

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL SILVER,

Cross-complainant and Appellant,

v.

PACIFIC AMERICAN FISH CO., INC. et  
al,

Cross-defendants and Respondents.

B214450

(Los Angeles County  
Super. Ct. No. BC356788)

Appeal from a judgment of the Superior Court of the County of Los Angeles,  
Ronald M. Sohigian, Judge. Affirmed in part and dismissed in part.

Paul A. Wollam; Bekken Law Group and Robert Bekken for Cross-complainant  
and Appellant.

Nemecek & Cole, Jonathan B. Cole, Michael W. Feenberg and Susan S. Baker for  
Cross-defendants and Respondents.

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\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception **INTRODUCTION, part B, FACTUAL AND PROCEDURAL BACKGROUND, parts A and B, and DISCUSSION, parts A through F.**

## INTRODUCTION

Michael Silver (Silver) filed a cross-complaint against Pacific American Fish Co., Inc., Paul Huh, and Peter Huh (collectively Pacific) alleging claims arising out of an asset purchase agreement and a related employment agreement. Pacific responded by asserting, *inter alia*, lack of standing and judicial estoppel, each based on Silver's prior bankruptcy proceeding. The trial court bifurcated the trial on the standing and estoppel defenses and ruled in Pacific's favor. Silver appeals from the adverse judgment on his cross-complaint.

### A. Award of Attorney Fees

In the published portion of the opinion, we hold that Silver's purported notice of appeal from the postjudgment order awarding Pacific attorney fees is untimely, and that his notice of appeal from the judgment does not encompass the separately appealable postjudgment order awarding attorney fees. Therefore, we do not have jurisdiction over Silver's challenge to the order awarding attorney fees to Pacific.

### B. Other Contentions<sup>1</sup>

In rejecting Silver's other contentions, we hold that: (i) the trial court did not abuse its discretion in denying Silver's motion for new trial; (ii) the trial court correctly ruled that Silver lacked standing to pursue his cross-claims and was judicially estopped from pursuing those claims because he failed to list them in his bankruptcy proceeding;

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<sup>1</sup> The cross-defendants and respondents will be referred to collectively as Pacific because Silver asserted each cause of action in his cross-complaint against each cross-defendant. When necessary for clarity, such as, for example, when discussing the voluntary dismissal of Pacific American Fish Co., Inc.'s cross-complaint against Silver, we will refer to that corporation as Pacific American and to the individual respondents by their proper names.

(iii) Silver did not move the trial court for additional time to reopen the bankruptcy proceeding and thus forfeited the issue of whether he should have been granted such time; (iv) the trial court correctly ruled that the personal guaranty and waiver of defenses by the individual cross-defendants had terminated because of full performance by Pacific American (v) the trial court did not violate the one judgment rule by entering judgment on Silver's cross-complaint because Pacific American had dismissed its cross-complaint and no other issues were pending between Silver and Pacific American; (vi) and the trial court correctly ruled that Silver was not the prevailing party on Pacific's cross-complaint. We therefore affirm the judgment.<sup>2</sup>

## **FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>**

### **A. The Asset Purchase and Silver's Bankruptcy**

In June 2004, Silver sold to Pacific American the assets of his food distribution business, M&M Foods, Inc. The sale resulted from tax and mail fraud convictions Silver suffered, and it allowed him to use the \$8,000,000 sale proceeds to repay partially the IRS and certain trade creditors. The parties memorialized their transaction in an asset purchase agreement that included a five-year employment agreement between Pacific American and Silver and a personal guaranty agreement between M&M Foods, Inc. and Peter and Paul Huh, principals of Pacific American.

Three months after Silver's employment agreement commenced, Pacific American terminated him because of his alleged illegal conduct. In November 2004, Silver and

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<sup>2</sup> Pacific's motion to augment the record is granted.

<sup>3</sup> The factual and procedural background specific to each issue raised on appeal are set forth below at the beginning of each discussion of those issues. This section sets forth a general statement of the facts and procedure to provide context for the ensuing discussion of the issues.

Pacific American entered into termination and modification agreements in which they released all claims against each other and terminated a non-competition clause in Silver's employment agreement.

In July 2005, Silver filed a voluntary Chapter 7 bankruptcy petition in federal court. Although Silver listed on the required asset disclosure form "[d]ebtor's interest in collections obtained on outstanding accounts receivable from former business activities" with an "unknown" value, he did not list any claims or causes of action against Pacific. During the bankruptcy proceeding, Silver appeared at two creditor meetings and was examined under oath concerning his assets. In April 2006, the bankruptcy court issued a discharge order and closed the bankruptcy estate.

## **B. The Litigation**

In August 2006, Silver's brother, Marvin, sued Pacific and Four Seasons Fine Foods in state court. Pacific American responded by filing a cross-complaint against Marvin *and Silver*. Although Pacific American did not serve its cross-complaint on Silver, he nevertheless answered and filed his own cross-complaint against Pacific alleging, *inter alia*, that Pacific had breached the asset purchase and employment agreements. Silver's operative third amended cross-complaint asserted causes of action for fraud in the inducement, intentional interference with economic advantage, wrongful termination, rescission, cancellation of instrument, and breach of contract against Pacific.

In June 2008, the trial court held a bifurcated trial on two of Pacific's affirmative defenses to Silver's cross-complaint—standing and judicial estoppel. Following a three-day bench trial, the trial court ruled in favor of Pacific and ordered Pacific to prepare a statement of decision. Two weeks later in early July 2008, Pacific American filed a voluntary dismissal without prejudice of its cross-complaint against Silver.

Following trial, but before the entry of a statement of decision or a judgment on Silver's cross-complaint, Silver filed motions to disqualify Pacific's trial counsel and to reopen evidence that the trial court denied. In December 2008, the trial court entered a

statement of decision and a judgment dismissing Silver's cross-complaint against Pacific. Silver then filed a motion for new trial and a motion to determine the prevailing party on Pacific American's cross-complaint and to fix amount of attorney fees. The trial court denied both motions.

### **C. The Award of Attorney Fees to Pacific**

On February 3, 2009, Pacific filed a motion for attorney fees and the hearing on that motion was thereafter continued to March 26, 2009. On February 25, 2009, *prior* to the hearing on Pacific's attorney fees motion, Silver filed a notice of appeal that specified, *inter alia*, that he was appealing from the trial court's order on Pacific's motion for attorney fees, a motion on which the trial court had yet to rule. On March 26, 2009, over a month after Silver filed his notice of appeal, the trial court heard and granted, in part, Pacific's motion for attorney fees and costs.

## **DISCUSSION**

### **A. Motion for New Trial**

#### *1. Background*

Following the trial court's judgment dismissing his cross-complaint against Pacific, Silver filed a motion for new trial. The motion asserted five grounds for a new trial under Code of Civil Procedure section 657:<sup>4</sup> (1) irregularity in the proceedings based on attorney misconduct; (2) accident or surprise; (3) newly discovered evidence; (4) insufficiency of the evidence; and (5) errors of law.

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<sup>4</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

The attorney misconduct claim was based on *three* discrete acts allegedly taken by Pacific's trial attorneys: (1) concealing the transcripts of two bankruptcy court creditor meetings held pursuant to 11 U.S.C. section 341(a) (341(a) transcripts);<sup>5</sup> (2) obtaining a trial court finding that Silver's former bankruptcy attorney negligently failed to schedule certain claims in the bankruptcy proceeding, while simultaneously representing that same bankruptcy attorney in an unrelated matter; and (3) threatening and intimidating the trustee in Silver's bankruptcy proceeding prior to entry of judgment in this matter. The trial court heard oral argument on the new trial motion and denied it without stating reasons.

## 2. *Contentions*

On appeal, Silver challenges the trial court's denial of his motion for new trial, arguing that attorney misconduct and newly discovered evidence warranted a new trial. The misconduct claim is based on *six* alleged acts of misconduct: (1) the alleged concealment by Pacific's attorneys of the 341(a) transcripts before, during, and after trial; (2) the alleged submission of a "perjured" declaration by one of Pacific's attorneys in opposition to the motion to disqualify; (3) the alleged procurement by Pacific's attorneys of Silver's attorney-client privileged information and documents; (4) the alleged reliance on the "perjured" declaration in opposition to the motion for new trial; (5) the alleged filing of a cross-complaint against Silver that Pacific's attorneys later admitted they never should have filed; and (6) alleged threats made to and intimidation of the bankruptcy trustee by Pacific's attorneys.

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<sup>5</sup> Title 11 of the United States Code section 341(a) provides: "Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors." Section 343 of that title provides: "The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section."

The newly discovered evidence ground is based on Silver’s belated discovery of the 341(a) transcripts. According to Silver, the concealment of those transcripts by Pacific’s attorneys prevented him from introducing the transcripts into evidence at trial and excused his belated discovery of that testimony.

