IT IS SO ORDERED.

Dated: 05:22 PM August 11 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 04-54324
	)	
MICHAEL SLYWKA	)	CHAPTER 7
LOUSIE LUBOMYRA SLYWKA,	)	
	)	
DEBTOR(S)	)	
	)	
SAUL EISEN, US TRUSTEE,	)	**ADVERSARY NO. 05-5024**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
MICHAEL SLYWKA	)	
LOUISE LUBOMYRA SLYWKA	)	**MEMORANDUM OPINION RE: OBJECTION OF UNITED STATES TRUSTEE TO DEBTORS' DISCHARGE**
	)	
DEFENDANT(S).	)	

This matter comes before the Court on the amended complaint of the United States Trustee, Region 9 (the "UST") objecting to debtors' discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) and (B) and (a)(4)(A) [docket #22] and defendant-debtors' answer thereto [docket #29]. The Court held a trial in this matter on April 10, 2006. Appearing at the trial were Linda Battisti, counsel for plaintiff

and Steve Hobt, counsel for defendant-debtors. During the trial, the parties presented evidence in the form of exhibits and in the form of testimony from defendant-debtors and Marc Gertz, the chapter 7 trustee administering defendant-debtors' main chapter 7 case.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (J), over which this Court has jurisdiction pursuant to 28 U.S.C. §1334. Based upon testimony and evidence presented at the trial, the arguments of counsel and the documents of record in this adversary proceeding and the main chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Prior to trial, the parties filed the following list of facts which they agree are not in dispute in this matter. *See* docket #33.

1. On August 9, 2004, defendant-debtors filed a joint voluntary petition under Chapter 7 of the Bankruptcy Code.

2. On Schedule A, defendant-debtors listed one parcel of real estate (their residence) located at 3508 Balmoral Drive, Richfield, Ohio. They listed a value of this real estate in the amount of $1,700,000.00 with liens in the total sum of $2,478,000.00.

3. On Schedule B, question 1 "Cash on hand", defendant-debtors checked off "None" and listed $0.00 as the current market value.

4. On Schedule B, defendant-debtors listed the following personal property:

   a. Household goods valued at $1,000.00.
   b. Wearing apparel valued at $500.00.
   c. Miscellaneous jewelry valued in the amount of $0.00.
   d. One SEP retirement account in the amount of $45,000.00.
   e. Accounts receivable owed by HLT, Inc. to the Debtors in the amount of $37,500.00.
   f. A tax refund in the amount of $0.00.

g. Two leased automobiles, a 2002 BMW and a 2002 Lexus valued at $26,696.40.
h. An interest in HLT, Inc. valued at $0.00.
i. Life insurance with no value.

5. In their Amended Schedules filed March 17, 2005 [Main Case docket #49], Schedule B indicates the following personal property:

a. Cash on hand - $200.00.
b. Share draft account 1336C with Cleveland Selfreliance Credit Union, Inc. - $563.02.
c. Share account number 1336 with Cleveland Selfreliance Credit Union, Inc. - $91.12.
d. Checking account with Century Bank - $4,360.76.
e. Money market accounts with Advest, Inc. - $9,629.49.
f. Savings account 3076 with Cleveland Selfreliance Credit Union, Inc. - $147.41.
g. Miscellaneous household goods and furnishings - $8,000.00.
h. Hottub (two person)(12 to 13 years old) - $50.00.
i. 2 Plasma televisions - $2,750.00.
j. Miscellaneous books - $30.00.
k. Various prints and watercolor - $150.00.
l. 45 Longaberger baskets - $500.00.
m. Miscellaneous clothing - $2,000.00.
n. 2 ball gowns - $800.00.
o. Jewelry (items are individually listed) - total $6,275.00.
p. Workout equipment (rowing machine, health rider, Roman chair, slant board, Versa climber, Pilates reformer, assorted weights, weight bench, folding chairs, and a scale) - $300.00.
q. Air rifle - $50.00.
r. Skis - $20.00.
s. Bicycles - $20.00.
t. Portable 4X4 knock down Infared Sauna - $50.00.
u. Interest in a certain SEP IRA account number WBW-810141-94 through Advest, Inc. - $33,766.69.
v. IRA account number WBW-810125-94 with Advest, Inc. - $5,957.32.
w. Monies owed by HRSG to Debtor, Michael Slywka - $37,500.00.
x. Monies owed by Munn Group to Michael Slywka - $4,575,000.00.
y. IRA account number WBW-810117-94 through Advest, Inc. - $904.23.

z. Possible income tax refunds from IRS and State of Ohio for 2003 - $62,000.00.
aa. 2002 Mercury Mountaineer - $16,235.00.
bb. Dell laptop computer (2 years old) - $500.00.
cc. Compac desktop computer and printer (5 years old) - $100.00.

