The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: January 23 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-72243
Jeffrey L. Strobehn and Marielle J. Strobehn,	)	Chapter 7
Debtors.	)	Adv. Pro. No. 05-3431
	)	Hon. Mary Ann Whipple
Louis J. Yoppolo, Trustee,	)	
Plaintiff,	)	
v.	)	
Jeffrey L. Strobehn, et al.,	)	
Defendants.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on a complaint filed by Plaintiff Louis J. Yoppolo, the Chapter 7 Trustee in Defendants' underlying Chapter 7 bankruptcy case, objecting to Defendants' Chapter 7 discharge under 11 U.S.C. § 727(a)(2), (a)(3), (a)(4)(A) and (a)(6)(A). The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference

entered in this district. Proceedings to determine objections to discharge are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(J).

This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, Defendants are entitled to judgment on the complaint.

FINDINGS OF FACT

Defendants Jeffrey and Marielle Strobehn filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on October 6, 2005. They were part of the filing rush preceding the October 17, 2006, effective date of most of the substantial amendments to the Bankruptcy Code added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Marielle Strobehn is 39 years old and is attending Owens Community College where she is completing her final year in the nursing program. She previously has worked as a marketing representative selling insurance, a co-manager of a Victoria's Secret, and most recently a sales representative at Elder Beerman on a part-time basis. Jeffrey Strobehn is 46 years old, has no formal education beyond high school, and is currently unemployed. He had previously been employed as a surgical sales representative for a company for twenty-four years but lost his job approximately two and a half years ago due to restructuring within the company. Approximately five years ago, he had purchased a roofing and siding company and borrowed $75,000 from his mother, Marlene Strobehn, to do so. The business ultimately was not successful and Mr. Strobehn testified that he had to "let it go" approximately two years later due to a poor economy. Marlene Strobehn was not repaid the $75,000 loaned by her.

As a result of Mr. Strobehn's loss of employment and the roofing company, the Strobehns have been struggling financially for several years. As early as October 2003, they had consulted with their attorney regarding bankruptcy. They provided information to their attorney at that time for the purpose of filing a Chapter 13 petition. Significantly, one of their assets was their home that was titled in the name of Marielle Strobehn. Although they had a great deal of equity in the home, they were struggling to make the monthly mortgage payments. Mr. Strobehn, however, was interviewing for a job that Defendants believed he would obtain and, thus, they believed they would be able to fund a Chapter 13 plan. But Mr. Strobehn

was not offered the job and the Chapter 13 petition was not filed. Eventually, on July 27, 2005, just over two months before filing their Chapter 7 petition, Defendants sold their home. After paying the mortgage, two judgment liens and the costs of the sale, Ms. Strobehn received $35,166.66. The ultimate disposition of proceeds of that sale forms the basis of the Trustee's objection to Defendants' discharges.

According to Defendants, they had been unable to make their house payments after Mr. Strobehn lost his job. In an attempt to avoid foreclosure and retain the equity in the home, over time, various family members and several friends had loaned them money for their house payments. Apparently having had decided to sell the home, Defendants promised that the "house-payment" loans would be repaid to each person when the house was sold. There is no documentation of the twenty-one loans that were made to them. After receiving the proceeds from the sale of the home, Ms. Strobehn initially deposited the entire amount in their joint bank account. Within two weeks thereafter, four withdrawals totaling $22,050 were made from the account. Ms. Strobehn testified that $2,000 of those funds were used in order to cover moving expenses, as they had to be out of the house in thirty days, and that the balance was used to repay the twenty-one persons who had loaned them money in order to make their house payments ("the house-payment creditors"). Ms. Strobehn further testified that when the money was withdrawn, Defendants put it in a lockbox in their home and later paid each of the house-payment creditors $950 in cash. She testified that through the move after sale of the house she lost her checks. Ms. Strobehn testified that although many of the house-payment creditors live out of town, they were in town for a family wedding several weeks after the sale of the house. She also testified that additional funds were withdrawn and kept in the lockbox in order to cover Defendants' ongoing living expenses.

