that point then, both Mr. Ortiz and Ms. Sioson owned 25% of the partnership, with Mr. Gutierrez owning the remaining 50%.

Around 2016, the partners mutually agreed to adjust their ownership interests: Mr. Ortiz and Ms. Sioson would each own 33% and Mr. Gutierrez would hold 34% (Exhibit 31). A year later, the parties bought out Mr. Gutierrez's position for \$10,000. To facilitate the purchase, Ms. Sioson borrowed money from another friend. The parties planned to pay the friend back over time with the store's revenue. But they did not memorialize the sale or otherwise describe their respective ownership interests in a written agreement. The court rejects as unpersuasive and unproven Ms. Sioson's assertion that she alone bought out Mr. Gutierrez. It thus finds that – after the purchase of Mr. Gutierrez's interest – they each owned 50% of GVapes23.

² Ms. Sioson also filed an objection to any documentary evidence from Mr. Ortiz (ECF No. 38). But Mr. Ortiz has offered no such evidence. All evidentiary rulings may otherwise be found in the trial record.

³ But at no point did GVapes23 or its partners own the sneaker inventory. They merely provided their space for the consignee to conduct business.

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Supreme One SD

With Mr. Gutierrez gone, the parties were in business together. In June 2017, they moved to a new storefront at 3400 East 8th Street, Suite 108, Chula Vista, CA 91950. Ms. Sioson signed the lease because Mr. Ortiz had an unlawful detainer on his record, which he thought would be an obstacle to obtaining a favorable lease in his own name (Exhibit 7). Within two months, the parties had renamed the store “Supreme One SD” and secured a seller’s permit (Exhibits 3 & 5). Things went smoothly for about a year. During that time, both parties worked approximately 40–45 hours per week in the shop.

In 2018, the parties’ personal relations began to deteriorate, which generated tensions in the business. So they started negotiations to end their professional relationship. To that end, they considered returning Ms. Sioson her \$17,500 investment. They never reached a final agreement on settlement terms, however. Mr. Ortiz nonetheless tried to borrow that money from a friend. But he only succeeded in obtaining \$16,320 in the form of a cashier’s check made out to Mr. Ortiz and his mother (Exhibit 38). Ms. Sioson ultimately rejected the offer. So in June 2018, Ms. Ortiz cashed the check. *Id.*

Conversion by Mr. Ortiz

Around July 18, 2018 – without Ms. Sioson’s knowledge or consent – Mr. Ortiz removed all of the inventory (other than the consigned sneakers) from the store.⁴ He took much of it to a local stadium, where he sold it to raise money for the shop’s rent. The court infers from the evidence that in the process he made \$1,692 – the monthly rental price under the operative lease at that time (Exhibit 7). Upon learning this, Ms. Sioson withdrew the remaining \$2,904.90 from the Supreme One SD checking account (Exhibit 37, p. 413). She kept that entire sum for herself even though Mr. Ortiz had rights to half of it. She then left a handwritten note with the shop’s landlord, terminating the lease (Exhibit 20). Thereafter, Mr. Ortiz went into business with his mother, naming their new shop “Supreme One Socal.”

At trial, Mr. Ortiz said he removed the inventory with the belief that he was taking only his fair share of the business’s assets. He explained that Ms. Sioson had sole control over the shop’s checking account. And he had agreed to cut her in on a portion of his own holding in the original store, GVapes23. He also included her in buying out Mr. Gutierrez, the cost of which he intended to share with her. So, he said, all that was left for him was the inventory.

⁴ Ms. Sioson also alleges that Mr. Ortiz took away the shop’s fixtures and furniture. She provides a photo of the empty store interior to prove that point (Exhibit 27). In retort, Mr. Ortiz testified that the fixtures and furniture were only temporarily removed so that the store could be refitted for the new business with his mother, after which everything was returned. There is no photographic evidence to the contrary, and the court credits Mr. Ortiz’s explanation. Accordingly, it concludes that Mr. Ortiz did not take and sell off the non-inventory property – all of which is accounted for in Mr. Ortiz’s bankruptcy schedules in any event.