As explained below, four of the six alleged acts of misconduct were not presented to the trial court in support of the motion for new trial. As a result, the assertions of misconduct based on those four acts—as grounds for a new trial—have been forfeited on appeal. As to the two alleged acts of misconduct that Silver did present to the trial court in his new trial motion, the trial court did not abuse its discretion in denying the motion based on those alleged acts. And, because the newly discovered evidence ground is based upon the belated discovery of the 341(a) transcripts that were a matter of public record presumptively available to Silver, the trial court did not abuse its discretion in denying the new trial motion on that ground.

### 3. *Section 657 and Standard of Review*

“The grounds upon which a new trial may be granted are statutory.” (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899.) Section 657 provides: “The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or

inadequate damages. ¶ 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. ¶ 7. Error in law, occurring at the trial and excepted to by the party making the application.”

Generally, rulings on motions for new trial are reviewed for abuse of discretion. “We are mindful of the fact that a trial judge is accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal. (See *Malkasian v. Irwin* [(1964)] 61 Cal.2d 738, 747; 6 Witkin, Cal. Procedure (2d ed. 1971) § 293, pp. 4278-4279.) However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party (see Code Civ. Proc., § 906), including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 445 [54 Cal.Rptr. 68]; *Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 483-484 [36 Cal.Rptr. 689]. See *Tobler v. Chapman* [(1973)] 31 Cal.App.3d 568, 578-579.)” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.)

“While the concept “abuse of discretion” is not easily susceptible [of] precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded “the bounds of reason, all of the circumstances before it being considered. . . .” [Citations.]’ [Citation.] ‘A decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not [to] be set aside on review.’ [Citation.]” (*Schall v. Lockheed Missiles & Space Co.* (1995) 37 Cal.App.4th 1485, 1488, fn. 1.)

#### 4. *Misconduct*

##### a. Concealment of 341(a) transcripts

In August and September 2005, Silver appeared at the creditors meetings held in his bankruptcy proceeding and was examined under oath by the trustee and counsel for certain creditors. That testimony was electronically recorded.

Prior to trial, Silver propounded contention discovery seeking, inter alia, all documents upon which Pacific was basing its contentions in defense of Silver's cross-complaint. Pacific did not produce the 341(a) transcripts in response to that document request. During opening statements, however, Pacific's attorney stated, "We'll also establish that at the 341(a) hearing, [Silver] admitted he had no accounts receivable . . . owing to him." Notwithstanding that statement, Pacific thereafter failed to submit the 341(a) transcripts as evidence during trial and, after trial, when Silver claims to have discovered the transcripts, Pacific's attorney refused to join in Silver's motion to reopen evidence so that the trial court could review the transcripts.

Silver pointed to the conduct of Pacific's attorneys with respect to the 341(a) transcripts in support of his motion for new trial. In denying that motion, the trial court implicitly rejected Silver's contentions of intentional concealment of the transcripts.

There is no dispute that Silver appeared at two creditor meetings, represented by counsel, and testified under oath pursuant to 11 U.S.C. section 341(a). Silver also does not contest that his testimony at those meetings was taken and recorded as part of a formal statutory procedure in bankruptcy court and was therefore a matter of public record. (See *In re Williams* (E.D.N.C.) 2009 Bankr. LEXIS 840, \*6-7 ["[I]t strains credulity that the defendants were actually surprised by [an affidavit attaching a 341(a) transcript]. The digital recordings of debtors' 341 meetings are a matter of public record".])

Nevertheless, Silver contends that because he suffered from, inter alia, Alzheimer's disease and dementia, he was unaware of the existence and availability of his recorded testimony. He also contends that his attorneys in the state court action were

not bankruptcy specialists and, as a result, were also unaware of the existence and availability of the recorded testimony. But the trial court implicitly rejected those factual contentions. Under an abuse of discretion standard of review, a decision will not be reversed merely because reasonable minds may disagree with the trial court's decision. Nor do we substitute our judgment for that of the trial court. Rather, we review all the circumstances before the trial court and determine whether the challenged trial court ruling exceeded the bounds of reason, i.e., whether there is a clear showing that the ruling was arbitrary or irrational. (*Schall v. Lockheed Missiles & Space Co.*, *supra*, 37 Cal.App.4th at p. 1488, fn. 1.)

In light of the public record nature of the 341(a) transcripts, and that they recorded Silver's *own testimony* under oath in the bankruptcy proceeding while he was represented by counsel, it was neither arbitrary nor irrational for the trial court to conclude that Silver's assertions of concealment and misconduct were unfounded. To the contrary, it was well within the bounds of reason to find that Silver had, at a minimum, constructive knowledge of the existence of the transcripts and therefore to conclude that Pacific's attorneys could not conceal from Silver the existence of transcripts he knew or should have known existed.

Moreover, even if the trial court erred in refusing to hold a new trial to consider the 341(a) transcripts, that error was not prejudicial. (See *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 872.) Contrary to Silver's characterization of the transcripts, they do not clearly and unequivocally disclose the nature and extent of the claims that Silver asserted in his state court cross-complaint against Pacific. Nowhere in those transcripts does Silver candidly disclose any potential cross-claims against Pacific, much less the substantial claims he asserted in his cross-complaint. At best, the transcripts suggest that Silver *may* have believed at the time of his testimony that he had released all claims arising from the asset purchase and employment agreements. But that vague response falls far short of a candid disclosure of his cross-claims and does little to rebut Pacific's other, substantial evidence that Silver intentionally concealed from the trustee his claims against Pacific. Although the transcripts *may* arguably support an inference that Silver

did not disclose his claims because he believed he had released them, they also support the contrary inference that Silver was being purposely vague and less than candid about those claims. Thus, even assuming that the trial court had considered the transcripts, they were insufficient to overcome Pacific's showing that Silver intentionally concealed his cross-claims. As a result, it is not reasonably probable that Silver would have obtained a more favorable result had the trial court held a new trial to consider the transcripts. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

b. Perjured declaration

Silver contends that one of Pacific's attorneys, Michael Feenberg, submitted a "perjured" declaration in support of Pacific's opposition to the motion to disqualify Pacific's attorneys. Silver points to a paragraph in that declaration in which attorney Feenberg declares, "*At no time did [Pacific's attorneys] have any communications with [Silver's bankruptcy attorney] Ezra or [Ezra's law firm] regarding [Silver] or this case other than the questions posed during [attorney] Ezra's deposition and the scheduling of the deposition. At no time did [attorney] Ezra, [his law firm,] or anybody on their behalf ever disclose[] any information to [Pacific's attorneys] regarding [Silver] or M&M [Foods, Inc.]*." In addition, attorney Feenberg made similar assertions in Pacific's opposition to the motion for new trial, albeit not under oath: "As detailed in [Pacific's] Opposition to [the] Motion to Disqualify [Pacific's attorneys], [attorney] Ezra is not a party to this litigation. [Pacific's attorney have] not obtained any confidential information or documents from [attorney] Ezra or [his law firm] concerning [Silver]. *The only communication between [Pacific's law firm] and [attorney] Ezra regarding this matter took place during [attorney] Ezra's deposition . . . . The only documents ever provided to [Pacific's attorneys] were documents produced at [attorney] Ezra's deposition . . . .*" (Italics added.)

Following the hearing on the motions to disqualify and for a new trial, Pacific submitted an application for attorneys fees and costs that attached billing statements from Pacific's attorneys, including certain time entries by attorney Feenberg. One entry, dated

July 28, 2008, stated, “MWF: Outside conference with [attorneys] Ezra and Gubner [regarding] disclosure in bankruptcy proceedings of Silver’s claims [regarding] Silver’s attempt to reopen case and alleged meeting [between attorney] Ezra and Silver [regarding] decision to withdraw Motion to Reopen [bankruptcy].” That entry was for 2.70 hours of professional services rendered to Pacific by attorney Feenberg two days *prior* to the submission of his declaration in opposition to the motion to disqualify. Moreover, four prior entries for services rendered by attorney Feenberg in May and June 2008 indicate a meeting, as well as other e-mail, telephone, and letter communications between attorney Feenberg and attorney Ezra, with one of those entries stating that attorney Feenberg had rejected attorney Ezra’s request for payment of fees relating to his deposition.

According to Silver, the foregoing time entries establish that attorney Feenberg knowingly misled the trial court in Pacific’s oppositions to the motions to disqualify and for a new trial by misstating under oath the nature and extent of his communications with attorney Ezra, both before and after attorney Ezra’s deposition. Silver therefore argues that the trial court erred in denying him a new trial based on these acts of attorney misconduct.