In early October 2005, Defendants again consulted with their attorney regarding filing bankruptcy, and on October 6, 2005, their Chapter 7 petition was filed. In their Statement of Financial Affairs, Defendants disclosed the July 2005 sale of their home. However, in response to a request to list all payments made within one year before filing for the benefit of creditors who are or were insiders, Defendants did not list the twenty-one house-payment loans repaid to family members and friends during that time period. Mrs. Strobehn testified that, although she told their attorney that payments to family members had been made, after responding to his inquiry as to whether any payment was more than $1,000,[1] the payments were not included in the Statement of Financial Affairs prepared by him.

On their Schedule F, Defendants scheduled over $292,000 in unsecured nonpriority claims, which

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[1] The Trustee similarly inquired at the first meeting of creditors whether Defendants had paid any family members more than $1,000. [Ex. 15, p. 25, l.10-16].

included over $170,000 in credit card debt and over $101,000 in debts on which judgments had been obtained against them. The credit card debt includes debt relating to the failed business as well as personal debt. Defendants did not, however, schedule the $75,000 owed by them to Marlene Strobehn. According to Defendants, they did not think they could schedule debts owed to family members.

On their original Schedule B, Defendants disclose that they had no cash on hand and only $100 in their checking account on the date of filing. However, on November 23, 2005, at the first meeting of creditors, when questioned regarding the disposition of proceeds received by them at the closing of the sale of their home, Ms. Strobehn informed the Trustee that Defendants repaid people who had loaned them money to make their house payments. When asked by the Trustee whether there was any cash from those proceeds remaining on the date their petition was filed, Ms. Strobehn testified that they had $8,000 left at that time. She further stated that they had been living off of those funds since filing but still had some money left, which she estimated totaled $5,000. The Trustee requested that those funds be turned over to him as soon as possible.

As to the discrepancy between their Schedule B and the cash actually remaining on the date their petition was filed, Ms. Strobehn testified that their attorney had previously prepared bankruptcy schedules when they were contemplating filing a Chapter 13 petition in 2003. That petition was never filed, and she believes the schedules were not completely updated before filing the petition in this case. Ultimately, on January 3, 2006, Defendants amended Schedule B to reflect a total of $4,400 in cash on hand and in their checking account and the Statement of Financial Affairs to disclose the twenty-one $950 payments made within one year of filing to individuals who were insiders. However, based on Ms. Strobehn's testimony at the first meeting of creditors and at trial, the amended schedules are still inaccurate. At the time of commencement of the case, approximately $8,000 was on hand; the $4,400 amount is about what was left by the time of the first meeting of creditors and actually turned over to the Trustee.

On December 6, 2005, not yet having received the funds, the Trustee filed a motion for turnover of $8,000 in cash, a motion for a Rule 2004 examination to be held on December 22, 2005, at 2:00 p.m., and the instant Complaint to Deny Discharge. No responses to the motions were filed and the court granted both motions, ordering Defendants to turn over to the Trustee $8,000 in cash from the sale of real estate and to appear on the date and time designated for a Rule 2004 examination. The order granting the motion for turnover was entered on a default basis on December 22, 2005, at 3:12 p.m.

Ms. Strobehn testified that after the first meeting of creditors, Defendants had trouble contacting their attorney and were unsure of the method of turning money over to the Trustee. Nevertheless, on

December 22, 2005, Defendants delivered to the Trustee a bank check in the amount of $4,425. According to Defendants, that was the total amount of the $8,000 that actually remained after the meeting of creditors.

Having observed the Defendants testify and having considered the circumstances surrounding the filing of their petition, the court finds their testimony to be credible. While Mr. Strobehn had a very poor memory, in particular the court finds Ms. Strobehn's testimony to be credible regarding the cash repayment of loans from family and friends, withdrawing cash in order to cover their living expenses, and the inaccuracies in their original bankruptcy schedules and Statement of Financial Affairs. Withdrawing cash and keeping it in a lock box in their home allowed them to pay their living expenses and, having lost her checks in the move, to repay the house-payment creditors that they promised would be repaid after closing on the sale of their home. Given the financial circumstances of the Strobehns and the relationship of the house-payment creditors, the clear need for such loans and the fact that they were actually made and repaid is credible, notwithstanding the lack of documentation of the loans and their repayment.

