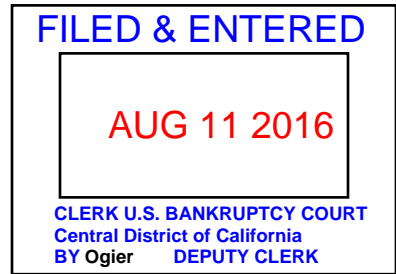


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re:
JASMIN KATCHTOURIAN and REMON
YOUNANY,

Debtors.

SATISH SHETTY,

Plaintiff,

v.
JASMIN KATCHTOURIAN and REMON
YOUNANY,

Defendants.

Case No.: 1:14-bk-10668-MB

Chapter 7

Adv. Case No.: 1:14-ap-01098-MB

**MEMORANDUM OF DECISION
FOLLOWING TRIAL**

1 On April 22, 2016, the Court conducted a trial in this adversary proceeding. Dana Douglas
2 represented plaintiff Satish Shetty (“Shetty” or “Plaintiff”). Brian Nomi represented defendants
3 Jasmin Katchtourian (“Katchtourian”) and Remon Younany (“Younany,” collectively with
4 Katchtourian, the “Defendants”), the chapter 7 debtors herein. This memorandum constitutes the
5 Court’s findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of
6 Bankruptcy Procedure.

7 Plaintiff alleges four claims for relief under Bankruptcy Code sections 523(a)(2)(A),
8 523(a)(6), 727(a)(4)(A), and 727(a)(5). For the reasons discussed herein, the Court determines that
9 Plaintiff failed to carry his burden of proof on the nondischargeability of his claims under sections
10 523(a)(2)(A) and 523(a)(6), and finds in favor of the Defendants. The Court makes no
11 determinations on Plaintiff’s two section 727 claims because Plaintiff failed to preserve those
12 claims in the pre-trial order, as discussed more fully below.

13 I. JURISDICTION

14 This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b).
15 Venue in this Court is proper pursuant to 28 U.S.C. § 1409(a). This adversary proceeding is a core
16 proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (I) and (J), and this Court has the
17 constitutional authority to enter a final judgment on the Complaint. *Stern v. Marshall*, 131 S. Ct.
18 2594 (2011).

19 II. FACTS

20 Debtors filed their chapter 7 petition on February 10, 2014. Prepetition, Debtors owned and
21 operated Harbor Petroleum, Inc. (“Harbor Petroleum”), which operated a gas station located at
22 2124 Harbor Boulevard, Ventura, CA 93001 (the “Defendants’ Business”).
23
24
25
26
27
28

1 Plaintiff's causes of action involve two separate claims, one by Gary Yannalfo
2 ("Yannalfo") in the amount of \$87,000.00 and the other by Avi Kavehpour ("Avi") and Ali
3 Kavehpour ("Ali," collectively with "Azi," the "Kavehpours")¹ in the amount of \$183,000.00. Both
4 claimants assigned the entirety of their claims to Plaintiff.

5 The Kavehpour Claim

6 In or around January 2012, the Kavehpours entered into a stock purchase agreement (the
7 "Stock Purchase Agreement") with the Defendants. The Stock Purchase Agreement purported to
8 transfer an ownership interest in Defendants' Business to the Kavehpours in exchange for
9 \$183,000.00.

10 Plaintiff asserts that Defendants informed Azi that Defendants' Business was profitable and
11 "free and clear with no liabilities," but that Defendants' Business was delinquent on a loan in an
12 amount over \$600,000.00.

13 Plaintiff further argues that no documents were executed evidencing the transfer of any
14 ownership interests in Defendants' Business to the Kavehpours. Plaintiff contends that no such
15 documents were ever executed because the Defendants' Business' petroleum distribution license(s)
16 and franchise agreement did not permit the transfer of such interests.

17 The Yannalfo Claim

18 Similarly, Plaintiff contends that sometime before January 18, 2013, Defendants
19 represented to Yannalfo that Defendants' Business was solvent.² Yannalfo entered into an
20 agreement with the Defendants wherein Yannalfo would invest in the Defendants' Business in
21 return for an ownership interest of Defendants' Business. Between January 2013 and May 2013,
22

23 ¹ Because both Avi Kavehpour and Ali Kavehpour retain the same surname, we refer to them
24 by their first names to identify them. No disrespect is intended by their first name references.

