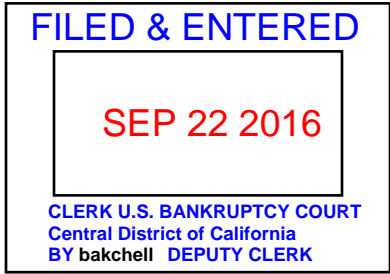


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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

In re:  
  
DIVINE MEDA AUBRY,  
  
Debtor.

Case No. 2:13-bk-25295-RK  
  
Chapter 7

**MEMORANDUM DECISION AFTER  
TRIAL ON CONTESTED MATTER OF  
TRUSTEE'S MOTION FOR ORDER: (1)  
DISALLOWING DEBTOR'S AMENDED  
EXEMPTION IN STRUCTURED  
SETTLEMENT ANNUITY AND  
PROCEEDS THEREOF; OR (2) IN THE  
ALTERNATIVE, IF THE COURT  
DECIDES TO ALLOW SUCH AMENDED  
EXEMPTION, CONDITIONING  
ALLOWANCE OF AMENDED  
EXEMPTION ON PAYMENTS OF FEES  
OF TRUSTEE AND HIS GENERAL  
COUNSEL**

Pending before the court is the Motion of the Chapter 7 Trustee Jason M. Rund ("Trustee") for Order: (1) Disallowing Debtor's Amended Exemption In Structured Settlement Annuity and Proceeds Thereof; or (2) In the Alternative, if the Court Decides to Allow Such Amended Exemption, Conditioning Allowance of Amended Exemption On

1 Payments of Fees of Trustee and His General Counsel (“Motion”). ECF (Electronic Case  
2 Filing or Docket Number) 45. Debtor Divine M. Aubry (“Debtor”) filed an opposition to the  
3 Motion, ECF 47, and Trustee filed a reply thereto, ECF 48. Trustee then filed evidentiary  
4 objections to Debtor’s declaration, which was attached to Debtor’s opposition, ECF 49,  
5 and a supplemental reply to Debtor’s opposition, ECF 50.

6 The Motion initially came on for hearing before the undersigned United States  
7 Bankruptcy Judge on June 30, 2015. At this hearing, the court determined that because  
8 the Motion raised disputed factual and legal issues regarding Debtor’s good or bad faith  
9 to warrant application of equitable estoppel, the Motion would be treated as a contested  
10 matter under Rule 9014 of the Federal Rules of Bankruptcy Procedure. Thereupon, the  
11 court set a pre-trial conference for September 8, 2015, and at the pre-trial conference,  
12 the court set trial dates for November 12 and 13, 2015, which were then continued by  
13 stipulation and order to January 7 and 8, 2016. ECF 55 and 57. On November 17, 2015,  
14 the parties filed and lodged a joint pretrial stipulation, ECF 69 and 74, which the court  
15 approved by order entered on January 6, 2016, ECF 75. The court then vacated the  
16 January 7, 2016 trial date, ECF 70, and conducted the trial of this contested matter on  
17 January 8, 2016.

18 At trial, Matthew F. Kennedy of the law firm of Robert A. Hessling, APC, appeared  
19 on behalf of Trustee, and Michael F. Chekian, Attorney at Law, appeared on behalf of  
20 Debtor. Following trial, the court directed the parties to lodge proposed findings of fact  
21 and conclusions of law. On February 17, 2016, Trustee lodged his proposed findings of  
22 fact and conclusions of law, ECF 77, and on March 18, 2016, Debtor lodged her  
23 proposed findings of fact and conclusions of law, ECF 78. On March 31, 2016, Trustee  
24 filed objections to Debtor’s proposed findings of fact and conclusions of law. ECF 79.  
25 Thereafter, the court took the matter under submission.

26 Having considered the moving and opposing papers, the exhibits and declarations  
27 attached therein, the undisputed facts set forth in their joint pretrial stipulation, ECF 69,  
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1 approved by order entered on January 6, 2016, ECF 75, the evidence admitted at trial,  
2 the oral and written arguments of the parties, and the record before the court, the court  
3 makes the following findings of fact and conclusions of law pursuant to Rules 7052 and  
4 9014 of the Federal Rules of Bankruptcy Procedure and Rule 52 of the Federal Rules of  
5 Civil Procedure. The court adopts as its findings of fact the Admitted Facts Nos. 1-55 at  
6 pages 1 through 8 of the Pretrial Stipulation, ECF 69, filed on November 17, 2015, as  
7 approved by order of this court on January 6, 2016, ECF 75, which are otherwise  
8 incorporated by reference herein to the extent not otherwise expressly referred to below.  
9 Any finding of fact that should be properly characterized as a conclusion of law should be  
10 considered as such, and any conclusion of law that should be properly characterized as a  
11 finding of fact should be considered as such.

## 12 I. BACKGROUND

### 13 A. Debtor's Background, Pre-Bankruptcy Dealings with Zwerdling, and 14 Debtor's Annuity

15 Debtor has a high school diploma and three and one-half years of college where  
16 she studied business administration with an emphasis in accounting but did not receive a  
17 degree. *Trial Testimony of Divine Meda Aubry*, January 8, 2016 at 11:28 a.m. Debtor  
18 worked in accounting for many years, as an office manager for an insurance agency, and  
19 later became a pharmaceutical sales representative. *Id.*, January 8, 2016 at 11:29 a.m.  
20 In about 2007, Debtor started a small business, Divine Blessings, a yoga-inspired  
21 clothing line. *Id.*

22 In or about late 2011 or early 2012, Debtor befriended creditor Helene Barbara  
23 Zwerdling ("Zwerdling") at the Agape International Spiritual Center in Culver City,  
24 California, where they both attended services. *Pretrial Stipulation*, ECF 69, at 3, ¶ 9.  
25 Debtor often conducted trade shows at the Agape International Spiritual Center where  
26 she displayed and sold Divine Blessings's clothing products. *Id.* at 3, ¶ 10.

27 During 2012, Zwerdling's relationship with Debtor grew to the point where they  
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1 talked on nearly a daily basis, and in or about September 2012, Debtor requested that  
2 Zwerdling loan Debtor the sum of \$1,356 to pay for the fees associated with a trade show  
3 at the Long Beach Convention and Entertainment Center. *Pretrial Stipulation* at 3, ¶¶ 11  
4 and 13.

5 Pursuant to an oral agreement, Zwerdling loaned Debtor the requested \$1,356 for  
6 the Long Beach trade show, which Debtor repaid several weeks later. *Pretrial Stipulation*  
7 at 4, ¶ 14. Pursuant to a separate written loan agreement, Zwerdling loaned Debtor an  
8 additional \$2,500. *Id.* at 4, ¶ 15. In connection with the written loan agreement, Debtor  
9 told Zwerdling that Debtor had an annuity (the “Annuity”), that the annual Annuity  
10 payment would become due and payable to Debtor in mid-December 2012, and that  
11 Debtor would repay the loan out of the Annuity proceeds in late December 2012, which  
12 Debtor subsequently did. *Id.* at 4, ¶¶ 16 and 18. The Annuity was payable in 31 annual  
13 payments of \$8,381, beginning December 19, 2008 and continuing through and including  
14 December 19, 2038. *Id.* at 6, ¶ 39. Thus, Debtor was aware that she owned an interest  
15 in the Annuity at least as of December 2012 and before she met with and retained Lisa F.  
16 Collins-Williams as her bankruptcy attorney to file her bankruptcy petition in this case in  
17 June 2013 as discussed below.

18 In December 2012, Zwerdling loaned Debtor an additional \$36,000 pursuant to a  
19 separate, written loan agreement, which required that Debtor make minimum payments  
20 of \$8,000 per year with the payments to commence on January 10, 2013 and continue on  
21 the tenth day of each successive month. *Pretrial Stipulation* at 4, ¶ 19; *Trustee’s Trial*  
22 *Exhibit D*, Loan Agreement between Debtor and Helene Barbara Zwerdling. The total  
23 minimum loan payment of \$8,000 per year approximated the annual Annuity payment  
24 collected by Debtor each December. *Pretrial Stipulation* at 4, ¶ 20.

