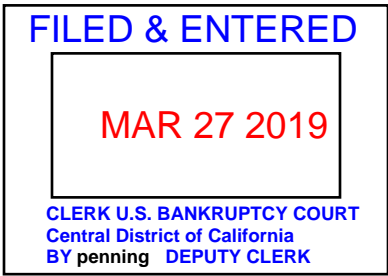


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**NOT FOR PUBLICATION**  
**UNITED STATES BANKRUPTCY COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**LOS ANGELES DIVISION**

In re:  
ARTURO GONZALEZ, dba Long Beach Realty, Inc.; dba South Bay Realty; dba Mindset; aka Art Gonzalez; aka Art Gonzalez, Jr.,  
Debtor.

Case No. 2:15-bk-25283-RK  
Chapter 7  
Adv. No. 2:16-ap-01037-RK

WESLEY H. AVERY, as Chapter 7 Trustee for the Bankruptcy Estate of Arturo Gonzalez,  
Plaintiff,

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL ON (1) THE SIXTH CLAIM FOR RELIEF IN THE COMPLAINT TO REVOKE THE DEBTOR'S DISCHARGE FOR FRAUD UNDER 11 U.S.C. § 727(d)(1); AND (2) THE SEVENTH CLAIM FOR RELIEF IN THE COMPLAINT TO REVOKE THE DEBTOR'S DISCHARGE FOR FRAUDULENT ACQUISITION OF ESTATE ASSETS UNDER 11 U.S.C. § 727(d)(2)**

vs.  
ARTURO GONZALEZ, an individual, dba Long Beach Realty, Inc.; dba South Bay Realty; dba Mindset; aka Art Gonzalez; aka Art Gonzalez, Jr.,  
Defendant.

Trial Date: January 11 and 12, 2018  
Time: 9:00 a.m.  
Place: Courtroom 1675  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, CA 90012

The trial on the sixth and seventh claims for relief in the complaint filed by the Plaintiff and Chapter 7 Trustee, Wesley H. Avery ("Plaintiff" or "Trustee"), to revoke the discharge of the Defendant and Debtor, Arturo Gonzalez ("Defendant" or "Debtor"), for fraud under Section 727(d)(1) of the Bankruptcy Code, Title 11, United States Code

1 (U.S.C.), and to revoke Debtor's discharge for knowing and fraudulent acquisition of  
2 Estate assets under 11 U.S.C. § 727(d)(2) was held on January 11 and 12, 2018.  
3 Plaintiff appeared at trial by Brett B. Curlee, of the Law Offices of Brett Curlee, through  
4 attorney Brett B. Curlee. Defendant, who is self-represented, appeared at trial for  
5 himself.

6 Having considered the Complaint of Plaintiff (Adversary No. 2:16-ap-01037-RK,  
7 Docket No. 1), Plaintiff's trial brief (Docket No. 53), Plaintiff's trial declarations (Docket  
8 No. 54), the Notice of Designation of John J. Menchaca as the Accounting Expert for  
9 the Plaintiff (Docket No. 52), the Answer of Defendant to the Complaint (Docket No.  
10 21), the trial exhibits of Plaintiff and Defendant and Defendant's declaration presented  
11 at the time of trial, and the testimony of witnesses and oral arguments of Plaintiff's  
12 Counsel and Defendant at trial, and having found that there were no objections to  
13 Plaintiff's declarations and trial exhibits, and that there were objections by Plaintiff to  
14 evidence submitted by Defendant, which are discussed herein, where appropriate, the  
15 court hereby makes the following findings of fact and conclusions of law pursuant to  
16 Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.<sup>1</sup>

17 **I. FINDINGS OF FACT**

18 1. On October 5, 2015, Debtor filed his voluntary petition for relief under  
19 Chapter 7 of the Bankruptcy Code, 11 U.S.C, which commenced this bankruptcy case  
20 entitled *In re Arturo Gonzalez, dba Long Beach Realty, Inc.; dba South Bay Realty; dba*  
21 *Mindset; aka Art Gonzalez; aka Art Gonzalez, Jr.*, Case No. 2:15-bk-25283-RK  
22 ("Bankruptcy Case"). Plaintiff's Trial Exhibits ("Ex. P-xx"), Petition, Ex. P-3. On the  
23 "Schedule B-Personal Property" ("Schedule B") to the Petition, Debtor listed his  
24 business Long Beach Realty, Inc. ("Long Beach Realty") as an asset and identified its  
25 assets as \$1,100 in Long Beach Realty's bank account, \$9,500 in accounts receivable,

26 \_\_\_\_\_  
27 <sup>1</sup> The court has reviewed and adopted in part proposed findings of fact and conclusions of law submitted  
28 by Trustee but has conducted its own independent review of the testimony and evidence received at trial,  
and the court has substantially modified the proposed findings of fact and conclusions of law to reflect its  
independent views of the case.

1 and \$400 in business equipment. Petition, Ex. P-3, p. 38.<sup>2</sup> On the "Schedule C-  
2 Property Claimed as Exempt" ("Schedule C"), Debtor claimed an exemption in the  
3 amount of \$10,600 pursuant to California Code of Civil Procedure (C.C.P.)  
4 § 703.140(b)(5) in the value of Long Beach Realty's assets. Petition, Ex. P-3, p. 42.  
5 On page 3 of Debtor's bankruptcy petition filed on October 5, 2015, he signed an oath  
6 "declar[ing] under penalty of perjury that the information provided in this petition is true  
7 and correct," which information included the information listed on the bankruptcy  
8 schedules attached thereto. Petition, Ex. P-3, p. 28.

9       2. At trial, Debtor argued that he disclosed everything he needed to disclose  
10 on the date that he filed his bankruptcy case on October 5, 2015. Trial Transcript  
11 (January 12, 2018) (hereinafter "Day 2 TT") (Docket No. 94), 40:3-23.<sup>3</sup> That statement  
12 is not true because as discussed below, Debtor did not disclose all of his prepetition  
13 assets which belonged to the bankruptcy estate in this case on his petition and  
14 bankruptcy schedules as required by the Bankruptcy Code. See *Cusano v. Klein*, 264  
15 F.3d 926, 945 (9th Cir. 2001) (citing, *inter alia*, 11 U.S.C. §§ 521(a)(l) and 541(a)(1)).

16       3. On cross-examination at trial, Debtor, a licensed California real estate  
17 broker, California Bureau of Real Estate No. 01207677, testified that when he filed his  
18 bankruptcy petition, there were sales commissions pending on sales transactions of  
19 three real properties that he was due to receive as the real estate broker when the  
20 sales transactions closed. Testimony of Arturo Gonzalez, Trial Transcript (January 11,  
21 2018) (hereinafter "Day 1 TT") (Docket No. 95), 278:1-6. Those three real property  
22 sales transactions are identified by the property locations herein as (1) "W. L Street,"  
23 (2) "Banning," and (3) "Oceanside." Debtor was aware that his sales commissions from  
24 these real estate sales transactions were pending before he filed his bankruptcy  
25 petition. Gonzalez Testimony, Day 1 TT, 257:25-262:4. However, Debtor only

26

27 <sup>2</sup> The citations to the page numbers of Plaintiff's Exhibits are to the Bates stamped pages in Plaintiff's  
Exhibit Binder presented at trial.

28 <sup>3</sup> The citations to written transcripts of the trial and hearings and to documents is to page numbers and  
line numbers in the following format: page:line(s) or page:line to page:line.

1 disclosed one of these three pending sales commissions on his bankruptcy petition and  
2 schedules filed on October 5, 2015 when he listed the amount of \$9,500.00 for the W. L  
3 Street sales commission on Schedule B-Personal Property in listing the assets of his  
4 Long Beach Realty business. Petition, Ex. P-3, p. 38.

5 4. Debtor testified at trial that the W.L. Street sales transaction went into  
6 escrow on August 1, 2015. Gonzalez Testimony, Day 1 TT, 260:23-25. He testified at  
7 trial that the Banning sales transaction went into escrow on August 20, 2015. Gonzalez  
8 Testimony, Day 1 TT, 261:18-24. He testified at trial that the Oceanside sales  
9 transaction went into escrow on September 11, 2015. Gonzalez Testimony, Day 1 TT,  
10 259:1-4. Debtor also testified that the sales commission due to him for the W.L. Street  
11 sales transaction was \$10,000. Gonzalez Testimony, Day 1 TT, 258:11-12. He  
12 testified that the sales commission for the Banning sales transaction was \$21,178.  
13 Gonzalez Testimony, Day 1 TT, 258:8-10. He testified that the sales commission for  
14 the Oceanside sales transaction was \$14,625. Gonzalez Testimony, Day 1 TT, 258:13-  
15 23. Though escrows were open for all of these three real property sales transactions  
16 with sales commissions due Debtor totaling \$45,803, he listed only one of the real  
17 property sales commissions as an account receivable on his bankruptcy schedules with  
18 his bankruptcy petition—the W.L. Street sales commission for \$9,500. In listing the  
19 W.L. Street sales commission on his original bankruptcy schedules, Debtor did not list it  
20 as "contingent." Gonzalez Testimony, Day 1 TT, 278:1-10; Petition, Ex. P-3, pp. 38 and  
21 42.

22 5. At trial, Debtor disclosed for the first time that before he filed his  
23 bankruptcy case, he had received a sales commission for selling a fourth property,  
24 "Sandison." The sale transaction for Sandison closed on August 27, 2015, and Debtor  
25 was holding the commission check from the Sandison sales transaction in the amount  
26 of \$4,810.75 when he filed his bankruptcy petition on October 5, 2015, yet he did not  
27 disclose this asset on his bankruptcy petition or at any time subsequent until his  
28 testimony at trial. Gonzalez Testimony, Day 1 TT, 276:8-13; 279:8-281:7; 281:14-

1 285:22; Day 2 TT, 41:3-45:5. However, Debtor testified at trial that he disclosed this  
2 asset to his bankruptcy attorney, Anerio V. Altman, and that the attorney failed to  
3 disclose it on his bankruptcy petition and schedules. Gonzalez Testimony, Day 1 TT,  
4 281:8-12; 285:6-8. The court does not find this testimony to be credible as to the filing  
5 of Debtor's petition and original bankruptcy schedules filed on October 5, 2015 and his  
6 first amended schedules filed on December 14, 2015 because Debtor offered no  
7 evidence at trial to corroborate this statement that he so informed his attorney of the  
8 Sandison commission check so that the attorney could have included it on the  
9 schedules. (As discussed below, Debtor is asserting the advice of counsel defense  
10 which he agreed to withdraw at the hearing on December 19, 2017 on Trustee's motion  
11 to compel document subpoenas to Altman, who had subsequently withdrawn as  
12 counsel for Debtor, for attorney-client communications regarding Debtor's advice of  
13 counsel defense, and based on that withdrawal of the defense, the court ordered that  
14 the subpoenas not be enforced and that Debtor may not present evidence in support of  
15 an advice of counsel defense, which he has subsequently tried to assert.) The  
16 Sandison commission has not been disclosed on Debtor's original and amended  
17 bankruptcy schedules. See Schedules B-Personal Property attached to Petition and  
18 Amended Schedules, Exs. P-3, P-4, P-5, and P-6.

19 6. Debtor was asked at trial whether he listed his cash withdrawal of  
20 \$1,253.96 from his bank account on October 5, 2015, the filing date of his bankruptcy  
21 petition, on his bankruptcy schedules, and he responded, "I don't think so." Gonzalez  
22 Testimony, Day 2 TT, 78:3. Trustee argues that this testimony constitutes a false oath  
23 because this cash withdrawal was not listed on the bankruptcy petition. Trustee's  
24 Proposed Findings of Fact and Conclusions of Law, filed on April 30, 2018, Proposed  
25 Conclusion of Law, p. 22, ¶22. However, Debtor listed \$1,500 cash on hand on his  
26 Original Schedule B filed on October 5, 2015 and Amended Schedules filed December  
27 14, 2015, February 4, 2016, and May 9, 2016. See Schedules B-Personal Property  
28 attached to Petition and Amended Schedules, Exs. P-3, P-4, P-5, and P-6. Because

1 the record is inconclusive whether the cash withdrawal was reported and included as  
2 part of the \$1,500 cash on hand on Schedule B, the court does not find that there was a  
3 false oath from an omission of the cash withdrawal of \$1,253.96 on the bankruptcy  
4 petition and schedules.

5 7. At the initial meeting of creditors pursuant to 11 U.S.C. § 341(a) on  
6 November 9, 2015, Debtor did not appear, but an appearance attorney was present to  
7 represent Defendant. Trustee told the appearance attorney to have Debtor amend the  
8 petition to list open sales commissions and continued the meeting of creditors pursuant  
9 to 11 U.S.C. § 341(a) to December 15, 2015. Declaration of Wesley H. Avery ("Avery  
10 Decl."), p. 3, ¶ 5; Testimony of Wesley H. Avery, Day 1 TT, 152:3-19.

11 8. By email dated November 9, 2015 at 10:53 p.m., Debtor told his  
12 bankruptcy attorney, Altman, that (1) the Banning sales transaction would close on  
13 November 13, 2015, and a sales commission of \$20,178 due to Debtor would be paid,  
14 and (2) a week afterwards, the Oceanside sales transaction would close, and a sales  
15 commission of \$14,625 due to Debtor would be paid. Email Exchange Between Debtor  
16 and Anerio V. Altman, dated November 9 and 10, 2015, Defendant's Trial Exhibit ("Ex.  
17 D-xx") D-19. The email shows Debtor already received the \$9,500 W.L. Street sales  
18 commission check on November 7, 2015. *Id.*

19 9. As reflected in Debtor's pleadings filed in this case, his bankruptcy  
20 attorney, Altman, was advised by the appearance attorney after the first meeting of  
21 creditors to amend the petition to include prepetition commissions received post-  
22 petition. Debtor's Reply to Opposition of Chapter 7 Trustee to Motion to Convert, Ex. P-  
23 17, p. 225. Altman acknowledged that "at the first [section] 341[(a) meeting of  
24 creditors], the Debtor did not appear, but appearance counsel did. The Trustee  
25 requested that appearance counsel inform Debtor's Counsel to amend the petition to  
26 include the pre-petition commissions received post-petition." Ex. P-17, 225:12-14.  
27 Altman declared he met with Debtor before the continued meeting of creditors in this  
28 case on December 15, 2015 to discuss "whether any commissions were funded that

1 were owed pre-petition and funded post-petition." Ex. P-17, p. 236, ¶¶ 14:13-14. As  
2 discussed herein, there were prepetition sales commissions owed to Debtor that he  
3 received post-petition, but he did not disclose receipt of these commissions to Trustee.