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As of the December 5, 2018, bankruptcy filing, Mr. Ortiz valued both businesses at no more than \$5,000 combined: (1) \$2,000 for Supreme One SD inventory and assets; (2) \$2,000 for Supreme One Socal inventory; and (3) \$1,000 for Supreme One Socal furniture and accessories (ECF No. 1, p. 16). Ms. Sioson provided no competing evidence of value. She chose not to do so as to keep litigation costs down. Instead, she asked the court to simply equate her damages with the total amount she invested in the business. She alternatively urged the court to look to the dollar amount of the proposed \$17,500 buyout. Through this adversary proceeding, then, Ms. Sioson seeks to recover from Mr. Ortiz her entire \$17,500 investment and hold it nondischargeable.

Legal Standards

Nondischargeability

The Bankruptcy Code is designed to provide a ‘fresh start’ to the discharged debtor. *United States v. Sotelo*, 436 U.S. 268, 280 (1978). As a result, the Supreme Court has narrowly interpreted exceptions to the broad presumption of discharge. See *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). As we have observed, “exceptions to discharge should be limited to dishonest debtors seeking to abuse the bankruptcy system in order to evade the consequences of their misconduct.” *Sherman v. SEC (In re Sherman)*, 658 F.3d 1009, 1015-16 (9th Cir. 2011). The creditor thus bears the burden of proving, by a preponderance of the evidence, that the particular debt falls within one of § 523(a)’s exceptions to discharge. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); see also *In re Betancourt*, BAP No. CC-14-1010-KiKuDa, 2015 Bankr. LEXIS 1844, at *13 (B.A.P. 9th Cir. June 3, 2015).

Section 523(a)(6) – Willful and Malicious Conduct

Under § 523(a)(6), debts “for willful and malicious injury by the debtor to another entity or to the property of another entity” are nondischargeable. 11 U.S.C. § 523(a)(6). The court analyzes the “willful” and “malicious” dimensions of § 523(a)(6) separately. See *In re Barboza*, 545 F.3d 702, 706 (9th Cir. 2008); *In re Lawson*, BAP No. NC-14-1153-TaPaJu, 2015 Bankr. LEXIS 905, at *10 (B.A.P. 9th Cir. Mar. 20, 2015) (reinforcing *In re Su*, 290 F.3d 1140, 1146-47 (9th Cir. 2002) and the application of a separate analysis in each prong of “willful” and “malicious”). Both willfulness and maliciousness must be proven to apply § 523(a)(6). See *In re Ormsby*, 591 F.3d 1199, 1206 (9th Cir. 2010).

An injury is willful if the debtor “acted with either the desire to injure or a belief that injury was substantially certain to occur.” *Ditto v. McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007). On the other hand, “[a] malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.” *In re Ormsby*, 591 F.3d at 1207 (quoting *In re Jercich*, 238 F.3d 1202, 1209 (9th Cir. 2001)). Gauging willfulness is an objective standard. See *In re Chin-Liang Chan*, 325 B.R. 432, 436 (Bankr. N.D. Cal. 2005). “Malice may be inferred based on the nature of the wrongful act.” *In re Ormsby*, 591 F.3d at 1207. But before malice may be inferred, the willful injury must be established. *Id.* (citing *In re Thiara*, 285 B.R. 420, 434 (B.A.P. 9th Cir. 2002)).

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Moreover, “tortious conduct is a required element for a § 523(a)(6) nondischargeability finding.” *In re Rodriguez*, 568 B.R. 328, 339 (Bankr. S.D. Cal. 2017) (citing *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008)); see also *In re Jercich*, 238 F.3d at 1205; *In re Peklar*, 260 F.3d 1035, 1038 (9th Cir. 2001). Further, conduct “is only tortious if it constitutes a tort under state law.” *Lockerby*, 535 F.3d at 1041 (citing *In re Jercich*, 238 F.3d at 1206).

Section 523(a)(6)’s language covers conversion. See, e.g., *In re Sandoval*, 341 B.R. 282, 295 (Bankr. C.D. Cal. 2006) (first citing *In re Bailey*, 197 F.3d 997, 1000 (9th Cir. 1999); and then citing *In re Littleton*, 942 F.2d 551, 554 (9th Cir. 1991)); see also *In re Thomas*, 47 B.R. 27, 33 (Bankr. S.D. Cal. 1984) (“Congress intended that the phrase ‘willful and malicious injury’ found in Section 523(a)(6) of the Code would cover a willful and malicious conversion.”). The Ninth Circuit has held that “[t]he conversion of another’s property without his knowledge or consent, done intentionally and without justification and excuse, to the other’s injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6).” *In re Bailey*, 197 F.3d at 1000 (quoting *In re Littleton*, 942 F.2d at 554).