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1 B. Debtor's Dealings with Her Bankruptcy Counsel, Lisa F. Collins-Williams,  
2 Initial Petition Documents and 341(a) Meeting of Creditors

3 Fearing that a creditor, Debtor's landlord, might levy one of her bank accounts, on  
4 June 3, 2013, Debtor went to the Law Offices of Lisa F. Collins-Williams to obtain legal  
5 assistance. See *Pretrial Stipulation* at 5, ¶¶ 29 and 30; *Trial Testimony of Divine Meda*  
6 *Aubry*, January 8, 2016 at 11. While there, Debtor completed a bankruptcy  
7 questionnaire, *Debtor's Trial Exhibit 2*, Bankruptcy Questionnaire, and met with Attorney  
8 Lisa F. Collins-Williams ("Collins-Williams") for about 30 minutes to discuss Debtor's  
9 financial situation and eligibility for relief under the Bankruptcy Code. *Trial Testimony of*  
10 *Divine Meda Aubry*, January 8, 2016 at 11:36-11:37 a.m.

11 On June 11, 2013, Debtor filed her petition for relief under Chapter 7 of the United  
12 States Bankruptcy Code, 11 U.S.C. *Trustee's Trial Exhibit U*, Voluntary Chapter 7  
13 Petition, ECF 1, filed on June 11, 2013. Jason M. Rund was duly appointed as the  
14 Chapter 7 Trustee of Debtor's bankruptcy estate. See *Notice of Chapter 7 Bankruptcy*  
15 *Case, Meeting of Creditors, & Deadlines*, ECF 4, filed on June 11, 2013. Debtor's  
16 bankruptcy schedules as part of her initial bankruptcy petition documents did not disclose  
17 any interest in the Annuity. *Trustee's Trial Exhibit V, Schedules and Statement of*  
18 *Financial Affairs*, ECF 8, filed on June 25, 2013. Specifically, Item 10 on Schedule B-  
19 Personal Property, requested the Debtor to disclose any annuities ("10. Annuities.  
20 Itemize and name each issuer."), but "None" was checked off on this item. *Id.*, ECF 8 at  
21 5.

22 According to Debtor, when she met with Collins-Williams in preparing to file for  
23 bankruptcy, she filled out a bankruptcy questionnaire from Collins-Williams, which had no  
24 written inquiries about annuities or worker's compensation awards, Collins-Williams did  
25 not review each line of the questionnaire, Collins-Williams did not ask her "if she had any  
26 retirement," and Collins-Williams did not ask her any questions about her assets, except  
27 her clothing line. *Debtor's Proposed Findings of Fact and Conclusions of Law*, ECF 78,  
28

1 filed on March 18, 2016, at 2, *citing, Trial Testimony of Divine Meda Aubry*, January 8,  
2 2016, at 11:37-11:40 a.m. and *Trial Testimony of Lisa F. Collins-Williams*, January 8,  
3 2016, at 1:02-1:03 p.m. and 1:30 p.m. In other words, Debtor's excuse for not listing the  
4 Annuity as either an asset or an income item on her petition and original bankruptcy  
5 schedules is that she did not tell her lawyer about the Annuity because her lawyer did not  
6 ask. The court does not find that Debtor 's excuse to be satisfactory because the  
7 bankruptcy questionnaire, *Debtor's Trial Exhibit 2*, Bankruptcy Questionnaire, asks for  
8 disclosure by Debtor of assets and income items, which the Annuity was both, that is, an  
9 asset and an income item, and Debtor and her counsel met for 30 minutes to go over the  
10 bankruptcy questionnaire which clearly elicited information from Debtor about her assets  
11 and income items. Debtor's explanation that the bankruptcy questionnaire did not  
12 specifically ask about annuities or only asked for "monthly" items of income as opposed  
13 to annual items of income like the Annuity is hyper-technical and does not excuse her  
14 lack of disclosure to her bankruptcy attorney about the existence of the Annuity asset and  
15 income. Debtor knew that she was hiring a bankruptcy attorney, Collins-Williams, to help  
16 her file a bankruptcy petition and start a bankruptcy case, that she was being asked  
17 information about her assets and income to disclose in her bankruptcy case, that she had  
18 an interest in the Annuity, a prepetition asset, and that she had received income from the  
19 Annuity, a prepetition income item, and that she did not disclose this information to her  
20 attorney, Collins-Williams, so that the information would not be on her bankruptcy petition  
21 and schedules as originally filed.

22 At Debtor's meeting of creditors under 11 U.S.C. § 341(a) on July 30, 2013,  
23 Trustee examined Debtor under oath, and Debtor testified, among other things, as  
24 follows:

25 TRUSTEE RUND: Did you read and sign your bankruptcy petition,  
26 schedules, and statements?

27 MS. AUBRY: Yes.

1 TRUSTEE RUND: Are you personally familiar with everything contained in  
your bankruptcy petition, schedules, and statements?

2 MS. AUBRY: Yes.

3 TRUSTEE RUND: To the best of your knowledge, is all that information  
4 true, correct, and complete?

5 MS. AUBRY: Yes.

6 TRUSTEE RUND: Any errors or omissions that you need to bring to my  
attention or the court's attention?

7 MS. AUBRY: No.

8 TRUSTEE RUND: All of your assets are identified in your bankruptcy  
9 schedules?

10 MS. AUBRY: Yes.

11 *Pretrial Stipulation* at 2-3, ¶ 6, quoting, *Transcript of Section 341(a) Meeting of Creditors*  
12 at [page:line(s)] 5:13–6:7, *Trustee's Trial Exhibit F*, *Transcript of Section 341(a) Meeting*  
13 of Creditors at 5:13-6:7. Debtor knew that she was testifying under penalty of perjury at  
14 the meeting of creditors. *Trial Testimony of Divine Meda Aubry*, January 8, 2016 at  
15 11:36-11:37 a.m.

16 Trustee filed a report of no distribution on July 31, 2013, *Trustee's Trial Exhibit W*,  
17 *Chapter 7 Trustee's Report of No Distribution*, ECF 10, Debtor received her discharge on  
18 September 16, 2013, ECF 14, and Debtor's bankruptcy case was closed on September  
19 20, 2013, *Trustee's Trial Exhibit X, Document re Close of Case*, ECF 16. *Pretrial*  
20 *Stipulation* at 3, ¶¶ 7-8.

21 C. The Reopening of Debtor's Bankruptcy Case

22 On December 28, 2013, Debtor, by her bankruptcy attorney, Collins-Williams,  
23 filed a motion to reopen Debtor's bankruptcy case for the purpose of amending her  
24 Schedule F listing general unsecured creditors so that the debts owed to these creditors  
25 would be discharged. *Debtor's Motion to Reopen Case*, ECF 17, filed on December 28,  
26 2013. Specifically, Debtor meant to amend her Schedule F to add Zwerdling as a  
27 creditor because Debtor felt her friend Zwerdling was becoming "unbearable" and  
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1 “disruptive” in trying to help Debtor with her business and in wanting Debtor to repay the  
2 loan, and thus, to make sure her debt to Zwerdling would also be discharged in  
3 bankruptcy. *Trial Testimony of Divine Meda Aubry*, January 8, 2016 at 11:58 a.m.-12:00  
4 p.m. Debtor’s bankruptcy schedules as part of her initial bankruptcy petition documents  
5 did not list Zwerdling as a creditor or her creditor’s claim. *Trustee’s Trial Exhibit V,*  
6 *Schedules and Statement of Financial Affairs*, ECF 8, filed on June 25, 2013.