Even assuming that Silver is correct, he did not assert attorney Feenberg’s acts of alleged misconduct in support of his motion for new trial. Rather, Silver raised those acts at a subsequent hearing on Pacific’s attorney fees motion. By not raising the specific acts of alleged misconduct by attorney Feenberg in opposition to the new trial motion, Silver forfeited them as claims of error on his appeal from the order denying that motion. “The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497-500.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 [108 Cal.Rptr.2d 385, 25 P.3d 598] (*Simon*): ““““The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial

had . . . .” [Citation.] ““No procedural principle is more familiar to this Court than that a *constitutional* right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” . . .’ [Citation.] [¶] ‘The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . .” ““In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal”” [Citation.]” (Fn. omitted; [citations].)’ (*Simon, supra*, 25 Cal.4th at p. 1103, italics added.)” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

Moreover, although Silver may have preserved for appeal the acts of alleged misconduct by attorney Feenberg as they relate to the trial court’s order on Pacific’s attorney fees motion, he failed to perfect an appeal from that post-judgment order. As discussed in detail below, Silver’s notice of appeal from the trial court’s order on Pacific’s attorney fees motion was premature. And, contrary to Silver’s suggestion, his appeal from the judgment does not encompass the subsequent postjudgment order awarding attorney fees to Pacific. This court therefore lacks jurisdiction over Silver’s challenges to that order, including any challenges based on the alleged misconduct of attorney Feenberg.<sup>6</sup>

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<sup>6</sup> There may be innocent explanations for the time sheet entries, but on their face, the allegations of misconduct against attorney Feenberg constitute serious accusations that due to the procedural posture in which they are raised, are not before this court. Because we cannot address those alleged acts of attorney misconduct on this appeal, we make no determinations as to their merits.

c. Misappropriation or privileged information

Silver also contends that the time entries by attorney Feenberg establish that Pacific's attorneys improperly obtained attorney-client privileged information and documents from Silver's bankruptcy counsel, attorney Ezra. According to Silver, these additional acts of attorney misconduct support the granting of a new trial. But the alleged misappropriation of attorney-client information was not raised with the trial court in support of Silver's motion for new trial. Thus, as he did with respect to the "perjured" declaration allegations, Silver has forfeited contentions based on alleged misappropriation on his appeal from the trial court's order denying his new trial motion.

d. Prosecution of meritless cross-complaint

Silver contends that Pacific's attorneys engaged in further misconduct by prosecuting an admittedly meritless cross-complaint against Silver. According to Silver, notwithstanding their admission in open court that Pacific's cross-complaint lacked merit, Pacific's attorneys continued to prosecute that pleading, causing Silver to expend needless amounts of time and money defending that cross-complaint. We do not reach this questionable assertion because prosecution of a meritless cross-complaint by Pacific's attorneys was not raised as a ground for Silver's motion for new trial. Thus, as it relates to the trial court's order denying a new trial, this specific act of misconduct has been forfeited on appeal.

e. Intimidation of bankruptcy trustee

In his new trial motion, Silver argued that Pacific's counsel had threatened and intimidated the trustee of his bankruptcy estate. He based this claim on a November 2008 declaration by the trustee advising the bankruptcy court of "the highly inappropriate intimidation tactics and threats that are being made against me by [Pacific's trial attorneys] for simply complying with my responsibility as a Chapter 7 [bankruptcy] Trustee to pursue potentially viable claims on behalf of estate creditors." Silver also

relied on a letter to the trustee from Pacific’s trial counsel attached to the trustee’s declaration as an exhibit.

In response, Pacific claims that the bankruptcy court “rejected such allegations outright” by stating that Pacific’s trial counsel were doing a “very intelligent, aggressive, lawyer-like job to try to get [Pacific] not sued any more in this cause of action. [T]hat’s a legitimate pursue [*sic*] of representing your client.” Silver counters in his reply that the quoted statement by the bankruptcy court was not made in response to the alleged threats and intimidation by Pacific’s attorneys, but he does not provide any other explanation for the court’s statement.

In denying Silver’s motion for new trial, the trial court implicitly rejected this assertion of misconduct or, at a minimum, concluded that the alleged conduct with respect to the bankruptcy, which conduct occurred several months *after* the state court trial, did not affect Silver’s right to a fair trial in state court. The record supports both of those implicit findings.

As to whether the alleged misconduct occurred, the trustee testified that she felt threatened and intimidated by Pacific’s letter to her, but the bankruptcy court’s statement reasonably could have been construed as a rejection of that allegation. Moreover, even assuming the bankruptcy court’s statement was unrelated to the alleged threats and intimidation, the trial court reasonably could have concluded that the timing of the conduct—some five months after the trial in state court—failed to support Silver’s claim of prejudice *at trial*. Therefore, the trial court did not abuse its discretion in denying Silver’s motion for new trial on this alleged act of attorney misconduct.

##### 5. *Newly Discovered Evidence*

For reasons similar to those stated in our discussion of the alleged concealment of the 341(a) transcripts, we reject Silver’s contention that the trial court should have granted a new trial based on newly discovered evidence. Under section 657, newly discovered evidence will warrant a new trial only if the moving shows that “he could not, with reasonable diligence, have discovered and produced [the evidence] at trial.”

(§ 657(4).) In this case, Silver’s only showing of diligence involved his assertions that he suffered from memory problems and that his trial attorneys were not bankruptcy experts. The trial court, however, rejected those excuses, and the public record character of the 341(a) transcripts reasonably supports that rejection.

## **B. Rulings on Pacific’s Affirmative Defenses**

### *1. Standing*

Silver contends that he had standing to pursue his state court claims against Pacific because certain of those claims either arose after the filing of his bankruptcy petition, and therefore never were the property of the bankruptcy estate, or were “accounts receivable” disclosed in the bankruptcy that were abandoned by the trustee at the close of the bankruptcy proceeding. Accordingly, Silver argues the trial court erred in ruling that he lacked standing to pursue those claims because, at the time he filed the cross-complaint against Pacific, all such claims were his property.

The determination of this issue turns on whether all of the claims asserted in Silver’s cross-complaint became the property of his bankruptcy estate and, if so, whether any of those claims were abandoned by the trustee of that estate upon discharge of the debtor. “As a general matter, upon the filing of a petition for bankruptcy, ‘all legal or equitable interests of the debtor in property’ become the property of the bankruptcy estate and will be distributed to the debtor’s creditors. [11 U.S.C.] section 541(a)(1).” (*Rousy v. Jacoway* (2005) 544 U.S. 320, 325.) The Historical and Statutory Notes for section 541 provide: “This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. [T]he estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, [and] *causes of action . . .*” (11 U.S.C.A. § 541, Revision Notes and Legislative Reports (1978 Acts), italics added.)

In California, tangible personal property has been defined in the context of the sales and use tax law as “personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.” (Rev. & Tax. Code, § 6016.) “Although there appears to be no comprehensive definition of intangible property (Cowdrey, *Software and Sales Taxes: The Illusory Intangible* (1983) 63 B.U.L. Rev. 181, 200-203), such property is generally defined as property that is a ‘right’ rather than a physical object. (*Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 734 [57 P.2d 1022]; Black’s Law Dict. (6th ed. 1990) p. 809, col. 1.) As the court in *Roth Drug, Inc. v. Johnson*, *supra*, 13 Cal.App.2d at page 734 observed: ‘Tangible property is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, *choses in action*, copyrights, the circulation of a newspaper, annuities and the like.’” (*Navistar Internat. Transportation Corp. v. State Bd. of Equalization* (1994) 8 Cal.4th 868, 875, italics added.)

Thus, if Silver’s claims in the cross-complaint against Pacific qualified as his intangible property—i.e, choses in action—those claims became the property of his bankruptcy estate if they existed at the time he filed his bankruptcy petition. “In California, a chose in action, also known as a ‘thing in action,’ is statutorily defined as ‘a right to recover money or other personal property by a judicial proceeding.’ (Civ. Code, § 953.) (See Black’s Law Dict. (7th ed. 1999) p. 234 [defining ‘chose in action’ as ‘[t]he right to bring an action to recover a debt, money, or thing’].) A claim need not have been filed, or a judicial determination made, for there to be a chose in action. Instead, only a right to recover need exist. (See, e.g. *Krusi v. S.J. Amoroso Construction Co., Inc.* (2000) 81 Cal.App.4th 995, 1003 [97 Cal.Rptr.2d 294] [equating a chose in action with a right to bring a lawsuit].)” (*Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934, 948 (dis. opn. of Moreno, J.).)

A right to recover money or personal property by a judicial proceeding exists in California when a cause of action accrues. ““A cause of action accrues at the moment the party who owns it is entitled to bring and prosecute an action thereon. [Citations.]” [Citations.] That is said to occur when “. . . events have developed to a point where

plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.” [Citation.]” (*Krusi v. S.J. Amoroso Construction Co., Inc., supra*, 81 Cal.App.4th at p. 1003.) “Generally speaking, a cause of action accrues at “the time when the cause of action is complete with all of its elements.” [Citations.] An important exception to the general rule of accrual is the “discovery rule,” which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she “has *reason* at least *to suspect* a factual basis for its elements.” [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period.’ (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807 [27 Cal.Rptr.3d 661, 110 P.3d 914] (*Fox*).)” (*Grisham v. Phillip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 634, italics added.)

