

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

## PAMELA CHEUNG

No. 2:14-cv-02087-MCE

Appellant,

v.

## MEMORANDUM AND ORDER

TAL S. FLETCHER, TRUCKEE  
TAHOE TRANSPORTATION, INC.,

Appellee.

Appellant Cheung (“Cheung”) appeals the Bankruptcy Court’s judgment in favor of Appellee Fletcher (“Fletcher”). The Bankruptcy Court held that Cheung’s debt to Fletcher was nondischargeable under 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4)(A). For the reasons set forth below, this Court affirms the Bankruptcy Court’s decision.<sup>1</sup>

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<sup>1</sup> Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

## BACKGROUND<sup>2</sup>

3 Fletcher owned Truckee Tahoe Transportation, Inc. (“TTT”) which operated a  
4 private car service in the Truckee, Tahoe and Reno areas. In 2011, Cheung agreed to  
5 purchase a 50% interest in TTT. She paid Fletcher \$50,000 cash over several months  
6 and executed a \$50,000 promissory note in favor of Fletcher. Cheung and Fletcher  
7 agreed that Cheung would manage TTT, and Fletcher would take an advisory role and  
8 drive on some of the trips. After a dispute arose between Cheung and Fletcher,  
9 however, they agreed to go their separate ways. By that point, Cheung had made  
10 \$30,000 of her required initial payment. On November 6, 2012, Cheung and Fletcher  
11 agreed to dissolve TTT and distribute its assets and liabilities between them, but the  
12 dissolution and distribution were never completed. On November 14, 2012, Cheung and  
13 Gubitosi, a new business partner, incorporated Tahoe Elite Private Car Services, Inc.  
14 (“Tahoe Elite”).<sup>3</sup>

15 On November 27, 2012, Cheung filed a Chapter 7 bankruptcy petition. On  
16 December 27, 2012, the Debtor's initial 341 meeting was held. A continued hearing was  
17 held on January 7, 2013. On the basis of Cheung's petition, the Chapter 7 Trustee  
18 Thomas Aceituno issued its finding that "there is no property available for distribution  
19 from the estate over and above that exempted by law." Fletcher did not object to the  
20 trustee's finding within the thirty day period provided by Rule 5009(a) of the Federal  
21 Rules of Bankruptcy Procedure.

22 On February 24, 2013, Fletcher filed an adversary complaint objecting to any  
23 discharge for Cheung under § 727. The adversary complaint alleges that Cheung  
24 fraudulently failed to disclose the following: (1) Cheung's ownership interest in Tahoe  
25 Elite; (2) Cheung's property as a result of the dissolution of TTT (the TTT telephone

<sup>26</sup> Unless otherwise specified, the factual assertions in this section are based on the allegations in Cheung's Opening Brief. See Appellant's Opening Br., Aug. 13, 2015, ECF No. 9 at 2-5.

<sup>3</sup> This factual assertion is based on the allegation in Fletcher's Brief. See Appellee's Br., Aug. 28, 2015, ECF No. 10 at

1 number, the TTT corporate goodwill, and a 2007 Yukon vehicle); and (3) her 50%  
2 interest in TTT. On August 4, 2014, the Bankruptcy Court entered judgment holding that  
3 Cheung's debt to Fletcher was nondischargeable under 11 U.S.C. §§ 727(a)(2)(A) and  
4 727(a)(4)(A). On August 19, 2014, Cheung filed a Notice of Appeal.

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## **STANDARD**

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8 An appellant may petition the district court for review of a bankruptcy court's  
9 decision. Fed. R. Bankr. P. 8013. The applicable standard of review is identical to that  
10 which circuit courts of appeal apply when reviewing district court decisions. See In re  
11 Baroff, 105 F.3d 439, 441 (9th Cir. 1997). Accordingly, this Court reviews the  
12 bankruptcy court's findings of fact for clear error, but reviews conclusions of law and  
13 mixed questions of law and fact de novo. In re Hamada, 291 F.3d 645, 649 (9th Cir.  
14 2002). A court's factual determination is clearly erroneous if it is illogical, implausible, or  
15 without support in the record. United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21  
16 (9th Cir. 2009). The question of whether a claim is nondischargeable presents mixed  
17 issues of law and fact and is reviewed de novo. Id. A de novo review is an independent  
18 review in which the reviewing court does not give any deference to the decision of the  
19 lower court. Preblich v. Battley, 181 F.3d 1048, 1051 (9th Cir. 1999).