7 According to Debtor, she did not list Zwerdling as a creditor on her original  
8 bankruptcy schedules because she just obtained the loan from Zwerdling, she intended  
9 to pay Zwerdling back, she did not file her bankruptcy case to “wipe out” (i.e., discharge)  
10 her debt to Zwerdling and a staff member at the Law Office of Lisa F. Collins-Williams  
11 told her that it was “allowable” not to list all creditors on her bankruptcy petition. *Debtor’s*  
12 *Proposed Findings of Fact and Conclusions of Law*, ECF 78, filed on March 18, 2016, at  
13 2, *citing, Trial Testimony of Divine Meda Aubry*, January 8, 2016, at 11:43 and 11:53-  
14 11:54 a.m. To some extent, the court finds Debtor’s trial testimony on these points to be  
15 credible that she did not list Zwerdling as a creditor because she intended to pay  
16 Zwerdling back and originally did not want to discharge her debt to Zwerdling with her  
17 bankruptcy case, which is corroborated by the list of creditors that Debtor prepared for  
18 her consultation with the Law Office of Lisa F. Collins-Williams with Zwerdling’s name  
19 and address crossed out. *Id.*; *Debtor’s Trial Exhibit 3, Divine Aubry Creditors [List]* at 1.  
20 Collins-Williams testified at trial that she never told Debtor that Debtor had the option of  
21 listing all creditors rather than it being a requirement and that as a matter of practice, she  
22 would never tell debtors that they had the option to list all creditors. *Trial Testimony of*  
23 *Lisa F. Collins-Williams*, January 8, 2016 at 1:07 p.m. On this point, the court finds that  
24 Collins-Williams is credible, and that if Debtor heard something to the contrary from  
25 someone on Collins-Williams’s staff as opposed to Collins-Williams, Debtor could not  
26 have reasonably relied on staff’s advice as opposed to the advice of the lawyer, Collins-  
27 Williams, and Debtor failed to take reasonable steps to clarify any purported guidance  
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1 from staff. Debtor should have listed Zwerdling as a creditor on her bankruptcy  
2 schedules, which appears to have been a strategic choice that Debtor made on her own  
3 without her lawyer's involvement.

4 On December 28, 2013, Zwerdling spoke with Debtor about the non-  
5 payment of the \$36,000 loan and thereafter corresponded with Debtor on various  
6 occasions regarding the non-payment of the loan. *Pretrial Stipulation* at 4, ¶ 22.  
7 Zwerdling's concern grew inasmuch as Debtor had informed Zwerdling that Debtor had  
8 received her annual Annuity payment in December 2013, yet Debtor had not used any of  
9 those proceeds to pay Zwerdling because Debtor was having financial difficulties at the  
10 end of 2013. *Id.* at 4, ¶ 23; *Trial Testimony of Helene Barbara Zwerdling*, January 8,  
11 2016 at 10:46-10:57 a.m.; *Trial Testimony of Divine Meda Aubry*, January 8, 2016 at  
12 12:03 p.m.

13 As a result of Debtor's default on Zwerdling's loan, Zwerdling filed a small claims  
14 complaint against Debtor in the Los Angeles County Superior Court, Southwest District—  
15 *Zwerdling v. Aubry*, Case No. ING 14S00939 ("Small Claims Action")—seeking to collect  
16 the amount of \$6,240 that was due and owing under the loan through April 2014. *Pretrial*  
17 *Stipulation* at 4-5, ¶ 24. Thereafter, in or about mid-March 2014, Zwerdling received a  
18 letter from Collins-Williams from which Zwerdling first learned about Debtor's bankruptcy  
19 case. *Id.* at 5, ¶ 25; *Trustee's Trial Exhibit J, Letter from Lisa F. Collins-Williams to*  
20 *Helene Barbara Zwerdling and Enclosures (Order Denying Debtor's Motion to Reopen*  
21 *Case and Discharge of Debtor)*. Enclosed with Collins-Williams's letter were copies of a  
22 Discharge of Debtor order and an Order Denying Debtor's Motion to Reopen Case, which  
23 indicated that Debtor had filed a motion on December 28, 2013 to reopen the bankruptcy  
24 case to add a certain creditor to her bankruptcy schedules. *Pretrial Stipulation* at 5, ¶ 26.  
25 Zwerdling had not known of Debtor's bankruptcy case until she received Collins-  
26 Williams's letter. *Trial Testimony of Helene Barbara Zwerdling*, January 8, 2016 at 11:06-  
27 11:07 a.m.

1 In or about late March 2014 and April 2014, Zwerdling corresponded by mail and  
2 email with Collins-Williams regarding Debtor's bankruptcy filing. *Pretrial Stipulation* at 5,  
3 ¶ 27. In Zwerdling's responsive email correspondence dated April 1, 2014, Zwerdling  
4 reminded Collins-Williams that, among other things, Collins-Williams had filed the motion  
5 to reopen the bankruptcy case on December 28, 2013 to add Zwerdling as a creditor and  
6 therefore knew about Zwerdling and the loan agreement with Debtor for about two  
7 months before Zwerdling filed the Small Claims Action. *Id.* at 5, ¶ 28; *Trustee's Trial*  
8 *Exhibit L, E-Mail Correspondence (1) between Helene Barbara Zwerdling and Debtor and*  
9 *E-Mail Correspondence (5) between Helene Barbara Zwerdlin and Lisa F. Collins-*  
10 *Williams.*

11 Zwerdling subsequently notified the United States Trustee about Debtor's  
12 unscheduled assets including the Annuity. *Pretrial Stipulation* at 5, ¶ 31; *Trial Testimony*  
13 *of Helene Barbara Zwerdling*, January 8, 2016 at 11:16 a.m. On April 14, 2014, as a  
14 result of the information provided by Zwerdling, the United States Trustee filed an *ex*  
15 *parte* motion to reopen the case to administer unscheduled assets consisting of the  
16 interest in Divine Blessings, the Divine Blessings Account and any other possible  
17 unscheduled assets. *Id.* at 5-6, ¶¶ 31-32; *Trustee's Trial Exhibit Y, U.S. Trustee's Ex*  
18 *Parte Motion to Reopen Bankruptcy Case under 11 U.S.C. § 350(b) for the Purpose of*  
19 *Appointing Chapter 7 Trustee to Administer Assets*, ECF 21. By an order entered on  
20 April 16, 2014, the *ex parte* motion was granted and the case was reopened. *Trustee's*  
21 *Trial Exhibit Z, Order on U.S. Trustee's Motion to Reopen Case*, ECF 22. Trustee was  
22 re-appointed as the Chapter 7 Trustee and withdrew his prior no distribution report.  
23 *Notice of Appointment of Trustee as Interim Trustee in a Reopened Case*, ECF 24, filed  
24 on April 23, 2014, and *Notice Withdrawing Trustee's Report of No Distribution*, ECF 25,  
25 filed on April 24, 2014.

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1 D. Debtor's First Amended Bankruptcy Schedules

2 On April 28, 2014, over ten months after Debtor filed her initial petition documents,  
3 Debtor filed her first amended Schedules B, F, I and J ("First Amended Schedules") and  
4 Statement of Financial Affairs. *Trustee's Trial Exhibit AA, Amended Schedules B, F, I*  
5 *and J and Statement of Financial Affairs*, ECF 26. On her First Amended Schedule B,  
6 Personal Property, Debtor listed, among other personal property, the Divine Blessings  
7 Account, four other bank accounts, clothing inventory with an aggregate scheduled value  
8 of \$5,700, and the Annuity with a value of \$0.00, which she described as follows:

9 HARTFORD LIFE INDURANCE [sic] COMPANIES ANNUITY

10 Location: In debtor's possession YEARLY

11 PAYMENT \$8,381

12 *Id.* at 4-6. This was the first time in the bankruptcy case that Debtor disclosed any  
13 interest in the Annuity as a prepetition asset or item of income.

14 On her First Amended Schedule F, Creditors Holding Unsecured Nonpriority  
15 Claims, Debtor also added listings of several unsecured nonpriority claims of creditors  
16 including Zwerdling's \$36,000 claim. *Trustee's Trial Exhibit AA, Amended Schedules B,*  
17 *F, I and J and Statement of Financial Affairs*, ECF 26, filed on April 28, 2014, at 10. On  
18 her First Amended Schedule I, Your Income, and, in addition to her monthly pension or  
19 retirement income of \$1,150, Debtor listed her monthly Annuity income of \$698 and her  
20 monthly income of \$900 from her business. *Id.* at 15. At this time, Debtor did not file an  
21 amended Schedule C, Property Claimed as Exempt, and therefore did not claim an  
22 exemption in the Annuity. *Id.* at 1-27.

23 E. Trustee's Post-Reopening Acts

24 Trustee's preliminary investigation revealed, among other things, that: (a) the  
25 Annuity was payable in 31 annual payments of \$8,381, beginning December 19, 2008  
26 and continuing through and including December 19, 2038; and (b) Hartford Cebesco  
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1 purchased the Annuity from the Hartford Life Insurance Company (“Hartford”) in  
2 connection with a structured settlement with Debtor. *Pretrial Stipulation* at 6, ¶ 39.