25 ² The Yannalfo Declaration also testifies that one reason Yannalfo believed the Defendants'
26 Business to be solvent was because on January 18, 2013, a representative of Chase Bank, Debra
27 Dana Beckett, confirmed that the Defendants' Business made regular deposits. The Court will not
28 consider this a representation or omission on behalf of the Defendants because it was Ms. Beckett,
not the Defendants, who made that representation.

1 Yannalfo tendered approximately \$87,000.00 to the Defendants, but the Defendants never executed
2 any document transferring an interest in the Defendants' Business to Yannalfo.

3 III. PROCEDURAL HISTORY

4 On February 10, 2014, Defendants filed their voluntary, joint petition under chapter 7 of the
5 Bankruptcy Code. On May 5, 2014, the chapter 7 trustee filed her "no-asset" report. On May 16,
6 2014, Plaintiff commenced this adversary proceeding. On June 11, 2016, Plaintiff filed his *First*
7 *Amended Complaint to Determine Dischargeability and Objection to Debtor's Discharge Pursuant*
8 *to 11 U.S.C. §523 and 11 U.S.C. §727 of the Bankruptcy Code*, which is the operative complaint
9 herein (the "Complaint"). Adv. Dkt. 3.

10 The parties entered into a pre-trial stipulation (the "Pre-Trial Stipulation"), wherein the
11 parties agreed to present direct evidence by declaration in lieu of live testimony. Adv. Dkt. 83. On
12 February 22, 2016, the Court entered an order approving the Pre-Trial Stipulation (the "Pre-Trial
13 Order"). Adv. Dkt. 80. Paragraph G of the Pre-Trial Order states, "The foregoing admissions
14 have been made by the parties, and the parties have specified the foregoing issues of fact and law
15 remaining to be litigated. Therefore, this order supersedes the pleadings and governs the course of
16 trial of this cause, unless modified to prevent manifest injustice."

17 Failure to Preserve Section 727 Claims

18 Although the Complaint alleged claims for relief under Bankruptcy Code section 727, the
19 Pre-Trial Stipulation and the Pre-Trial Order failed to preserve Plaintiff's two claims for relief
20 under section 727. Paragraph C of the Pre-Trial Stipulation and the Pre-Trial Order list only two
21 issues of law to be litigated:

- 22 i. "The alleged foregoing acts, misrepresentations, omissions, fraud, and false
23 pretenses by Defendants to the Kavehpours and by Defendant Younany to
24 Yannalfo constitute actual fraud" and
- 25 ii. "The above-described conduct concerning the promises and representations to
26 the Kavehours and to Yannalfo constitute willful and malicious injury by the
27 Defendants to the Kavehpours and to Yannalfo constitute willful and malicious
28 injury by the Defendants to the Kavehpours and to Yannalfo."

1 Both of those issues of law go directly to Plaintiff's claims under sections 523(a)(2)(A) and
2 523(a)(6), and do not in any way pertain to claims for relief under sections 727(a)(4)(A) and
3 727(a)(5).

4 The Ninth Circuit has held that issues not preserved in the pretrial order are eliminated from
5 the action. *Hunt v. County of Orange*, 672 F.3d 606, 617 (9th Cir. 2012) (quoting *S. Cal. Retail*
6 *Clerks Union and Food Emp'rs Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th
7 Cir. 1984)); *United States v. Joyce*, 511 F.2d 1127, 1130 n.1 (9th Cir. 1975) (“[T]he parties are
8 bound by their agreement to limit the issues to be tried.”). The Court finds that Plaintiff's claims
9 for relief under sections 727(a)(4)(A) and 727(a)(5) are abandoned due to Plaintiff's failure to
10 preserve them in the Pre-Trial Stipulation and Pre-Trial Order. Accordingly, the Court makes no
11 determinations as to those claims under section 727.

12 Plaintiff's Failure to Comply with Pre-Trial Order Deadlines

13 The Pre-Trial Order also set certain deadlines for each party to file their exhibits and
14 declarations comprising each side's case in chief. Plaintiff's exhibits and declarations were to be
15 filed no later than March 25, 2016, and Defendants' exhibits and declarations were to be filed no
16 later than April 1, 2016. The Court set trial for April 22, 2016.

17 On April 19, 2016, three days before trial, Plaintiff filed his *Ex Parte Request for Relief*
18 *from Deadline and Permission to File and Lodge Trial Brief and Supporting Declarations* (the “Ex
19 Parte Motion”). The Ex Parte Motion sought relief from the deadlines set in the Pre-Trial Order,
20 and requested that the Court permit Plaintiff to file eleven exhibits (Plaintiff's Exhs. 1-11), one
21 deposition transcript of Defendant Younany (the “Deposition Transcript”) (Plaintiff's Exh. 12), and
22 three declarations (Plaintiff's Exhs. 13-15).