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## **ANALYSIS**

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Cheung argues that the Bankruptcy Court erred in denying her discharge  
24 because: (1) no evidence supports that she concealed her assets under § 727(a)(2)(A);  
25 (2) no evidence supports that Cheung knowingly and fraudulently failed to disclose the  
26 value of the TTT telephone number, goodwill, and the 2007 Yukon under § 727(a)(4)(A);  
27 and (3) Cheung reasonably relied on the Liquidation Proposal to assign zero valuation to  
28 TTT.

1                   **A. 11 U.S.C. § 727(a)(2)(A)**

2                   A discharge may be denied if it is demonstrated that:

3                   the debtor, with intent to hinder, delay or defraud a creditor  
4                   has transferred, removed, destroyed, mutilated, or concealed  
5                   property of the debtor, within one year before the date of the  
6                   filing of the petition.

7                   11 U.S.C. § 727(a)(2)(A).

8                   The Bankruptcy Court correctly found that Cheung transferred the TTT telephone  
9                   number, the customer information of TTT, and the 2007 Yukon to Elite Tahoe within one  
10                  year before the filing of the petition. The remaining issue is whether the transfer was  
11                  accompanied by “intent to hinder, delay or defraud” Fletcher. 11 U.S.C. § 727(a)(2)(A).  
12                  Whether Cheung harbored intent to hinder, or delay, or defraud Fletcher is a question of  
13                  fact reviewed for clear error. See In re Woodfield, 978 F.2d 516, 518 (9th Cir. 1992); see also In re Beverly, 374 B.R. 221, 243 (9th Cir. 2007).

14                  Intent may be inferred from surrounding circumstances. In re Woodfield, 978 F.2d  
15                  at 518. The surrounding circumstances include the various “badges of fraud” that  
16                  constitute circumstantial evidence of intent. Id. Intent may also be established by  
17                  inferences drawn from a course of conduct. See In re Adeeb, 787 F.2d 1339, 1343 (9th  
18                  Cir. 1986).

19                  As applied to Cheung’s transfer of the TTT telephone number, the TTT customer  
20                  information, and the 2007 Yukon to Tahoe Elite, the Bankruptcy Court relied on  
21                  circumstantial evidence and course of conduct to establish Cheung’s intent to hinder,  
22                  delay or defraud Fletcher. First, with respect to the TTT telephone number, the  
23                  Bankruptcy Court properly concluded that the TTT telephone number was an asset of  
24                  substantial value. Fletcher had used the same number to build his customer base in  
25                  Tahoe and Truckee for private car service. The Bankruptcy Court also found that people  
26                  in Tahoe and Truckee were accustomed to calling this number to arrange transportation.  
27                  ECF No. 6-1, at 199. Second, with respect to the TTT customer information, the  
28                  Bankruptcy Court also concluded that given the personal services nature of the

1 business, the customer information that Fletcher had established for a decade had  
2 substantial value. Finally, with regard to the 2007 Yukon, the Bankruptcy Court held that  
3 the transfer of the 2007 Yukon should have been documented in the filing because it  
4 was property of the bankruptcy estate before the agreement to dissolve.