3 Trustee retained the law firm of Robert A. Hessling, APC, as his general counsel in  
4 this bankruptcy case to assist him with, among other matters, collecting the Annuity  
5 payments and liquidating Trustee’s right, title and interest in the Annuity. *Pretrial*  
6 *Stipulation* at 7, ¶ 40; *Trustee’s Trial Exhibit BB, Application of Trustee to Employ Robert*  
7 *A. Hessling, APC, as General Counsel for Trustee; and Declarations of Jason M. Rund*  
8 *and Robert A. Hessling*. On July 9, 2014, Trustee filed a Notification of Asset Case and a  
9 Notice of Possible Dividend and Order Fixing Time to File Claims, which scheduled a  
10 claims bar date of October 14, 2014. *Trustee’s Trial Exhibit CC, Notification of Asset*  
11 *Case and Notice of Possible Dividend and Order Fixing Time to File Claims*, ECF 29. By  
12 an order entered on August 1, 2014, the court authorized the employment of Robert A.  
13 Hessling, APC, as Trustee’s general counsel, with an effective employment date of June  
14 19, 2014. *Trustee’s Trial Exhibit EE, Order Authorizing Employment of Robert A.*  
15 *Hessling, APC, as General Counsel for Trustee*, ECF 34.

16 Robert A. Hessling, APC, assisted Trustee with, among other matters, collecting  
17 the Annuity payments and seeking to liquidate Trustee’s right, title and interest in the  
18 Annuity by, among other things:

- 19 a. communicating with Collins-Williams regarding the turnover of the  
20 Annuity payments to Trustee;
- 21 b. seeking to locate prospective purchasers;
- 22 c. communicating with representatives of JG Wentworth regarding the  
23 purchase and sale of Trustee’s right, title and interest in the Annuity;
- 24 d. after negotiations, reaching a tentative agreement on Trustee’s  
25 behalf with JG Wentworth regarding such purchase and sale;
- 26 e. reviewing drafts of sale documents from JG Wentworth, and  
27 preparing an addendum to such documents; and

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1 f. demanding on Trustee's behalf that Hartford turn over the future  
2 annual Annuity payments.

3 *Trustee's Trial Exhibit BB, Application of Trustee to Employ Robert A. Hessling, APC, as*  
4 *General Counsel for Trustee; and Declarations of Jason M. Rund and Robert A.*  
5 *Hessling, ECF 27, filed on July 7, 2014; Pretrial Stipulation at 7, ¶ 43.*

6 Further exchanges of documents and extensive negotiations between Robert A.  
7 Hessling, APC, and another party, JG Wentworth, a prospective purchaser, ensued, but  
8 JG Wentworth decided not to purchase the Annuity. *Pretrial Stipulation at 7, ¶ 44.*  
9 Moreover, Hartford initially failed to respond to Trustee's request for turnover of the  
10 Annuity payments, but ultimately complied and remitted the December 2014 Annuity  
11 payment of \$8,381 to Trustee. *Id.* at 8, ¶ 46.

12 On September 10, 2014, the United States Trustee filed an adversary proceeding  
13 against Debtor, *United States Trustee for the Central District of California, Region 16, v.*  
14 *Divine Meda Aubry*, Adv. No. 2:14-ap-01595-RK, seeking the revocation of Debtor's  
15 discharge based upon, among other things, Debtor's alleged knowing and intentional  
16 omissions of her interests in assets, income and debts in her bankruptcy petition and  
17 bankruptcy schedules (i.e., *Trustee's Trial Exhibits U and V, Voluntary Chapter 7 Petition*  
18 *and Schedules and Statement of Financial Affairs, ECF 1 and 8).*

19 F. Debtor's Second Amended Bankruptcy Schedules

20 On May 6, 2015, nearly two years after Debtor's first bankruptcy petition and  
21 schedules were filed in this bankruptcy case and over one year since Debtor's  
22 bankruptcy case was reopened and since Debtor filed her first amended bankruptcy  
23 schedules, Debtor filed amended bankruptcy schedules for a second time, amending  
24 Schedules A through J ("Second Amended Schedules") and Debtor's Statement of  
25 Financial Affairs. *Debtor's Trial Exhibit 4, [Second] Amended bankruptcy schedules filed*  
26 *as document 44 on 05/06/15, ECF 44.* On Debtor's Second Amended Schedule B,  
27 Debtor lists the Annuity with the following, more detailed information:

1 Worker's Compensation Award: payout as structured settlement annuity  
2 from The Hartford as part of settlement of worker's compensation case  
3 number WC 0539172 which were supposed to commence 12/19/2008, but  
4 did not commence until 2013. Annual payments of \$8381 through and  
5 including 12/19/2038. The annuity has no cash surrender value. Listing  
6 estimated value of future payments as of 6/11/2013, which are reasonably  
7 needed for Debtor's health, maintenance and support.  
8 Location: In insurance company's possession

9 *Id.* at 21. On the Second Amended Schedule B, Debtor valued the Annuity at \$217,906.

10 *Id.* With the Second Amended Schedules, for the first time, Debtor filed an amended  
11 Schedule C-Property Claimed as Exempt ("First Amended Schedule C"), wherein she  
12 claimed an exemption in the Annuity pursuant to California Code of Civil Procedure §  
13 703.140(b)(10)(C). *Id.* at 25.

## 14 II. DISCUSSION

### 15 A. Burden of Proof on Validity of Debtor's Exemption Claim under California 16 Code of Civil Procedure § 703.140(b)(10)(C)

17 On Debtor's First Amended Schedule C, Property Claimed as Exempt, as part of  
18 her Second Amended Schedules, Debtor claimed the Annuity, which she listed as a  
19 "Worker's Compensation Award", as exempt under California Code of Civil Procedure §  
20 703.140(b)(10)(C). Pursuant to California Code of Civil Procedure § 703.140(b)(10)(C),  
21 the debtor may elect to exempt the right to receive "[a] disability, illness, or  
22 unemployment benefit."

23 "Workers' compensation benefits are generally treated as *disability* benefits and  
24 thus exempt without regard to amount or whether the award is necessary for the support  
25 of the debtor (or debtor's dependents)." 2 March, Ahart and Shapiro, *California Practice*  
26 *Guide: Bankruptcy*, ¶ 7:626 at 7-81 (2015) (emphasis in original), *citing, In re Cain*, 91  
27 B.R. 182, 183 (Bankr. N.D. Ga. 1988) (construing 11 U.S.C. § 522(d)(10)(C), which  
28 verbatim mirrors the language of California Code of Civil Procedure § 703.140(b)(10)(C);  
*In re LaBelle*, 18 B.R. 169, 170 (Bankr. D. Me. 1982) (same); *Matter of Evans*, 29 B.R.  
336, 338 (Bankr. D.N.J. 1983) (same); *see also, In re Jones*, 446 B.R. 466, 473 (Bankr.  
D. Kan. 2011) (construing 11 U.S.C. §§ 522(d)(10)(C) and (E), whose language verbatim

1 mirrors California Code of Civil Procedure §§ 703.140(b)(10)(C) and (E), and observing  
2 that notwithstanding 11 U.S.C. § 522(d)(10)(E)'s "reasonably necessary" requirement,  
3 workers' compensation benefits are exemptible under 11 U.S.C. § 522(d)(10)(C) because  
4 they are inherently limited in amount and thus may be assumed to already be curtailed to  
5 an amount reasonably necessary to support the debtor). Nonetheless, regarding whether  
6 Debtor can exempt the Annuity under California Code of Civil Procedure §  
7 703.140(b)(10)(C), as claimed on Debtor's First Amended Schedule C, the court  
8 considers whether Debtor or Trustee has the burden of proof on California Code of Civil  
9 Procedure § 703.140(b)(10)(C).

10 Under 11 U.S.C. § 522(l), "[u]nless a party in interest objects, the property  
11 claimed as exempt on such list is exempt." Rule 4003(c) of the Federal Rules of  
12 Bankruptcy Procedure provides with respect to exemption objections that "the objecting  
13 party has the burden of proving that the exemptions are not properly claimed." However,  
14 state law set forth in California Civil Code § 703.580(b) provides for a different burden of  
15 proof with respect to exemption objections: "At a hearing under this section, the  
16 exemption claimant has the burden of proof."