Here, all of Silver’s claims against Pacific meet California’s accrual test, and they therefore became the property of the bankruptcy estate upon the filing of the petition in the bankruptcy proceeding. Each of those claims arises from the asset purchase agreement, the employment agreement, or the modification and termination agreements. Silver does not dispute that Pacific terminated the employment agreement on September 30, 2004. Thus, he would have or should have been aware at that time of facts giving rise to claims related to that termination, such as his claims for breach of that agreement and wrongful termination. (See *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1320 [“for purposes of filing a tort claim for wrongful termination, the cause of action accrues when the employment is actually terminated, whether by the employer or the employee”].) Moreover, following the termination of the employment agreement, Silver entered into a broad release of all claims arising out of either the employment agreement or the asset purchase agreement and agreed to terminate the employment agreement, thereby voluntarily extinguishing all rights he may have had under either agreement. In this action, he takes the position, in effect, that his release was not enforceable. Nevertheless, prior to entering into those November 2004 agreements, Silver presumably

investigated, or should have investigated, the potential claims he may have had arising out of the breach of either the asset purchase or the employment agreement, and therefore knew or should have known the nature and extent of any such claims. That would include the claims for fraud in the inducement of the asset purchase agreement, intentional interference,<sup>7</sup> wrongful termination under the employment agreement, rescission and cancellation of the asset purchase and employment agreements, and breach of the asset purchase and employment agreements. Under the foregoing California authorities on accrual, any such claims accrued in or about September through November 2004, well before Silver filed his bankruptcy petition in July 2005.

“In the context of bankruptcy proceedings, it is well understood that ‘a trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed.’ *Kane v. Nat’l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) (per curiam). The commencement of Chapter 7 bankruptcy extinguishes a debtor’s legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(1) (indicating that a bankruptcy estate includes “all legal or equitable interests of the debtor in property”); *id.* § 323 (establishing the bankruptcy trustee as the ‘representative’ of the estate with the ‘capacity to sue and be sued’ on its behalf). Thus, ‘[g]enerally speaking, *a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate*, and only the trustee in bankruptcy has standing to pursue it.’ (*Parker [v. Wendy’s Int’l, Inc.* (11 Cir. 2004)] 365 F.3d [1268,] 1272; *accord Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th

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<sup>7</sup> The intentional interference claim is based on Pacific’s alleged conduct in inducing Silver to cancel a pending agreement with another buyer to purchase the assets of M&M Food, Inc. so M&M could enter into the asset purchase agreement with Pacific American instead. According to Silver, one of the inducements to enter into the asset purchase agreement with Pacific was the offer of a lucrative, five-year employment agreement. Thus, Silver should have been aware of this claim when, after only three months, Pacific terminated that lucrative, five-year agreement.

Cir. 2004); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 535 (4th Cir. 1997).” (*Moses v. Howard University Hospital* (D.C. Cir. 2010) 606 F.3d 789, 795, italics added.)

Because Silver knew or with the exercise of reasonable diligence should have known of the existence of all of the claims asserted in his cross-complaint against Pacific by approximately November 2004, those claims became intangible personal property, i.e., choses in action, that he possessed at the time he filed his July 2005 bankruptcy petition. By operation of federal law, ownership of those claims transferred to his bankruptcy estate. As discussed below, only the trustee of that estate had standing to pursue them from that point forward, unless and until the trustee abandoned those claims.

Silver attempts to avoid the trial court’s lack of standing determination by characterizing the claims under his employment agreement as claims for post-petition earnings from that agreement, citing *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 505-506. But in that case, the causes of action for wrongful termination accrued *after* the filing of the bankruptcy petition and therefore never became the property of the bankruptcy estate. (*Id.* at p. 506.) In this case, all of Silver’s cross-claims accrued *prior* to the filing of his petition. Moreover, although earnings from services performed by an individual debtor after the commencement of the bankruptcy are excluded from the property of the estate (11 U.S.C. § 541(a)(6)), Silver did not perform any postpetition services under the employment agreement, and therefore had no post-petition earnings under that agreement. In addition, “the bankrupt’s estate includes not only claims that had accrued and were ripe at the time the petition was filed, but also those claims that accrued postpetition, but that are ‘sufficiently rooted in the pre-bankruptcy past: *Segal v. Rochelle*, 382 U.S. 375, 380 . . . .” (*Field v. Transcontinental Ins. Co.* (E.D.Va. 1998) 219 B.R. 115, 119, *aff’d*, 173 F.3d 424 (4th Cir.)) Here, Silver’s employment agreement terminated well before he filed for bankruptcy and was replaced, if at all, by *a right* of action to sue for monies due and owing under that agreement. Pursuant to the authorities cited above, that right of action was Silver’s personal intangible property that passed to his bankruptcy estate on the filing of the bankruptcy petition.

Silver further contends that his cross-claim against Pacific based on the obligation to collect on behalf M&M Foods, Inc. certain accounts receivable was scheduled in the bankruptcy proceeding and was therefore abandoned by the trustee upon Silver's discharge in the bankruptcy proceeding. He bases this contention on the following entry in a schedule of personal assets attached to his bankruptcy petition: "Debtor's interest in collections obtained on outstanding accounts receivable from former business activities." Silver also indicated that the value of the accounts receivable was "unknown."

"An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. See 11 U.S.C. § 554(a) (directing that '[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome . . . or that is of inconsequential value and benefit to the estate'); *id.* § 554(c) (directing that 'any property scheduled . . . [but] not otherwise administered at the time of the closing of a case is abandoned to the debtor and [considered] administered'). "[U]pon abandonment . . . the trustee is . . . divested of control of the property because it is no longer part of the estate. . . . Property abandoned under [§] 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed.'" *Kane* 535 F.3d at 385 (quoting 5 COLLIER ON BANKRUPTCY ¶ 554.02[3], p. 554-5); *see also Parker* 365 F.3d at p. 1272. [¶] Whatever interest passed to the trustee when [the debtor] filed for Chapter 7 bankruptcy [is] extinguished when [the trustee] abandon[s] the cause of action. . . . *Cf. Brown v. O'Keefe*, 300 U.S. 598, 602, 57 S.Ct. 543, 81 L.Ed. 827 (1937). In other words, 'when property of the bankrupt is abandoned, the title reverts to the bankrupt, *nunc pro tunc*, so that he is treated as having owned it continuously.' *Morlan [v. Univ. Guaranty Life Ins. Co. (7th Cir. 2002)]* 298 F.3d [609,] 617 (internal quotation marks and citation omitted) (emphasis added)." (*Moses v. Howard University Hospital, supra*, 606 F.3d at p. 795.) But property not formally scheduled in the bankruptcy proceeding is *not abandoned* at the close of the bankruptcy proceeding, even if the trustee was aware of the existence of the property. (*Vreugdenhill v. Navistar Int'l Transp. Corp.* (8th Cir. 1991) 950 F.2d 524, 526.)

Silver argues that the trial court's ruling on the abandonment issue is reviewed de novo. But the trial court's ruling was based on the trial court's *factual finding* that Silver did not adequately schedule the receivables claim in the bankruptcy proceeding. We review a trial court's factual findings under a substantial evidence standard. "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court. (*Ibid.*; *Bandle v. Commercial Bk. of Los Angeles* (1918) 178 Cal. 546, 547 [174 P. 44]; see also *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507 [156 Cal.Rptr. 41, 595 P.2d 619]; *Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143]; 6 Witkin, *Cal. Procedure* (2d ed. 1971) §§ 247, 248, pp. 4239-4240.)" (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 (*Jessup Farms*).

In ruling on the abandonment issue, the trial court stated, "This Court finds that none of the claims, theories or causes of action contained in the [third amended cross-complaint] were listed in any portion of [Silver's] bankruptcy schedules or his amended schedules in the Bankruptcy Case. This Court finds that none of the claims, theories or causes of action contained in the [third amended cross-complaint] constituted materials which could fairly be regarded as a claim or contention arising out of accounts receivable of [Silver] whatsoever. This Court rejects [Silver's] contention that under Schedule B, Accounts Receivable, the property described as 'Debtor's interest in collections obtained on outstanding accounts receivable from former business activities' relates to any of the claims, theories or causes of action contained in the [third amended cross-complaint]." Those findings are supported by substantial evidence.