23 At trial, Plaintiff stated that the Deposition Transcript was designated solely for the purpose
24 of impeachment evidence. Because Defendants opted not to present any witnesses on their behalf,
25 and no impeachment of such witnesses occurred, the Court did not admit the Deposition Transcript
26 into evidence. The parties stipulated to the admission of the three late-filed declarations: (i)
27 *Declaration of Plaintiff Satish Shetty* (the “Shetty Declaration”) (Plaintiff's Exh. 13); (ii)
28 *Declaration of Witness Azi Kavehpour* (the “Kavehpour Declaration”) (Plaintiff's Exh. 14); and

1 (iii) *Declaration of Witness Gary Yannalfo* (the “Yannalfo Declaration”) (Plaintiff’s Exh. 15). At
2 trial, Defendants waived their right to cross-examine Shetty, Kavehpour, and Yannalfo. However,
3 Defendants objected to the admission of the remaining eleven exhibits (the “Disputed Exhibits”),
4 for failure to comply with the deadlines provided in the Pre-Trial Order.

6 IV. THE DISPUTED EXHIBITS

7 The Pre-Trial Order required Plaintiff to file all trial exhibits no later than March 25, 2016,
8 but Plaintiff did not file them until April 19, 2016, which was only three days before trial. The Pre-
9 Trial Order stated that failure to comply with the deadlines and procedures set out in the Pre-Trial
10 Order could result in the imposition of sanctions, including “the exclusion of evidence (e.g.,
11 witnesses who were not timely identified or exhibits that were not timely submitted).” Defendants
12 also urged the Court not to admit the Disputed Exhibits at trial.

13 Courts are discouraged from precluding the introduction of evidence when it would amount
14 to a case-terminating sanction. *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1247
15 (9th Cir. 2012). Accordingly, while the Court indicated at trial that it generally would not admit
16 Plaintiff’s late-filed exhibits, the Court stated that it would take into consideration any
17 authenticated documents filed by Plaintiff of which the Court could properly take judicial notice
18 under Federal Rule of Evidence 201.

19 The Court, having reviewed the Disputed Exhibits, takes judicial notice that the following
20 pleadings were filed in the cases specified below:

- 21 1. Plaintiff’s Exhibit 2 – *Corporate Ownership Statement Pursuant to FRBP 1007(a)(1)*
22 *and 7007.1, and LBR 1007-4*, filed with this Court in Debtors’ Business’ bankruptcy
23 case, *In re Harbor Petroleum, Inc.*, case number 1:13-bk-10846-MT.
- 24 2. Plaintiff’s Exhibit 3 – *Schedule F – Creditors Holding Unsecured Nonpriority Claims,*
25 *Declaration Concerning Debtor’s Schedules*, filed with this Court in Debtors’
26 Business’ bankruptcy case, *In re Harbor Petroleum, Inc.*, case number 1:13-bk-
27 10846-MT.

- 1 3. Plaintiff's Exhibit 4 – *Schedule B – Personal Property, Declaration Concerning*
2 *Debtor's Schedules*, filed with this Court in a prior bankruptcy case filed by Younany,
3 *In re Remon Younany*, case number 1:11-bk-23447-MT.
- 4 4. Plaintiff's Exhibit 9 – a summons dated October 11, 2013, from the California
5 Superior Court for an unlawful detainer action brought by third-party, "Tesoro
6 Refining and Marketing Company, LLC," against Defendants.
- 7 5. Plaintiff's Exhibit 10 – *Schedule F – Creditors Holding Unsecured NonPriority*
8 *Claims, Declaration Concerning Debtor's Schedules, Electronic Filing Declaration*,
9 filed with this Court in the Defendants' underlying bankruptcy case, *In re Jasmin*
10 *Katchtourian and Remon Younany*, case number 1:14-bk-10668-MB.
- 11 6. Plaintiff's Exhibit 11 - *Schedule F – Creditors Holding Unsecured NonPriority*
12 *Claims, Electronic Filing Declaration*, filed with this Court in a prior bankruptcy case
13 filed by Defendant Younany, *In re Remon Younany*, case number 1:11-bk-23447-MT.