4 10. On December 14, 2015, one day before the continued meeting of  
5 creditors, Debtor filed an Amended Schedule B-Personal Property and an Amended  
6 Schedule C-Property Claimed as Exempt. Amended Schedules, filed on December 14,  
7 2015, Ex. P-4, pp. 74-81. On his Amended Schedule B, Debtor identified Long Beach  
8 Realty as an asset identified along with its assets, including a bank account holding  
9 \$1,100 and business equipment valued at \$400. Instead of following Trustee's  
10 instructions to identify prepetition commissions that Debtor received post-petition, in his  
11 Amended Schedule B-Personal Property, Debtor revised Long Beach Realty's  
12 prepetition accounts receivable (sales commissions) to include them as "contingent  
13 interests at time of filing: \$44,303 (contingent)." Ex. P-4, p. 76. The W.L. Street sales  
14 commission had not been listed as "contingent" on the Schedule B filed with Debtor's  
15 original bankruptcy petition. Trustee argues that Debtor should have disclosed at the  
16 December 15, 2015 meeting of creditors that he had received payment of the  
17 prepetition sales commissions and had the funds in his possession, and that Debtor  
18 should have followed Trustee's instructions to identify the prepetition sales  
19 commissions received postpetition on the Amended Schedule B-Personal Property.

20 11. The "contingent interests" identified as accounts receivable on the  
21 Amended Schedules B and C filed on December 14, 2015 included "W. L Street Sale:  
22 \$9,500," "Banning Sale: \$20,178," and "Oceanside Sale: \$14,625" (unless otherwise  
23 noted, the commissions for the three sales transactions are collectively referred to  
24 herein as "Commissions"). On these amended schedules, Debtor then stated that Long  
25 Beach Realty had a "current value" of \$1,500. On the Amended Schedule C-Property  
26 Claimed as Exempt, Defendant claimed an exemption in the amount of \$1,500 in Long  
27 Beach Realty under C.C.P. § 703.140(b)(6) and gave the Commissions a value of  
28 \$0.00 under C.C.P. § 703.140(b)(5). Avery Decl., p. 3, ¶¶ 6; Amended Schedules, filed

1 on December 14, 2015; Ex. P-4, p. 80. As in his original bankruptcy schedules filed  
2 with his bankruptcy petition, Debtor did not disclose the Sandison sales commission or  
3 the cash withdrawal of \$1,253.96 on the petition date on October 5, 2015 on these  
4 amended schedules. Ex. P-4, pp 75-81; Gonzalez Testimony, Day 1 TT, 194:3-14; Day  
5 2 TT, 78:2-79:3.

6 12. At the continued meeting of creditors pursuant to 11 U.S.C. § 341(a) on  
7 December 15, 2015, Debtor testified that he signed his bankruptcy petition after having  
8 read his schedules, that he was personally familiar with the information in the petition,  
9 that to the best of his knowledge the information was true and correct, that there were  
10 no errors or omissions in his schedules to bring to Trustee's attention, and that he listed  
11 all his assets on his bankruptcy schedules. Audio Recording of Continued Meeting of  
12 Creditors on December 15, 2015, Day 1 TT, 191:12-192:25 (recording played at  
13 request of Trustee). Moreover, Debtor signed his original and amended bankruptcy  
14 schedules under penalty of perjury, affirming that the schedules were true and correct.  
15 Petition, Ex. P-3; Schedules Amended December 14, 2015, Ex. P-4; Schedules  
16 Amended February 4, 2016, Ex. P-5; Schedules Amended May 9, 2016, Ex. P-6.

17 13. Also at the continued meeting of creditors pursuant to 11 U.S.C. § 341(a)  
18 on December 15, 2015, Debtor acknowledged that he filed the amended schedules a  
19 day earlier on December 14, 2015, Audio Recording of Continued Meeting of Creditors  
20 on December 15, 2015, Day 1 TT, 193:25-194:2. Debtor was asked if there were any  
21 sales pending other than Banning, Oceanside, and W.L. Street, to which he replied  
22 there were none; Trustee advised Debtor that he could either exempt the Commissions  
23 or the equity in his home, but not both; Trustee stated he would shut down Long Beach  
24 Realty and collect the Commissions; Trustee told Debtor that he had a \$1,500  
25 exemption in Long Beach Realty's assets, and the rest was non-exempt, and Debtor  
26 agreed; Trustee instructed Debtor not to spend any money in Long Beach Realty's bank  
27 account until he and Trustee reached an agreement, and Debtor agreed; and Debtor  
28 admitted that he knew from speaking to his appearance attorney that Trustee had a



1 right to instruct him not to expend money belonging to the bankruptcy estate. Audio  
2 Recording of Continued Meeting of Creditors on December 15, 2015, Day 1 TT, 194:3-  
3 14, 198:2-17; Gonzalez Testimony, Day 2 TT, 87:22-88:3; Avery Trial Decl., pp. 3-4,  
4 ¶ 7. At the continued meeting of creditors on December 15, 2015, Debtor did not  
5 disclose his receipt of the Commissions or the Sandison commission check he was  
6 holding at the time that he filed his bankruptcy case. *Id.* The first time Debtor disclosed  
7 receiving the Sandison Commission was at trial on January 11, 2018 and only on cross-  
8 examination during trial. Gonzalez Testimony, Day 1 TT, 280:11-288:7-8.

9 14. Debtor admitted in his testimony at trial that the W.L. Street sales  
10 transaction closed on November 3, 2015 and that he received the \$9,500 commission  
11 check on November 7, 2015, which he cashed. Gonzalez Testimony, Day 1 TT, 263:9-  
12 265:10; 269:15-24. Debtor also admitted in his trial testimony that the Oceanside sales  
13 transaction closed on November 13, 2015, and he received the \$14,625 commission  
14 check on November 14 or 15, 2015. Gonzalez Testimony, Day 1 TT, 272:10-25.  
15 Debtor also admitted in his trial testimony that the Banning sales transaction closed on  
16 November 25, 2015, and that he received the \$20,178 commission about a week later.  
17 Gonzalez Testimony, Day 1 TT, 273:3-274:2.

18 15. Debtor testified at trial that he was aware when he amended his  
19 bankruptcy schedules on December 14, 2015 and when he testified at the December  
20 15, 2015 creditors meeting that the Commissions were not then contingent, were paid,  
21 and were in his possession, and he admitted in his trial testimony that he did not tell  
22 Trustee that he had received the Commissions. Gonzalez Testimony, Day 1 TT,  
23 276:14-277:24; Avery Trial Decl., p. 5, ¶ 13, Real Estate Records Pertaining to Debtor's  
24 Active and Closed Listings, Ex. P-11.

25 16. Trustee argues that Debtor filed his Amended Schedules on December  
26 14, 2015 with the intent to mislead Trustee and to prevent Trustee from discovering  
27 Defendant had received all the Commissions. Trustee points out that Debtor gave  
28 Long Beach Realty a value of \$1,500 on the Amended Schedule B when the real value

1 was \$44,303, not \$1,500, and he did not include the Sandison Commission check on  
2 the amended schedules, which item was not contingent on the date of the filing of  
3 Debtor's bankruptcy case and was not listed in the amended schedules. Trustee also  
4 points out that Debtor on his Amended Schedule C gave Long Beach Realty a value of  
5 \$1,500 and claimed an exemption in that amount pursuant to C.C.P. § 703.140(b)(6),  
6 and that Debtor gave the Commissions a value of \$0.00 under C.C.P. § 703.140(b)(5),  
7 which he also claimed as exempt. As Trustee argues, it appeared from the schedules  
8 that Defendant was only exempting the \$1,100 in Long Beach Realty's bank account  
9 and \$400 in business equipment. Amended Schedules, filed on December 14, 2015,  
10 Ex. P-4, p. 80.

11 17. In response, Debtor argues that his bankruptcy schedules were a  
12 "snapshot" of his assets on the date that he filed his bankruptcy case. Trustee argues  
13 that this does not negate the fact that Debtor knew that Trustee wanted to know the  
14 status of the Commissions as acknowledged by Debtor, his then-bankruptcy attorney,  
15 Altman, and Debtor's appearance attorney, as noted above. Debtor testified that he  
16 looked at his amended schedules before he signed them. Gonzalez Testimony, Day 2  
17 TT, 39:2-13. Thus, Debtor was fully aware of the information in his amended  
18 bankruptcy schedules and that all the sales Commissions had been paid to him.

19 18. The first and only time that Debtor had disclosed receiving payment of the  
20 Sandison Sales Commission was on January 11, 2018 at trial on cross-examination.  
21 Gonzalez Testimony, Day 1 TT, 280:11-288:8. Instead of turning the Sandison check  
22 over to Trustee, Debtor deposited it into Long Beach Realty's bank account on  
23 December 18, 2015, three days after the continued meeting of creditors on December  
24 15, 2015 and four days after filing the Amended Schedules on December 14, 2015.  
25 Declaration of John J. Menchaca ("Menchaca Decl."), p. 15, ¶ 2, Schedule of Arturo  
26 Gonzalez, Bank Account Debits/Disbursements and Credits/Receipts, Ex. P-22-A.

27 19. As a defense for his nondisclosure of the Sandison Commission, Debtor  
28 testified that he did not consider it a commission anymore when he filed his bankruptcy

1 case on October 5, 2015 because he did not consider it pending because he had  
2 already received the commission check which was uncashed when he filed his  
3 bankruptcy case. Gonzalez Testimony, Day 2 TT, 151:7-152:4. However, this  
4 explanation makes Debtor's failure to disclose this commission as an asset anywhere in  
5 his bankruptcy petition and schedules more egregious than the failure to disclose the  
6 other pending sales commissions because he had received payment of the Sandison  
7 sales commission in the form of a negotiable instrument that he could reduce to cash at  
8 any time when he filed his bankruptcy petition and he failed to disclose this asset on his  
9 bankruptcy petition and schedules, which was knowing and material. Debtor's failure to  
10 disclose the Sandison sales commission check on his amended schedules filed on  
11 December 14, 2015 was another false oath because he knew he had it as a prepetition  
12 asset when he cashed it a few days later.

13         20. As another defense, Debtor testified at trial that he did not turn the  
14 Commissions over to Trustee because he wanted to convert his bankruptcy case to one  
15 under Chapter 13 of the Bankruptcy Code. Gonzalez Testimony, Day 1 TT, 310:18-  
16 311:8; Day 2 TT, 29:11-30:15. As this court ruled, Debtor was not eligible for chapter  
17 13 because he did not have any regular income. Avery Trial Decl., p. 4, ¶ 10,  
18 Memorandum Decision and Order Denying Debtor's Motion to Convert Case, Ex. P-20.  
19 Debtor did not file his Motion to Convert the bankruptcy case to Chapter 13 until  
20 January 15, 2016, a month after the continued meeting of creditors on December 15,  
21 2015, and he did so in response to Trustee's demand for disclosure of the  
22 Commissions that Debtor received at the prior meetings of creditors. See Debtor's  
23 Reply to Opposition of Chapter 7 Trustee to Motion to Convert, Ex. P-17, 237:10.  
24 Debtor testified at trial that at no time did he notify Trustee or make any effort to turn  
25 the Commission checks over to Trustee after Debtor received them. Gonzalez  
26 Testimony, Day 1 TT, 276:21-277:8; 277:16-24.

27         21. Debtor's argument that he wanted to pay his creditors is not supported by  
28 the evidence because he did not disclose most of his pending sales commissions and

1 the Sandison sales commission for which he already received a check on his  
2 bankruptcy petition and schedules when he filed his bankruptcy case on October 5,  
3 2015, he did not tell Trustee at the meetings of creditors that he received the  
4 commissions and he was spending the commissions which were assets of the  
5 bankruptcy estate for his personal and business purposes rather than paying creditors.

6 22. Although Debtor has admitted that Long Beach Realty assets were assets  
7 of the bankruptcy estate, Debtor did not advise Trustee of the Long Beach Realty Sales  
8 Commissions nor did Debtor ask Trustee for permission before Debtor spent the  
9 Commissions that Debtor deposited into Long Beach Realty's bank account. Gonzalez  
10 Testimony, Day 2 TT, 65:7-16; 65:19-66:4. Plaintiff's forensic accountant, John  
11 Menchaca ("Menchaca"), testified that Long Beach Realty received sales commissions  
12 totaling \$43,664.47 between October 5, 2015 and January 28, 2016. Trial Testimony of  
13 John Menchaca, Day 1 TT, 224:1-17; Schedule of Arturo Gonzalez, Bank Account  
14 Debits/Disbursements and Credits/Receipts, Ex. P-22-A, pp. 316-321. From Long  
15 Beach Realty's bank account, Debtor disbursed monies totaling \$33,883.52 between  
16 October 5, 2015 and January 15, 2016 to pay his personal and business expenses.  
17 Avery Decl., p. 5, ¶ 11; Menchaca Decl., p. 16, ¶ 5, Schedule of Arturo Gonzalez, Bank  
18 Account Debits/Disbursements and Credits/Receipts, Ex. P-22-A, p. 713, ¶ 2:16-18;  
19 Letter from Anerio V. Altman to Brett B. Curlee, dated February 13, 2016, Ex. P-13, pp.  
20 146-168; Menchaca Testimony, Day 1 TT, 235:23-236:3; 246:12-15.

21 23. Debtor's paid accounts receivable disbursed from Long Beach Realty's  
22 bank account as of January 14, 2016 included \$21,178 from two commission checks  
23 traceable directly to the Banning sale transaction listed on his Amended Schedule B,  
24 one check for \$11,195 deposited December 3, 2015, and the other for \$8,968  
25 deposited January 7, 2016. Menchaca Decl., p. 16, ¶¶ 5-6, Schedule of Arturo  
26 Gonzalez, Bank Account Debits/Disbursements and Credits/Receipts, Ex. P-22-A;  
27 Menchaca Testimony, Day 1 TT, 225:3-23. At trial, Debtor admitted that he deposited  
28 the check for \$11,195 into Long Beach Realty's bank account to use the money for his

1 business and personal expenses. Gonzalez Testimony, Day 1 TT, 274:3-25.

2 24. From December 3 to December 17, 2015, Debtor had spent \$7,173.45 of  
3 the \$11,195 Banning sales transaction commission deposited into Long Beach Realty's  
4 checking account and had spent the balance of the Banning Sales Commissions by  
5 December 24, 2015. Menchaca Decl., pp. 16-17, ¶ 7. Unbeknownst to Trustee or  
6 Menchaca, Defendant deposited the Sandison commission check for \$4,810.75 on  
7 December 18, 2015, only three days after being told by Trustee at the continued  
8 meeting of creditors on December 15, 2015 not to dissipate money in Long Beach  
9 Realty's bank account. This brought total sales commissions directly deposited by  
10 Debtor into Long Beach Realty's checking account from which Debtor disbursed  
11 therefrom not less than \$38,694.27 between October 5, 2015 and January 15, 2016,  
12 including the \$33,883.52 identified by Menchaca and the \$4,810.75 Sandison  
13 commission check first disclosed by Debtor at trial. Expert Opinion Report of John  
14 Menchaca and Schedule of Arturo Gonzalez, Bank Account Debits/Disbursements and  
15 Credits/Receipts, Exs. P-22 and 22-A, Menchaca Decl., p. 16, ¶ 5:15-18; ; Letter from  
16 Anerio V. Altman to Brett B. Curlee, dated February 13, 2016, Ex. P-13, pp. 146-168;  
17 Menchaca Testimony, Day 1 TT, 235:23-236:3; 246:12-15; Gonzalez Testimony, Day 2  
18 TT, 68:12-19.