While the discrepancy between the schedules and Statement of Financial Affairs originally filed by the Strobehns and what they disclosed to the Trustee at the first meeting of creditors, and later in their amended Schedule B and Statement of Financial Affairs, is troubling, the court ultimately finds their explanation credible. The original Statement of Financial Affairs indicating that payments to their bankruptcy attorney were made between October 16, 2003, and January 8, 2004, corroborates their testimony that they had consulted with their attorney in contemplation of filing bankruptcy at an earlier date and that information had been given to their attorney and schedules had been prepared at that time. *Compare* Ex. 1, Case No. 05-72243 Statement of Financial Affairs Q. 9 *with* Ex. 1, Case No. 05-72243 Disclosure of Compensation of Attorney for Debtors. No additional attorney fees are disclosed as being paid with respect to the bankruptcy petition that was actually filed in this case in 2005. While disconcerting, and essentially forcing the Trustee to commence this adversary proceeding, the court finds it more likely than not that the serious inaccuracies are in large part due to carelessness resulting from the panicked rush to file bankruptcy before October 17, 2005.

In July 2006, Defendants' attorney was permitted to withdraw as counsel in this adversary proceeding. Since then, Defendants have since proceeded pro se in this adversary proceeding.

LAW AND ANALYSIS

Under 11 U.S.C. § 727, as in effect prior to BAPCPA, an individual debtor is entitled to a discharge unless one of the ten enumerated exceptions to discharge specified in that section is established. Consistent

with the fresh start policy underlying the Bankruptcy Code, exceptions to discharge must be construed strictly against the objecting party and liberally in favor of the debtor. *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000). The party objecting to the discharge has the burden of proving by a preponderance of the evidence that an exception applies. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). Plaintiff objects to Debtor's Chapter 7 discharge pursuant to § 727(a)(2), (a)(3), (a)(4)(A) and (a)(6)(A).

Initially, the court notes that on the face of the documentary evidence before it and before the Trustee, it appears that there was a violation of the Strobehns' duty to honestly and fully disclose information and participate in the bankruptcy process such that they would not be entitled to a discharge. *See Palik v. Sexton (In re Sexton)*, 342 B.R. 522, 530 (Bankr. N.D. Ohio 2006) (stating that the central purpose of discharge is relief for the honest but unfortunate debtor). But the Strobehns' testimony offered at trial, testimony that the court finds credible, indicates otherwise. The court will address each of the Trustee's claims separately below.

I. 11 U.S.C. § 727(a)(2)

Section 727(a)(2) provides that:

> (a) The court shall grant the debtor a discharge unless–
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> > (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed--
> >
> > > (A) property of the debtor, within one year before the date of the filing of the petition; or
> > >
> > > (B) property of the estate, after the date of the filing of the petition[.]

Both subparts of this section require a plaintiff to prove, by a preponderance of the evidence, the following two elements: "1) a disposition of property, such as concealment and 2) 'a subjective intent on the debtor's part to hinder, delay or defraud a creditor [or an officer of the estate] through the act disposing of the property.'" *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000) (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). Although direct proof of intent will rarely be available, intent to hinder, delay or defraud may be inferred from circumstantial evidence or from the debtor's course of conduct. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 724 (B.A.P. 6th Cir. 2003).

In support of his claim, the Trustee relies on the facts that the Strobehns withdrew nearly $30,000 from their checking account within a few months of filing their petition and had $8,000 of those funds left at the time of filing, only $4,425 of which was turned over to the Trustee on December 22, 2005.