Although federal law governs a debt’s dischargeability, courts look to state law to determine whether a conversion has occurred. *In re Sandoval*, 341 B.R. at 295 (first citing *In re Jercich*, 238 F.3d at 1206; and then citing *In re Bailey*, 197 F.3d at 1000). In California, the elements of a conversion are: “(1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages.” *Duke v. Superior Court*, 18 Cal. App. 5th 490, 501 (Cal. Ct. App. 2017) (quoting *Welco Elec., Inc. v. Mora*, 223 Cal. App. 4th 202, 208-09 (Cal. Ct. App. 2014)).

But whether a defendant’s actions amount to conversion under California law “is not dispositive of whether the underlying claims are nondischargeable under § 523(a)(6).” *In re Manser*, 99 B.R. 434, 435-36 (B.A.P. 9th Cir. 1989) (first citing *In re Cecchini*, 780 F.2d 1440, 1443-44 (9th Cir. 1986); and then citing *In re Houtman*, 568 F.2d 651, 651 (9th Cir. 1978)). Indeed, “[b]oth willfulness and maliciousness must be proven to block discharge under section 523(a)(6). That applies equally to a debt based on conversion in order for a debt arising from conversion to be excepted from discharge under § 523(a)(6).” *In re Horne*, 549 B.R. 241, 249 (Bankr. E.D. Cal. 2016).

Section 727(a)(4)(A) – False Oath or Account

Under § 727(a)(4)(A), the court will deny a discharge if “the debtor knowingly or fraudulently, in or in connection with the case” made a “false oath or account.” 11 U.S.C. § 727(a)(4)(A). “The fundamental purpose of § 727(a)(4)(A) is to ensure that the trustee and creditors have accurate information without having to conduct costly investigations.” *In re Wills*, 243 B.R. 58, 63 (B.A.P. 9th Cir. 1999) (citing *In re Aubrey*, 111 B.R. 268, 274 (B.A.P. 9th Cir. 1990)). Put differently, “the entire thrust of an objection to discharge because of a false oath or account is to prevent knowing fraud or perjury in the bankruptcy case. As a result, the objection should not apply to

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minor errors or deviations in testimony under oath.” *In re Wills*, 243 B.R. at 63 (quoting William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE 2D § 74.11 (1997)).

A plaintiff seeking denial of discharge under § 727(a)(4)(A) must plead that: “(1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently.” *In re Retz*, 606 F.3d 1189 (9th Cir. 2010) (quoting *In re Roberts*, 331 B.R. 876, 882 (B.A.P. 9th Cir. 2005)).

First, errors and omissions contained in a debtor’s schedules and statement of financial affairs qualify as false oaths under § 727(a)(4)(A), because they are certified to be true and correct under penalty of perjury. *In re Retz*, 606 F.3d at 1197.

Second, a false oath or omission “is material if it bears a relationship to the debtor’s business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor’s property.” *In re Wills*, 243 B.R. at 62 (citing *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)); see also *In re Khalil*, 379 B.R. 163, 173 (B.A.P. 9th Cir. 2007). Such statement may also be material in the absence of direct financial prejudice to creditors. *In re Wills*, 243 B.R. at 63 (citing *In re Weiner*, 208 B.R. 69, 72 (B.A.P. 9th Cir. 1997), *rev’d on other grounds*, 161 F.3d 1216 (9th Cir. 1998)). But as explained by the Bankruptcy Appellate Panel,

A false statement or omission that has no impact on a bankruptcy case is not grounds for denial of a discharge under § 727(a)(4)(A). 6 Lawrence P. King et al., COLLIER ON BANKRUPTCY ¶ 727.04[1][b] (15th ed. Rev. 1998) (citing *In re Fischer*, 4 B.R. 517 (Bankr. S.D. Fla. 1980)). As a result, omissions or misstatements relating to assets having little or no value may be considered immaterial. See, e.g., *In re Waddle*, 29 B.R. 100 (Bankr. W.D. Ky. 1983). Likewise, omissions or misstatements concerning property that would not be property of the estate may not meet the materiality requirement of § 727(a)(4)(A). See, e.g., *In re Swanson*, 36 B.R. 99 (B.A.P. 9th Cir. 1984). However, an omission or misstatement relating to an asset that is of little value or that would not be property of the estate is material if the omission or misstatement detrimentally affects administration of the estate.