17 In *In re Carter*, 182 F.3d 1027 (9th Cir. 1999), relying upon Rule 4003(c) of the  
18 Federal Rules of Bankruptcy Procedure, the Ninth Circuit held that the objecting party  
19 has the burden of production and persuasion:

20 A claimed exemption is presumptively valid . . . Initially, this means that the  
21 objecting party has the burden of production and the burden of persuasion.  
22 The objecting party must produce evidence to rebut the presumptively valid  
23 exemption. If the objecting party can produce evidence to rebut the  
24 exemption, the burden of production then shifts to the debtor to come  
forward with unequivocal evidence to demonstrate that the exemption is  
proper. The burden of persuasion, however, always remains with the  
objecting party.

25 182 F.3d at 1029 n. 3, *citing inter alia*, Fed. R. Bankr. P. 4003(c) (also noting "there was  
26 sustained discussion and some disagreement in the bankruptcy court and the BAP  
27 concerning burdens of proof, production and persuasion"; other citations and quotations  
28

1 omitted); *see also*, *In re Diaz*, 547 B.R. 329, 336 (9th Cir. BAP 2016) (discussing the  
2 burden of proof under Rule 4003(c) as stated in *In re Carter*). Subsequently, the United  
3 States Supreme Court in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000)  
4 held that because the burden of proof is a substantive element of state law, when state  
5 law is applied in federal cases, that state's burden of proof is applicable. 530 U.S. at 20-  
6 21 (“[d]o the State’s right and the taxpayer’s obligation include the burden of proof? Our  
7 cases point to an affirmative answer. Given its importance to the outcome of cases, we  
8 have long held the burden of proof to be a ‘substantive’ aspect of a claim. That is, the  
9 burden of proof is an essential element of the claim itself; one who asserts a claim is  
10 entitled to the burden of proof that normally comes with it.” (citations omitted)); *see also*,  
11 *In re Diaz*, 547 B.R. at 336-337 (discussing the impact of *Raleigh v. Illinois Department of*  
12 *Revenue* on the use of burden of proof under state law for deciding an exemption  
13 objection).

14       Regarding whether a claimed exemption under state law invalidates the burden of  
15 proof allocation set forth in Rule 4003(c) of the Federal Rules of Bankruptcy Procedure, to  
16 date, “there is no binding authority that explicitly changes the burden allocation set forth in  
17 *Carter* or FRBP 4003(c).” *In re Gilman*, 544 B.R. 184, 196 (Bankr. C.D. Cal. 2016). As  
18 noted in *In re Gilman*, in post-*Raleigh* cases, the Ninth Circuit itself has not addressed the  
19 issue and although the Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”) has  
20 recognized the conflict between the Supreme Court’s holding in *Raleigh* and the Ninth  
21 Circuit’s holding in *Carter*, “post-*Raleigh* BAP decisions on exemptions are unpublished,  
22 do not address the burden of proof issue or conclude[ ] that either burden allocation would  
23 result in the same disposition.” *Id.*, citing, *In re Elliot*, 523 B.R. 188, 192 (9th Cir. BAP  
24 2014) (applying the *Carter* burden allocation without addressing California Code of Civil  
25 Procedure § 703.580(b)); *In re Neff*, 2014 WL 448885, slip op. at \*8 (9th Cir. BAP 2014)  
26 (unpublished decision) (same); *In re Karr*, 2006 WL 6810996, slip op. at \* 5 n. 4 (9th Cir.  
27 BAP 2006) (unpublished decision); *In re Stanley*, 2006 WL 6811019, slip op. at \*2 (9th  
28



1 Cir. BAP 2006) (unpublished decision); *In re Davis*, 323 B.R. 732, 736 (9th Cir. BAP  
2 2005) (same) and 323 B.R. at 742-744 (concurring opinion of Judge Klein, discussing  
3 why California Code of Civil Procedure § 703.580(b) may be the correct burden); *In re*  
4 *Kelley*, 300 B.R. 11, 16-17 (9th Cir. BAP 2003) (applying the *Carter* burden allocation  
5 without addressing California Code of Civil Procedure §703.580(b)). This year in *In re*  
6 *Diaz*, in the absence of Ninth Circuit authority following *Raleigh v. Illinois Department of*  
7 *Revenue*, the BAP decided that the reasoning of *Raleigh* supersedes the rule regarding  
8 burden of proof stated in *In re Carter* when it held that “where a state law exemption  
9 statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not  
10 change that allocation.” Nonetheless, as explained below, in the absence of controlling  
11 case law from the Ninth Circuit or the Supreme Court, because the court determines that  
12 Debtor is entitled to exempt the Annuity under California Code of Civil Procedure §  
13 703.140(b)(10)(C) under either burden of proof allocation, the court need not decide  
14 whether Debtor or Trustee has the burden of proof. See, *In re Arnold*, 471 B.R. 578, 588-  
15 590 (Bankr. C.D. Cal. 2012) (setting forth this court’s analysis why BAP decisions are not  
16 generally controlling on the bankruptcy courts in this circuit); see also, *Zachary v.*  
17 *California Bank & Trust*, 811 F.3d 1191, 1193 n. 1 (9th Cir. 2016) (the precedential effect  
18 of BAP decisions remains an open question in this circuit).

19 Applying the burden set forth in California Code of Civil Procedure § 703.580(b),  
20 placing the burden of proof on the party claiming the exemption, that is, if Debtor has the  
21 burden to prove Debtor’s right to receive a disability benefit as exempt under California  
22 Code of Civil Procedure § 703.140(b)(10)(C), based on the evidence that Debtor offered  
23 and the court received at trial, this court would determine that Debtor has made the  
24 requisite *prima facie* evidentiary showing that Debtor is entitled to exempt the Annuity  
25 under California Code of Civil Procedure § 703.140(b)(10)(C). See, *In re Diaz*, 547 B.R.  
26 at 337, *citing inter alia*, California Code of Civil Procedure § 703.580(b).

27

28

1 First, the undisputed facts set forth in paragraphs 16 and 39 of the Joint Pretrial  
2 Stipulation indicate that Debtor has an Annuity, which Hartford Cebesco purchased from  
3 the Hartford Life Insurance Company in connection with a structured settlement with  
4 Debtor. Second, on Debtor's Second Amended Schedule B, Debtor disclosed the asset  
5 in question as a "worker's compensation award: payout as structured settlement annuity  
6 as part of worker's compensation case . . . ." *Debtor's Trial Exhibit 4, Amended*  
7 *bankruptcy schedules filed as document 44 on 05/06/15*, ECF 44, at 21. Third, at trial, in  
8 Debtor's case-in-chief, Debtor testified that she suffered a work-related injury that caused  
9 her to be out of work for ten years and that Debtor owned the Annuity when she first  
10 visited Collins-Williams' office for a pre-bankruptcy consultation on June 3, 2013. *Trial*  
11 *Testimony of Divine Meda Aubry*, January 8, 2016 at 11:29 and 11:38 a.m. No other  
12 documentary or oral evidence from Debtor was received at trial regarding the nature and  
13 character of the Annuity. Based thereupon, the court finds that the Annuity stems from  
14 the work-related injury that caused Debtor to be out of work for ten years, and thus, the  
15 court determines that under California Code of Civil Procedure § 703.580(b), Debtor has  
16 met her burden of demonstrating that she is entitled to receive a disability, illness, or  
17 unemployment benefit for purposes of claiming an exemption under California Code of  
18 Civil Procedure § 703.140(b)(10)(C). Accordingly, the burden of production then shifts to  
19 Trustee to produce rebuttal evidence that the Annuity should be characterized as  
20 something other than a disability benefit. Because Trustee failed to offer any such  
21 rebuttal evidence, the court would determine that under the burden allocation set forth in  
22 California Code of Civil Procedure § 703.580(b), Debtor's claim of exemption in the  
23 Annuity under California Code of Civil Procedure § 703.140(b)(10)(C) should be allowed.

24 Nonetheless, applying the burden set forth in Rule 4003(c) of the Federal Rules of  
25 Bankruptcy Procedure, that is, if Trustee has the burden of persuasion to disprove  
26 Debtor's right to claim the exemption for a disability benefit under California Code of Civil  
27 Procedure § 703.140(b)(10)(C), based on the evidence Trustee offered and the court  
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1 received, this court would determine that Trustee has failed to meet his burden of  
2 persuasion that Debtor is not entitled to claim the Annuity as exempt under California  
3 Code of Civil Procedure § 703.140(b)(10)(C) because Trustee did not offer any oral or  
4 documentary evidence to prove that the Annuity should be characterized as something  
5 other than a disability benefit. Furthermore, through admitted facts in paragraphs 16 and  
6 39 in the Joint Pretrial Stipulation, Trustee admits that Debtor has the Annuity, which  
7 Hartford Cebesco purchased from the Hartford Life Insurance Company in connection  
8 with a structured settlement with Debtor. Accordingly, the court determines that Trustee  
9 has not met his burden of persuasion under Rule 4003(c) that the Annuity is not exempt  
10 under California Code of Civil Procedure § 703.140(b)(10)(C).