6. On or about July 27, 2004, defendant-debtor, Louise Slywka, withdrew from her IRA account the sum of $17,085.20.

7. On or about August 23, 2004, defendant-debtor, Michael Slywka, withdrew the sum of $25,229.31 from his Advest IRA account WBW-810141 and the sum of $4,768.37 from Advest account number WBW-80125 and deposited such funds in his Refco account TF01 913MF.

8. On or about September 2, 2004, defendant-debtor, Michael Slywka, deposited to his Refco account TF01 913MF the sum of $9,500.00.

9. On or about September 14, 2004, defendant-debtor, Michael Slywka, deposited to his Refco account TF01 913MF the sum of $6,000.00.

10. On or about November 10, 2004, defendant-debtor, Michael Slywka, deposited to his Refco account TF01 913MF the sum of $25,000.00.

In addition to the foregoing stipulated facts, the Court makes the following findings of facts.

1. Marc Gertz is the duly appointed chapter 7 trustee assigned to administer defendant-debtors' main chapter 7 case.

2. Based upon his review of the Schedules initially filed in this case, Mr. Gertz determined that defendant-debtors had no non-exempt assets to administer.

3. The initial § 341 meeting of creditors was scheduled for October 4, 2004 but not held until November 5, 2004. That meeting was further adjourned to and ultimately concluded on December 3, 2004.

4. Pursuant to his inquiry of defendant-debtors at the § 341 meetings, Mr. Gertz concluded that this case warranted additional investigation.

5. As part of his additional investigation, a respresentative of Mr. Gertz visited defendant-debtors' residence to evaluate the nature and state of the household goods located there.

6. Defendant-debtors' non-exempt household goods were ultimately sold by Mr. Gertz at auction for $22,492.50.

7. Upon request of the trustee after the § 341 meetings, defendant-debtors provided him with additional documents including copies of cancelled checks written on defendant-debtors' accounts. Based upon his review of those cancelled checks, the trustee discovered that defendant-debtors had written a sizeable check to a jewelry story in the one year preceding the filing of their chapter 7 case.

8. On July 21, 2005 Mr Gertz filed a motion seeking an order requiring defendant-debtors to turn over "all jewelry including but not limited to the items listed on Amended Schedule B which was filed with the Court on or about March 17, 2005 including the jewelry, which, upon information and belief, Debtors purchased in the amount of $19,275.00 in the one year period preceding the bankruptcy filing." [Main Case - docket #55]. A turnover order was entered on September 21, 2005. [Main Case - docket #65].

9. Pursuant to the September 21, 2005 turnover order defendant-debtors turned over to Mr. Gertz several items of jewelry including a diamond and gold necklace and matching diamond and gold earrings, both of which were introduced as evidence during the trial.[1]

10. Mr. Gertz had both of these items of jewelry appraised. The necklace was appraised at $1,600.00 liquidation value and $6,000.00 replacement value and the earrings were appraised at $1,200 liquidation value and $3,800.00 replacement value. The trustee is aware of no liens on the jewelry and intends to liquidate it for the benefit of the estate.

11. Defendant-debtors have entered into an agreement with the chapter 7 trustee to repay the estate approximately $100,000.00 on account of certain pre-petition financial accounts including investment accounts with Advest.

12. Micheal Slywka holds an engineering degree and is a sophisticated business man who once served as the Chief Executive Officer of HLT Inc., a company with 60 employees, 6 locations and annual sales of approximately $20 million. In August 2003, Mr. Slywka sold HTL Inc. for a sales price of approximately $4 million. Mr. Slywka is also the holder of several patents.

13. Louise Slywka is a trained draftsperson who worked at HLT Inc. from 1989 to 1995 doing inside sales and customer service. Mrs. Slywka maintains all of her family's household books and records.

14. Defendant-debtors filed their chapter 7 bankruptcy petition through the assistance of the same counsel who has been their family attorney for approximately twenty five years. Sometime after their bankruptcy case was filed, defendant-debtors retained Mr. Hobt as their counsel. Mr. Hobt filed the March 17, 2005 Amended Schedules and has represented defendant-debtors at all times in this adversary proceeding.