In re Wills, 243 B.R. at 63.

Third, “[a] debtor ‘acts knowingly if . . . she acts deliberately and consciously.’” *Id.* In addition, “[a] statement is made with knowledge if it is known to the debtor to be false, or made without a belief in its truth, or made with a reckless disregard of its truth.” *In re Downey*, 242 B.R. 5, 13 (Bankr. D. Idaho 1999) (citing *In re Sears*, 225 B.R. 270, 274 (Bankr. D.R.I. 1998)).

Fourth, the plaintiff must allege that the debtor made a false representation with “the intention and purpose of deceiving the creditors.” *Id.* at 1198-99 (quoting *In re Khalil*, 379 at 173). Further, “the debtor’s fraudulent intent in making the oath must be actual, not constructive.” *In re Retz*, 606 F.3d at 1198-99 (citing *In re Wills*, 243 B.R. at 64).

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Constructive Trust

“A constructive trust is an equitable remedy imposed to prevent unjust enrichment.” *In re Advent Mgmt. Corp.*, 178 B.R. 480, 487 (B.A.P. 9th Cir. 1995). California has codified the definition of a constructive trust in two statutes. The first provides that “[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.” CAL. CIV. CODE § 2223. The second provides that:

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

CAL. CIV. CODE § 2224. Because “a constructive trust is a remedy, it is inchoate until its existence is established by court order.” *In re Advent Mgmt. Corp.*, 178 B.R. at 488. Thus the “incipient beneficiary of a constructive trust has no rights greater than any other creditor of the debtor who has not reduced his claim to judgment and perfected it.” *MARKAIR, INC. v. MARKAIR EXPRESS, INC.*, 172 B.R. 538, 642 (B.A.P. 9th Cir. 1994).

“In bankruptcy, it does not end the matter for a court to find that state law would impose a constructive trust over certain property; the constructive trust will not be given effect if it is against the federal bankruptcy policy favoring ratable distribution to all creditors.” *In re Advent*, 178 B.R. at 489 (first citing *Mitsui Manuf. Bank v. Unicom Computer Corp. (In re Unicom Computer Corp.)*, 13 F.3d 321, 325 (9th Cir. 1994); and then citing *In re Golden Triangle Capital, Inc.*, 171 Bankr. 79, 82 (B.A.P. 9th Cir. 1994)).

Legal Analysis and Conclusions

Section 523(a)(6) – Nondischargeability

In July 2018, Mr. Ortiz took all of Supreme One SD’s inventory for himself even though Ms. Sioson held a 50% ownership interest in it. This was a conversion. *See Duke*, 18 Cal. App. 5th at 501 (describing the elements of conversion as “(1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages”) (quoting *Welco Elec., Inc.*, 223 Cal. App. 4th at 208)). But conversion alone is insufficient for a § 523(a)(6) nondischargeability finding. The defendant must have converted the property both willfully and maliciously. *See In re Horne*, 549 B.R. at 249.

An injury is willful if the debtor “acted with either the desire to injure or a belief that injury was substantially certain to occur.” *Ditto*, 510 F.3d at 1078. Both modes of willfulness are present here. The court finds that Mr. Ortiz took the inventory both to capture its entire value for himself and also spitefully to deny Ms. Sioson her portion of it. His assertion that he was merely trying to raise money for rent is not convincing. And even if the court were to accept Mr. Ortiz’s explanation that he wanted the inventory to keep the business going, the effect of his deliberate

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actions was to deny Ms. Sioson her share of the joint property. In addition, the court finds that Mr. Ortiz knew she had a claim to half of it, and understood that appropriating the inventory was substantially likely to harm her. Therefore, Mr. Ortiz acted willfully when he converted the business inventory.

“A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.” *In re Ormsby*, 591 F.3d at 1207 (quoting *In re Jercich*, 238 F.3d at 1209).

