Dated: February 22, 2011
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re EARL BENARD BLASINGAME and MARGARET GOOCH BLASINGAME,
Debtors.

Case No. 08-28289-L
Chapter 7

EDWARD L. MONTEDONICO, CHAPTER 7 Trustee; CHURCH JOINT VENTURE, A Limited Partnership; and FARMERS & MERCHANTS BANK, Adamsville,
Plaintiffs,

v.

Adv. Proc. No. 09-00482

EARL BENARD BLASINGAME and MARGARET GOOCH BLASINGAME,
Debtors/Defendants,

KATHERINE BLASINGAME CHURCH, EARL BENARD "BEN" BLASINGAME, JR.,
Necessary Parties,

BLASINGAME FAMILY BUSINESS INVESTMENT TRUST,
BLASINGAME FAMILY RESIDENCE GENERATION SKIPPING TRUST,
THE BLASINGAME TRUST,
Defendant Trusts,

FLOZONE SERVICES, INC.;
FIBERZONE TECHNOLOGIES, INC.;
BLASINGAME FARMS, INC.;
GF CORPORATION;
AQUA DYNAMICS GROUP CORPORATION;
Defendant Corporations.

MEMORANDUM ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DISCHARGE CLAIMS

I. INTRODUCTION

THIS ADVERSARY PROCEEDING is before the court upon the Complaint To Recover Property of the Estate, For Declaratory and Injunctive Relief, To Object to and Avoid Discharge and To Object to Claimed Exemptions filed September 9, 2009, by the Plaintiffs: Edward L. Montedonico, Chapter 7, Trustee; Church Joint Venture, a Limited Partnership; and Farmers & Merchants Bank, Adamsville. The Plaintiffs object to the Debtors' Discharge pursuant to 11 U.S.C. § 727(a)(2)(A); 727(a)(2)(B); 727(a)(4); and 727(a)(5). The Debtors filed their answer on November 25, 2009. After extensive discovery, on April 26, 2010, the Plaintiffs filed their Motion for Partial Summary Judgment on Discharge Claims with supporting documents. Adv. Doc. Nos. 74 and 75. The Debtors filed their Response to the Motion for Partial Summary Judgment and supporting documents on June 30, 2010. Adv. Doc. No. 99. On July 12, 2010, the Plaintiffs filed a Reply to the Defendants' Response. Adv. Doc. No. 106. The Motion for Partial Summary Judgment on the Discharge Claims was submitted to the Court without oral argument on August 11,

2010, and is now ripe for decision. This is a core proceeding. 28 U.S.C. § 157(b)(2)(J). The following constitutes findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7056.[1]

The court is to grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56, incorporated at Fed. R. Bank. P. 7056. The Sixth Circuit Court of Appeals has described the standard as follows:

> [T]he moving party may discharge its burden by "pointing out to the [bankruptcy] court ... that there is an absence of evidence to support the nonmoving party's case." The nonmoving party cannot rest on its pleadings, but must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show that there is a genuine issue for trial. Although we must draw all inferences in favor of the nonmoving party, it must present significant and probative evidence in support of its complaint. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]."

Hall v. Tollett, 128 F.3d 418, 421-22 (6th Cir. 1997) (internal citations omitted). In a recent unpublished opinion, the Bankruptcy Appellate Panel surveyed the law concerning materiality in a summary judgment proceeding concerning discharge. The panel said,

> A material fact is one whose resolution will affect the determination of the underlying action. *Tenn. Dep't of Mental Health & Mental Retardation v. Paul. B.,* 88 F.3d 1466, 172 (6th Cir. 1996). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *Schaffer v. A.O. Smith Harvestore Prods., Inc.,* 74 F.3d 722, 727 (6th Cir. 1996) (citations omitted). "The substantive law determines which facts are 'material' for summary judgment purposes." *Hanover Ins. Co. v. American Eng'g Co.,* 33 F.3d 727, 730 (6th Cir. 1994) (citations omitted).

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[1] The motion was filed prior to the December 1, 2010, effective date of amendments to Federal Rule of Civil Procedure 56 made applicable by Federal Rule of Bankruptcy Procedure 7056. References herein are to the rule prior to amendment.