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[1] Pursuant to the parties' consent at the conclusion of Mr. Gertz's testimony, this jewelry was returned to his custody.

DISCUSSION

Through the amended complaint the UST contends that defendant-debtors should be denied their discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and (B) and (a)(4)(A). At trial, counsel for the UST indicated that she would be proceeding only under § 727(a)(4)(A). To justify denial of a discharge pursuant to 11 U.S.C. § 727(a)(4)(A), the UST must demonstrate, by a preponderance of the evidence, that: (1) defendant-debtors made statements under oath; (2) the statements were false; (3) defendant-debtors knew the statements were false; (4) defendant-debtors made the statements with fraudulent intent; and (5) the statements related materially to the bankruptcy case. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000).

(1) Whether Statements were Made Under Oath: Through the stipulations and during trial, defendant-debtors acknowledged that they each signed the Petition, the Schedules and the Amended Schedules that were filed in this case. Each of those documents contain statements regarding defendant-debtors' financial condition and all were signed by defendant-debtors under penalty of perjury. Additionally, defendant-debtors testified, under oath, during two meetings held by the trustee pursuant to § 341 of the Bankruptcy Code.

(2) Whether False Statements were Made: The information included in the Schedules that were intially filed by defendant-debtors was grossy inaccurate as evidenced by the Amended Schedules filed on March 17, 2005. *See* docket #49. *See also* Stip. #4 and #5, *supra*. Because those amendments included the addition of several large and/or expensive items of personal property that were located in defendant-debtors' home (*e.g.* 2 plasma televisions, 45 Longaberger baskets, portable 4x4 sauna) as well as several investment accounts with significant balances their wholesale omission of such items from the originally filed Schedules cannot have occurred due to

mere oversight or typograhical error. Moreover, during trial, neither defendant-debtor presented any plausible excuse for why such items were not included in their original bankruptcy filing. Accordingly, the Court determines that the information included on defendant-debtors' initially filed Schedules was false.

(3) Whether Defendant-Debtors Knew the Statements were False: During trial, both defendant-debtors stated that they did not review their Petition and Schedules before they were filed. However, during the initial first meeting of creditors, each defendant-debtor answered in the affirmative when asked whether they reviewed the Petition and Schedules and whether the information contained therein was correct. *See* UST Ex. 2 at pg. 2, lines 10-25 and pg. 3, lines 1-4. Based upon such conflicting testimony (all given under oath), coupled with the demeanor of defendant-debtors during trial, the Court concludes that, at the time their Petition and Schedules were filed, defendant-debtors knew that statements contained therein were not accurate. Moreover, given a duty to carefully and thoroughly review the information in their Petition and Schedules to insure that such information is accurate and complete, defendant-debtors may not insulate themselves from accusations of fraud by failing to read these documents prior to signing and filing. *See In re Zimmerman*, 320 B.R. 800, 806 (Bankr. M.D.Pa. 2005).

The conclusion that defendant-debtors knew the information included on their originally filed Petition and Schedules was false is further evidenced by their failure, despite several occasions to do so, to correct their omissions and provide the trustee with accurate information. For instance, during the first § 341 exam, Mr. Gertz questioned defendant-debtors about whether they owned any gold, silver, jewelery, antiques or collectibles worth more than $500.00 per item. In response, Mrs. Slwka stated the following:

MRS. SLYWKA: I collect nothing.

THE TRUSTEE: All right.

MRS. SLYWKA: We've had a house robbed. I collect nothing.

THE TRUSTEE: You've had your what?

MRS. SLYWKA: We had a house robbed.

THE TRUSTEE: You had a --

MRS. SLYWKA: A theft.

THE TRUSTEE: – burglary of your home? When was that?

MRS. SLYWKA: Oh, no, not at this home. No.

THE TRUSTEE: At a previous home? Okay.

MRS. SLYWKA: And I don't collect anything because of that.

See UST Ex. 2 at pg. 17, lines 8-24. It was not until March 17, 2005 (more than four months after this colloqy) that defendant-debtors filed amended Schedules which included, among other things, the diamond necklace and matching earrings which debtors valued at $5,000.00.

The trustee also inquired whether defendant-debtors had any bank accounts. In response to that question Mr. Slywka said, simply, "no." *See* UST Ex. 2 at pg. 15, line 25. The trustee then asked a follow up question that resulted in the following answers by Mrs. Slywka:

THE TRUSTEE: When's the last time either of you had a bank account, savings or checking account?