In a bankruptcy proceeding, the "bankruptcy code place[s] an affirmative duty on [the debtor] to schedule his assets and liabilities. [11 U.S.C.,] § 521(1). If he fail[s]

properly to schedule an asset, including a cause of action, that asset continues to belong to the bankruptcy estate and [does] not revert to [the debtor]. *See Stein v. United Artists Corp.*, 691 F.2d 885, 893 (9th Cir. 1982) (holding that only property ‘administered or listed in the bankruptcy proceedings’ reverts to the bankrupt); *accord Hutchins v. IRS*, 67 F.3d 40, 43 (3d Cir. 1995); *Vreugdenhill v. Navistar Int’l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991) (holding that property is not abandoned by operation of law unless the debtor ‘formally schedules the property before the close of the case’). [¶] The debtor has a duty to *prepare schedules carefully, completely, and accurately.*’ *In re Mohring*, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992); *accord In re Jones*, 134 B.R. 274, 279 (N.D. Ill. 1991); *In re Baumgartner*, 57 B.R. 513, 516 (Bankr. N.D. Ohio 1986); *In re Mazzola*, 4 B.R. 179, 182 (Bankr. D. Mass. 1980). Although there are ‘no bright-line rules for how much itemization and specificity is required,’ [the debtor] was required to be *as particular as is reasonable* under the circumstances. *In re Mohring*, 142 B.R. at 395.” (*Cusano v. Klein* (9th Cir. 2001) 264 F.3d 936, 945, italics added.)

“While state law determines the existence of a claim, “the question of *when* a [claim] arises under the bankruptcy code [for purposes of scheduling it] is governed by federal law.” (*In re Cool Fuel, Inc.* (9th Cir. 2000) 210 F.3d 999, 1006, italics added.) The federal courts apply four different tests,<sup>8</sup> depending upon the type of fact pattern, to

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<sup>8</sup> “First, the ‘accrual’ (or right to payment) test provides that a claim arises when a cause of action accrues under state law or other nonbankruptcy law. (*Matter of M. Frenville Co., Inc.* (3d Cir. 1984) 744 F.2d 332, 334-337; *In re Hassanally* (Bankr. 9th Cir. 1997) 208 B.R. 46, 50-51.) Of course, depending on the theory of liability, a cause of action may not accrue under state law until the plaintiff actually knows of an injury and its cause or, through reasonable diligence, could have discovered the injury and its cause. (*In re Hassanally, supra*, 208 B.R. at pp. 50, 54.) The Ninth Circuit and most other federal courts have rejected the accrual test because it defines a claim more narrowly than intended by Congress; for instance, it excludes a cause of action that is not yet cognizable. (See *id.* at p. 51; *In re Cool Fuel, Inc., supra*, 210 F.3d at p. 1006; *Butler v. NationsBank, N.A.* (4th Cir. 1995) 58 F.3d 1022, 1028-1029.) The test still applies in the Third Circuit, its circuit of origin. (See *In re Dean* (Bankr. W.D.Pa. 2004) 317 B.R. 482, 485-486.) [¶] Second, under the ‘conduct’ test, a claim arises when the wrongful conduct occurs even if the resulting injury has not yet become manifest. (*In re*

determine when a claim arises. [¶] . . . [¶] Although the courts do not always articulate which test is being applied, the results are generally consistent.” (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 133-135.) Therefore, in determining whether a potential legal claim or cause of action must be scheduled, “certainty of success on a legal claim is not required; undisputed facts are not necessary. Rather, a debtor must list a claim, depending on the circumstances, if the wrongful conduct has already occurred, if there is a sufficient nexus between the wrongdoer’s prepetition conduct and the parties’ preconfirmation relationship, or if the claim’s existence is fairly contemplated. (See, e.g., *In re Hassanally*, *supra*, 208 B.R. at pp. 50-53; *In re Cool Fuel, Inc.*, *supra*, 210 F.3d at pp. 1006-1007; *In re Zilog, Inc.* (9th Cir. 2006) 450 F.3d 996, 999–1001.)” (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 136.)

Silver’s asset disclosure schedule did not mention Pacific American, M&M Foods, Inc., or the asset purchase agreement, much less the accounts receivable Pacific

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*Hassanally*, *supra*, 208 B.R. at p. 51; *In re Parks* (Bankr. E.D.Mich. 2002) 281 B.R. 899, 902.) The conduct test has been criticized for defining claims too broadly. (*Epstein v. Official Comm. of Unsecured Creditors* (11th Cir. 1995) 58 F.3d 1573, 1576-1577.) ‘[M]any courts have taken the view that the conduct test may be overly broad, tending to include the claims of parties such as classes of future mass tort claimants who cannot know prepetition that they may have a claim in the future.’ (*In re Agway, Inc.* (Bankr. N.D.N.Y. 2004) 313 B.R. 31, 42.) [¶] Third, the ‘relationship’ test, which often governs claims against a manufacturer of defective products, focuses on the wrongdoer’s prepetition conduct and the creation of a relationship, such as contact, exposure, impact, or privity, between the wrongdoer and the claimant. (See *In re Hassanally*, *supra*, 208 B.R. at p. 52.) A claim arises for purposes of the bankruptcy estate if, no later than the confirmation of a reorganization plan, a relationship exists between an identifiable claimant or group of claimants and the wrongdoers prepetition conduct. (*Ibid.*; *Epstein v. Official Comm. of Unsecured Creditors*, *supra*, 58 F.3d at p. 1577.) [¶] Fourth, under the ‘fair contemplation’ test, a claim arises when a claimant can fairly or reasonably contemplate the claim’s existence even if a cause of action has not yet accrued under state or other nonbankruptcy law. (See *In re Cool Fuel, Inc.*, *supra*, 210 F.3d at pp. 1006-1007; *In re Hexcel Corp.* (N.D.Cal. 1999) 239 B.R. 564, 567-570; *Signature Combs, Inc. v. U.S.* (W.D.Tenn. 2003) 253 F.Supp.2d 1028, 1037-1039.) This test originated in environmental cleanup cases. (See *In re Hexcel Corp.*, *supra*, at p. 569.)” (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at pp. 133-135.)

American was obligated to collect on behalf of M&M Foods, Inc. under that agreement. If, as he now contends, the reference to “[d]ebtor’s interest in collections obtained on outstanding accounts receivable from former business activities” was meant to refer to the accounts receivable to be collected by Pacific American under the asset purchase agreement, it was incumbent upon Silver to make that clear, i.e., “as particular as is reasonable under the circumstances.” (*Cusano v. Klein, supra*, 264 F.3d at p. 945.) One purpose of the schedule is to provide the trustee and creditors with a description of personal assets sufficient to allow a determination as to whether and to what extent a given asset has potential value. The listing as phrased provides no hint as to the party responsible for collecting on the accounts or to which “business activities” the accounts relate. The vagueness of the listing, coupled with the trial court’s finding that Silver willfully concealed assets from the trustee, supports a finding that the accounts receivable claims asserted in Silver’s cross-complaint were not adequately scheduled in the bankruptcy. That finding, in turn, supports the trial court’s legal conclusion that those claims had not been abandoned by the trustee. And, even assuming Silver is correct and we review without deference the trial court’s finding on the scheduling issue under a de novo standard of review, our review of the record would lead us to conclude that Silver did not adequately list his accounts receivable claims against Pacific in his bankruptcy and that they were not abandoned by operation of law.

## 2. *Judicial Estoppel*

Even if Silver had standing in state court to pursue either his employment contract claims or the accounts receivable claims, the trial court nevertheless ruled that he was judicially estopped from pursuing such claims based on his conduct in the bankruptcy court. Specifically, the trial court found that “judicial estoppel completely bars [Silver] from proceeding with the claims advanced in the [third amended cross-complaint]. This Court finds that [Silver] deliberately and intentionally withheld the information concerning those claims from the bankruptcy court and from his creditors at the time he filed the Bankruptcy Case and at all times after the filing of the Bankruptcy Case until the

Bankruptcy Case was closed. ¶ . . . ¶ Here judicial estoppel bars [Silver] from proceeding on the [third amended cross-complaint] which asserts claims, theories and causes of action he: (i) intentionally failed to list in his Bankruptcy Petition, Schedule “B” when he filed the Bankruptcy Case on July 13, 2005; (ii) again failed to list when he amended his Schedule “B” on May 10, 2006; (iii) continued to fail to list through the closing of his Bankruptcy Case on August 17, 2006; (iv) identified as an asset that should have been listed in his Motion to Reopen the Bankruptcy Case filed with the Bankruptcy Court on April 18, 2008; (v) continued to hide from his Bankruptcy creditors when he withdrew his Motion then scheduled to be heard on May 7, 2008; (vi) continued to hide from his Bankruptcy creditors when he filed the most recent Motion to Reopen, which does not fully disclose his claims, theories and causes of action; and (vii) admitted he intends to keep for himself to first satisfy his debt to the IRS and then retain for his own personal gain. ¶ This Court finds that [Silver’s] conduct constitutes a frustration of the bankruptcy proceedings and further constitutes conduct which can only be characterized as playing fast and loose with the court system to obtain an unfair advantage. . . . ¶ This Court rejects [Silver’s] reliance on the cases of *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 479; *Bostonian v. Liberty Savings Bank* (1997) 52 Cal.App.4th 1075; *Cloud v. Northrop Grumann* (1998) 67 Cal.App.4th 995; and *Klopstock v. Superior Court* (1941) 17 Cal.2d 13. The bad faith conduct demonstrated by [Silver] distinguishes the foregoing legal authorities.”