11 Therefore, under either burden of proof allocation, the court determines that  
12 Debtor is entitled to claim the Annuity as exempt pursuant to California Code of Civil  
13 Procedure § 703.140(b)(10)(C) in full.

14 B. Equitable Estoppel

15 Notwithstanding the court's determination that Debtor is entitled to claim the  
16 Annuity as exempt under California Code of Civil Procedure § 703.140(b)(10)(C), for the  
17 reasons described below, the court determines that Debtor should be equitably estopped  
18 from exempting the Annuity under California Code of Civil Procedure §  
19 703.140(b)(10)(C). "[W]hen a debtor claims a *state-created* exemption, the exemption's  
20 scope is determined by state law, which may provide that certain types of debtor  
21 misconduct warrant denial of the exemption." *Law v. Siegel*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1188,  
22 1196-1197 (2014) (emphasis in original); *accord, In re Lua*, 529 B.R. 766, 774 (Bankr.  
23 C.D. Cal.), *affirmed*, 551 B.R. 448, 452 (C.D. Cal. 2015), *appeal pending*, No. 15-56814  
24 (9th Cir., notice of appeal filed on November 24, 2015).

25 Under California law, five elements must be present for the doctrine of equitable  
26 estoppel to apply:

27 (a) a representation or concealment of material facts; (b) made with  
28 knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and

1 permissibly, of the truth; (d) with the intention, actual or virtual, that the  
ignorant party act on it; and (e) that party was induced to act on it.

2 *Simmons v. Ghaderi*, 44 Cal. 4th 570, 584 (2008), *citing*, 13 Witkin, *Summary of*  
3 *California Law*, Equity, § 191 at 527-528 (2005); *accord*, *In re Lua*, 551 B.R. at 453. The  
4 party asserting equitable estoppel has the burden of proof. *Busching v. Superior Court*,  
5 12 Cal.3d 44, 53 (1974) (“Unless the record affirmatively discloses the existence of a  
6 sufficient excuse or the basis for an estoppel.”) (citations omitted).

7 By the Motion, Trustee argues that Debtor’s claimed exemption under California  
8 Code of Civil Procedure § 703.140(b)(10)(C) in the Annuity should be disallowed based  
9 on the doctrine of equitable estoppel.

10 1. Representation or Concealment of Material Fact (first element)

11 The party against whom equitable estoppel is sought must have represented or  
12 concealed a material fact. *Young v. Horizon West, Inc.*, 220 Cal.App.4th 1122, 1131-  
13 1132 (2013); *accord*, *In re Lua*, 551 B.R. at 453.

14 Here, Debtor’s First Amended Schedules, filed in this case on April 28, 2014,  
15 constitutes a representation by Debtor that she was not claiming an exemption in the  
16 Annuity. *See In re Lua*, 529 B.R. at 776. Additionally, Debtor’s silence on her claim of  
17 exemption for her Annuity from April 28, 2014, the date on which her First Amended  
18 Schedules were filed, to May 6, 2015, the date on which her Second Amended  
19 Schedules claiming the Annuity as exempt property for the first time were filed,  
20 constitutes a concealment for purposes of equitable estoppel. Debtor concealed from  
21 Trustee and the court that she would file her Second Amended Schedules claiming the  
22 Annuity as exempt. The court also finds that the representation and concealment were  
23 material because on Debtor’s Second Amended Schedules, Debtor valued the Annuity at  
24 \$217,906, by far Debtor’s most valuable asset, which comprises the largest portion of her  
25 total assets valued on her Second Amended Schedules at \$335,744.09. Furthermore,  
26 the materiality of Debtor’s representation of no claim of exemption and concealment of a  
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1 claim of exemption is underscored by the fact that on Debtor's First Amended Schedules,  
2 Debtor valued the Annuity at \$0, which is not the true value of this asset.

3 Moreover, further back in this case, Debtor's original Schedules, filed on June 25,  
4 2013, constitute a representation by Debtor that she was not claiming an exemption in  
5 the Annuity as she had not even listed the Annuity as an asset owned by her as of the  
6 petition date. *See In re Lua*, 529 B.R. at 776. Additionally, Debtor's silence on listing the  
7 Annuity as an asset or an item of income owned by her as of the petition date and on her  
8 claim of exemption for her Annuity from June 25, 2013, the date on which her original  
9 Schedules were filed, to May 6, 2015, the date on which her Second Amended  
10 Schedules claiming the Annuity as exempt property for the first time were filed, also  
11 constitutes a concealment for purposes of equitable estoppel. Debtor concealed the  
12 existence of the Annuity from her bankruptcy attorney, Trustee and creditors so that the  
13 Annuity would not be disclosed on her bankruptcy schedules as either an asset or an  
14 income item. The court also finds that the representation and concealment were material  
15 because on Debtor's Second Amended Schedules, Debtor valued the Annuity at  
16 \$217,906, by far Debtor's most valuable asset, which comprises the largest portion of her  
17 total assets valued on her Second Amended Schedules at \$335,744.09, which  
18 information was not disclosed either on her original bankruptcy petition and schedules  
19 and on her first amended bankruptcy schedules.

20 Accordingly, the court determines that Trustee has proven by the preponderance  
21 of the evidence that the first element of equitable estoppel, Representation or  
22 Concealment of Material Fact, is met.

23 2. Made with Knowledge of the Facts (second element)

24 The party against whom estoppel is sought must also have had knowledge of the  
25 facts. *City of Long Beach v. Mansell*, 3 Cal.3d 462, 491 and n. 28 (1970); *accord, In re*  
26 *Lua*, 551 B.R. at 453. Furthermore, as stated by the California Supreme Court in *City of*  
27 *Long Beach v. Mansell*,

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1  
2 [The requirement of actual knowledge of the true facts on the part of the  
3 party to be estopped] applies in its full force only in cases where the conduct  
4 creating the estoppel consists of silence or acquiescence. It does not apply  
5 where the party, although ignorant or mistaken as to the real facts, was in  
such a position that he *ought* to have known them, so that knowledge will be  
imputed to him. In such a case, ignorance or mistake will not prevent an  
estoppel.

6 3 Cal.3d at 491 and n. 28 (citation omitted).

7 Throughout Debtor's written opposition to the Motion and in her testimony at trial,  
8 she asserted that she did not review her initial bankruptcy schedules and her First  
9 Amended Schedules before they were filed with the court, nor did she sign any of the  
10 accompanying electronic filing declarations. The court observes that the electronic filing  
11 declaration attached to the First Amended Schedules, which were filed on April 28, 2014,  
12 is a photocopy of the electronic filing declaration attached to Debtor's initial schedules,  
13 which were filed on June 11, 2013, and based on Debtor's trial testimony, Debtor did not  
14 sign either of the electronic filing declarations. While this constitutes a violation of Local  
15 Bankruptcy Rule 1002-1(f), it does not negate the fact that Debtor ought to have known  
16 that she did not claim an exemption in the Annuity on her initial and first amended  
17 bankruptcy schedules and that Trustee had the opportunity and intent to collect and  
18 liquidate the Annuity as an asset of the bankruptcy estate.

19 At Debtor's 11 U.S.C. § 341(a) meeting of creditors on July 30, 2013, she testified  
20 under oath that she had read and signed her bankruptcy petition, schedules and  
21 statements, and was personally familiar with everything contained therein. Yet at trial,  
22 Debtor testified that she incorrectly said such at the meeting of creditors because she  
23 was nervous and was not aware that she was concealing anything on those documents.  
24 *Trial Testimony of Divine M. Aubry*, January 8, 2016 at 11:55-11:57 a.m. Irrespective of  
25 whether Debtor reviewed her original bankruptcy schedules and signed the  
26 accompanying electronic filing declaration, through her statements under oath at the 11  
27 U.S.C. § 341(a) meeting of creditors on July 30, 2013, as of that date, Debtor was on  
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1 notice of her duties and rights under the Bankruptcy Code, including the duty to list the  
2 Annuity as an asset on her bankruptcy schedules and to make her claim that it was  
3 exempt property. See 11 U.S.C. § 521(a)(1)(B) (stating that the debtor must file a  
4 schedule of assets and liabilities “unless the court orders otherwise”); see also, 4 Resnick  
5 and Sommer, *Collier on Bankruptcy*, ¶ 521.03[2] at 521-14 and n. 16 (16th ed. 2016)  
6 (“The debtor has a duty to prepare schedules carefully, completely and accurately.”),  
7 citing, *Cusano v. Klein*, 264 F.3d 936 (9th Cir. 2001).