5 Particularly when coupled with the substantial value of these assets, the new  
6 business relationship between Cheung and Gubitosi supports by a preponderance of  
7 evidence that Tahoe Elite was created to transfer assets to hinder or delay Fletcher in  
8 collecting the remaining value owed from the purchase of TTT. See In re Khalil,  
9 370 B.R. 163, 172 (9th Cir. BAP 2007) (“those objecting to discharge bear the burden of  
10 proving by a preponderance of the evidence that [the debtor’s] discharge should be  
11 denied”). Such factual determination is neither illogical, implausible nor without support  
12 in the record. See Hinkson, 585 F.3d at 1261-62 & n. 21. Further, Cheung has shown  
13 no error in these findings or the bankruptcy court’s application of the law. The Judgment  
14 denying her discharge under § 727(a)(2)(A) is AFFIRMED.

15 **B. 11 U.S.C. § 727(a)(4)(A)**

16 Section 727(a)(4)(A) denies a discharge to a debtor who knowingly and  
17 fraudulently makes a false oath in the course of the bankruptcy proceedings. In order to  
18 bring a successful § 727(a)(4)(A) claim for false oath, the plaintiff must show: (1) debtor  
19 made a false oath in connection with the case; (2) the oath related to a material fact;  
20 (3) the oath was made knowingly; and (4) the oath was made fraudulently. See In re  
21 Roberts, 331 B.R. 876, 882 (9th Cir. 2005). A claim for denial of a discharge under  
22 § 727 is construed liberally in favor of the discharge and strictly against a person  
23 objecting to the discharge. In re Adeeb, 787 F.2d at 1324. The Bankruptcy Court’s  
24 finding that Cheung knowingly made a false oath in her bankruptcy case is reviewed for  
25 clear error. See In re Beauchamp, 236 B.R. 727, 729 (9th Cir. BAP 1999).

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1                   **1. The TTT telephone number, the TTT goodwill, and the 2007 Yukon**

2                   A false oath may involve a false statement or omission in the debtor's schedules.  
3                   See In re Khalil, 379 B.R. 163, 172 (9th Cir. 2007). "A false statement is material if it  
4                   bears a relationship to the debtor's business transactions or estate, or concerns the  
5                   discovery of assets, business dealings, or the existence and disposition of the debtor's  
6                   property." In re Wills, 243 B.R. at 62. The Bankruptcy Court was not clearly erroneous  
7                   in determining that Cheung's omission on the Schedules constitutes a false oath  
8                   regarding a material fact. ECF No. 6-1, at 202. The TTT telephone number, the  
9                   customer information and the 2007 Yukon bear a direct relationship to Cheung's daily  
10                  operations of Tahoe Elite. In fact, Cheung used them to operate Tahoe Elite before the  
11                  dissolution of TTT was completed.

12                  Additionally, the Bankruptcy Court was not clearly erroneous in determining that  
13                  Cheung knowingly failed to make these disclosures. A debtor "acts knowingly if she acts  
14                  deliberately and consciously." See In re Khalil, 379 B.R. at 173. In defense of her lack  
15                  of knowledge, Cheung argues that the Liquidation Proposal did not specifically value the  
16                  telephone number, and she was not aware of the value of the goodwill. The Bankruptcy  
17                  Court, however, found that Cheung's decade-long experience as a sale agent and her  
18                  retention of counsel to assist her through the bankruptcy process, a preponderance of  
19                  the evidence supported a finding that she acted knowingly. ECF No. 6-1, at 202. Also,  
20                  Cheung admitted during trial that she chose to keep the telephone number instead of the  
21                  website because Gubitosi informed her of the value of the telephone number. ECF  
22                  No. 10 at 8.

23                  Finally, the Bankruptcy Court was not clearly erroneous in finding that Cheung  
24                  made a false oath fraudulently. The fraud provision of § 727(a)(4) is similar to common  
25                  law fraud. See In re Anastas, 94 F.3d 1280, 1284 (9th Cir. 1996). A false oath is made  
26                  fraudulently when the (1) debtor makes an omission; (2) that at the time she knew was  
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1 false; and (3) with the intention and purpose of deceiving creditors. See In re Khalil,  
2 379 B.R. at 173.