14 15 **V. LEGAL ANALYSIS**

16 The Complaint alleges two causes of action for nondischargeable debts and two causes of
17 action objecting to Defendants' chapter 7 discharge. As previously noted, the Court deems
18 Plaintiff's two claims under section 727 of the Bankruptcy Code abandoned for failure to preserve
19 them in the Pre-Trial Stipulation and Pre-Trial Order. *Hunt v. County of Orange*, 672 F.3d 606, 617
20 (9th Cir. 2012). For the claims brought under section 523 of the Bankruptcy Code, the creditor-
21 plaintiff bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498
22 U.S. 279, 287 (1991).

23 24 **A. Nondischargeability under 11 U.S.C. § 523(a)(2)(A)**

25 Bankruptcy Code section 523(a)(2)(A) excepts from discharge a debt obtained by "false
26 pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or*
27 *an insider's financial condition.*" (emphasis added). To prove a claim under section 523(a)(2)(A),
28 Plaintiff must show: (1) that the debtor made the representations other than a statement respecting

1 the debtor's or an insider's financial condition; (2) that at the time he knew they were false; (3) that
2 he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied
3 on such representations; and (5) that the creditor sustained alleged loss and damage as the
4 proximate result of such representations. *In re Diamond*, 285 F.3d 822, 827 (9th Cir. 2002)
5 (citations omitted).³ Plaintiff fails to meet his burden under section 523(a)(2)(A) because he fails
6 to meet all the requisite elements.

7 First, Plaintiff asserts that Younany made certain representations that Defendants' Business
8 was "free and clear" with no liabilities, and that Defendants' Business was solvent and profitable.
9 These representations fail at the outset because they are "statement[s] respecting the debtor's or an
10 insider's financial condition." 11 U.S.C. § 523(a)(2)(A). These alleged misrepresentations clearly
11 go to the financial conditions of an insider,⁴ which are expressly excepted by section 523(a)(2)(A).

12 Next, Plaintiff asserts that Younany misrepresented that ownership interests in Defendants'
13 Business could be sold to the Kavehpours and Yanalfo when Younany failed to disclose that the
14 Defendants were contractually prohibited from selling or transferring any interest in Defendants'
15 Business. Plaintiff contends that Younany knew he could not sell any interests in Defendants'
16 Business because the Defendants' Business' petroleum distribution license and/or franchise
17 agreement precluded such a transfer. However, Plaintiff fails to demonstrate Younany's alleged
18 knowledge of the contents of those agreements, which were never offered into evidence.

19 Finally, the Court finds that Plaintiff failed to show that Defendants intended to deceive
20 Yannalfo and the Kavehpours. Plaintiff relies solely on the argument that Defendants knew they

22 ³ The United States Supreme Court recently issued its decision in *Husky Int'l Elecs., Inc. v.*
23 *Ritz*, 136 S. Ct. 1581 (2016) holding that the term "actual fraud" under section 523(a)(2)(A)
24 encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a
25 false representation. However, this Court need not make a determination under *Husky Int'l Elecs.,*
Inc. because Plaintiff's claim under section 523(a)(2)(A) is based on alleged false representations
and does not allege other forms of fraud as contemplated by *Husky Int'l Elecs., Inc.*

26 ⁴ Section 101(31)(A)(iv) of the Bankruptcy Code defines an insider as a "corporation of
27 which the debtor is a director, officer, or person in control." Here, Defendants' Business is an
28 insider of the Debtors as Debtors were the "person[s] in control" of Defendants' Business.

1 could not convey ownership interests in Defendants' Business to others. As previously stated, the
2 Court has no evidence before it to support Plaintiff's assertion. Therefore, the Court finds in favor
3 of Defendants for this claim for relief under section 523(a)(2)(A).

4
5 **B. Nondischargeability under 11 U.S.C. § 523(a)(6)**

6 Plaintiff also argues that the debt is nondischargeable under Bankruptcy Code section
7 523(a)(6), but ultimately fails to prove a claim under this statute. Section 523(a)(6) excepts from
8 discharge a debt arising from a willful and malicious injury by the debtor to another entity or to the
9 property of another entity. A claim under section 523(a)(6) requires the creditor to prove that the
10 debtor's conduct in causing the tort was both willful and malicious. *Barboza v. New Form, Inc. (In*
11 *re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008).