8 “A debtor cannot, merely by playing ostrich and burying his head deeply enough in  
9 the sand, disclaim all responsibility for statements which he has made under oath.” *In re*  
10 *Retz*, 606 F.3d 1189, 1199 (9th Cir. 2010) (citation omitted). “Every debtor has a  
11 continuing duty to assure the accuracy and completeness of schedules. Postpetition  
12 discovery of rights that actually existed at the time of filing must be addressed in the  
13 schedules. This implies a duty to amend.” *Searles v. Riley (In re Searles)*, 317 B.R. 368,  
14 378 (9th Cir. BAP 2004), *affirmed*, 212 Fed. Appx. 589 (9th Cir. 2006); see also, 11  
15 U.S.C. § 521(a)(1); Federal Rule of Bankruptcy Procedure 1007; *In re Rolland*, 317 B.R.  
16 402, 413 (Bankr. C.D. Cal. 2004) (“Full and comprehensive disclosure is critical to the  
17 integrity of the bankruptcy process.”), citing; *Heidkamp v. Whitehead (In re Whitehead)*,  
18 278 B.R. 589, 594 (Bankr. M.D. Fla. 2002) (“The veracity of the debtor’s Statement is  
19 absolutely essential to the successful administration of the Bankruptcy Code.”).

20 Regarding Debtor’s First Amended Schedules, at trial, Debtor testified that she did  
21 not review them before they were filed, nor did she sign the accompanying electronic  
22 filing declaration. *Trial Testimony of Divine M. Aubry*, January 8, 2016 at 12:05-12:07  
23 p.m. Yet Debtor also admitted in her trial testimony that she had input in the First  
24 Amended Schedules. *Trial Testimony of Divine M. Aubry*, January 8, 2016 at 12:06-  
25 12:07 p.m. Again, irrespective of whether Debtor reviewed the First Amended Schedules  
26 and signed the accompanying electronic filing declaration, through her statements under  
27 oath at the 11 U.S.C. § 341(a) meeting of creditors on July 30, 2013, at least on this  
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1 record as of that date, Debtor was on notice of her duties and rights under the  
2 Bankruptcy Code, including the duty to list the Annuity as an asset on her bankruptcy  
3 schedules and to make her claim that it was exempt property. Furthermore, beyond the  
4 July 30, 2013 11 U.S.C. § 341(a) meeting of creditors, the court observes that Debtor had  
5 other sufficient notice of Trustee's opportunity and intent to collect and liquidate the  
6 Annuity as an asset of the bankruptcy estate, information which Debtor sat on until May  
7 6, 2015 when Debtor filed her Second Amended Schedules and claimed an exemption in  
8 the Annuity for the first time. For example, Debtor's testimony that she had input in the  
9 First Amended Schedules demonstrates that Debtor had notice that her bankruptcy  
10 schedules were being amended before April 28, 2014 to list a previously undisclosed  
11 asset, the Annuity, after her creditor, Zwerdling, informed the United States Trustee that  
12 Debtor had failed to disclose this asset in Debtor's bankruptcy petition documents.  
13 Debtor did not want Zwerdling to collect on the Annuity after Zwerdling asked for payment  
14 on her loan based on Debtor's agreement to pay Zwerdling back from the annual  
15 payments from the Annuity paid to Debtor each December, so instead of paying  
16 Zwerdling as Debtor promised from her December 2013 Annuity payment, Debtor used  
17 the money for other purposes and had her attorney, Collins-Williams, move to reopen  
18 Debtor's bankruptcy case to amend her bankruptcy schedules to add Zwerdling, a  
19 creditor previously known to Debtor, but not previously listed by Debtor on her schedules,  
20 to make sure that any debt owed by Debtor to Zwerdling would be discharged.  
21 Moreover, the court observes that Debtor had other sufficient notice of Trustee's  
22 opportunity and intent to collect and liquidate the Annuity, including the following: on July  
23 7, 2014, Debtor was served with a copy of Trustee's application to employ Robert A.  
24 Hessling, APC, as Trustee's general counsel, which expressly states that Trustee sought  
25 such services to, among other things, collect and liquidate the Annuity, ECF 27; on July  
26 9, 2014, Debtor was also served with a copy of Trustee's Notification of Asset Case, ECF  
27 30; and at trial, Debtor testified that she first learned of her First Amended Schedules

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1 when Debtor's deposition was taken by the U.S. Trustee in December 2014. *Trial*  
2 *Testimony of Divine M. Aubry*, January 8, 2016 at 11:46 a.m. Thus, at a minimum,  
3 Debtor ought to have known of her opportunity to claim an exemption in the Annuity such  
4 that knowledge should be imputed to her under *City of Long Beach v. Mansell*, 3 Cal.3d  
5 462, 491 and n. 28 when the First Amended Schedules were filed in April 2014 on her  
6 behalf by her attorney as she admittedly had input in these amended schedules and was  
7 served with Trustee's papers to reopen the case and retain counsel to pursue the value  
8 of the Annuity shortly thereafter by July 2014. Accordingly, the court determines that  
9 Trustee has proven by the preponderance of the evidence that the second element of  
10 equitable estoppel, Made with Knowledge of the Facts, is met.

11 3. To a Party Ignorant of the Truth

12 To invoke equitable estoppel against Debtor, Trustee must also demonstrate that  
13 he was "ignorant, actually and permissibly, of the truth." *Simmons v. Ghaderi*, 44 Cal.4th  
14 at 584; *accord, In re Lua*, 551 B.R. at 454. Here, the evidence indicates that Trustee had  
15 no knowledge or indication that Debtor was going to file her Second Amended Schedules  
16 and claim the Annuity as exempt. From Trustee's conduct following the filing of Debtor's  
17 First Amended Schedules, which includes communications with Debtor's counsel,  
18 Collins-Williams, regarding turnover of the Annuity and collection of the first Annuity  
19 payment in December of 2014, and Trustee's employment of Robert A. Hessling, APC,  
20 for the purpose of collecting the Annuity payments and liquidating Trustee's right, title and  
21 interest in the Annuity as a prepetition asset of the bankruptcy estate, the court infers that  
22 Trustee was not aware that Debtor intended to claim an exemption in the Annuity.  
23 Trustee, who has been on the panel of Chapter 7 Trustees since 2003 and has  
24 administered over 15,000 Chapter 7 bankruptcy cases, *Trial Testimony of Jason M.*  
25 *Rund*, January 8, 2016 at 9:26 a.m., would not have undertaken the above-described  
26 actions and incurred thousands of dollars of professional fees and expenses to the  
27 bankruptcy estate had Trustee known that Debtor would amend her Schedule C to claim  
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1 the Annuity as exempt property. Specifically, Trustee's counsel has incurred \$11,287 in  
2 professional fees relating to the Annuity as of the date the Motion was filed, June 2, 2015.  
3 *Trustee's Trial Exhibit HH*; Motion, Declaration of Robert A. Hessling at ¶ 6. Accordingly,  
4 the court determines that Trustee has proven by the preponderance of the evidence that  
5 the third element of equitable estoppel, To a Party Ignorant of the Truth, is met.

6 4. With the Intention that the Ignorant Party Act on it

7 Although equitable estoppel requires a finding of intent, *City of Long Beach v.*  
8 *Mansell*, 3 Cal.3d at 490, Trustee need not prove that the debtor intended to deceive him  
9 to create an equitable estoppel since:

10 it is enough if the party has been induced to refrain from using such means  
11 or taking such action as lay in his power, by which he might have retrieved  
12 his position and saved himself from loss . . . Where the delay in  
commencing action is induced by the conduct of the defendant it cannot be  
availed of by him as a defense.