First, Mr. Ortiz’s conversion was a wrongful act. See, e.g., *In re Sandoval*, 341 B.R. at 295. Second, his conversion was not inadvertent or accidental. Rather, he took the inventory deliberately as part of a well-thought-out plan. So he acted intentionally. Third, Mr. Ortiz’s conversion denied Ms. Sioson her 50% interest in the inventory. Thus, his actions necessarily caused injury. Fourth, Mr. Ortiz converted the inventory without just cause or excuse. His assertion that he took the inventory because Ms. Sioson had drained the business checking account is not convincing. He removed the inventory on July 18, 2018, but Ms. Sioson did not empty the checking account until two days later (Exhibit 37, p. 413). That said, the court does not condone her action; it too was wrongful and a deliberate conversion of Mr. Ortiz’s 50% interest in the bank funds. But her own tortious conduct cannot possibly amount to just cause or an excuse since Mr. Ortiz’s wrongdoing occurred *before* the bank withdrawal. So he had no just cause or excuse. All four elements are thus satisfied: Mr. Ortiz acted maliciously.

Based on the foregoing, the court concludes that Mr. Ortiz’s July 2018 conversion was done willfully and maliciously such that the resultant debt may be excepted from discharged.

Section 727(a)(4)(A) – False Oath or Account

Ms. Sioson asserts that Mr. Ortiz’s discharge should be denied altogether because he: (1) scheduled \$2,000 of Supreme One SD’s inventory; (2) scheduled \$2,000 of Supreme One Social’s inventory; (3) scheduled \$1,000 of Supreme One Social’s furniture and accessories; and (4) stated he was doing business under both stores’ names (ECF No. 1, p. 6-7).

As the court notes below in analyzing damages, Mr. Ortiz owned just 50% of the Supreme One SD inventory he scheduled. By listing the entire \$2,000, then, he misrepresented his interest. Also noted below, Ms. Sioson did not own any of the scheduled Supreme One Social inventory. So Mr. Ortiz did not misstate his interest there. He owned only 50% of the Supreme One Social furniture and accessories that he scheduled, however. By claiming the full \$1,000, he misstated his interest. Last, Mr. Ortiz conducted business as both Supreme One SD and Supreme One Social. Just because he did not register the businesses does not make this a misrepresentation. The court will thus only examine these scheduling inaccuracies: (1) Supreme One SD inventory, \$2,000; and (2) Supreme One Social furniture and accessories, \$1,000.

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To deny a debtor's discharge under § 727(a)(4)(A), the court must find that "(1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently." *In re Retz*, 606 F.3d at 1189.

First, errors and omissions contained in a debtor's schedules and statement of financial affairs can qualify as false oaths under § 727(a)(4)(A) because they are certified to be true and correct under penalty of perjury. *In re Retz*, 606 F.3d at 1197. By claiming 100% ownership in the assets of Supreme One SD and Supreme One Socal, Mr. Ortiz made a false oath. So the first element is met.

The second element is not satisfied, however. Mr. Ortiz scheduled not only his interest in the assets but Ms. Sioson's as well. So he made misstatements concerning assets that would not be property of the estate. Therefore, those misrepresentations could not "detrimentally affect[] administration of the estate" or otherwise cause financial prejudice to creditors. *In re Wills*, 243 B.R. at 63. The court thus finds that Mr. Ortiz's false oaths did not relate to material facts. Because the second § 727(a)(4)(A) element fails, the court need not reach the remaining ones.

Constructive Trust

A constructive trust has not yet been imposed in this matter. So it was, at best, inchoate at the time this adversary proceeding was filed. *See In re Advent Mgmt. Corp.*, 178 B.R. at 488. Given Mr. Ortiz's actions, a constructive trust might be ordered, however. *See generally CAL. CIV. CODE* §§ 2223, 2224. But that is generally disfavored in bankruptcy because it upsets the ratable distribution scheme. *See In re Seaway Express Corp.*, 912 F.2d 1125, 1130 (9th Cir. 1990) (stating that "even courts granting constructive trusts have cautioned against application of the doctrine in bankruptcy cases because it amounts to giving a priority to an otherwise unsecured creditor"). Here, though, there would not be the same concern because Mr. Ortiz's bankruptcy was a no asset case; no creditors were paid at all. Just the same, given the court's § 523(a)(6) nondischargeability finding above, it would be duplicative to also impose a constructive trust. Ms. Sioson's quantum of damages would be unchanged. The court therefore denies this additional request for relief as unwarranted.⁵

⁵ The court notes that Ms. Sioson did not plead § 523(a)(4), which covers trust relationships. Even if she had, that subsection does not apply to constructive trusts. *See In re Honkanen*, 446 B.R. 373, 378-79 (B.A.P. 9th Cir. 2011) ("Trusts arising as remedial devices to breaches of implied or express contracts – such as resulting or constructive trusts – are excluded [from § 523(a)(4)], while statutory trusts that bear the hallmarks of an express trust are not.").