Defendants' prepetition use of funds would be the subject of the Trustee's claim under § 727(a)(2)(A). The use of the remaining nonexempt proceeds of sale after the petition date would be the subject of § 727(a)(2)(B) as these funds became property of the estate on October 6, 2005. *See Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 328-29 (Bankr. N. D. Ohio 2006). As to both Debtors' property prepetition and property of the estate post-petition, the Trustee has proven disposition by the Strobehns. However, the court finds that the record does not establish the requisite actual intent to hinder, defraud or delay either creditors or the Trustee as an officer of the estate. As discussed above, the court believes that the Strobehns actually did use a large portion of those funds before filing their petition in order to fulfill their promises to repay their family and friends who had loaned them money to make their house payments during their nearly two and half years of financial difficulty. The remainder of the funds not turned over to the Trustee were used both prepetition and postpetition to cover their living expenses. The most serious issue is the Strobehns' expenditure of the remaining funds, which had not been disclosed on their schedules, between the filing of the bankruptcy case and the first meeting of creditors. The nonexempt portion of the $8,000[2] was clearly property of the bankruptcy estate that Defendants were not legally entitled to spend after filing their petition.

The court finds that Defendants did not dispose of the money with the requisite intent to hinder, delay, or defraud either a creditor or the Trustee. The fact that Defendants did properly disclose the sale of their home in their Statement of Financial Affairs weighs against a finding that they were attempting to conceal the proceeds of that sale from the Trustee. While the disclosure at the first meeting of creditors of information omitted from a debtor's schedules does not automatically "cure" the original omission, Ms. Strobehn did not hesitate in disclosing at the first meeting of creditors the estimated amount then remaining from the sale of their home or the fact that cash payments were made to the house-payment creditors. Her testimony has remained consistent through the first meeting, the 2004 examination and at trial. Disclosing this information at the first meeting of creditors in this case supports the court's conclusion that Defendants' post-petition disposition of some $3,500 in funds was undertaken without fraudulent intent or intent to hinder or to delay creditors or the Trustee. And the record does not display any knowledge or information

[2]Based on Debtors' original Schedule C, it appears that at least $1,600 of these funds could have been jointly claimed as exempt through unused exemption amounts available under Ohio Rev. Code § 2329.66(A)(4)(a) [$100 in bank account claimed, with $700 remaining] and (18) [$800 remaining]. [Ex. 1 (Case No. 05-72243, Doc. #1, Schedule C)]. Debtors' amended Schedule C [Ex. 6] claims $800 of the $4,400 in funds disclosed as exempt under Ohio Rev. Code § 2329.66(A)(4)(a). But given the incorrect disclosure that persists and the post-petition dissipation of more than the $1,600 amount that could originally have been claimed exempt with accurate disclosure, where $8,000 should have been scheduled, the court finds that no part of the $4,425 in funds actually turned over to the Trustee by Debtors [Ex. 8] is exempt.

that Defendants had one way or another as to property of the estate, their obligations respecting property of the estate and the requirement that it be preserved after filing and turned over to the Trustee, or the bankruptcy system in general beyond Ms. Strobehn's identification of the difference between Chapter 7 and Chapter 13. *Cf. id.* at 329. ("Debtor transferred property of the estate [$80,000 in personal injury settlement proceeds], with the knowledge that the property should have been turned over to the Trustee."); *In re Searles*, 317 B.R. 368, 379 (B.A.P. 9th Cir. 2004)(requisite intent inferred where debtor did not hand community property over to the trustee and instead "engaged in prolonged warfare with the trustee resisting surrender of property that was unambiguously property of the estate.").[3] Defendants are, therefore, entitled to judgment in their favor on this claim.

II. 11 U.S.C. § 727(a)(3)

A debtor will be denied a discharge if he has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. § 727(a)(3). The purpose of this provision is "to give creditors and the bankruptcy court complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." *Meridian Bank v. Alten*, 958 F.2d 1226, 1230 (3rd Cir. 1992); *see Turocy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999). It also ensures that "creditors are supplied with dependable information on which they can rely in tracing a debtor's financial history." *Meridian Bank*, 958 F.2d at 1230.