12 To show a willful injury under section 523(a)(6), Plaintiff must establish that Defendants
13 deliberately or intentionally injured Plaintiff or Plaintiff's property, and that in doing so, the
14 Defendants intended the consequences of their act, not just the act itself. *Kawaauhau v. Geiger*,
15 523 U.S. 57, 60–61 (1998). In other words, Defendants must act with a subjective motive to inflict
16 injury, or with actual knowledge that injury is substantially certain to result from the conduct. *In re*
17 *Su*, 290 F.3d 1140, 1143 (9th Cir. 2002); *Petralia v. Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001).
18 Injuries resulting from reckless or negligent acts do not satisfy the wrongful intent required by
19 section 523(a)(6). *In re Pekar*, 260 F.3d 1035, 1038 (9th Cir. 2001).

20 An injury is malicious within the meaning of section 523(a)(6) if the debtor: (1) commits a
21 wrongful act, (2) done intentionally, (3) which necessarily causes injury; and (4) the act is done
22 without just cause or excuse. *In re Su*, 290 F.3d at 1147.

23 Plaintiff argues that his claims should be determined nondischargeable under section
24 523(a)(6) because Defendants knew they could not convey interests in the Defendants' Business
25 and that the financial condition of Defendants' Business meant that the investments by the
26
27
28

1 Kavehpours and Yanalfo would not be repaid.⁵ First, as previously discussed, Plaintiff fails to
2 demonstrate Defendants' alleged knowledge that any petroleum distribution license and/or
3 franchise agreement, neither of which were introduced into evidence, precluded Defendants from
4 transferring an interest of Defendants' Business.

5 Next, Plaintiff contends Defendants acted willfully and maliciously when taking money
6 from Yannalfo and the Kavehpours because—Plaintiff argues—Defendants took the money
7 knowing it was unlikely that Yannalfo and the Kavehpours would be repaid. Plaintiff's argument
8 assumes the Defendants' Business was in financial distress, and that Defendants knew this, because
9 Defendants' Business subsequently filed its own bankruptcy on February 10, 2013. This argument
10 sounds very much like Plaintiff's argument under section 523(a)(2), but nevertheless fails on its
11 own accord under section 523(a)(6).

12 Plaintiff never gets close to proving that Defendants acted with a subjective motive to inflict
13 injury, or with actual knowledge that injury is substantially certain to result because Plaintiff fails
14 to prove the underlying premise of this argument, i.e. that Defendants' Business was not solvent or
15 profitable at the time Defendants allegedly made misrepresentations about the financial condition
16 of the Defendants' Business.

17 As to the Kavehpour Claim, the Kavehpours paid Defendants \$183,000.00 in or around
18 January 2012. But Plaintiff failed to offer any evidence regarding the financial condition of the
19 business in or around January 2012. The only evidence relied on by Plaintiff is the fact that
20 Defendants' Business filed for its own bankruptcy on February 10, 2013, over one year later. This
21 is insufficient alone to prove that Defendants' Business was insolvent or unprofitable in January
22 2012, let alone that Defendants acted willfully and maliciously when entering into an agreement
23 with the Kavehpours in January 2012.

24
25 ⁵ Plaintiff's Trial Brief also asserts that "Sheikhpour willfully and maliciously engaged in
26 conduct designed to extinguish Chevron's lien on the Residence, while preserving rights on the
27 Residence for himself." Adv. Dkt. No. 85 at 10:17-19. The Court presumes that sentence was
28 inadvertently carried over from a previous pleading in a different proceeding and does not pertain
to this adversary proceeding.

1 As to the Yannalfo Claim, Yannalfo failed to testify in his declaration as to *when*
2 Defendants made the alleged representations about the financial condition of Defendants' Business,
3 leaving the Court at a loss to determine whether such representations were made at a time when
4 they were false. Indeed, the only representation described with any specificity by Yannalfo is the
5 representation of a Chase Bank representative, not the Defendants. Thus, on the record before it,
6 the Court cannot conclude that Defendants acted willfully and maliciously with respect to
7 Yannalfo.

8 Therefore, the Court finds in favor of Defendants for this claim for relief under section
9 523(a)(6).

10 VI. CONCLUSION

11 For all of the foregoing reasons, Plaintiff fails to establish that his debts should not be
12 discharged pursuant to sections 523(a)(2)(A) or 523(a)(6). Accordingly, the Court will enter a
13 separate judgment in favor of Defendants on Plaintiff's claims for relief under section 523 of the
14 Bankruptcy Code.

15
16 ###

17
18
19
20
21
22
23 Date: August 11, 2016



24 _____
Martin R Barash
United States Bankruptcy Judge