19 25. While Debtor insisted in his trial testimony that he used Commissions for  
20 necessary business expenses, the evidence shows otherwise. Gonzalez Testimony,  
21 Day 2 TT, 55:13-56:3. Long Beach Realty's Bank Statements and bank account  
22 transaction register and Defendant's testimony at trial show he was using Commissions  
23 deposited into Long Beach Realty's checking account to pay his personal expenses,  
24 including Trader Joe's, Whole Foods, Sam's Club, travel costs, and all the restaurant  
25 costs identified in Long Beach Realty's bank statements and bank account transaction  
26 register. Gonzalez Testimony, Day 2 TT, 84:21-85:5; Letter from Anerio V. Altman to  
27 Brett B. Curlee, dated February 13, 2016, Ex. P-13, pp. 149-168; and Schedule of  
28 Arturo Gonzalez, Bank Account Debits/Disbursements & Credits/Receipts, Ex. P-22-A.

1           26.       On December 7, 2015, Debtor used \$858.60 of the money in Long  
2 Beach Realty's bank account to purchase tickets to New York for a vacation for himself,  
3 his daughter, his brother, and his sister; he made a second airline ticket purchase on  
4 December 10, 2015 for \$795.20; and on December 14, 2015, the same day his  
5 amended schedules were filed and the day before he was scheduled to testify at the  
6 continued meeting of creditors, he spent \$1,151.88 on hotel rooms in New York for a 5-  
7 day family trip. Gonzalez Testimony, Day 2 TT, 70:20-73:17; Letter from Anerio V.  
8 Altman to Brett B. Curlee, dated February 13, 2016, Ex. P-13, pp. 157-158.

9           27.       There were also other personal expenses paid for by Debtor from Long  
10 Beach Realty's account that were stated on the record and contained in the bank  
11 statements in Plaintiff's Exhibits 13 and 22-A that are incorporated herein. Day 2 TT,  
12 73:18-75:22; Letter from Anerio V. Altman to Brett B. Curlee, dated February 13, 2016,  
13 Ex. P-13, pp. 149-168; and Schedule of Arturo Gonzalez, Bank Account  
14 Debits/Disbursements and Credits/Receipts, Ex. P-22-A. There is no evidence that  
15 Trustee consented to any of those expenditures. Gonzalez Testimony, Day 2 TT,  
16 75:23-76:10; Letter from Anerio V. Altman to Brett B. Curlee, dated February 13, 2016,  
17 Ex. P-13.

18           28.       The court finds that Debtor did not fully and accurately disclose the status  
19 of the Commissions to Trustee and led Trustee to believe all the Commissions were  
20 "contingent" when Debtor filed his Amended Schedules on December 14, 2015, and  
21 Debtor testified at the continued meeting of creditors on December 15, 2015 where  
22 Debtor did not disclose his receipt of the Commissions, and Trustee did not learn of the  
23 status of the Commissions that had been collected until after Trustee heard about the  
24 telephone conversation between his attorney, Curlee, and Debtor's attorney, Altman, on  
25 January 15, 2016.

26           29.       Debtor did not disclose the Sandison Sales Commission, a prepetition  
27 asset belonging to the bankruptcy estate, to Trustee, which Debtor received and spent,  
28 as the Sandison Sales Commission was not disclosed in Defendant's bankruptcy

1 petition, any amendments thereto, which documents were signed by him under  
2 declaration of penalty of perjury, nor was the Sandison Sales Commission disclosed to  
3 Trustee at any time until Debtor was cross-examined at trial on January 11, 2018.

4 30. Debtor did not voluntarily turn over, surrender, or deliver estate assets as  
5 Debtor argued at trial. On January 15, 2016, Defendant's conversion motion and  
6 Plaintiff's application to employ Brett B. Curlee ("Curlee") as Trustee's counsel were  
7 filed. Curlee Decl., p. 11, ¶ 4, Application to Employ Law Offices of Brett Curlee, Ex. P-  
8 9, pp. 120-131, Main Bankruptcy Case Docket Nos. 28 and 29. At 11:50 a.m. on  
9 January 15, 2016, Curlee called Altman to discuss the status of the Commissions;  
10 Altman advised Curlee that Debtor had received "some" Commissions and was using  
11 "some" for living expenses and holding the rest to pay the mortgage for Debtor's  
12 residence after the case was converted to Chapter 13; on behalf of Trustee, Curlee  
13 instructed Altman that Debtor must sequester and account for the Commissions; and  
14 Altman stated that he would contact his client. Curlee Decl., p. 11, ¶ 4; Emails  
15 Exchanged Between Anerio V. Altman and Brett B. Curlee, Ex. P-10, pp. 132-133.

16 31. From hearing about this telephone conversation between Trustee's  
17 attorney, Curlee, and Debtor's attorney, Altman, on January 15, 2016, Trustee learned  
18 for the first time that "some" Commissions had been paid to Debtor and that Debtor was  
19 using "some" for living expenses, and Trustee reviewed Debtor's brokerage listings and  
20 found the last sale on which any Commission was due closed on November 25, 2015,  
21 20 days before Debtor filed his amended schedules and 21 days before the continued  
22 meeting of creditors on December 15, 2015. Avery Decl. p. 5, ¶¶ 11-13, Real Estate  
23 Records Pertaining to Debtor's Active and Closed Listings, Ex. P-11, pp. 134-140;  
24 Avery Testimony, Day 1 TT, 135:1-136:23. As noted above, Debtor confirmed that the  
25 three prepetition sales transactions with pending commissions due to Debtor as of the  
26 date of filing of the bankruptcy petition had closed by early December 2015.

27 32. Debtor presented no evidence at trial to demonstrate that Trustee had  
28 learned of Debtor's actions prior to January 15, 2016, and thus the court finds that the

1 first time that Trustee knew of Debtor's receipt and use of the Commissions was  
2 January 15, 2016.

3 33. Immediately after their telephone call on January 15, 2016, Trustee's  
4 counsel, Curlee, emailed Debtor's counsel, Altman, demanding that Debtor sequester,  
5 not spend, and account for the Commissions, and Curlee informed Altman that Trustee  
6 demanded bank statements from Debtor showing the funds were sequestered and not  
7 being used for Debtor's post-petition living expenses. Curlee Decl., pp. 11-12, ¶¶ 5 and  
8 6; Emails Exchanged Between Anerio V. Altman and Brett B. Curlee, Ex. P-10, pp. 132-  
9 133.

10 34. At 1:55 p.m. after speaking to his client (Debtor), Altman emailed Curlee  
11 that "[a]fter taking time to speak to my client I regret to say that we will not comply with  
12 the Trustee's requests as we see no point in doing so." That is, Debtor's position was  
13 that the issues of turnover of property would be addressed in the case after it was  
14 converted to Chapter 13. Curlee Decl., p. 12, ¶ 6; Emails Exchanged Between Anerio  
15 V. Altman and Brett B. Curlee, Ex. P-10, pp. 132-133. Thus, in other words, Debtor  
16 was refusing to cooperate with Trustee and comply with Trustee's instructions that the  
17 prepetition assets of the bankruptcy estate in the Commissions not be dissipated.

18 35. Debtor's bankruptcy schedules amended on December 14, 2015, which  
19 were the operative schedules in the case as of January 15, 2016, showed that he only  
20 claimed an exemption in the amount of \$1,500 in the value of Long Beach Realty's  
21 assets reflecting the value of the cash of \$1,500.00 and equipment of \$400.00 and that  
22 he gave the Commissions a property value of \$0.00 and an exemption value of \$0.00.  
23 Thus, according to Trustee, as shown by Debtor's amended bankruptcy schedules, the  
24 balance of Long Beach Realty's assets including the "contingent" interests in the W L  
25 Street, Banning and Oceanside sales commissions which had not been claimed at that  
26 time by Debtor as exempt belonged to the bankruptcy estate. At trial, Trustee testified  
27 that it was his duty to administer and protect all nonexempt assets of the bankruptcy  
28 estate from being wasted or dissipated. Avery Testimony, Day 1 TT, 135:14-20.



1           36.       According to Trustee, because he was unable to obtain Debtor's  
2 cooperation in disclosing and turning over nonexempt assets of the bankruptcy estate,  
3 on January 21, 2016, Trustee filed the complaint to commence this adversary  
4 proceeding, *Wesley H. Avery v. Arturo Gonzalez, dba Long Beach Realty, Inc.; dba*  
5 *South Bay Realty; dba Mindset; aka Art Gonzalez; aka Art Gonzalez, Jr.*, Adv. Case No.  
6 2:16-ap-01637-RK ("Adversary Proceeding"). Complaint, Ex. P-1. Also, according to  
7 Trustee, he was required to move ex parte for an accounting and to bar further  
8 dissipation of the Commissions pending further hearing, and this court granted a  
9 temporary restraining order ("TRO") and set Trustee's Preliminary Injunction and  
10 Turnover Motion for hearing on February 17, 2016. Curlee Decl., p. 12, ¶ 7, Complaint  
11 and Order on Ex Parte Application for Turnover of Funds, Accounting and TRO, Exs. P-  
12 1 and P-12; Avery Decl., pp. 5-6, ¶ 14. The TRO shows that Trustee had to obtain a  
13 court order to compel Debtor to account for and report the Commissions and to halt the  
14 further use of Commissions by Debtor to pay his business and personal expenses.

15           37.       On February 4, 2016, Debtor filed further Amended Schedules B and C  
16 to claim value in Long Beach Realty as exempt, including \$7,625 under C.C.P.  
17 § 703.140(b)(6) as a "tool of trade" and \$21,125 more under the C.C.P. § 703.140(b)(5)  
18 wild card exemption, and he listed the Commissions as no longer contingent, as  
19 Trustee had previously directed him to do at the first section 341(a) meeting of  
20 creditors. Avery Decl., p. 6, ¶ 15, Amended Schedules filed on February 4, 2016, Ex.  
21 P-5, pp. 82-90; Avery Testimony, Day 1 TT, 138:19-140:3. As Trustee argues, Debtor  
22 could have done that on his amended schedules filed on December 14, 2015, but he  
23 did not. Again, Debtor failed to disclose the Sandison Commission on these further  
24 amended bankruptcy schedules. These further amended bankruptcy schedules were  
25 only filed after Trustee took action to compel Debtor to disclose and turn over the  
26 Commissions. As previously noted, Debtor did not disclose the existence of the  
27 Sandison Sales Commission in this bankruptcy case until January 11, 2018 at trial.  
28 Gonzalez Testimony, Day 1 TT, 280:11-288:8.

1           38. Pursuant to the TRO, Debtor finally accounted for the Commissions on  
2 February 11, 2016. Avery Decl., p. 7, ¶ 18, Letter from Anerio V. Altman to Brett B.  
3 Curlee, dated February 13, 2016, Ex. P-13, pp. 146-168; Curlee Decl., p. 13, ¶ 10,  
4 Letter from Anerio V. Altman to Brett B. Curlee, dated February 13, 2016, Ex. P-13.  
5 Debtor's bankruptcy counsel, Altman, confirmed to Trustee's counsel, Curlee, that as of  
6 February 11, 2016, Debtor maintained \$14,625 in uncashed checks (the Oceanside  
7 Sales Commission), and another \$10,267.50 in cash from sales commissions from the  
8 sales transaction for the Ravenna property that arose post-petition. Letter from Anerio  
9 V. Altman to Brett B. Curlee, dated February 13, 2016, Ex. P-13, p. 146-148.

10           39. At the evidentiary hearing on Trustee's motion for preliminary injunction  
11 and turnover on February 17, 2016, this court ordered Debtor to turn over \$16,054 in  
12 non-exempt Commissions; that as Debtor's counsel, Altman was to hold another \$8,550  
13 that Debtor argued was exempt pending Trustee's objection to Debtor's "tool of the  
14 trade" exemption; and that Debtor was allowed to keep \$20,200 as exempt based on  
15 Debtor's amended schedules claiming exemptions pursuant to California Code of Civil  
16 Procedure § 7013.140(b)(5). Curlee Decl., pp. 13-14, ¶ 11, Transcript from Hearing on  
17 Plaintiff's Motion for Preliminary Injunction, February 17, 2016, Ex. P-14, pp. 190-204;  
18 Order on Motion for Preliminary Injunction, Ex. P-15; Amended Schedules, filed on  
19 February 4, 2015, Ex. P-5, p. 85.

20           40. As a defense, Debtor argued that because he turned the non-exempt  
21 Commissions over to Trustee pursuant to the turnover order, there was no damage to  
22 the bankruptcy estate. However, as Trustee argues, Debtor did so only pursuant to a  
23 turnover order after Trustee prosecuted his turnover action against Debtor. Gonzalez  
24 Testimony, Day 1 TT, 278:11-15.

25           41. Moreover, Debtor did not disclose the \$4,810.75 Sandison Sales  
26 Commission at any time. Curlee Decl., pp. 13-14, ¶ 11, Letter from Anerio V. Altman to  
27 Brett B. Curlee, dated February 13, 2016 and Transcript from Hearing on Plaintiff's  
28 Motion for Preliminary Injunction, February 17, 2016, Exs. P-13 and P-14. Trustee

1 argues that he could have sought recovery of these monies as part of the preliminary  
2 injunction and turnover actions had Debtor accounted for these monies, but for the fact  
3 that Debtor failed to disclose or account for these additional assets.

4 42. On March 8, 2016, this court orally ruled that the remaining amount of  
5 \$8,550 that Debtor claimed as exempt was not exempt as a tool of trade and ordered  
6 Debtor to turn over these funds to Trustee. Curlee Decl., p. 14, ¶ 12, Order on Chapter  
7 7 Trustee's Motion Objecting to Certain Personal Property Exemptions, Ex. P-18 pp.  
8 280-283; Findings of Fact and Conclusions of Law re: Objection to Personal Property  
9 Exemptions, Ex P-19, pp. 284-295.

10 43. On May 9, 2016, after the court ordered turnover of the funds of  
11 \$8,550.00, Debtor further amended his bankruptcy schedules again to show the  
12 Commissions were paid and no longer contingent. Debtor once again did not disclose  
13 the Sandison Commission of \$4,810.75 on these further amended schedules. Avery  
14 Decl., pp. 8-9, ¶ 23; Amended Schedules filed on May 9, 2016, Ex. P-6, p. 94.