The Trustee, as the objecting party, has the initial burden of proving Defendants' lack of records within the meaning of § 727(a)(3). *Strzesynski v. Devaul (In re Devaul)*, 318 B.R. 824, 829 (Bankr. N.D. Ohio 2004). In order to meet his burden, he must (1) offer evidence of the general nature of Defendants' business or personal financial position and the types of transactions about which recorded information is sought, (2) present evidence identifying the recorded information he alleges has been concealed, destroyed, mutilated, falsified or not kept or preserved by Defendants, and (3) show how the missing recorded information "might" enable Defendants' actual financial condition or business transactions to be ascertained under the circumstances of the case. *Id.* at 833. Once the Trustee's initial burden is met, the burden of proof shifts to Defendants to justify the lack of records. *Id.* at 829. Although the Bankruptcy Code does not specify what constitutes justification, it requires the court to make a determination based on "all of the

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[3]These claims by their very nature often implicate important aspects of the attorney -client relationship, and can create thorny issues relating to ongoing representation and testimony.

circumstances of the case." 11 U.S.C. § 727(a)(3). The Third Circuit set forth the following oft cited standard that courts should employ in deciding whether a debtor has proven justification for missing records:

> The issue of justification depends largely on what a normal, reasonable person would do under similar circumstances. The inquiry should include the education, experience, and sophistication of the debtor; the volume of the debtor's business; the complexity of the debtor's business; the amount of credit extended to debtor in his business; and any other circumstances that should be considered in the interest of justice.

Meridian Bank v. Alten, 958 F.2d 1226, 1231 (3rd Cir. 1992).

In this case, the Trustee has met his burden of proving that Defendants failed to keep records from which their financial condition might be ascertained. First, he offered evidence of withdrawals made from Defendants' checking account over a two week period after their house closing. These withdrawals are the transactions about which he sought recorded information. The records identified by the Trustee that were not kept by Defendants include loan documents for the twenty-one $950 house-payment loans and cancelled checks or other such documentation of the repayment of those loans, both of which would obviously enable the Trustee to ascertain Defendants' actual financial condition, especially as it pertains to the proceeds of the sale of their home. It is therefore incumbent upon Defendants to justify their failure to keep these records.

The court notes that, while Defendants appear to be intelligent individuals, Mr. Strobehn has only a high school education and Ms. Strobehn's ongoing education is in nursing. Both have sales backgrounds. With respect to loan documents, the trial testimony indicates that all of the house-payment loans were made by family and friends for the purpose of assisting Defendants in avoiding foreclosure and retaining the equity in their home. The loans were all for a relatively modest amount. Under the circumstances, it is not unreasonable that the parties to those loan agreements did not reduce their agreements to promissory notes or other writings. Likewise, with respect to repayment of those loans, it was not unreasonable that the payments were made in cash rather than by check. Ms. Strobehn lost their checks in the move; the checking account records for July, August and September 2005 admitted in evidence show a gap in written check numbers and a gap of at least 10 days in August in the clearing of checks. [Exs. 9-11]. Again, payments were being made to family and friends by financially unsophisticated individuals. The funds did not involve a business transaction but were simply part of Defendant's personal finances, which they largely operated on a cash basis. Defendants testified that they had received cash from their family and friends at the time the loans were made and, therefore, used cash to repay those loans. Given the relationship of the parties, the nature and simplicity of the transactions, and the lost checks, the failure to keep recorded

documentation of the house-payment loans and their repayment is justified under the circumstances. As such, Defendants are entitled to judgment on this claim.

III. 11 U.S.C. § 727(a)(4)

Section 727(a)(4) provides that "[t]he court shall grant the debtor a discharge unless. . .the debtor knowingly and fraudulently, in or in connection with the case. . .made a false oath or account[.]" 11 U.S.C. § 727(a)(4)(A). In order to prevail, a plaintiff must prove, by a preponderance of the evidence that:

> 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case.

Keeney v. Smith (In re Keeney), 227 F.3d 679, 685 (6th Cir. 2000). A false oath includes false statements or omissions in a debtor's schedules. *Huntington Center Partners, Ltd. v. Dupree (In re Dupree),* 197 B.R. 928, 937 (Bankr. N.D. Ala.,1996). A false oath is material if it "'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" *Keeney*, 227 F.3d at 686 (quoting *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). While a false statement knowingly made or an omission made with reckless indifference to the truth may be grounds for denying a Chapter 7 discharge, a debtor is entitled to a discharge if the false statement is the result of mistake or inadvertence. *Keeney*, 227 F.3d at 686.