3 A debtor's fraudulent intent may also be established by circumstantial evidence or  
4 by inferences drawn from her course of conduct. See e.g., In re Devers, 759 F.2d 751,  
5 753 (9th Cir. 1985). In examining the circumstances, the court may find "badges of  
6 fraud" including: (1) that there was a close relationship between the transferor and the  
7 transferee; (2) that the transfer was in anticipation of a pending suit; (3) that the  
8 transferor debtor was insolvent or in poor financial condition at the time of the transfer;  
9 (4) that all or substantially all of the debtor's property was transferred; (5) that the  
10 transfer so completely depleted the debtor's assets that the creditor has been hindered  
11 or delayed in recovering any part of the judgment; and (6) that the debtor received  
12 inadequate consideration for the transfer. See In re Woodfield, 978 F.2d at 518; see also In re Roberts, 331 B.R. at 885. These factors need not all be present in order to  
14 find that a debtor acted with the requisite intent. Id.

15 Here, the Bankruptcy Court relied on circumstantial evidence to conclude by a  
16 preponderance of evidence that Cheung fraudulently made a false oath. In filing  
17 bankruptcy, Cheung operated under her counsel's advice to hide her ownership of the  
18 assets. Cheung was also working closely with Gubitosi who claimed to be her "ultimate  
19 financial backstop." ECF No. 6-1, at 63. Further, multiple omissions such as the TTT  
20 telephone number, the customer list and the 2007 Yukon may support an inference of  
21 fraud because the valuable nature of the assets suggests that Cheung was aware of  
22 them at the time of preparing the Schedule. See In re Khalil, 379 B.R. at 175 (multiple  
23 omissions of material assets may supports an inference of fraud). Further, the  
24 substantial value of the assets in question suggests that Cheung may have wanted to  
25 conceal them. Id. (omissions may support an inference of fraud if the substantial value  
26 of the assets is such that a debtor might want to conceal). Additionally, Cheung has  
27 shown no error in the Bankruptcy Court's reliance on these inferences.

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## 2. The TTT interest

In advocating a different conclusion, Cheung argues that she valued her interest in TTT at zero because TTT was insolvent. The Bankruptcy Court rejected Cheung’s argument because although “dividends to shareholders were not being paid, they were being compensated in other ways from the assets of TTT.” ECF No. 6-1, at 197. Considering that TTT was a closed corporation with only two shareholders, the Bankruptcy Court rejected Cheung’s claim of TTT’s insolvency. Additionally, Cheung’s decade of experience as a sale agent, the business relationship she embarked in with Gubitosi, and the fact she was receiving advice from bankruptcy counsel all point to the inescapable conclusion that Cheung knew TTT had a value greater than zero. She also admitted that TTT’s goodwill value “could easily have been \$20,000 or \$30,000” when Cheung filed her petition in November 2012. ECF No. 10 at 10.

25       Lastly, the Bankruptcy Court did not clearly err when it found that Cheung made  
26 the false oath fraudulently. Cheung's course of conduct and pattern of action  
27 demonstrate her fraudulent intent for purposes of § 727(a)(4)(A). The Bankruptcy Court  
28 found that "the statement that TTT had no value is way too cavalier given the fact that

1 both of the operators continued to operate in business and with customers and customer  
2 lists.” ECF No. 6-1, at 202. Further, the Bankruptcy Court pointed to Cheung’s reliance  
3 on counsel to conclude by a preponderance of evidence that Cheung “was playing so  
4 close to the line in an effort to hide, that it is actually over the line.” Id. Such factual  
5 determination was neither illogical, implausible nor without support in the record. See  
6 Hinkson, 585 F.3d at 1261-62 & n.21. Accordingly, the Court affirms the denial of  
7 Cheung’s discharge under § 727(a)(4)(A).

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9 **CONCLUSION**

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11 Based on all of the foregoing, the decision of the Bankruptcy Court is hereby  
12 **AFFIRMED.**

13 **IT IS SO ORDERED.**

14 Dated: March 15, 2016

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16   
17 MORRISON C. ENGLAND, JR. CHIEF JUDGE  
18 UNITED STATES DISTRICT COURT

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