15 44. The court finds that (1) Debtor only turned over to Trustee the value of  
16 the non-exempt Commissions involuntarily and only pursuant to the court's temporary  
17 restraining order to compel Debtor to report and disclose the Commissions received  
18 (and this turnover did not include the nonexempt Sandison Sales Commission); and  
19 (2) despite the turnover order, Debtor failed to cooperate with Trustee, and the  
20 bankruptcy estate was damaged, because Debtor intentionally did not report or turn  
21 over the Sandison Sales Commission of \$4,810.75. Had the Sandison Sales  
22 Commission been fully disclosed by Debtor to Trustee, Trustee could have sought  
23 turnover of an additional \$4,810.75 on behalf of the estate.

24 45. It was Debtor's duty to disclose these assets on his bankruptcy petition  
25 and schedules and otherwise to Trustee pursuant to 11 U.S.C. § 521(a)(1) and (3) so  
26 Trustee could review the assets and determine whether these assets should be  
27 administered as part of the bankruptcy estate pursuant to 11 U.S.C. § 704. Trustee  
28 had a right to require the prepetition assets belonging to the bankruptcy estate in the

1 Commissions under 11 U.S.C. § 541(a) not to be dissipated which Debtor ignored  
2 knowingly at his own peril. 11 U.S.C. §§ 523(a)(3) and 704.

3 46. Debtor argued at trial that there was no harm because he paid back the  
4 Commissions. That argument presumes two things: (1) Debtor's failure to cooperate is  
5 irrelevant, which it is not under 11 U.S.C. § 521(a)(3); and (2) the Bankruptcy Code  
6 allows a bankruptcy debtor to take money belonging to the bankruptcy estate without  
7 consent of Trustee, as an option or a loan, that can be paid back later from other post-  
8 petition sources when and if available, which is contrary to 11 U.S.C. §§ 541(a) and  
9 704. That argument of Debtor is not persuasive because Debtor interfered and  
10 obstructed Trustee's performance of his duties to collect and reduce to money property  
11 of the bankruptcy estate by not fully disclosing his prepetition assets and spending the  
12 undisclosed prepetition assets without the knowledge and authorization of Trustee  
13 contrary to 11 U.S.C. §§ 521(a)(3) and 704.

14 47. The evidence before the court shows that Debtor not only spent exempt  
15 Commissions, but also non-exempt Commissions as well. Debtor was entitled to  
16 exempt Commissions totaling \$20,200 pursuant to California Code of Civil Procedure  
17 § 703.140(b)(5) as the parties have agreed. The bankruptcy estate was entitled to non-  
18 exempt commissions of \$16,054 pursuant to the court's turnover order, plus \$8,550  
19 pursuant to the court's order disallowing Debtor's "tool of the trade" exemption under  
20 California Code of Civil Procedure § 703.140(b)(6), for a total of \$24,604 (which does  
21 not include the Sandison Sales Commission of \$4,810.75). Order on Motion for  
22 Preliminary Injunction and Order on Chapter 7 Trustee's Motion Objecting to Certain  
23 Personal Property Exemptions, Exs. P-15 and P-18.

24 48. In Debtor's accounting provided to Trustee on February 11, 2016,  
25 Debtor's bankruptcy counsel, Altman, disclosed, "As stated previously, the checks for  
26 Oceanside are not cashed and can be signed over and the remainder of cash can be  
27 paid to make up the difference from the sale at Ravenna." Letter from Anerio V. Altman  
28 to Brett B. Curlee, dated February 13, 2016, Ex. P-13, p. 148. It is not disputed that the

1 Ravenna sale was post-petition. Letter from Anerio V. Altman to Brett B. Curlee, dated  
2 February 13, 2016, Ex. P-13, p. 147. At the further continued meeting of creditors on  
3 February 24, 2016, Debtor testified that he had spent the \$20,178 from the Banning  
4 sales transaction and the \$9,500 from the W.L. Street sales transaction. Gonzalez  
5 Testimony, Day 1 TT, 210:10-24.

6 49. Debtor testified that he turned over the two cashier's checks totaling  
7 \$14,625 from the Oceanside sales transaction to Trustee. Avery Testimony, Day 1 TT,  
8 146:20-147:18; Gonzalez Testimony, Day 2 TT, 81:2-11. Debtor did not have non-  
9 exempt Commissions to make up the difference between \$14,625 and the \$24,604 in  
10 total non-exempt commissions that the bankruptcy estate was entitled to receive, so  
11 Debtor made up the difference from the Ravenna sales commission of \$10,267.50  
12 earned by Debtor postpetition, which is not property of the bankruptcy estate. Avery  
13 Decl., p. 8, ¶ 21; Avery Testimony, Day 1 TT, 146-147.

14 50. The court finds that Debtor spent \$9,979 of non-exempt commissions.  
15 Moreover, when the Sandison Sales Commission is taken into account, Debtor had  
16 spent \$14,789.75 of non-exempt commissions. Defendant had sufficient proceeds from  
17 the Ravenna sale to make up the difference in regard to the Commissions. This  
18 mitigating fact does not negate the adverse fact that Debtor used non-exempt  
19 Commissions to pay business and personal expenses in disregard of his duties as a  
20 bankruptcy debtor to report the acquisition of estate assets, and to deliver, turn over,  
21 and surrender those assets to Trustee pursuant to 11 U.S.C. §521(a)(3) and (4). The  
22 court further finds that Debtor has failed to voluntarily turn over to Trustee the Sandison  
23 Sales Commission, a prepetition asset which is property of the bankruptcy estate.

24 51. As a defense, Debtor testified that Trustee's duty was to object to time-  
25 barred proofs of claim and that therefore Trustee should have realized Debtor could  
26 have paid all of his creditors and should have not sought turnover of the Sales  
27 Commissions. Gonzalez Testimony, Day 2 TT, 161:22-164:7. In response, Trustee  
28 testified that the dispute over disclosure and turnover of the Sales Commissions

1 occurred before the deadline for creditors to file proofs of claim on March 21, 2016 and  
2 Trustee had no way of knowing what proofs of claim would be filed before then. Avery  
3 Decl., ¶ 9, Notification of Asset Case and Request for Claims Bar Date/Notice of  
4 Possible Dividend, Ex. P-7, p. 104.

5 52. As Trustee testified at trial, he had to act quickly because Debtor was  
6 converting estate assets by spending the sales commission monies, so he reviewed  
7 Debtor's scheduled debts on the bankruptcy petition which listed \$97,045 in unsecured  
8 debts. Avery Testimony, Day 1 TT, 48:15-20; Avery Decl., ¶ 3, Ex. P-3; Petition, Ex. P-  
9 3, pp. 35 and 48-50. While a duty for Trustee to object to proofs of claim under 11  
10 U.S.C. § 704(a)(5) might have arisen after the claims filing deadline of March 21, 2016,  
11 Trustee had to act promptly when he learned on January 15, 2016 that Debtor was  
12 spending the estate assets in the Sales Commissions. At that time, Trustee's  
13 knowledge indicated that based on Debtor's schedules, there were potentially  
14 unsecured claims of \$97,045 that may need to be paid, and Debtor was spending  
15 assets not claimed as exempt which could be used to pay such claims. Moreover, even  
16 if consideration of the claims bar date is a factor, in this Chapter 7 bankruptcy case, late  
17 filed claims are obligated to be paid, though such claims may be subject to  
18 subordination in order of payment pursuant to 11 U.S.C. § 726, and this would include  
19 the proof of claim of the California Franchise Tax Board of \$5,950.17 filed late on  
20 August 19, 2016. Claim No. 5-1, filed on August 19, 2016. Therefore, the court finds  
21 that Trustee's actions were reasonable at the time that the actions were taken in order  
22 to protect the assets of the bankruptcy estate.

## 23 **II. CONCLUSIONS OF LAW**

### 24 **A. Causes of Action Tried by the Court.**

25 1. The two remaining causes of action in the complaint were tried, including  
26 (1) the sixth cause of action to revoke Debtor's discharge obtained through fraud under  
27 11 U.S.C. § 727(d)(1), and (2) the seventh cause of action to revoke Debtor's discharge  
28 for fraudulent acquisition of estate property under 11 U.S.C. § 727(d)(2).

1 **B. Subject Matter Jurisdiction.**

2 2. As a preliminary matter, the court finds that Trustee's Complaint, including  
3 the claims for relief to revoke discharge under 11 U.S.C. § 727, was timely filed within  
4 one year after Debtor is deemed to have received his discharge. 11 U.S.C. § 727(e). In  
5 this case, the court has not yet formally entered a discharge for Debtor. However, the  
6 court may and does deem that Debtor's discharge was entered as of January 9, 2016,  
7 the day after the last day of the 60-day period after the first date set for the meeting of  
8 creditors under 11 U.S.C. § 341(a) for objecting to discharge pursuant to Federal Rule of  
9 Bankruptcy Procedure 4004(a). *In re Dietz*, 914 F.2d 161, 164 (9th Cir. 1990) (citing,  
10 *inter alia*, Federal Rule of Bankruptcy Procedure 4004(c)).

11 3. The last date to object to Debtor's discharge was January 8, 2016, and  
12 Debtor's discharge would be effective after that day. Trustee's Adversary Complaint was  
13 filed on January 21, 2016, one week after Plaintiff discovered Defendant had received  
14 the Commissions. Complaint, Ex. P-1. While Defendant's Answer states that the  
15 discharge was never entered, formal entry of the discharge on the court's docket is not  
16 required as discharge may be deemed effective immediately on expiration of the 60-day  
17 period after the first date set for the meeting of creditors under 11 U.S.C. § 341(a), so  
18 long as no objections are filed. Defendant's Answer to Complaint, Ex. P-2, p. 22, ¶ vv;  
19 *In re Dietz*, 914 F.2d at 164 (citing, *inter alia*, Federal Rule of Bankruptcy Procedure  
20 4004(c)). The first meeting of creditors was set for November 9, 2015, the 60-day  
21 objection to discharge period expired on January 8, 2016, so Debtor is deemed to have  
22 received his discharge immediately after January 8, 2016, and Trustee properly sought  
23 to revoke it. *Id.*

24 4. No objections were raised before or at trial on any other ground to the  
25 court's jurisdiction to hear the revocation of discharge causes of action.

26 5. The court finds that it has subject matter jurisdiction to adjudicate the  
27 causes of action to revoke Defendant's discharge pursuant to 28 U.S.C. §§ 157(a),  
28 (b)(2)(A), (J) and (O) and 1334.

1 **C. Trustee's Burden of Proof as Plaintiff.**

2 6. Revocation of discharge is construed liberally for the bankruptcy debtor  
3 and strictly against the party objecting to discharge. *First Beverly Bank v. Adeeb (In re*  
4 *Adeeb)*, 787 F.2d 1339, 1342 (9th Cir. 1986) (citation omitted). But a court lacks  
5 discretion to refuse a request to revoke the discharge where 11 U.S.C. § 727(d) grounds  
6 are established. 4 March, Ahart, Shapiro, *California Practice Guide: Bankruptcy*,  
7 ¶ 22:1745 at 22-226 (2018) (citing 11 U.S.C. § 727(d) ("the court *shall* revoke a  
8 discharge. . . .") (emphasis added)). Trustee as Plaintiff has the burden to demonstrate,  
9 by the preponderance of evidence, each element of a cause of action under  
10 §§ 727(d)(1) and (d)(2). Federal Rule of Bankruptcy Procedure 4005; *In re Puente*, 49  
11 B.R. 966, 968 (Bankr. W.D.N.Y. 1985).

12 **D. Elements of Plaintiff's Cause of Action Under 11 U.S.C. § 727(d)(1).**

13 7. Parties may object to discharge within 60 days after the meeting of  
14 creditors, and if there is no objection within that period, "the court shall forthwith grant  
15 the discharge." Federal Rule of Bankruptcy Procedure 4004. The United States Court  
16 of Appeals for the Ninth Circuit has held that, in deeming the discharge to have been  
17 entered on the sixtieth day, "the court acted consistently with the spirit of the bankruptcy  
18 rules, which contemplate that discharge is effective immediately upon expiration of the  
19 60-day period following the creditors' meeting, so long as no objections are filed." *In re*  
20 *Dietz*, 914 F.2d at 164. Here, as reflected on the case docket for this bankruptcy case,  
21 the deadline for objecting to discharge pursuant to Federal Rule of Bankruptcy  
22 Procedure 4004(a) was January 8, 2016. Although the court did not formally enter an  
23 order of discharge, Debtor became entitled to a discharge on January 8, 2016, and the  
24 court may and does deem Debtor's discharge was entered as of January 9, 2016.

25 8. Considering Trustee's sixth cause of action to revoke Debtor's discharge  
26 under 11 U.S.C. § 727(d)(1), applicable law holds that a discharge will be revoked under  
27 § 727(d)(1) if Trustee as Plaintiff shows: (1) Debtor obtained his discharge through  
28 fraud; and (2) Trustee, as the requesting party, had no knowledge of the fraud prior to



1 discharge. 11 U.S.C. § 727(d)(1); *Dean v. McDow*, 299 B.R. 133, 139 (E.D. Va. 2003).  
2 A debtor is deemed to have obtained his discharge by fraud if: (1) he knowingly and  
3 fraudulently made a false oath in or in connection with the bankruptcy proceeding; and  
4 (2) the oath concerned a material fraud that would have resulted in the denial of  
5 discharge under 11 U.S.C. § 727(a)(4)(A) had it been known prior to discharge. *Id.*;  
6 *Jones v. U.S. Trustee, Eugene*, 736 F.3d 897, 900 (9th Cir. 2013).

7 9. "A false statement or an omission in the debtor's bankruptcy schedules or  
8 statement of financial affairs can constitute a false oath." *In re Retz*, 606 F.3d 1189,  
9 1196 (9th Cir. 2010) (quoting *In re Khalil*, 379 B.R. 163, 172 (9th Cir. BAP 2007)). "An  
10 omission or misstatement that 'detrimentally affects administration of the estate' is  
11 material." *In re Retz*, 606 F.3d at 1198 (quoting *Fogal Legware of Switzerland, Inc., v.*  
12 *Wills (In re Wills)*, 243 B.R. 58, 63 (9th Cir. BAP 1999)).

13 10. Debtor "knowingly and fraudulently" made false oaths in or in connection  
14 with the bankruptcy proceeding because the preponderance of the evidence shows that  
15 Debtor made false oaths on his bankruptcy petition and schedules filed on October 5,  
16 2015, on the amended bankruptcy schedules filed on December 14, 2015, and at the  
17 continued meeting of creditors pursuant to 11 U.S.C. § 341(a) on December 15, 2015.  
18 These false oaths concerned material facts that would have resulted in denial of his  
19 discharge under 11 U.S.C. § 727(a)(4)(A) had they been known prior to the deadline to  
20 object to discharge. *Dean v. McDow*, 299 B.R. at 139.