In this case, the Trustee alleges that Defendants made a false oath or account by not listing on Schedule B the $8,000 left from the proceeds of the sale of their home on the date they filed their bankruptcy petition, by failing to list the payments made in satisfaction of the house-payment loans from family and friends in their Statement of Financial Affairs, and by failing to list Marlene Strobehn, Jeffery Strobehn's mother, as a creditor to whom they owed $75,000. There is no dispute that the failure to include the above information in their schedules and Statement of Financial Affairs constitutes statements made by Defendants, that those statements were false, and that the statements were made under oath. There is also no dispute that these false statements related materially to this case in that they concerned the disclosure of assets of the estate, business dealings, and the disposition of property within ninety days before filing their petition. However, the Trustee did not meet his burden of proving that Defendants made those statements with fraudulent intent.

As discussed earlier, rather than fraud, the court finds the inaccuracies in Defendants' schedules and Statement of Financial Affairs to be symptomatic of the slap-dash bankruptcy practice that burgeoned in panicked rush to file bankruptcy before October 17, 2005. Thousands of cases were filed in the weeks leading up to that date. Unfortunately, the sheer number of cases attorneys were dealing with resulted in

inadvertent errors and, at times, poor communication regarding what was required of debtors. The court is convinced that is what occurred in this case. While debtors have a duty to disclose such information as was omitted in this case without being specifically asked for the information and to carefully prepare their bankruptcy schedules, given the climate in which this case was filed and the fact that Defendants freely and, the court believes, truthfully, orally disclosed all of the information when questioned by the Trustee at the first meeting of creditors, the court concludes that they lacked the fraudulent intent necessary to support a claim under § 727(a)(4)(A). The previously prepared schedules were not thoroughly updated. Both their lawyer and the trustee focused on whether they had made any payments to any one person aggregating over $1000, and they had not. Both misunderstood and thought that they could not list debts owed to family members such as Marlene Strobehn. Defendants are, therefore, entitled to judgment on this claim.

IV. 11 U.S.C. § 727(a)(6)(A)

Section 727(a)(6)(A) provides that a debtor who "has refused . . . to obey any lawful order of the court, other than an order to respond to a material question or to testify" must be denied a discharge in bankruptcy. The word "refused" as used in § 727(a)(6)(A) must be distinguished from the word "failed" that is used elsewhere in § 727(a). As a consequence, something more than a mere failure to comply with a court order must be established to deny a debtor's bankruptcy discharge. *Yoppolo v. Freeman (In re Freeman)*, 293 B.R. 413, 415 (Bankr. N.D. Ohio 2002). Courts have determined that the showing necessary to deny a debtor a discharge for refusing to obey an order is the same as that for determining whether to hold a party liable for civil contempt. *Id.*; *Hazlett v. Gorshe (In re Gorshe)*, 269 B.R. 744, 747 (Bankr. S.D. Ohio 2001); *United States v. Richardson (In re Richardson),* 85 B.R. 1008, 1011 (Bankr. W.D. Mo. 1988); *see Jordan v. Smith,* 2006 U.S. Dist. LEXIS 71077, *6--*11 (E.D. Va., September 26, 2006)(characterizes majority approach to refusal as requiring willful and intentional disobedience and minority approach as using civil contempt proceeding analysis). In a civil contempt proceeding, three elements must be established: "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite." *Freeman*, 293 B.R. at 415-16.

In this case, it is undisputed that Defendants violated the court's order for turnover of $8,000 remaining from the proceeds of the sale of their home on the date their petition was filed, which the court finds was specific and definite, by turning over only $4,425 rather than the entire amount. The court's order was served on both Defendants and on their counsel. [Exs. 2 and 4; s*ee* Case No. 05-72243, Doc. # 17,

Notice of Order].[4] Thus, there is no dispute that the Trustee has met his burden with respect to each of these elements.