13 *Superior Dispatch, Inc. v. Insurance Corporation of New York*, 181 Cal.App.4th 175, 186  
14 (2010), citing, *Lantzy v. Centex Homes*, 31 Cal.4th 363, 384 (2003); accord, *In re Lua*,  
15 529 B.R. at 777. "An estoppel may arise although there was no designed fraud on the  
16 part of the person sought to be estopped." *Lantzy v. Centex Homes*, 31 Cal.4th at 384;  
17 *Vu v. Prudential Property & Casualty Insurance Company*, 26 Cal.4th 1142, 1152 (2001);  
18 see also, *Crestline Mobile Homes Manufacturing Co. v. Pacific Finance Corp.*, 54 Cal.2d  
19 773, 778-779 (1960) ("Negligence that is careless and culpable conduct is, as a matter of  
20 law, equivalent to an intent to deceive and will satisfy the element of fraud necessary to  
21 an estoppel."). Silence may be used as evidence of fraudulent intent. *In re Lua*, 529  
22 B.R. at 777, citing, *R.D. Reeder Lathing Company, Inc. v. Allen*, 66 Cal.2d 373, 378  
23 (1967). Based on Debtor's silence about the Annuity in failing to list it as an asset on her  
24 original bankruptcy schedules, then listing it on her First Amended Schedules, but not  
25 claiming an exemption when she finally listed it as an asset on her First Amended  
26 Schedules, and much later claiming it as exempt on her Second Amended Schedules,  
27 the court finds that the element of intent is satisfied. Although Debtor claims that she was  
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1 unaware of the contents of her First Amended Schedules when they were filed on April  
2 28, 2014, even if that were true, as previously discussed, the court observes that Debtor  
3 had other sufficient notice of Trustee's opportunity and intent to collect and liquidate the  
4 Annuity, information which Debtor sat on until May 6, 2015 when Debtor filed her Second  
5 Amended Schedules whereby she claimed an exemption in the Annuity for the first time.  
6 Trustee relied on Debtor not claiming an exemption and Debtor remained silent despite  
7 having notice of Trustee's opportunity and intent to collect and liquidate the Annuity at  
8 least since the meeting of creditors in July 2013. Accordingly, the court determines that  
9 Trustee has proven by the preponderance of the evidence that the fourth element of  
10 equitable estoppel, With the Intention That the Ignorant Party Act on it, is met.

11 5. That Party Was Induced to Act on it

12 The element of reliance requires that Trustee change his position in reliance on  
13 something said or done by Debtor, resulting in detriment or prejudice to Trustee. *State*  
14 *Compensation Insurance Fund v. Workers' Compensation Appeals Board*, 40 Cal.3d 5,  
15 16 (1985); *accord, In re Lua*, 551 B.R. at 455. As previously discussed, Trustee was  
16 unaware that Debtor would amend her Schedule C and to his detriment, Trustee relied on  
17 Debtor's decision to wait a year to amend her Schedule C by incurring thousands of  
18 dollars of costs in administering the estate before Debtor filed her First Amended  
19 Schedule C. When Debtor filed her First Amended Schedule B on April 28, 2014, at  
20 which time Debtor did not attempt to claim an exemption in the Annuity, Trustee believed  
21 that meaningful value could be realized from the Annuity for unsecured creditors. See  
22 *Trial Testimony of Jason M. Rund*, January 8, 2016 at 9:42-9:43 a.m. and 10:15 a.m.  
23 Had Trustee known of Debtor's intent to claim an exemption in the Annuity, Trustee  
24 would not have, among other things, retained the law offices of Robert A. Hessling, APC,  
25 to assist him with collecting the Annuity payments and liquidating Trustee's right, title and  
26 interest in the Annuity. Accordingly, the court determines that Trustee has proven by the

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1 preponderance of the evidence that the fifth element of equitable estoppel, That Party  
2 Was Induced to Act on it, is met.

3 Based on the foregoing, the court determines that Trustee has proven by the  
4 preponderance of the evidence that all five elements of equitable estoppel are met and  
5 therefore, Debtor's amended exemption in the Annuity should be disallowed based on  
6 application of California's doctrine of equitable estoppel.

7 C. Prejudice

8 Additionally, Trustee argues that Debtor's claimed exemption in the Annuity should  
9 be disallowed because allowance of the claimed exemption would prejudice Trustee and  
10 creditors. Nonetheless, as previously stated, "[W]hen a debtor claims a *state-created*  
11 exemption, the exemption's scope is determined by state law, which may provide that  
12 certain types of debtor misconduct warrant denial of the exemption." *Law v. Siegal*, 134  
13 S.Ct. at 1196-1197) (emphasis in original); *see also, In re Lua*, 529 B.R. at 774 ("Where,  
14 as here, a debtor claims a state-created exemption, the scope of the exemption—and  
15 any basis for denial of the exemption—must be found in state law.") Trustee has not  
16 cited any authority consistent with *Law v. Siegel, supra*, demonstrating that prejudice is a  
17 proper basis for denial of an exemption under California law, nor is the court aware of any  
18 such authority as it appears that based on the authorities cited by Trustee, this was a  
19 judge-made reason for denial of a state law created exemption set forth in the federal  
20 common law, which does not survive the holding of *Law v. Siegel*. *See, In re Lua*, 529  
21 B.R. at 772-774.

22 As cogently explained by the court in *In re Lua*:

23 Bankruptcy Rule 1009 provides that a "schedule . . . may be amended by  
24 the debtor as a matter of course *at any time* before the case is closed. Fed.  
25 R. Bankr. P. 1009(a)(emphasis added), and the Ninth Circuit has applied  
26 this right to the claim of exemptions. *See Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir. 1998); *see also Tyner v. Nicholson (In re Nicholson)*, 435 B.R. 622, 630 (9th Cir. BAP 2010).

27 Although exemptions and their amendment are liberally construed, a  
28 judicially created limit on this latitude and flexibility arose. Bankruptcy  
courts throughout the country, including courts in the Ninth Circuit, denied

1 leave to amend or disallowed a claimed exemption if the trustee or other  
2 party in interest timely objected and showed that either: (1) the debtor acted  
3 in bad faith; or (2) creditors were prejudiced. See *Michael*, 163 F.3d at 529  
4 (adopting the test set forth in *Doan v. Hudgins (In re Doan)*, 672 F.2d 831  
5 (11th Cir. 1982)). The Bankruptcy Code does not mention either “bad faith”  
6 or “prejudice” as a basis for disallowing an original or amended exemption.  
7 See *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir.  
8 2000)(acknowledging that disallowing amended exemptions based on bad  
9 faith or prejudice represents “judge-made exceptions”). Instead, courts  
10 relied upon section 105(a) as the source of their equitable power to disallow  
11 amended exemptions on those grounds. *Nicholson*, 435 B.R. at 630.

12 This judicially created power was effectively abrogated by the recent United  
13 States Supreme Court decision, *Law v. Siegel* . . . [The Supreme Court  
14 held] that the general equitable powers of section 105(a) did not provide  
15 authority for judge-made exceptions to explicit mandates of the Bankruptcy  
16 Code. Because section 522(k) explicitly prohibits the use of exempt  
17 property to satisfy administrative expenses such as attorney fees, the  
18 bankruptcy court was not authorized to invoke a judge-made equitable  
19 exception to order otherwise. *Law*, 134 S.Ct. at 1194 (“We have long held  
20 that ‘whatever equitable powers remain in the bankruptcy courts must and  
21 can only be exercised within the confines of the Bankruptcy Code.’”). The  
22 Supreme Court emphasized that “federal law provides no authority for  
23 bankruptcy courts to deny an exemption on a ground not specified in the  
24 Code,” and that any basis for denial of a state law exemption must arise  
25 under state law. *Id.* at 1197-98.

26 *In re Lua*, 529 B.R. at 772-773.

27 Accordingly, the court determines that Debtor’s claimed exemption in the  
28 Annuity should not be disallowed on the basis of prejudice to Trustee and creditors.

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**III. CONCLUSION**

For the foregoing reasons, Trustee’s Motion should be granted and Debtor’s amended claim of exemption in the Annuity should be disallowed. A separate order granting Trustee’s Motion is being entered concurrently herewith.

IT IS SO ORDERED.

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Date: September 22, 2016



Robert Kwan  
United States Bankruptcy Judge