21 11. "Where it can be shown that there was an intentional omission of assets  
22 and disclosure of grounds which would have barred discharge, there would be  
23 justification for revoking the discharge." *Donovan v. LaPorta (In re La Porta)*, 26 B.R.  
24 687, 692 (Bankr. N.D. Ill. 1982) (citing *Wendel v. Daugherty (In re Daugherty)*, 14 B.R. 1  
25 (Bankr. S.D. Fla. 1981)). The discharge may be denied under 11 U.S.C. § 727(a)(4) if  
26 the debtor "knowingly and fraudulently" made a false oath. *In re Franz*, 540 B.R. 765,  
27 780 (Bankr. D. Mont. 2015) (citing *In re Wills*, 243 B.R. at 64). Fraudulent intent may be  
28 established by circumstantial evidence or by inferences drawn from a debtor's course of

1 conduct. *Id.* (citing *In re Devers*, 759 F.2d 751, 753-754 (9th Cir. 1985)); see *Farmers*  
2 *Co-Operative Association of Talmage, Kansas v. Strunk*, 671 F.2d 391, 395 (10th Cir.  
3 1982).

4 **E. Plaintiff's Knowledge of the Fraud Under 11 U.S.C. § 727(d)(1).**

5 12. The preponderance of the evidence shows that Trustee did not have any  
6 knowledge of the false oaths in Debtor's bankruptcy petition and schedules,  
7 amendments thereto, or of the false testimony given by Defendant prior to discharge.

8 13. Trustee and his attorney, Curlee, both testified that the first time Trustee  
9 learned Debtor had collected the Commissions and was using them to pay living  
10 expenses was January 15, 2016 after Trustee heard about Curlee's telephone  
11 conversation with Debtor's counsel, Altman, that day. Avery Decl., ¶ 11; Curlee Decl.,  
12 ¶ 7. Debtor did not dispute or offer any evidence at trial to refute testimony of Trustee  
13 or his attorney. Nor did Debtor dispute that January 15, 2016 was the date that Trustee  
14 first became aware that Debtor was in possession of the Commissions and was using  
15 them to pay his personal expenses.

16 14. The court finds that the testimony of Trustee and his attorney, Curlee, is  
17 credible and that Trustee, though diligent in his efforts to investigate and recover  
18 Debtor's assets, did not have actual knowledge of Debtor's actions regarding the  
19 bankruptcy estate's assets until January 15, 2016. Nor did the Trustee have actual  
20 knowledge of the falsity of Defendant's testimony at the December 15, 2015 creditors  
21 meeting, or the falsity of the original schedules or the amendments thereto, until after  
22 the deadline to object to Debtor's discharge had passed on January 8, 2016 and until  
23 January 15, 2016.

24 **F. Application of the Law to Plaintiff's Seventh Cause of Action Under 11**  
25 **U.S.C. § 727(d)(1) Regarding the Defendant's "Knowing and Fraudulent" Acts.**

26 15. To revoke Debtor's discharge under 11 U.S.C. § 727(d)(1), the discharge  
27 must have been obtained through the fraud of the debtor. *In re Jones*, 736 F.3d at 900.  
28 To determine whether the discharge was procured by fraud, the bankruptcy court must

1 analyze whether the debtor would have been in violation of 11 U.S.C. § 727(a)(4)(A). *Id.*  
2 To prove a violation of 11 U.S.C. § 727(a)(4)(A), Trustee must show that: (1) Debtor  
3 made a false oath in connection with the case; (2) related to a material fact;  
4 (3) knowingly; and (4) fraudulently. *Id.* (citing *In re Retz*, 606 F.3d 1189, 1197 (9th Cir.  
5 2010)). "While any single omission or error may be the result of an innocent mistake,  
6 multiple inaccuracies are evidence of 'a pattern of reckless and cavalier disregard for the  
7 truth serious to supply the necessary fraudulent intent required by § 727(a)(4)(A)."  
8 *Dean v. McDow*, 299 B.R. at 140 (citing *Hatton v. Spencer (In re Hatton)*, 204 B.R. 477,  
9 484 (E.D. Va. 1997)).

10 16. Section 521(a)(1)(B) of the Bankruptcy Code, 11 U.S.C., requires the  
11 debtor in a bankruptcy case to file a schedule of assets and liabilities, a schedule of  
12 current income and current expenditures, and a statement of financial affairs. 11 U.S.C.  
13 §521(a)(1)(B); *see also, In re Rolland*, 317 B.R. 402, 13 (Bankr. C.D. Cal. 2004). "[T]he  
14 debtor has a duty to prepare schedules carefully, completely and accurately." *Cusano v.*  
15 *Klein*, 264 F.3d at 946 (citing and quoting, *inter alia, In re Mohring*, 142 B.R. 389, 394  
16 (Bankr. E.D. Cal. 1992), *aff'd mem.*, 153 B.R. 601 (9th Cir. BAP 1993), *aff'd mem.*, 24  
17 F.3d 247 (9th Cir. 1994)); *see also* 11 U.S.C. § 521(a)(1). Thus, "Debtors have an  
18 absolute duty to file complete and accurate schedules." *In re Rolland*, 317 B.R. at 413,  
19 (citing *inter alia, Cusano v. Klein*, 264 F.3d at 946). "Full and comprehensive disclosure  
20 is critical to the integrity of the bankruptcy system." *Id.* (citing *inter alia, Heidkamp v.*  
21 *Whitehead (In re Whitehead)*, 278 B.R. 589, 594 (Bankr. M.D. Fla. 2002) (stating that  
22 "[t]he veracity of the debtor's Statement is absolutely essential to the successful  
23 administration of the Bankruptcy Code"); *In re Bohrer*, 266 B.R. 200, 201 (Bankr. N.D.  
24 Cal. 2001) (opining that "[a] debtor may not adopt a cavalier attitude toward . . . the  
25 accuracy of his schedules by arguing that they are not precise and correct"); and *In re*  
26 *Mohring*, 142 B.R. at 389 ("The proper 'operation of the bankruptcy system depends on  
27 honest reporting.")).

28 17. Bankruptcy schedules and statements are signed under penalty of perjury.

1 Federal Rule of Bankruptcy Procedure 1008; 28 U.S.C. § 1746; *see also, In re Rolland*,  
2 317 B.R. at 414. "Debtors are presumed to have read the schedules and statements  
3 before signing the documents, and are responsible for their contents. *In re Rolland*, 317  
4 B.R. at 414 (citing *Carpenter v. Fanaras (In re Fanaras)*, 263 B.R. 655, 667 (Bankr. D.  
5 Mass. 2001)). "Whether or not the documents are prepared by an attorney, debtors  
6 bear an independent responsibility for the accuracy of the information contained in their  
7 schedules and statements." *In re Rolland*, 317 B.R. at 414 (citing *AT&T University Card*  
8 *Services Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n. 8 (9<sup>th</sup> Cir. BAP 1997).  
9 "Schedules and statements which are inaccurate or incomplete must be corrected by the  
10 debtor, and any ambiguities contained therein are construed against the debtor." *In re*  
11 *Rolland*, 317 B.R. at 414 (citing *In re Mohring*, 142 B.R. at 394-395). Furthermore, a  
12 debtor has an affirmative duty to "cooperate with the trustee in preparing a 'complete  
13 inventory of the property of the debtor.'" *In re Mohring*, 142 B.R. at 394 (quoting Federal  
14 Rule of Bankruptcy Procedure 2015(a)). A debtor has the duty to surrender to the  
15 Chapter 7 trustee all property of the bankruptcy estate and any recorded information,  
16 including books, documents, records and papers relating to property of the estate. 11  
17 U.S.C. § 521(a)(4); *see also, Olsen v. Zerbetz (In re Olsen)*, 36 F.3d 71, 73 (9<sup>th</sup> Cir.  
18 1994).

19 18. "A fact is material 'if it bears a relationship to the debtor's business  
20 transactions or estate, or concerns the discovery of assets, business dealings, or the  
21 existence and disposition of the debtor's property.'" *In re Khalil*, 379 B.R. at 173 (quoting  
22 *In re Wills*, 243 B.R. at 62). "An omission or misstatement that 'detrimentally affects  
23 administration of the estate' is material." *In re Retz*, 606 F.3d at 1198 (quoting *In re*  
24 *Wills*, 243 B.R. at 63). "Even if the debtor can show that the assets were of little value or  
25 that a full and truthful answer would not have directly increased the estate assets, a  
26 discharge may be denied if the omission adversely affects the trustee's or creditors'  
27 ability to discover other assets or to fully investigate the debtor's pre-bankruptcy dealing  
28 and financial condition." *In re Wills*, 243 B.R. at 63 (citing 6 Collier on Bankruptcy

1 ¶ 727.04[1][b] (15th ed. 1998)). "Similarly, if the omission interferes with the possibility  
2 of a preference or fraudulent conveyance action the omission may be considered  
3 material." *Id.*

4 19. The preponderance of the evidence shows that Debtor made false oaths  
5 regarding his original and amended bankruptcy schedules which he signed under  
6 penalty of perjury as true and correct. Petition, Ex. P-3, pp. 28, 38, 42. In his original  
7 bankruptcy petition and schedules, Debtor omitted the Sandison Sales Commission  
8 check when he filed his bankruptcy petition and schedules on October 5, 2015. On his  
9 Schedule B-Personal Property filed with his bankruptcy petition, Debtor listed Long  
10 Beach Realty and identified its assets as including \$9,500 in accounts receivable, and  
11 on Schedule C-Property Claimed as Exempt, he claimed an exemption of \$10,600 in the  
12 value of Long Beach Realty's assets pursuant to California Code of Civil Procedure  
13 § 703.140(b)(5), including \$9,500 for an account receivable, but he did not list the  
14 account receivable as "contingent."

15 20. Although Debtor argued that he disclosed everything he needed to on his  
16 bankruptcy petition and schedules when he filed his bankruptcy case, that statement is  
17 not true. There were three real property sales transactions pending as of the date of the  
18 filing of the bankruptcy case for which Debtor was to receive sales commissions,  
19 including for the W.L. Street, Banning and Oceanside sales transactions, but only the  
20 commission for one of these transactions (for W L Street) was disclosed on the  
21 bankruptcy petition and schedules and the other commissions for the two transactions  
22 (for Banning and Oceanside) were not. Yet Debtor was aware that all these real  
23 property sales transactions were in escrow when he filed his bankruptcy case. There  
24 were three accounts receivable, not one as stated by Debtor on his bankruptcy petition  
25 and schedules when he filed them on October 5, 2015, and these accounts receivable  
26 totaled \$45,803, not \$9,500 as Debtor stated on his bankruptcy petition and schedules,  
27 which is a material difference of over \$31,000.

28 21. Debtor did not identify the Banning and Oceanside Sales Commissions as

1 assets on his bankruptcy petition and schedules when they were filed October 5, 2015.  
2 Debtor only identified the W.L. Street Sales Commission in the amount of \$9,500 as an  
3 account receivable on his petition and schedules. Debtor had also received a sales  
4 commission before he filed his bankruptcy case for selling the Sandison property, and at  
5 the time he filed his bankruptcy petition, he was holding onto the Sandison commission  
6 check in the amount of \$4,810.75, which he failed to disclose in his bankruptcy petition  
7 and schedules at any time. The sales commissions that Debtor earned for his services  
8 in the sales transactions for the W L Street, Oceanside, Banning and Sandison  
9 properties were earned before he filed his bankruptcy case and were property of the  
10 bankruptcy estate which he was required to disclose on his bankruptcy petition and  
11 schedules. *Cusano v. Klein*, 264 F.3d at 945 (citing, *inter alia*, 11 U.S.C. §§ 521(a)(1)  
12 and 541(a)(1)). The Bankruptcy Code places an affirmative duty on Debtor to schedule  
13 his assets and liabilities. *Id.* Debtor should have scheduled all of these commissions as  
14 assets on his bankruptcy petition and schedules, and there is no principled reason why  
15 some commissions were listed as accounts receivable assets on the schedules and  
16 others were not.

17 22. Debtor was fully aware that Trustee wanted to know what Debtor's  
18 prepetition sales commissions were and what was paid post-petition. At the initial  
19 meeting of creditors on November 9, 2015, Trustee told Debtor's appearance attorney to  
20 have Debtor amend the petition to list open sales commissions and continued the  
21 meeting of creditors to December 15, 2015. Debtor's bankruptcy attorney, Altman, was  
22 advised by the appearance attorney for Debtor to amend the petition to include  
23 prepetition commissions paid post-petition. Altman met with Debtor to discuss the  
24 Commissions before the continued meeting of creditors on December 15, 2015. Debtor  
25 was aware on November 9, 2015 of the status and amounts of the Commissions as the  
26 email he sent to Altman that day provides a full accounting of the Commissions. Email  
27 Exchange between Debtor and His Attorney, Anerio V. Altman on November 9, 2015,  
28 Ex. D-19.

1           23. As Debtor testified at trial, he had received the Commissions by early  
2 December 2015, but instead of disclosing that he received the Commissions on his  
3 amended schedules filed on December 14, 2015, he listed the Commissions with a  
4 value of \$0.00 on the date that he filed his bankruptcy case, knowing full well that the  
5 Commissions of \$44,303 had been actually collected.

6           24. Debtor filed Amended Schedules B and C on December 14, 2015 to show  
7 that Long Beach Realty's prepetition accounts receivable (brokerage commissions)  
8 included "contingent interests at time of filing: \$44,303 (contingent)." Debtor identified  
9 the "contingent interests" as accounts receivable including \$9,500 for "W.L. Street Sale,"  
10 \$20,178 for the "Banning Sale," and \$14,625 for the "Oceanside Sale." But, he then  
11 valued Long Beach Realty at \$1,500 for \$1,100 in Long Beach Realty's bank account  
12 and \$400 in business equipment. On this Amended Schedule C, Debtor claimed an  
13 exemption of \$1,500 in Long Beach Realty under C.C.P. § 703.140(b)(6) and an  
14 exemption in the Commissions which were valued at \$0.00 under C.C.P.  
15 § 703.140(b)(5).