Nevertheless, impossibility or an inability to comply with a judicial order is a valid defense to a charge of civil contempt and, thus, is a valid defense under § 727(a)(6)(A). *Id.* at 416. "Such a defense is, however, only effective where after using due diligence the person, through no fault of their own, is still unable to comply with the order. In other words, the contemnor must establish that he has been reasonably diligent and energetic in attempting to comply with the court's mandate by taking all reasonable steps within his power to ensure compliance." *Id.* (citing *Palmigiano v. DiPrete*, 710 F. Supp. 875, 882 (D.R.I. 1989) (explaining that the crux of the impossibility defense is a lack of power to carry out the orders of a court due to circumstances beyond one's control)).

The court finds that Defendants have established that they were unable to comply with the turnover order entered on December 22, 2005. Although Defendants told the Trustee at the first meeting of creditors on November 28, 2005, that they had $8,000 left from the proceeds of the sale of their home on the date they filed their petition, they estimated that they had only $5,000 left at the time of the meeting, as they had been using the funds for living expenses. Thus, on December 6, 2005, the date the motion for turnover was filed, as well as on the date the order for turnover was entered, Defendants were unable to turnover the entire sum of $8,000.[5] Nevertheless, on the same date as the order was entered, and presumably before they were even aware of the order, Defendants delivered to the Trustee a bank check in the amount of $4,425, which they testified was the actual amount remaining at the time of the first meeting of creditors. Although there had been a delay of approximately three weeks after the Trustee had requested turnover of the funds that they had remaining, the court does not find the delay significant. Defendants were waiting for their attorney to instruct them as to the manner in which the turnover should occur. When such instruction was not forthcoming, Defendants took steps to carry out the Trustee's request, presumably delivering the check at their Rule 2004 examination scheduled on December 22, 2005. Thereafter, they believed they had complied with the order notwithstanding the difference between the amount in the order and the amount turned over. Given the amount of funds actually remaining as of the first meeting and the amount actually turned over on December 22, the motion was inexplicably not opposed and no effort to obtain relief from the order after

[4] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

[5] The court notes that although Defendants were still represented by counsel at the time the motion was filed, no response was filed and the motion was granted on a default basis.

entry was undertaken. *See Gillman v. Green (In re Green)*, 335 B.R. 181, 184 (Bankr. D. Utah)(debtor did not refuse to obey lawful order to turnover tax refunds, because the demand had not been made and the order was not in place at the time debtor acted in spending refunding money); *In re Pyatt,* 348 B.R. 783, 789 (B.A.P. 8th Cir. 2006)(turnover order reversed, because "[r]equiring turnover of property or its value from the debtor...who is not in possession of that property is contrary to common sense, Supreme Court precedent and the statute itself."). *Cf. LaBarge v. Ireland (In re Ireland)*, 325 B.R. 836, 838 (Bankr. E.D. Mo. 2005)(refusal to obey order found where order received and no request for relief from order made). The court also notes that Mr. Strobehn was at that time, and is still, essentially unemployed and Ms. Strobehn was attending school and working only part-time. The court concludes that Defendants took all reasonable steps within their power, but that they lacked the ability, to fully comply with the court's turnover order. Finding full compliance an impossibility, the court finds that the failure to comply does not amount to refusal in this case and further finds that Defendants are entitled to judgment on this claim.

CONCLUSION

The Trustee should not have had to pursue this adversary proceeding, which he was essentially forced to file by the serious inaccuracies in Defendants' bankruptcy schedules and by the unfolding of events in their Chapter 7 case after its commencement. Before trial, the court was at the very least highly skeptical that Defendants were the type of honest but unfortunate debtors for whom discharge is reserved by the Bankruptcy Code, based just on the number and magnitude of the errors in their schedules. But that is why cases must be decided based on evidence and through trial. After seeing and hearing the Strobehns' testimony as well as reviewing their testimony at the first meeting of creditors and their 2004 examination, the court is convinced that they are entitled to a discharge. Finding that the Trustee has failed to meet his burden under 11 U.S.C. § 727(a)(2) and (a)(4)(A), and finding that Defendants have met their burden of justifying a lack of records under § 727(a)(3) and of demonstrating impossibility under § 727(a)(6)(A), judgment will be entered in Defendants' favor on those claims. A separate judgment in accordance with this Memorandum of Decision will be entered by the Court.

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