Silver contends the evidence at trial did not support the trial court’s finding that he willfully concealed his claims against Pacific from the bankruptcy trustee. According to Silver, absent that unsubstantiated finding, judicial estoppel cannot be invoked to bar him from pursuing his claims against Pacific in state court or, at a minimum, seeking the bankruptcy trustee’s participation in or abandonment of those claims.

In *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986, the Supreme Court explained the doctrine of judicial estoppel. ““Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine’s dual goals are to maintain the integrity

of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.” (*Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735 [135 Cal.Rptr.2d 415], fn. omitted.) The doctrine applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 [70 Cal.Rptr.2d 96]; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943 [134 Cal.Rptr.2d 101].)” (*Aguilar v. Lerner, supra*, 32 Cal.4th at p. 986.)

“Several California courts have held that judicial estoppel bars an action where the plaintiff failed to disclose a legal claim in a prior bankruptcy case. (See, e.g., *International Engine Parts, Inc. v. Feddersen & Co.* [(1998)] 64 Cal.App.4th [345,] 350, 353 [accountant malpractice]; *Conrad v. Bank of America* [(1996)] 45 Cal.App.4th [133,] 137-138, 153-154 [lender liability]; *Billmeyer v. Plaza Bank of Commerce* (1995)] 42 Cal.App.4th [1086,] 1091-1092, 1096 [same].) Others have acknowledged the possibility of such a bar. (See, e.g., *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598-600 [90 Cal.Rptr.2d 510] [employment discrimination]; *Haley v. Dow Lewis Motors, Inc., supra*, 72 Cal.App.4th at pp. 509-511 [wrongful termination of employment]; *Cloud v. Northrop Grumman Corp., supra*, 67 Cal.App.4th at pp. 998-999, 1011-1020 [wrongful termination of employment and sexual harassment].)” (*Gottlieb v. Kest, supra*, 141 Cal.App.4th at p. 138.)

As noted, the trial court’s factual findings are reviewed under a substantial evidence standard of review. (*Jessup Farms, supra*, 33 Cal.3d at p. 660.) Under that standard, we must view the evidence of intentional concealment in a light most favorable to Pacific, giving Pacific the benefit of every reasonable inference and resolving all conflicts in Pacific’s favor. (*Ibid.*) That it is possible to draw some inference from the evidence, other than that drawn by the trial court, is of no consequence. (*Ibid.*)

Applying this standard of review, we conclude the trial court's findings of intentional concealment were supported by substantial evidence. Silver's filing of a motion to reopen the bankruptcy proceeding in the face of Pacific's demurrer on the standing issue, together with his immediate withdrawal of that motion when the trial court overruled the demurrer, supports a reasonable inference that he was trying to conceal his claims against Pacific from the trustee. The same conclusion applies to his filing of the second motion to reopen on the eve of trial and his failure in that motion candidly to disclose his claims. And, as discussed above, the evidence also supports a reasonable inference that Silver intentionally failed to disclose his claims against Pacific in his original bankruptcy petition and a subsequent amendment to that petition. When viewed in a light most favorable to Pacific's position on the intentional concealment issue, the evidence supports a reasonable inference that Silver did not candidly disclose his claims in the bankruptcy proceeding. Accordingly, the trial court correctly concluded that judicial estoppel barred Silver from proceeding on his cross-claims against Pacific.

### **C. Right to Reopen Bankruptcy Proceeding**

Silver contends that the trial court violated his right to adequate time to secure the bankruptcy trustee's participation in or abandonment of his claims against Pacific. Citing *Haley v. Dow Lewis, supra*, 72 Cal.App.4th 497, *Bostonian v. Liberty Savings, supra*, 52 Cal.App.4th 1075 and *Cloud v. Northrup Grumann, supra*, 67 Cal.App.4th 995, Silver argues that he requested adequate time from the trial court to pursue his rights under those cases, but the trial court denied his request.

This contention rests on Silver's assertion that, prior to and during trial, he made two motions in the trial court to continue or stay the state court proceedings for the express purpose of securing the trustee's participation in or abandonment of his claims against Pacific. The record, however, does not support that assertion.

Silver's claim that, *before trial* commenced, he moved the trial court for a continuance or stay under the cited cases is based on the following exchange between his

trial attorney and the trial court on the first day of trial: “[The Court]: Status of the case? [¶] [Attorney for Silver]: Ready for trial. But, your Honor, I do—there is [*sic*] some issues that come up [*sic*] that I would almost be inclined—these guys asked a week and a half ago for a continuance on [*sic*] the trial date. Might make sense. [¶] [The Court]: Do you still want that? [¶] [Attorney for Silver]: *We’re ready to go on this bankruptcy issue.* We do want a continuance with respect to the other matters.” After a brief delay, the proceeding resumed without any further discussion of a continuance. Instead, Silver’s trial counsel proceeded with opening statement. “[The Court]: Now, let’s go to work on Silver v. Pacific American, BC 356 788. [¶] All right, lawyers, is there any objection to our proceeding in the following sequence: That [Silver] to proceed first with both opening statement and evidence and closing argument? And [Pacific] to proceed second as to each of those? Is that okay with everybody? [¶] [Attorney for Silver]: That’s okay, Your Honor. [¶] [Attorney for Pacific]: Fine, Your Honor. [¶] [The Court]: All right, that’s the way we’ll do [it], then. That means, [Attorney for Silver,] that you are up.”

Although the foregoing exchange shows that Silver’s trial attorney indicated that he wanted a continuance because “some issues” had “come up,” he did not further specify the nature of those issues, much less request a continuance under the authorities cited. To the contrary, he unequivocally represented to the trial court that he was “ready to go on [the] bankruptcy issue” that had been bifurcated for trial, a position that was contrary to any request for time to pursue his claims with the trustee. Moreover, after the delay in the proceedings, Silver’s trial counsel did not renew his request for a continuance or seek a ruling on his continuance request made prior to the delay. Instead, he agreed to proceed with opening statement, effectively withdrawing any prior request to continue. Thus, the trial court did nothing to deny Silver his rights under the cited cases because Silver never requested prior to commencement of trial adequate time to pursue abandonment under those cases.

Silver’s claim that he renewed *during trial* his request for a stay or continuance is equally unsupported by the record. At the end of Pacific’s closing argument, the trial

court asked for Pacific American's position concerning Silver's assertion that Pacific American's cross-complaint against him should be dismissed. Pacific's trial counsel stated that those claims should be dismissed, but then qualified that statement by explaining that he was not the attorney who filed those claims and that he would need to discuss the issue with bankruptcy counsel. Pacific's trial counsel also agreed that the trial court would have the jurisdiction to make a dismissal order based on the discharge order in Silver's bankruptcy proceedings, but only if Silver made the appropriate motion. At the beginning of Silver's closing argument, the following exchange took place, the last portion of which Silver claims supports his contention: "[The Court]: If I were to dismiss the cross-complaint that [Pacific American] . . . filed against [Silver] on the ground that the cross-complaint was precluded by virtue of the bankruptcy discharge, would you have any objection to the termination of [Silver's] cross-complaint obtained against [Pacific]. [¶] [Attorney for Silver]: Yes, we would. You're asking if we want to dismiss . . . Silver's cross-complaint? [¶] [The Court]: Yes. [¶] [Attorney for Silver]: No, we don't want to dismiss [Silver's] cross-complaint. [¶] [The Court]: Even if [Pacific American's] cross-complaint against [Silver] is terminated, correct? [¶] [Attorney for Silver]: Correct. [¶] [The Court]: Go ahead with whatever other arguments -- [¶] [Attorney for Silver]: What I'm saying before this trial started, we were more than willing to have this thing go to bankruptcy court, have the jurisdiction of the bankruptcy court decide where the claim should be. And in the position we're in now, we're absolutely fine with the court if the court found it appropriate to have a stay on the trial, holds [*sic*] their decision, let us clear things up with the bankruptcy court. That is completely acceptable for us."