16           25. Debtor's original Schedules B and C filed with his bankruptcy petition on  
17 October 5, 2015 showed that \$9,500 was owed on the W.L. Street account receivable  
18 and \$9,500 in value was exempted. The November 9, 2015 email from Debtor to his  
19 then-bankruptcy attorney, Altman, shows that Debtor received the W.L. Street Sales  
20 Commission on November 7, 2015 before the first meeting of creditors took place on  
21 November 9, 2015. Debtor's Amended Schedules B and C filed on December 14, 2015  
22 disclosed the Commissions, but listed them as "contingent" and valued them, including  
23 the W.L. Street sales commission, at \$0.00 on the Amended Schedule C. The  
24 Commissions never had a value of \$0.00 even on the date that Debtor filed his  
25 bankruptcy case on October 5, 2015. Debtor did not disclose the Sandison Sales  
26 Commission check of \$4,810.75 on these amended bankruptcy schedules. Trustee  
27 argues that Debtor's misrepresentations about his real estate sales commissions on his  
28 amended bankruptcy schedules were material because he did not disclose that he

1 received \$44,303 in Commissions and \$4,810.75 for the Sandison Commission for a  
2 total of \$49,113.75 which were non-exempt assets belonging to the bankruptcy estate as  
3 he valued these assets at \$0.00. On this point, the court agrees in part and disagrees in  
4 part with Trustee's argument. The court agrees with Trustee that Debtor's continued  
5 failure to list the Sandison Commission of \$4,810.75, an asset of the bankruptcy estate  
6 which Debtor earned prepetition, on his amended schedules signed under penalty of  
7 perjury filed on December 14, 2015, was a false oath which was material. This second  
8 omission under oath on the amended schedules filed on December 2015 after the first  
9 omission on the original schedules filed on October 5, 2015 is egregious because  
10 Debtor had the Sandison Commission check of \$4,810.75 in his possession when he  
11 made an oath on both sets of schedules that they were true and correct, omitting this  
12 item. However, the court disagrees that Debtor's listing of the W L Street, Oceanside  
13 and Banning sales commissions as "contingent" with a value of zero on the amended  
14 schedules filed on December 14, 2015 were additional false oaths because Debtor listed  
15 these commissions on the amended schedules with the correct amounts of \$9,500 for W  
16 L Street, \$20,178 for Banning and \$14,625 for Oceanside which put Trustee on notice of  
17 these assets. It is arguable that Debtor's listing of these commissions as "contingent"  
18 with a value of zero was misleading, but it may have not been misleading to state the  
19 commissions on the schedules as "contingent" because the schedules are intended to  
20 reflect the debtor's assets and liabilities as of the date that the bankruptcy petition was  
21 filed (as the schedules request Debtor to state the "current value" of assets and  
22 liabilities, thus, the schedules and any amendments should reflect the "current value" as  
23 of the date of filing of the petition to which the schedules relate), and not later, and as  
24 Debtor argues, he does not receive payment of the commissions until escrow for the  
25 sales transactions closed postpetition. Trustee makes a good point that Debtor's listing  
26 of his sales commissions as "contingent" on his amended schedules is inconsistent with  
27 Debtor's listing of the amount of the W L Street commission of \$9,500 as an accounts  
28 receivable asset on his original schedules without stating it was "contingent" and that



1 Debtor on his later schedules filed on February 4, 2016 stating that the commissions  
2 were “contingent at time of filing, no longer contingent”. Nevertheless, the court does  
3 not find that Debtor’s listing of the W L Street, Banning and Oceanside sales  
4 commissions as “contingent” on the amended schedules filed on December 14, 2015 as  
5 additional false oaths since the material information about these commissions were  
6 materially disclosed, and Trustee could have inquired of Debtor about the status of  
7 collection of the commissions. Moreover, as to Debtor’s valuing the sales commissions  
8 at \$0.00 on the amended schedules filed on December 14, 2015, it may have been  
9 misleading to have done so because this was inconsistent with the original schedules  
10 which listed the value of the W L Street commission at full value of \$9,500 in valuing the  
11 Long Beach Realty assets at \$11,000 and Debtor does not state any reasonable basis  
12 for valuing the sales commission receivables as zero, but the court does not find that  
13 Debtor’s listing the W L Street, Banning and Oceanside sales commissions with zero  
14 value on the amended schedules filed on December 15, 2015 as additional false oaths  
15 because the material information about these commissions were disclosed on the  
16 amended schedules, that is, the identity of the properties to which the commissions  
17 related and the amount of the anticipated commissions were stated. However, valuing  
18 the commissions at zero on the amended schedules is probative of a fraudulent intent  
19 for Debtor’s failure to list his sales commission assets completely and accurately on his  
20 bankruptcy petition and schedules filed on October 5, 2015 and December 14, 2015.

21 26. At the continued meeting of creditors on December 15, 2015, Debtor  
22 testified under oath that he signed his bankruptcy petition after reading the schedules  
23 and was personally familiar with the information therein; that the information was true  
24 and correct; that there were no errors or omissions he needed to bring to Trustee's  
25 attention; and that he listed all his assets in his schedules. Audio Recording of  
26 Continued Meeting of Creditors on December 15, 2015, Day 1 TT, 190:4-203:16.  
27 Debtor acknowledged filing his first amended schedules a day earlier on December 14,  
28 2015. However, Debtor did not disclose in his testimony at the continued meeting of

1 creditors on December 15, 2015 that he received any Commissions, nor did he disclose  
2 that he was in possession of the Sandison sales commission check on these amended  
3 schedules or at the meeting of creditors on December 15, 2015. Defendant testified at  
4 trial that he was aware when he amended his schedules on December 14, 2015 and  
5 when he testified at the continued meeting of creditors on December 15, 2015 that the  
6 Commissions were no longer contingent, had been paid, and were in his possession.

7 27. Debtor's failures to fully disclose all of his prepetition sales commission  
8 assets on his bankruptcy petition and schedules and at the continued meeting of  
9 creditors on December 15, 2015 were knowing and fraudulent. Specifically, Debtor  
10 failed to disclose the Banning, Oceanside and Sandison sales commissions on his  
11 original bankruptcy schedules and he failed to disclose the Sandison sales commission  
12 on his amended schedules. The circumstances in this case indicate that Debtor failed to  
13 make these disclosures in order to mislead Trustee because Debtor wanted to use them  
14 after the bankruptcy case was filed to pay his (Debtor's) personal and business  
15 expenses. Debtor deposited the Commission checks into Long Beach Realty's bank  
16 account or cashed them and spent them without notifying Trustee or amending his  
17 bankruptcy schedules to state that he received them. Debtor through Long Beach  
18 Realty received Commissions of \$43,664.47 between October 5, 2015 and January 28,  
19 2016, not including the Sandison Sales Commission. Debtor disbursed \$33,883.52 of  
20 these funds from Long Beach Realty's bank account between October 5, 2015 and  
21 January 15, 2016 to pay his expenses.

22 28. Debtor deposited both Sales Commission checks for the Banning sales  
23 transaction—one check on December 3, 2015 for \$11,195 and the other check for on  
24 January 7, 2016 \$8,968. Debtor disbursed the monies from the Banning Sales  
25 Commission totaling \$21,178, by January 14, 2016. At trial, Debtor admitted in his  
26 testimony that he deposited the check for \$11,195 into Long Beach Realty's bank  
27 account to cash it and to use the money for his business and personal expenses. By  
28 December 24, 2015, Debtor spent all the money from the \$11,195 check from the

1 Banning Sale Commission.

2 29. As his defense regarding the Sandison Sales Commission, Debtor testified  
3 at trial that he did not consider the Sandison Sales Commission to be a pending  
4 commission when he filed his bankruptcy case because he had the uncashed check.  
5 The court finds this testimony to not be credible. Defendant's testimony does not  
6 explain his failure to disclose the Sandison Sales Commission subsequent to the filing of  
7 Debtor's bankruptcy petition, in any of his amended bankruptcy schedules, or until trial  
8 on cross-examination on January 11, 2018. There is no reasonable justification for  
9 Debtor not listing the Sandison sales commission check as an asset on his bankruptcy  
10 petition and schedules because there were no contingencies as he had in possession a  
11 check which he was free to reduce to cash by depositing it into his bank account at any  
12 time, which he did in December 2015 shortly after filing amended schedules which did  
13 not disclose that asset. Without advising Trustee or obtaining his permission, Debtor  
14 deposited the Sandison Sales Commission check for \$4,810.75 into Long Beach  
15 Realty's bank account on December 18, 2015, only three days after stating to Trustee at  
16 the meeting of creditors on December 15, 2015 that he had disclosed all his assets on  
17 his bankruptcy petition and schedules. Thus, the preponderance of the evidence shows  
18 that Debtor made a false oath on his bankruptcy petition and schedules when he failed  
19 to list the Sandison Sales Commission check of \$4,810.75 as an asset, which was a  
20 knowing and material omission.

21 30. As a further defense, Debtor argued at trial that he filed a motion to convert  
22 this case to one under Chapter 13 and that he was thus not required to disclose or to  
23 turn over the Commissions to Trustee because he was converting the case to Chapter  
24 13 and wanted to pay his creditors. The court finds that this argument lacks merit. A  
25 motion to convert a case to another chapter is not effective until an order is entered  
26 granting conversion. 11 U.S.C. § 706(a); Federal Rules of Bankruptcy Procedure  
27 1017(f)(2) and 9013; *In re Dipalma*, 94 B.R. 546, 549 (Bankr. N.D. Ill. 1988) (citing  
28 Federal Rules of Bankruptcy Procedure 1017(d) (now 1017(f)(2)) and 9013) . This court

1 determined that Debtor was ineligible for Chapter 13. Ex. P-20. *Marrama v. Citizens*  
2 *Bank of Massachusetts*, 549 U.S. 365, 371-374 (2007). The mere filing of a case  
3 conversion motion is not a defense because it does not relieve Trustee of his statutory  
4 authority and duties regarding administration of assets of the bankruptcy estate in this  
5 case under 11 U.S.C. § 704, nor does it relieve Debtor of his duty to disclose or turn  
6 over estate property to Trustee under 11 U.S.C. §§ 521(a)(1), (3) and (4).

7 31. The evidence that Trustee presented at trial shows that Debtor was not  
8 cooperating with Trustee as required by 11 U.S.C. § 521(a)(3) and (4) and that Debtor  
9 was using the false schedules and testimony at the meeting of creditors to avoid  
10 disclosure of his dissipation and misuse of the estate assets in the Sales Commissions.  
11 As Trustee argues, Debtor filed the case conversion motion on January 15, 2016, not to  
12 pay his creditors in a Chapter 13 case, but to avoid having to turn over these assets to  
13 Trustee and to hide the fraudulent use of the estate assets in the Sales Commissions  
14 from Trustee so he could continue using them for his expenses.

15 32. The week before Debtor filed his amended schedules, he used the  
16 Commissions deposited into Long Beach Realty's bank account to pay for a family  
17 vacation to New York. Debtor purchased \$1,653.80 worth of airline tickets for his family  
18 on December 10 and 13, 2015. On December 14, 2015, the day that Debtor filed his  
19 amended schedules valuing the Commissions at \$0.00 and identifying them as  
20 "contingent," he spent \$1,151.88 from Long Beach Realty's bank account on hotel  
21 rooms in New York. Debtor admitted that other expenses paid from Long Beach  
22 Realty's checking account for Sam's Club, Trader Joe's, Whole Foods, and all restaurant  
23 charges were personal expenses. Debtor's use of the Commissions which were estate  
24 assets under these circumstances is evidence of a fraudulent intent for Debtor's failure  
25 to list all of his sales commissions as estate assets on his bankruptcy petition and  
26 schedules he signed under oath and filed on October 5, 2015 and December 14, 2015.

27 33. Debtor only admitted to these expenditures on examination by Trustee's  
28 counsel at trial. When Trustee first learned of Debtor's unauthorized use of the

1 Commissions, which are his prepetition assets belong to the bankruptcy estate, on  
2 January 15, 2016, Debtor refused to account for the Commissions or to sequester them  
3 as required by 11 U.S.C. §§ 521(a)(3) and (4).

4 34. Trustee has demonstrated, by a preponderance of the evidence, that  
5 Debtor knowingly and fraudulently made false oaths as defined in 11 U.S.C. § 727(d)(1)  
6 in connection with his bankruptcy case, including making false and fraudulent oaths  
7 regarding his bankruptcy schedules and the amendments thereto, not accurately  
8 disclosing all of his Commissions on his schedules, and not disclosing the Sandison  
9 Sales Commission specifically. Debtor also gave false testimony at the continued  
10 meeting of creditors on December 15, 2015 that he had fully and accurately disclosed all  
11 his assets on his petition and schedules, and the Sandison sales commission check is a  
12 specific example of Debtor's material failures to disclose his assets on his bankruptcy  
13 petition and schedules signed under oath.

14 35. Trustee has demonstrated, by a preponderance of the evidence, that the  
15 false oaths that Debtor made on his bankruptcy schedules and the amendments thereto  
16 were material. At the continued meeting of creditors on December 15, 2015, Debtor did  
17 not disclose to Trustee that he had received \$44,303 in Commissions and \$4,810.75 for  
18 the undisclosed Sandison Sales Commission for a total of \$49,113.75. These omissions  
19 were material because they detrimentally affected Trustee's administration of the estate  
20 because Debtor was spending the Commissions before Trustee could administer them  
21 as assets of the bankruptcy estate.

22 36. The court finds that Trustee has demonstrated, by a preponderance of the  
23 evidence, that Debtor's fraud regarding estate assets, if known prior to the deadline to  
24 object to discharge, would have resulted in his discharge being denied under 11 U.S.C.  
25 § 727(a)(4)(A). *In re Franz*, 540 B.R. at 780 (citing *In re Wills*, 243 B.R. at 64).

26 **G. Elements of Plaintiff's Cause of Action Under 11 U.S.C. § 727(d)(2).**

27 37. Considering the seventh cause of action under 11 U.S.C. § 727(d)(2),  
28 Debtor's discharge may be revoked if he: (1) acquired bankruptcy estate property; and

1 (2) knowingly and fraudulently failed to report the acquisition or to deliver or surrender  
2 such property to Trustee. *In re Franz*, 540 B.R. at 780 (citing *In re Yonikus*, 974 F.2d  
3 901, 904 (7th Cir. 1992)); *In re Covino*, 241 B.R. 673, 677 (Bankr. D. Idaho 1999) (citing  
4 *Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925-926 (9th Cir. BAP  
5 1994)).

6 38. Regarding the first element of a claim under 11 U.S.C. § 727(d)(2), a  
7 bankruptcy debtor has an absolute duty to report whatever interest he has in property,  
8 including a prepetition interest, even if he believes it to be valueless. *In re Covino*, 241  
9 B.R. at 677 (citing *In re Yonikus*, 974 F.2d at 904 and n.7). It is a bankruptcy debtor's  
10 duty to share full information with the bankruptcy trustee. *Id.*; 11 U.S.C. §§ 521(a)(3) and  
11 (a)(4); Federal Rule of Bankruptcy Procedure 4002(a)(4); *In re Franz*, 540 B.R. at 780  
12 (citing *In re Retz*, 606 F.3d 1189, 1204 (9th Cir. 2010)); *see generally Grogan v. Garner*,  
13 498 U.S. 279, 286-287 (1991) (bankruptcy "limits the opportunity for a completely  
14 unencumbered new beginning to the 'honest but unfortunate debtor'" (quoting *Local*  
15 *Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). Debtor's right to a fresh start in bankruptcy  
16 is conditioned upon full disclosure. *In re Franz*, 540 B.R. at 780 (citing *Aubrey v. Thomas*  
17 (*In re Aubrey*), 111 B.R. 268, 274 (9th Cir. BAP 1990)).