MR. SLYWKA: (inaudible) checking account at the credit union.

MRS. SLYWKA: At the credit union I had a checking account. I had to stop using it because --

THE TRUSTEE: Okay. Approximately when?

MRS. SLYWKA: At the end of July.

THE TRUSTEE: End of July of this year?

MRS. SLYWKA: Yeah.

THE TRUSTEE: Okay.

MRS. SLYWKA: I think that was the last time I wrote a check.

See UST Ex. 2 at pg. 16, lines 1-13. However, in their Amended Schedules, defendant-debtors disclosed five accounts with balances totaling $14,791.80. *See* docket #49. *See also* Stip. #4 and #5, *supra*. Of the five accounts listed only one is with Advest, Inc. During trial, the trustee testified that further investigation into defendant-debtors' financial affairs revealed several other financial accounts (including three seperate accounts with Advest, Inc.) and that, due to such investigation, defendant-debtors have agreed to repay the estate approximately $100,000.00. *See* UST Ex. 4, 5, 6. Additionally, defendant-debtors have stipulated that less than 2 months prior to filing for bankruptcy they withdrew from their various financial accounts over $47,000.00. *See* Stip. #6 and #7, *supra*.

Based upon the foregoing, the Court finds that, at the time their Petition and Schedules were originally filed, defendant-debtors knew the information contained therein was false. The Court further finds that defendant-debtors knowingly made false statements during the § 341 meeting held on November 5, 2004. *See Richardson v. Clarke (In re Clarke)*, 332 B.R. 865, 872 (Bankr. C.D. Ill. 2005) (noting that requisite intent requirement under § 727(a)(4)(A) may be inferred from circumstantial evidence including a debtor's reckless indifference to the truth). *See also, In re McLaren*, 236 B.R. 882, 895 (Bankr. D.N.D. 1999) ("The requisite intent to deceive exists where a debtor, in the first instance of filing a petition, schedules or statement of financial affairs, makes statements therein, exceeding honest mistake, which are inconsistent or incompatible with her own knowledge and information.").

(4) Whether Defendant-Debtors Made the Statements with Fraudulent Intent:

Given the extent of incorrect and omitted information, the Court further concludes that defendant-debtors' statements were made with fraudulent intent. During trial, both defendant-debtors testified that they relied upon their family attorney to complete their Petition and Schedules and assumed that the information provided therein was accurate. Even if this Court were to credit such testimony, it does not explain why, during the November 5, 2004 § 341 meeting, defendant-debtors were not forthcoming to the trustee about the inaccuracies and omissions in those documents. Nor does it explain why defendant-debtors did not file the Amended Schedules until more than four months after that meeting was held.

The record in this case demonstrates a continued pattern by defendant-debtors of making omissions and false statements in their Schedules and in their responses to questions by the trustee at the meeting of creditors. Even assuming that defendant-debtors did blindly rely upon the advice of counsel, their reckless indifference to learn the truth before seeking protection of the bankruptcy system (or to correct such untruths once discovered) is sufficient to deny their discharge pursuant to 11 U.S.C. §727 (a)(4)(A).

> [T]he very purpose of. . . 11 U.S.C. §727 (a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.

In re Tully, 818 F.2d 106, 110 (1st Cir. 1987). *See also In re Krich*, 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988) (noting that "[a] discharge is a privilege and not a right and therefore the strict requirements of accuracy is a small quid pro quo").

(5) Whether the Statements Related Materially to the Bankruptcy Case: Any matter bearing on discovery of estate property or a debtor's business dealings is material for purposes of § 727(a)(4)(A). *See In re Gannon,* 173 B.R. 313, 319-320 (Bankr. S.D.N.Y. 1994). Because the information omitted from defendant-debtors' Petition and Schedules and their inaccurate answers to the trustee's questions at the § 341 meetings hampered the trustee in discovering all of the assets in this estate that can be administered for the benefit of creditors, the Court finds that the false statements at issue were material to this bankruptcy case.

CONCLUSION

Based upon the foregoing, the Court determines that the UST met his burden in proving that defendant-debtors should be denied a discharge pursuant to § 727(a)(4)(A). A separate judgment consistent with this Opinion will be entered.

# # #

cc: LINDA BATTISTI, Counsel for UST
STEPHEN HOBT, Counsel for Defendant-Debtors
PETER TSARNAS, Counsel for the Chapter 7 Trustee