At best, the foregoing exchange shows that when the trial court proposed mutual dismissal of the parties' respective cross-complaints, based on the bankruptcy discharge, Silver's counsel rejected that proposal and instead offered that a stay would be acceptable to Silver. But he made no formal motion to stay or continue and never mentioned the authorities upon which he relies. Once again, the trial court did not violate Silver's rights under those authorities because Silver never expressly requested adequate time to pursue

abandonment under their holdings, stating instead that if the trial court *on its own motion* decided to stay the state court action, Silver would have no objection. Moreover, by the time of the foregoing colloquy, the evidentiary phase of trial was complete and closing argument was well underway. Thus, even assuming Silver made the required motion at that juncture, the trial court would have been well within its discretion to deny it as untimely given the substantial expenditure of judicial and party resources on the merits of the standing and estoppel defenses.

Silver also relies on the following paragraph from his trial counsel's declaration in support of Silver's motion to disqualify: "3. On June 23, 2008, at the Final Status Conference held before trial commenced in this matter, I asked the Court for a continuance based on three different reasons. The first two reasons were related to sorting out the issues arising from . . . Silver's bankruptcy and the third reason was based on the recently confirmed disqualification issue related to [Pacific's counsel]."

To the extent that testimony conflicts with the record excerpts discussed above, the record controls over the after-the-fact characterizations of Silver's trial counsel. Moreover, as that paragraph of the declaration goes on to concede, counsel's testimony was provided without the benefit of reviewing the actual reporter's transcripts of the proceedings to which it refers. Thus, the self-serving declaration testimony provides no support for Silver's claim that he twice requested a continuance or stay to exercise his rights under the cited authorities.

#### **D. Termination of Guaranty Agreement**

Silver challenges that the trial court's ruling that the personal guaranty agreement executed by Peter and Paul Huh, including the waiver of defenses provision, terminated upon Pacific American's payment in full of the purchase price under the asset purchase agreement. According to Silver, the guaranty agreement required a fully executed writing to effect a termination thereof, in addition to payment in full of the guaranteed obligations by Pacific American. Silver therefore contends that the trial court

misconstrued the guaranty agreement and that he was entitled to a determination that the agreement was still in full force and effect at the time of trial.

A trial court's interpretation of an agreement is reviewed on appeal de novo. "Questions of contract interpretation are subject to de novo review unless the interpretation turns on the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839].)" (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 178.) Courts must construe agreements consistent with the "statutory mandate to interpret contracts in such a manner as will make them 'lawful, operative, definite, *reasonable*, and capable of being carried into effect, if it can be done without violating the intention of the parties' (Civ. Code, § 1643) and to 'give effect to every part' of a contract (*id.*, § 1641; *Sutton v. Farmers Ins. Exchange* (1995) 35 Cal.App.4th 1800, 1804 [42 Cal.Rptr.2d 191]; *Barrett v. Farmers Ins. Group* (1985) 174 Cal.App.3d 747, 750-751 [220 Cal.Rptr. 135])." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 757.)

The last sentence of the first paragraph of the guaranty agreement provides, "This Guaranty is unlimited regarding any indebtedness that arises out of any agreement entered into between M&M [Foods, Inc.] and [Pacific American] but *will terminate once the Promissory Notes are paid in full.*" The language of that sentence is clear and unequivocal as to when the guaranty agreement terminates—upon payment in full of the guaranteed obligations. No other condition precedent to termination is mentioned nor does any appear necessary. Once the subjects of the guaranty, i.e., the promissory notes, are paid in full, the purpose of the guaranty agreement comes to an end and the primary obligation of the contract is extinguished.

There is no dispute that the promissory notes that were the subjects of the guaranty were timely paid in full. Nevertheless, Silver maintains that the agreement remained in effect unless and until it was formally terminated by a fully executed writing. He relies on the following language in paragraph 11: "This Guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by [Peter and Paul Huh] and M&M [Foods, Inc.]." According to Silver, because there

was no evidence that the parties signed a writing expressly terminating the guaranty agreement, it was still in full force and effect at the time of trial, including the provision waiving defenses.

Silver's construction of the agreement is unreasonable. The manifest purpose of the boilerplate requirement of a signed writing in paragraph 11 was to prevent any of the contracting parties from *unilaterally* changing or terminating the agreement prior to the personal guarantors' full performance thereunder. The provision therefore relates to terminations for reasons *other than full performance*, such as for example, a novation substituting different guarantors in place of Peter and Paul Huh. As noted above, once the guaranteed obligations were satisfied, the guaranty agreement served no viable purpose and, by its own terms, it expired without the need for a formal, fully executed writing. We agree with the trial court's more reasonable interpretation of the agreement, which takes into consideration the primary purpose of the agreement and gives effect to both of the quoted provisions without violating the intentions of the parties.

#### **E. Entry of Judgment on Silver's Cross-Complaint**

Approximately two weeks after the trial court orally pronounced its decision in favor of Pacific on Silver's cross-complaint, Pacific American filed a voluntary dismissal, without prejudice, of its cross-complaint against Silver. Several months later, the trial court entered a formal statement of decision on the bifurcated trial of Pacific's standing and estoppel defenses and, based thereon, entered a judgment of dismissal on Silver's cross-complaint against Pacific.

Silver contends that the entry of judgment on his cross-complaint violates the "one final judgment rule."<sup>9</sup> Silver's argument is premised on the flawed assertion that Pacific

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<sup>9</sup> "[T]he 'one final judgment rule' [is] a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case. (*Griset v. Fair Political Practices Com.* [(2001)] 25 Cal.4th [688,] 697.) The theory underlying the rule "is that piecemeal disposition and multiple appeals in a single action

American’s voluntary dismissal without prejudice was defective because it was entered after trial commenced on *his* cross-complaint. Therefore, as Silver views the procedural posture of the case, the dismissal was ineffective, and Pacific American’s cross-complaint was either pending or at least unresolved at the time the trial court entered judgment on his cross-complaint.

The record reflects, however, that although trial had commenced as to Silver’s cross-complaint, no trial had commenced, or was even scheduled to commence, on Pacific American’s cross-complaint. The trial court’s bifurcation order specifies that, “[w]ith respect to the motion to bifurcate, insofar as it pertains to bifurcating the affirmative defense of standing from the remainder of the case, the motion is GRANTED. . . . So the [trial] sequence would be as follows: The issue of standing will be first, then the entirety of the case except for [punitive damages] . . . .” And the trial setting order states: “The within case is hereby set for trial as to bankruptcy/judicial estoppel issues. . . .”

Silver suggests that once trial commences on one party’s cross-complaint against the other, trial has “commenced” as to all other pleadings in the action for purposes of dismissals under section 581.<sup>10</sup> Silver provides no authority for this contention and it appears to be contrary to the purpose behind the provision in section 581 limiting a

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would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.” (*Ibid.*)” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21.)

<sup>10</sup> Section 581 provides in pertinent part, “(b) An action may be dismissed in any of the following instances: (1) With or *without prejudice*, upon written request of the plaintiff [or cross-complainant] to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any. [¶] . . . [¶] (e) *After the actual commencement of trial*, the court shall dismiss the complaint [or cross-complaint], or any cause of action asserted in it, in its entirety or as to any defendant, *with prejudice*, if the plaintiff [or cross-complainant] requests a dismissal, unless all affected parties to the trial consent to dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause.” (Italics added.)

plaintiff's or cross-complainant's<sup>11</sup> right to dismiss after commencement of trial. "Section 581's purpose in cutting off the plaintiff's [or the cross-complainant's] absolute right to dismissal upon commencement of trial is to avoid abuse by plaintiffs [or cross-complainants] who, when led to suppose a decision would be adverse, would prevent such decision by dismissing without prejudice and refile, thus subjecting the defendant [or cross-defendant] and the courts to wasteful proceedings and continuous litigation. [Citation.]" (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 909.)

No trial had begun as to any issue relating to Pacific American's cross-complaint, so there was no potential that Pacific American dismissed its pleading in anticipation of an adverse ruling. Thus, although the commencement of trial on Silver's cross-complaint prevented Silver from dismissing it without prejudice in anticipation of an adverse ruling, the commencement of that bifurcated trial did not prevent Pacific American from dismissing its cross-complaint without prejudice. During the bifurcated trial, nothing occurred as to Pacific American's claims against Silver that would have caused Pacific American to anticipate an adverse ruling on them, i.e., the abuse that "the commencement of trial" limitation in section 581 was intended to prevent did not exist at the time Pacific American filed its dismissal. Thus, under section 581, Pacific American had an absolute right to dismiss its cross-complaint without prejudice at its sole election. As a result, at the time the trial court entered judgment on Silver's cross-complaint, there were no other issues pending between Silver and Pacific. It follows that the trial court did not violate the one final judgment rule.

#### **F. Ruling on Silver's Claim for Attorney Fees and Costs**

Silver argues that because he was the prevailing party on Pacific American's cross-complaint against him, the trial court erred in denying his attorney fees motion.

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<sup>11</sup> Section 581, subdivision (a), defines "plaintiff" to include a cross-complainant and "defendant" to include a cross-defendant.