18 39. On the second element of a claim under 11 U.S.C. § 727(d)(2), whether a  
19 bankruptcy debtor "knowingly and fraudulently" fails to report or deliver property, intent is  
20 inferred from his course of conduct or the surrounding circumstances. *In re Yonikus*,  
21 974 F.2d at 905, (citing *In re Devers*, 759 F.2d at 753-754). "Because a debtor is  
22 unlikely to testify directly that his intent was fraudulent, the courts may deduce fraudulent  
23 intent from all the facts and circumstances of a case." *In re Devers*, 759 F.2d at 754  
24 (citing *In re Nazarian*, 18 B.R. 143, 146 (Bankr. D. Md. 1982)).

25 40. As to whether Debtor acted fraudulently, Trustee must show that Debtor  
26 knowingly and fraudulently made a false oath regarding a material fact as defined in 11  
27 U.S.C. § 727(a)(4)(A). *Wallick v. Thunberg (In re Thunberg)*, 413 B.R. 20, 25 (Bankr. D.  
28 R.I. 2009). Each element must be demonstrated by a preponderance of the evidence. *Id.*

1 at 26. Once it reasonably appears the oath is false, the burden shifts to the debtor to  
2 come forward with evidence to show that the oath was not fraudulent. *Id.* at 25 (citing  
3 *Matter of Mascolo*, 505 F.2d 274, 276 (1st Cir. 1974)).

4 **H. Application of the Law to Plaintiff's Seventh Cause of Action Under 11**  
5 **U.S.C. § 727(d)(2) Regarding Defendant's "Knowing and Fraudulent" Acts in**  
6 **Acquiring Assets of the Estate and Failing to Report and Deliver Those**  
7 **Assets to the Trustee.**

8 41. The court finds that Debtor acquired property of the bankruptcy estate,  
9 which includes the Commissions and the Sandison Sales Commission. When Trustee  
10 discovered on January 15, 2016, that Debtor had received the Commissions and was  
11 spending them, Debtor neither voluntarily accounted for them, reported them, nor  
12 delivered the Commissions to Trustee as the Chapter 7 Trustee.

13 42. In his January 15, 2016 email to Debtor's counsel, Trustee's counsel on  
14 behalf of Trustee instructed Debtor to account for and sequester the Commissions, but  
15 he refused and continued to refuse until the court entered its TRO requiring Debtor to  
16 account for the Commissions and entered its order requiring Debtor to turn over the  
17 Commissions.

18 43. The facts and circumstances of this case demonstrate that Debtor acted  
19 knowingly and fraudulently. At the continued meeting of creditors on December 15,  
20 2015, Trustee told Debtor that Debtor would shut down Long Beach Realty and collect  
21 the Commissions. Trustee told Debtor that Debtor had a \$1,500 exemption in Long  
22 Beach Realty's assets and the rest of its assets were non-exempt, and Debtor agreed.  
23 Trustee instructed Debtor not to spend any money in Long Beach Realty's bank account  
24 until they reached an agreement, and Debtor agreed. Trustee advised Debtor that  
25 Debtor could exempt his home or the corporation but would have to give up one and  
26 could not keep both. Trustee told Debtor not to dissipate the money until an agreement  
27 was worked out.

28 44. Debtor admitted at trial that he knew when he amended his bankruptcy

1 schedules on December 14, 2015 and gave testimony at his continued meeting of  
2 creditors on December 15, 2015 that the Commissions were no longer contingent.  
3 Despite Trustee's request for information about the Commissions, and Debtor's duty to  
4 report his assets to Trustee, Debtor did not disclose his receipt and possession of the  
5 Commissions to Trustee. See *In re Yonikus*, 974 F.2d at 904 (citing *inter alia*, *In re*  
6 *Gugliada*, 20 B.R. 524, 528 (Bankr. S.D.N.Y. 1982)).

7 45. Debtor's silence under these circumstances demonstrates his fraudulent  
8 intent. The deliberate nondisclosure of a material fact is no less culpable than an  
9 intentional false statement. *Piccolomini v. Wheeling Wholesale Grocery Co.*, (*In re*  
10 *Piccolomini*), 87 B.R. 385, 387 (Bankr. W.D. Pa. 1988) (citing *inter alia*, *Mursau Corp. v.*  
11 *Florida Penn Oil & Gas Inc.*, 638 F. Supp. 259 (W.D. Pa. 1986) and *Marian Bank v.*  
12 *International Harvester Credit Corp.*, 550 F. Supp. 456 (E.D. Pa. 1982), *aff'd mem.*, 725  
13 F.2d 668 (3rd Cir. 1983)). Debtor was and is duty bound to disclose the receipt and  
14 possession of the Commissions and the Sandison Commission to Trustee, but he  
15 intentionally refused to do so. 11 U.S.C. §§ 521(a)(1), (3) and (4). Moreover, these  
16 omissions were material because they detrimentally affected Trustee's administration of  
17 the estate.

18 46. Debtor's amended bankruptcy schedules filed on December 15, 2015,  
19 which were the operative schedules as of January 15, 2016, show that Debtor only  
20 claimed an exemption of \$1,500 in Long Beach Realty's assets. Based on the  
21 representations in Debtor's amended bankruptcy schedules, the balance of Long Beach  
22 Realty's assets, including most of the sales commissions listed as "contingent",  
23 belonged to the bankruptcy estate. At the time of trial, on cross-examination, Debtor  
24 admitted that he knew from speaking with his appearance attorney that Trustee had a  
25 right to instruct him not to expend money belonging to the bankruptcy estate. See 11  
26 U.S.C. §§ 521(a)(3) and (4) and 704.

27 47. At trial, Trustee testified that it was his duty to administer and protect all  
28 nonexempt assets of the bankruptcy estate from being wasted or dissipated. See 11



1 U.S.C. § 704. As the Chapter 7 Trustee, Trustee is statutorily obligated to investigate  
2 charges of concealment of assets, fraud, or any other wrongdoing by the debtor. *In re*  
3 *Chicago Art Glass, Inc.*, 155 B.R. 180, 188 (Bankr. N.D. Ill. 1993) (citing *In re Melenyzer*,  
4 140 B.R. 143, 155 (Bankr. W.D. Tex. 1992)). Trustee is a fiduciary of the bankruptcy  
5 estate's creditors charged with securing and carefully preserving assets in his  
6 possession on pain of surcharge for any assets that are or might be dissipated. *Id.* at  
7 187; *see also* 11 U.S.C. § 704. Trustee "may be charged with the value of assets which  
8 never came into his possession, if he fails in his duty to get them into his possession."  
9 *In re Melenyzer*, 140 B.R. at 155 (quoting *Pueblo Savings & Trust Co. v. Power*, 115  
10 F.2d 69, 72 (7th Cir. 1940)). Trustee, as the Chapter 7 Trustee, was duty bound to act.  
11 11 U.S.C. § 704.

12 48. As of January 15, 2016, Trustee learned Debtor was in possession of  
13 estate assets, was dissipating them, and was refusing to account for them in direct  
14 disregard of Trustee's duty to collect and preserve assets. 11 U.S.C. § 704 (a)(1)-(4).

15 49. Although Debtor argued at trial that he filed his motion to convert the case  
16 to Chapter 13, that fact does not relieve Trustee of his duties as the Chapter 7 Trustee  
17 to administer assets until the case is converted. As discussed above, Debtor was not  
18 eligible for conversion of the case to Chapter 13. Nor does this fact absolve Debtor of  
19 his duty to report and deliver assets of the bankruptcy estate to Trustee. This court has  
20 found no case authority to demonstrate that a Trustee loses authority to administer  
21 assets of a bankruptcy estate when a motion to convert the bankruptcy case is filed, only  
22 when granted pursuant to an order. The court denied Debtor's motion to convert the  
23 case by entered order. The court finds that Trustee acted appropriately and diligently as  
24 required by the Bankruptcy Code to recover the Commissions as property of the  
25 bankruptcy estate pursuant to 11 U.S.C. § 704.

26 50. Trustee was forced to file the complaint to initiate this Adversary  
27 Proceeding on January 21, 2016 and to move ex parte to obtain the temporary  
28 restraining order to compel Debtor to account for the Commissions and to halt him from

1 further use of Commissions to pay his expenses. Complaint, Ex. P-1; Order on Motion  
2 for Preliminary Injunction, Ex. P-15.

3 51. On February 4, 2016, Debtor filed Amended Schedules B and C to  
4 describe the Commissions as "contingent at the time of filing, no longer contingent."  
5 Amended Schedules filed on February 4, 2016, Ex. P-5, p. 85. This amendment could  
6 have been made on December 14, 2015 or disclosed at the continued meeting of  
7 creditors on the next day on December 15, 2015. Debtor offered no explanation why he  
8 could not have made the disclosures that he made in his amended schedules filed on  
9 February 4, 2016 earlier. Debtor's eventual disclosure does not absolve him of his earlier  
10 conduct and omissions. See *In re Thunberg*, 641 F.3d 559, 560 (1<sup>st</sup> Cir. 2011) (citing  
11 *Olsen v. Reese (In re Reese)*, 203 B.R. 425, 431-432 (Bankr. N.D. Ill. 1997)); see also 11  
12 U.S.C. §§ 521(a)(1), (3) and (4). As argued by Trustee, it was only in the face of the  
13 court's order that Debtor disclosed and accounted for the Commissions in the amended  
14 schedules on February 4, 2016 and in the letter from Debtor's counsel, Altman, to  
15 Trustee's counsel, Curlee, dated February 11, 2016. Amended Schedules filed on  
16 February 4, 2016, Ex. P-5; Correspondence dated February 11, 2016 re: Accounting for  
17 Receipt and Expenditure of Commissions, Ex. P-13, pp. 146-168.

18 52. Debtor's duty is to cooperate with Trustee and to surrender all estate  
19 property and any recorded information relating to property of the estate. 11 U.S.C.  
20 §§ 521(a)(3) and (a)(4); Federal Rule of Bankruptcy Procedure 4002(a)(4); see also,  
21 e.g., *Olsen v. Zerbetz (In re Olsen)*, 36 F.3d 71, 73 (9th Cir. 1994). Trustee was entitled  
22 to rely on Debtor to cooperate. *Id.* Instead, Debtor deliberately refused to voluntarily  
23 disclose to Trustee his acquisition of the estate property, namely, the Sales  
24 Commissions, including the Sandison Sales Commission.

25 53. At the trial on Trustee's preliminary injunction and turnover motion on  
26 February 17, 2016, the court ordered Debtor to turn over \$16,054 in non-exempt  
27 Commissions. Debtor's bankruptcy counsel, Altman, held another \$8,550 which  
28 Defendant argued was exempt pending Plaintiff's objection to Defendant's "tool of the

1 trade" exemption. Debtor was allowed to keep \$20,200 as exempt. Debtor's testimony  
2 at trial in these proceedings showed that he only delivered the non-exempt Commissions  
3 after the turnover order was entered.

4 54. Debtor did not disclose the Sandison Sales Commission in his bankruptcy  
5 petition and schedules filed on October 5, 2015. Trustee could have sought recovery of  
6 these monies as part of the preliminary injunction and turnover actions had Debtor  
7 accounted for these monies, but for the fact that Debtor failed to account or disclose  
8 these assets until trial. To this day, Debtor has not delivered the Sandison Sales  
9 Commission to Trustee.

10 55. The court finds that, excluding the Sandison Sales Commission check,  
11 Debtor did account for the Commissions and that their value was turned over, but  
12 involuntarily and only pursuant to the TRO and the subsequent turnover order to compel  
13 compliance with Debtor's duties.

14 56. The court finds that the bankruptcy estate was damaged because Debtor  
15 acquired the Sandison Sales Commission of \$4,810.75, and the bankruptcy estate was  
16 and is entitled to recover as non-exempt assets of the estate, but Debtor has not  
17 delivered this asset to Trustee.

18 57. The court finds that Debtor knowingly and fraudulently acquired estate  
19 assets, including the Commissions and the Sandison Sales Commission. The court  
20 further finds that Defendant knowingly and fraudulently failed to report or deliver the  
21 estate property to Trustee.

22 **I. Debtor's Argument that Trustee Did Not Object to Time-Barred Claims.**

23 58. At trial, Debtor argued that Trustee had a duty to object to time-barred  
24 proofs of claim, which Debtor contends that Trustee did not do. Debtor argued that had  
25 Trustee objected to time-barred claims, he would have realized Debtor could have paid  
26 his creditors. Debtor therefore argues that Trustee acted negligently by seeking to  
27 recover the Commissions for the estate. Gonzalez Decl., 2:20-4:4, 6:21-26; *see also*  
28 Debtor's Response to Trustee's Notice of Lodgment of Order in Adversary Proceeding to

1 Revoke the Debtor's Discharge under 11 U.S.C. § 727(d)(1) and (2) and for Fraudulent  
2 Acquisition of Assets, Docket No. 114, filed on June 14, 2018 (citing, *inter alia*, 11  
3 U.S.C. § 704(a)(5)). Debtor argues that Trustee should have immediately objected to  
4 the proofs of claims of Discover Bank and Western Federal Credit Union, filed on  
5 December 29, 2015 and January 4, 2016 since the statute of limitations on those  
6 contract claims under state law expired before the petition date and such claims should  
7 be disallowed. Debtor's Response to Trustee's Notice of Lodgment of Order in  
8 Adversary Proceeding to Revoke the Debtor's Discharge under 11 U.S.C. 727(d)(1) and  
9 (2) and for Fraudulent Acquisition of Assets, Docket No. 114, filed on June 14, 2018, at  
10 1-8. (The proofs of claim of Discover Bank and Western Federal Credit Union were later  
11 withdrawn. See Avery Testimony, Day 1 TT, 48:25 to 54:6.) Thus, according to Debtor,  
12 Trustee should have objected to these claims under 11 U.S.C. § 704(a)(5) as of January  
13 21, 2016 when Trustee filed this adversary proceeding because if Trustee had, the only  
14 valid creditor claim in this case would have been only the claim of the Internal Revenue  
15 Service of \$33,692.74, of which \$32,926.98 was secured by Debtor's real property. *Id.*  
16 According to Debtor, he had no fraudulent intent to defraud creditors because there are  
17 no valid creditor claims, except the IRS claim which was secured by his real property.  
18 *Id.* Moreover, as Debtor argues, there was no need for him to comply with Trustee's  
19 instructions to Debtor at the meeting of creditors on December 15, 2015 not to spend  
20 money, i.e., the sales commissions, because the bankruptcy estate was solvent  
21 according to Debtor's calculations based on disallowance of the statute-barred contract  
22 claims of Discover Bank and Western Federal Credit Union. *Id.* at 3-4.