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Damages⁶

Ms. Sioson bears the burden to prove the value of what Mr. Ortiz converted. *See Grogan*, 498 U.S. at 291. And the measure of that cannot be the cost of capital – \$17,500 – as she suggests. *See, e.g., Lockerby*, 535 F.3d at 1040; *see also In re Ratliff*, BAP No. AZ-10-1011-JuPaDu, 2010 Bankr. LEXIS 5046, at *35 (B.A.P. 9th Cir. Oct. 13, 2010). Neither can it reflect the proposed settlement amount, also \$17,500. *See FED. R. CIV. P. 408(a)* (providing that evidence of compromise offers and negotiations is not admissible if used to prove the validity or *amount* of a disputed claim) (emphasis supplied).

The only indication of asset value comes from Mr. Ortiz’s bankruptcy schedules. In them, he estimates Supreme One SD’s inventory and assets at \$2,000 as of December 2018 (ECF No. 13, p. 7). Ms. Sioson is entitled half of this as a 50% owner: \$1,000.⁷

Mr. Ortiz also sold off a portion of the Supreme One SD inventory after the conversion. The court infers that he raised at least \$1,692 (to pay the shop’s rent) and kept the remaining inventory for himself and his successor business. Again, Ms. Sioson is entitled to half of these sale proceeds as a 50% owner: \$846.

Mr. Ortiz also scheduled \$2,000 of Supreme One Socal’s inventory. *Id.* There is no evidence that this inventory is the same as the Supreme One SD inventory, which is listed separately in Mr. Ortiz’s schedules. *Id.* Ms. Sioson has not proven that she had any interest in the Supreme One Socal assets listed in the schedules. So she is not entitled to any of this amount.

In addition to inventory, Mr. Ortiz scheduled \$1,000 of Supreme One Socal’s furniture and accessories. *Id.* At trial, there was extensive testimonial and photographic evidence concerning the store furniture that the parties owned as part of Supreme One SD. Mr. Ortiz admitted that he took the retail furniture for use in his successor business; there was no testimony about new or different items being purchased, however. The court thus infers and concludes that \$1,000 in furniture and accessories listed for Supreme One Socal in Mr. Ortiz’s bankruptcy schedules came from Supreme One SD. And Ms. Sioson is entitled to half of this as a 50% owner: \$500.

⁶ In this calculation, the court recognizes that goodwill could be a component of damages. And it is clear that Mr. Ortiz went forward with more than just inventory after his July 18 conversion. But Ms. Sioson provided no evidence or argument on this point. And because she bears the burden of proof, she also bears its consequences. Thus, the court will not include goodwill in the damages calculation.

⁷ Ms. Sioson provided documents showing invoices for inventory purchases, but there is no evidence of what remained of those acquisitions as of the July 18 conversion. She also claimed that she paid for all of the inventory herself. The court rejects that assertion and instead finds that most all of the inventory was paid for with the Supreme One SD credit card. It happened to be in Ms. Sioson’s name, but Mr. Ortiz testified that the bills were paid out of the joint business account. The court sees no documentary evidence to the contrary and credits Mr. Ortiz’s explanation. Inventory purchases are thus not a reliable measure of damages here.

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The remaining asset is the Supreme One SD business bank account. It held \$2,904.90 on July 20, 2018, all of which Ms. Sioson took for herself. Yet Mr. Ortiz had rights to half of it as a 50% owner. Ms. Sioson's damages must therefore be reduced in that amount: \$1,452.45.

Taken together, the parties' business assets thus totaled \$7,596.90, of which Ms. Sioson is entitled one half: \$3,798.45.⁸ But she already received \$2,904.90 of that from the parties' checking account. Her total damages are the difference: **\$893.55**.

Conclusion

For the reasons stated above, Mr. Ortiz is liable to Ms. Sioson in the nondischargeable amount of **\$893.55** in this matter. A separate judgment for Ms. Sioson will issue.

IT IS SO ORDERED.

⁸ \$1,000 (1/2 of Supreme One SD's inventory) + \$846 (1/2 of Mr. Ortiz's sale proceeds) + \$500 (1/2 of Supreme One Socal's furniture and accessories) + \$1,452.45 (1/2 of converted bank funds) = \$3,798.45.