But this contention is based on the erroneous assumption that Pacific American could not dismiss its cross-complaint without prejudice because trial had commenced. Pacific American had an absolute right to dismiss its cross-complaint without prejudice, as trial had not commenced on issues raised in that pleading. Trial had only commenced on two of Pacific's affirmative defenses to Silver's cross-complaint. Because Pacific American's dismissal was without prejudice, and its attorney testified that the dismissal had nothing to do with the merits, the trial court did not abuse its discretion<sup>12</sup> in ruling that Silver was not the prevailing party on Pacific American's cross-complaint.

Silver counters the declaration testimony of Pacific's attorney by claiming that Pacific's attorney previously admitted during closing argument that Pacific American's cross-complaint lacked merit. But the record reflects that although Pacific's attorney stated that he would recommend dismissal of Pacific American's cross-complaint, he never stated that it lacked merit and he included a caveat to the effect that he would need to discuss the issue with bankruptcy counsel before making a final recommendation. In light of the declaration testimony from Pacific's attorney that the dismissal was for tactical reasons, his purported prior admission regarding lack of merit was, at best, a disputed fact. Thus, the trial court could have reasonably resolved that dispute by concluding that Pacific's counsel did not make an unequivocal admission and that the dismissal was based on reasons unrelated to the merits.

#### **G. Ruling on Pacific's Claim for Attorney Fees and Costs**

Pacific argues that Silver's appeal from the trial court's order granting Pacific's attorney fees motion is untimely and should be dismissed. We agree.

Silver filed a notice of appeal on February 25, 2009, which included a notice of appeal from the trial court's order granting Pacific's motion for attorney fees and costs.

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<sup>12</sup> A trial court's determination whether a litigant is a prevailing party is reviewed for abuse of discretion. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.)

The notice was filed *after* Pacific had filed its attorney fees motion, but well *before* any hearing or ruling on that motion. Thus, at the time Silver purported to appeal the order on Pacific's motion, there had been no indication of the trial court's intended ruling on that motion. The trial court's oral pronouncement of a ruling did not occur until March 26, 2009, over a month after the filing of Silver's notice of appeal. A notice of appeal filed after rendition of a judgment or statement of intended ruling but before entry of judgment may be treated as timely. (See Cal. Rules of Court, rule 8.104(e)(1), (2); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 620-624, pp. 698-702.) But here, Silver filed his notice of appeal before the statement of intended decision. Thus, the notice as it relates to the trial court's subsequent ruling on Pacific's attorney fees motion is untimely under the holding in *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960 [notice of appeal filed before announcement of trial court's intended ruling is untimely and cannot be treated as a premature but timely notice].)

In his reply brief, Silver suggests in a cursory footnote that his appeal is timely under the holding in *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998 (*Grant*). That case holds that an appeal from a final judgment encompasses a subsequent order fixing the amount of attorney fees, if the judgment adjudicated entitlement to attorney fees, but left the amount of those fees for later insertion by the court clerk. The implication of Silver's citation to *Grant* is that regardless of the timeliness of his appeal from the postjudgment attorney fees award, his appeal from *the judgment* included the trial court's subsequent order awarding fees and costs to Pacific.

In *Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1172, the court explained the limited holding in *Grant, supra*, 2 Cal.App.4th 993, as follows: "In *Grant*, the judgment expressly awarded attorney fees to certain parties, and the amounts of the awards were left blank for later insertion by the court clerk. Thereafter, the trial court set the amounts of the awards. The Court of Appeal rejected the argument it lacked jurisdiction over the fee issue, holding that 'when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award.' (*Id.* at p. 998.) [¶]

Here, in contrast to *Grant*, the judgment did not expressly award attorney fees to [the respondent]. Rather, it left the issues of entitlement and amount for later proceedings. In considering the applicability of the *Grant* exception, the court in *DeZerega v. Meggs* [(2000)] 83 Cal.App.4th [28,] at page 44, explained: ‘The issue . . . is not whether fees were ultimately recovered “as costs” but whether the *entitlement* to fees was *adjudicated* by the original judgment, leaving only the issue of amount for further adjudication.’ Were we to extend *Grant* in the manner [the appellant] urges, a prevailing party would never have to file a separate appeal from a postjudgment order granting attorney fees. That, of course, would be contrary to [the general rule that post-judgment orders awarding attorney fees are separately appealable].”

In the instant case, the judgment provided that Pacific “shall recover . . . attorney fees and costs of suit,” but left a blank space for the amount. According to Silver’s theory, that language was sufficient to bring this case within the limited exception in *Grant, supra*, 2 Cal.App.4th 993. Based on the record concerning the attorney fees award, we disagree that *Grant* applies to this case.

Notwithstanding the language in the judgment, it is clear that the parties subsequently litigated in a separate, postjudgment proceeding not only the reasonableness of the amount of the attorney fees Pacific was claiming, but also the threshold issue of Pacific’s *entitlement* to such fees. The statement of decision, on which the judgment is based, provided that “[Pacific], as prevailing party, may make an application for attorney’s fees and costs by postjudgment motion for allowance of attorney’s fees as an element of costs.” That language suggests that the trial court intended, and the parties understood, that the issue of attorney fees would be the subject of a separate postjudgment application. Consistent with the trial court’s intent and the understanding of the parties, Pacific argued in its motion the threshold issue of entitlement under section 1032 and Civil Code section 1717, contending it was the prevailing party under both statutes. Silver opposed the motion arguing, inter alia, that Pacific was not the prevailing party. The minute order for the hearing on Pacific’s attorney fees motion reflects that the trial court adjudicated *both* Pacific’s entitlement to an award of attorney fees and the

reasonableness of the amounts claimed. Under these circumstances, Silver was not misled into believing that the trial court had adjudicated prior to or in the judgment the issue of entitlement to attorney fees.

The facts in this case are closer to the facts in *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35 (*Praszker*) than to those in *Grant, supra*, 2 Cal.App.4th 993. In *Praszker*, “the issue of whether [the plaintiff] was entitled [to attorney fees and costs as damages] was deferred until after judgment and litigated by way of a motion to tax costs.” (*Id.* at p. 45.) Although the judgment included an award of costs and disbursements, it did not include any amount. The defendant appealed from the judgment, but did not appeal from the subsequent postjudgment order awarding attorney fees and costs. The court in *Praszker* held that “[i]f a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.” (Eisenberg, Horvitz & Wiener, Cal. Practice Guide, Civil Appeals and Writs (Rutter 1989) § 2.13, p. 2-5, (Eisenberg), citing Code Civ. Proc. § 906 and *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967 [231 Cal.Rptr. 241], italics original.) A postjudgment order which awards or denies costs or attorney’s fees is separately appealable. (Eisenberg, § 2:156, p. 2-42; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 223 [226 Cal.Rptr. 265]; *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 432 [159 Cal.Rptr. 473]; *Raff v. Raff* (1964) 61 Cal.2d 514, 519 [39 Cal.Rptr. 366, 393 P.2d 678]; Code Civ. Proc. § 904.1, subd. (b)), and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it. (*Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 363-364 [42 Cal.Rptr. 748].) [Footnote omitted.]” (*Praszker, supra*, 220 Cal.App.3d at p. 46.)

In response to the defendant’s argument that the recitation in the judgment concerning an award of costs and disbursements was sufficient to include on appeal the subsequent award of fees as costs, the court in *Praszker, supra*, 220 Cal.App.3d at page 46, footnote 4, stated: “We reject [the defendant’s] facile argument that the recitation in the . . . judgment that [the] plaintiff be awarded judgment together with ‘costs and disbursements’ was sufficient to encompass the subsequently awarded litigation costs.

Under the [trial] court’s order and stipulation of the parties, [the plaintiff] did not become entitled to such costs until a cost bill was filed and the motion to tax determined in a separate proceeding. Moreover, acceptance of [the defendant’s] position would sabotage the rule that postjudgment orders allowing or denying costs and attorneys fees must be separately appealed from, since virtually all judgments routinely provide for ‘costs’ to the prevailing party.”

Here, as in *Praszker, supra*, 220 Cal.App.3d 35, the issue of whether Pacific was entitled to an award of fees was deferred until after judgment and litigated in a separate postjudgment proceeding that resulted in a determination and order in Pacific’s favor. Under the rationale of *Praszker*, the postjudgment order awarding attorney fees was separately appealable and therefore required Silver to file a separate, timely notice of appeal. His failure to do so deprives this court of jurisdiction over his purported appeal from that order and mandates dismissal of that portion of his appeal.

## **DISPOSITION**

Silver's appeal from the order awarding attorney fees to Pacific is dismissed for lack of jurisdiction, and the judgment and other orders of the trial court from which he appeals are affirmed. Pacific American, Peter Huh, and Paul Huh are awarded costs on appeal.

## **CERTIFIED FOR PARTIAL PUBLICATION**

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.