23 59. Under 11 U.S.C. § 704(a)(5), Trustee has a duty to, "if a purpose would be  
24 served, examine proofs of claim and object to the allowance of any claim that is  
25 improper." See also *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1413 (2017)  
26 (noting that "[t]he audience in Chapter 13 bankruptcy cases includes a trustee, 11  
27 U.S.C. § 1302(a), who must examine proofs of claim and, where appropriate, pose an  
28 objection, §§ 704(a)(5), 1302(b)(1) (including any timeliness objection, §§ 502(b)(1),

1 558).”). At the time that Trustee initiated this adversary proceeding on January 21,  
2 2016, Trustee should have been aware that Discover Bank and Western Federal Credit  
3 Union had filed their proofs of claim on December 29, 2015 and January 4, 2016, but  
4 Trustee was aware that Debtor had scheduled debts of unsecured creditors totaling  
5 \$97,045 as shown on the petition and schedules, which meant that there could be  
6 potential unsecured claims in that amount filed in the case. Avery Testimony, Day 1 TT,  
7 48:15-20; Avery Decl., ¶ 3, Ex. P-3; Petition, Ex. P-3, pp. 35 and 48-50. Creditors of the  
8 bankruptcy estate had until the deadline of March 21, 2016 to file proofs of claim, and as  
9 of January 21, 2016, Trustee had no way of knowing what claims would be filed against  
10 the Estate until the deadline for filing proofs of claim had passed. Debtor has presented  
11 no evidence to demonstrate that Trustee knew what claims would be filed before the  
12 claims bar date. Moreover, even if the claims bar date, late filed claims are entitled to a  
13 distribution from the estate pursuant to 11 U.S.C. § 726, although such late filed claims  
14 may be subordinated in payment to timely claims. This would include the California  
15 Franchise Tax Board claim of \$5,950.15, which was filed late. Late filed claims may be  
16 still be entitled to a distribution from the estate since Trustee has not mailed a summary  
17 of his final report to creditors or commenced making final distributions. 11 U.S.C.  
18 § 726(a). Moreover, Debtor’s argument does not take into account the administrative  
19 expenses of Trustee and his professionals in administering this case which have to be  
20 considered in any distribution in this case pursuant to 11 U.S.C. § 726.

21 60. Here, Trustee acted reasonably in seeking to recover the estate assets in  
22 this adversary proceeding because Debtor was already spending estate assets in the  
23 Commissions and thus dissipating estate assets which would have been otherwise used  
24 to pay creditors based on the potential claims of unsecured creditors of \$97,045 as  
25 known to Trustee as of the filing date of the adversary proceeding on January 21, 2016  
26 and the administrative expense claims of Trustee and his professionals incurred in the  
27 administration of this case. Debtor’s argument that it was not necessary for Trustee to  
28 have acted if he had objected to the statute-barred claims of Discover Bank and

1 Western Federal Credit Union since the estate is solvent is based on a perspective  
2 based on hindsight which was not available to Trustee on January 21, 2016 when he  
3 filed this adversary proceeding to stop Debtor from dissipating estate assets in light of  
4 potential claims of \$97,045 as listed by Debtor on his bankruptcy petition and schedules,  
5 which were the facts known to Trustee at the time on January 21, 2016. Debtor's  
6 argument that the estate is solvent may not be right due to Trustee having to incur  
7 administrative expenses in having to retain counsel and bring suit to stop Debtor from  
8 dissipating estate assets in violation of Debtor's duties to cooperate with Trustee and  
9 surrender estate assets to Trustee under 11 U.S.C. § 521(a)(3) and (4) and to the fact  
10 that creditors may still file late claims which are entitled to be paid pursuant to 11 U.S.C.  
11 § 726. Accordingly, Debtor's defense that Trustee negligently failed to object to statute-  
12 barred claims before Trustee filed this adversary proceeding lacks merit.

13 **J. Debtor's Advice of Counsel Defense.**

14 61. Debtor argued that his failure to disclose the Commissions was due to bad  
15 advice from his attorney. This court has already ruled that Debtor waived such a  
16 defense, and the court ordered that Debtor could not present evidence of this defense at  
17 trial, because Debtor would not waive the attorney-client privilege to allow Trustee to  
18 discover the communications between Debtor and his bankruptcy counsel, Altman,  
19 which allegedly set forth the attorney's advice to Debtor. In the court's Order on  
20 Trustee's motion to compel compliance with a subpoena for production of documents,  
21 the court ordered as follows: "(1) The 'advice of counsel defense' was hereby waived for  
22 the trial in regard[] to the Plaintiff's complaint and the remaining causes of action  
23 pertaining to revocation of the Defendant's discharge; [and] (2) The Defendant may not  
24 present any evidence at trial regarding an 'advice of counsel' defense." Order, Docket  
25 No. 81 at 2; see *also* Stipulation to Disputed Issues Regarding Objections by  
26 Subpoenaed Parties to Document Production Subpoenas Service 10/23/2017 on Anerio  
27 V. Altman and Lake Forest Bankruptcy, Inc., by the Plaintiff, Wesley H. Avery, for  
28 Document Production Pertaining to Defendant's Advice of Counsel Defense, Docket No.

1 73, filed on November 22, 2017.

2 62. Moreover, Debtor's advice of counsel defense fails as a matter of law.  
3 Advice of counsel can be a defense to the revocation of discharge causes of action  
4 when such reliance negates the element of intent. See *In re Adeeb*, 787 F.2d at 1343.  
5 However, a party intending to rely on advice of counsel at trial must make full disclosure  
6 during discovery, and failure to do so constitutes a waiver of the advice of counsel  
7 defense. *In re Residential Capital, LLC*, 491 B.R. 63, 68 (Bankr. S.D.N.Y. 2013).  
8 Asserting the attorney-client privilege in discovery automatically constitutes a waiver of  
9 the advice of counsel defense. *Id.* at 69 (citing *Cary Oil Co., Inc. v. MG Refining &*  
10 *Marketing, Inc.*, 257 F.Supp.2d 751, 761 (S.D.N.Y. 2003)).

11 63. The court finds that Debtor waived the advice of counsel defense to  
12 Trustee's revocation of Debtor's causes of action pursuant to the Order of the court  
13 entered December 20, 2017 (Docket No. 81). Trustee served subpoenas on Debtor's  
14 bankruptcy attorney, Altman, on October 23, 2017 seeking discovery regarding Altman's  
15 communications with Debtor regarding Debtor's advice of counsel defense. As indicated  
16 by the discovery dispute stipulation between Trustee and Altman, Altman objected to the  
17 document production based on the assertion of the attorney-client and attorney work  
18 product privileges based on Debtor's instructions and was maintaining that objection  
19 unless Debtor waived the privileges to allow Altman to produce documents, and Trustee  
20 therefore filed a motion (Docket Nos. 73 and 74) to compel Altman to produce documents  
21 regarding Debtor's advice of counsel defense. At the hearing on Trustee's motion to  
22 compel Altman's document production on December 19, 2017, Curlee stated he and  
23 Debtor who was then representing himself in this case had reached an agreement that  
24 Debtor was withdrawing his advice of counsel defense, recited the agreement on the  
25 record, and Debtor indicated his assent on the record and did not otherwise object to the  
26 agreement. Audio File of Hearing on Trustee's Motion to Compel, December 19, 2017.  
27 Based on this agreement, the court stated that the assertion by Altman on behalf of Debtor  
28 of the attorney-client privilege stands, and the court would not order enforcement of

1 Trustee's document subpoenas to Altman because Debtor was withdrawing the advice of  
2 counsel defense. *Id.* This court therefore ordered that Debtor was not to present any  
3 evidence at trial regarding an advice of counsel defense (Docket No. 81).

4 64. At trial and despite the court's order barring the advice of counsel defense,  
5 Debtor repeatedly attempted to assert an advice of counsel defense. *See, e.g.,* Debtor's  
6 Response to Trustee's Notice of Lodgment of Order in Adversary Proceeding to Revoke  
7 the Debtor's Discharge under 11 U.S.C. § 727(d)(1) and (2) and for Fraudulent  
8 Acquisition of Assets, Docket No. 114, filed on June 14, 2018 (attaching copies of  
9 attorney-client communications). As Debtor waived his advice of counsel defense, the  
10 court hereby excludes any testimony, evidence, or argument presented by Debtor at trial  
11 or in closing argument on the advice of counsel defense. <sup>4</sup>

12 \_\_\_\_\_  
13 <sup>4</sup> Debtor's email to his attorney, Altman, on November 9, 2015 indicates an apparent  
14 misunderstanding of Debtor about his commissions when he wrote Altman, "When we  
15 met on 10/4 you asked me if someone owed me commissions, I understood that if  
16 contingency time frames had not passed, technically speaking a commission is not  
17 owed." Exchange of Emails between Debtor and His Bankruptcy Attorney, Anerio V.  
18 Altman, November 9 and 10, 2015, Ex. D-19. This may explain Debtor's reasoning why  
19 he did not tell Altman about the commissions, but this explanation is inconsistent with  
20 Debtor listing the amount of \$9,500.00 for the W L Street commission on the  
21 bankruptcy petition and schedules filed on October 5, 2019 because Debtor must have  
22 understood that the pending commissions needed to be listed as assets in listing the  
23 \$9,500.00 for W L Street. The email exchange on November 9, 2015 took place after  
24 the first meeting of creditors on that day when Trustee told Debtor's appearance  
25 attorney to amend the schedules to list open commissions and Altman was following up  
26 to ask Debtor about open commissions to amend the schedules. The email exchange  
27 of November 9 and 10, 2015 between Debtor and Altman only referred to the W L  
28 Street, Banning and Oceanside sales commissions, and not the Sandison commission.  
The first reference to the Sandison commission in the emails between Debtor and  
Altman is Altman's email to Debtor asking Debtor on February 9, 2016 at 8:49 a.m.:  
"SANDISON Escrow opened 7/31/15, Closed 8/31/15, I don't even see a payment to  
Long Beach Realty here. Why was this included? How did you or Long Beach Realty  
get paid?" Debtor's Response to Trustee's Notice of Lodgment of Order in Adversary  
Proceeding to Revoke the Debtor's Discharge under 11 U.S.C. § 727(d)(1) and (2) and  
for Fraudulent Acquisition of Assets, Docket No. 114, filed on June 14, 2018, Ex. 2.  
This email communication is inadmissible and may not be considered part of the  
evidentiary record because as discussed above, Debtor had waived the advice of  
counsel defense, but even considering it, the tone and language of the email indicates  
that Altman was not previously aware of the Sandison commission. The admissible  
evidence in the case including the bankruptcy schedules and Exhibit D-19 indicate that



1           65. The court sustains Trustee's objections to Defendant's Exhibit D-16,  
2 Exchange of Emails between Debtor and His Bankruptcy Attorney, Anerio V. Altman, on  
3 January 29, 2016, and Exhibit D-17, Exchange of Emails between Debtor and His  
4 Bankruptcy Attorney, Anerio V. Altman on December 16, 2015 and July 8 and 7, 2016,  
5 which the court finds are attorney-client privileged communications which Debtor did not  
6 permit Trustee to have pretrial discovery of in not agreeing to waive the attorney-client  
7 privilege for Altman to produce their attorney-client communications. Trustee's objections  
8 to Defendant's Exhibit D-19, Exchange of Emails between Debtor and His Bankruptcy  
9 Attorney, Anerio V. Altman on November 9 and 10, 2015 are sustained in part.  
10 Defendant's Exhibit D-19 is admitted, but only for purposes of showing that Debtor  
11 disclosed the existence of the Commissions (i.e., W L, Banning and Oceanside only) to his  
12 attorney on November 9, 2015.

13           66. The court also finds that any reliance by Debtor on advice of counsel was  
14 not taken in good faith. See *In re Adeeb*, 787 F.2d at 1343. The advice of counsel  
15 defense is narrowly construed and is not a defense when erroneous information should  
16 have been self-evident. *In re Retz*, 606 F.3d at 1199 (citing *Boroff v. Tully (In re Tully)*,  
17 818 F.2d 106, 111 (1st Cir. 1987)). "A debtor cannot, merely by playing ostrich and  
18 burying his head deeply enough in the sand, disclaim all responsibility for statements  
19 which he has made under oath." *In re Tully*, 818 F.2d at 111.

20           67. Based on the court's findings above, the court finds Debtor's actions were  
21 neither reasonable nor undertaken in "good faith" reliance on advice of counsel. Debtor  
22 acted knowingly and fraudulently to hide the receipt and expenditure of the  
23 Commissions from Trustee. Moreover, the evidence shows Debtor did not act in good  
24 faith after disclosing the W. L Street, Banning and Oceanside Commissions to his  
25 attorney in their email exchange on November 9 and 10, 2015, and particularly in regard

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26 Altman was only aware of the W L Street, Banning and Oceanside commissions when  
27 he asked Debtor about open commissions to amend the schedules in response to  
28 Trustee's instruction to the appearance counsel at the first meeting of creditors on  
November 9, 2015.

1 to the Sandison Sales Commission (the receipt of which he disclosed at trial on January  
2 11, 2018), none of which were disclosed to Altman in the November 9 and 10, 2015  
3 email exchange, and which were not disclosed to Trustee until trial.

4 68. Accordingly, based on the entire record of this case, the court finds that  
5 Trustee as Plaintiff has satisfied his burden of proving by a preponderance of the  
6 evidence both elements of 11 U.S.C. § 727(d)(1), and in reviewing the evidence  
7 cumulatively, the relief requested on Plaintiff's sixth cause of action is warranted.  
8 Defendant's discharge will be revoked pursuant to 11 U.S.C. § 727(d)(1).

9 69. Accordingly, based on the entire record of this case, the court finds that  
10 Trustee as Plaintiff has satisfied his burden of proving by a preponderance of the  
11 evidence both elements of 11 U.S.C. § 727(d)(2), and in reviewing the evidence  
12 cumulatively, the relief requested on Plaintiff's seventh cause of action is warranted.  
13 Defendant's discharge will be revoked pursuant to 11 U.S.C. § 727(d)(2).

14 70. Counsel for Trustee is hereby ordered to lodge a separate judgment  
15 consistent with these findings of fact and conclusions of law.

16 IT IS SO ORDERED.

17 # # #

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Date: March 27, 2019

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Robert Kwan  
United States Bankruptcy Judge