> In determining whether each party has met its burden, the court must keep in mind that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

In re Rivera, 356 B.R. 786, 2007 WL 130415, at *4 (6th Cir. BAP 2007). The Plaintiffs, as the moving parties, bear the initial burden of proving that there are no genuine issues of material fact, and that they are thus entitled, as a matter of law, to a declaration that the Debtors are not entitled to discharge. If they are able to accomplish this, the burden then shifts to the Debtors, as the non-moving parties, to provide sufficient proof through the use of affidavits and other evidence of an issue requiring trial. *Harris v. Gen. Motors, Corp.*, 201 F.3d 800, 802 (6th Cir. 2000).

II. EVIDENTIARY RECORD

The motion for partial summary judgment is supported by a Statement of Undisputed Facts and an Appendix consisting of some 42 documents, including documents filed in the Debtors' Chapter 7 bankruptcy case, excerpts from the Rule 2004 examinations of Benard Blasingame, Margaret Gooch Blasingame, Joyce Long, and Katherine Gooch Blasingame; the Authentication Affidavit of Williams Rhodes Platt, County Executive Officer, United States Department of Agriculture, Farm Services Agency, McNairy/Chester County FSA, Tennessee Office, with copies of three Conservation Reserve Program contracts attached; the Affidavit of Greer Simonton, appraiser, with a copy of his appraisal report for personal property in the residence of Benard Blasingame attached; and the Affidavit of Bruce W. Akerly, attorney for the Plaintiffs Church Joint Venture and Farmers & Merchants Bank, to the effect that the deposition transcript included in the appendix are true and correct copies of deposition testimony.[2] Adv. Doc. No. 74. Also included in

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[2] The record reflects that in fact these were examinations taken pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure rather than depositions taken pursuant to Rule 7030.

the appendix as items 21 through 40 are copies of various documents that appear to have been produced by the Debtors in response to requests by the Plaintiffs. Although they have been numbered, the court has found it very difficult to identify these documents from the examination excerpts provided by the Plaintiffs. In addition to the Statement of Undisputed Facts and the Appendix, the Plaintiffs filed a legal memorandum in support of their motion. Adv. Doc. No. 75.

The Debtors filed their Response to the Motion for Partial Summary Judgment on June 30, 2010, which is supported by a legal memorandum, an appendix which will be described in more detail, and an item by item response to the Plaintiffs' Statement of Undisputed Facts, which was signed by Attorney Joseph T. Townsend, as attorney for the Debtors, and Attorney Martin A. Grusin, as attorney for the "Trusts" and "Corporations," but not by the Debtors. Adv. Doc. No. 99. The Debtors filed no independent statement of undisputed facts. The Appendix of the Debtors consists of copies of six trust agreements, the Plaintiffs' Response to the Non-Debtor Defendants' Amended Motions to Dismiss (Summary Judgment) filed in this adversary proceeding (Adv. Doc. No. 89); a series of affidavits, each of which is virtually identical in content, but signed individually by Earl Benard Blasingame, Debtor; Margaret Gooch Blasingame, Co-Debtor; Joyce Long; Katherine Blasingame Church; Earl Benard Blasingame, Jr.; Earl Benard Blasingame, Co-Trustee of The Blasingame Family Business Investment Trust; Margaret Gooch Blasingame, Co-Trustee of The Blasingame Family Business Investment Trust; Earl Benard Blasingame, Co-Trustee of the Blasingame Family Development Generation Skipping Trust; Margaret Gooch Blasingame, Co-Trustee of the Blasingame Family Development Generation Skipping Trust; Earl Benard Blasingame, Co-Trustee of the Blasingame Residence Trust; Margaret Gooch Blasingame, Co-Trustee of the Blasingame Residence Trust; Margaret Gooch Blasingame, President of G.F.

Corporation; Katherine Blasingame Church, President of Flozone Services, Inc.; Katherine Blasingame Church, President of Fiberzone Technologies, Inc.; Earl Benard Blasingame, Representative for Aqua Dynamics Group Corporation (Administratively Dissolved); Earl Benard Blasingame, Representative of Blasingame Farms, Inc. (Administratively Dissolved); and the "Joint Affidavit in Support of Amended Motion to Dismiss Aqua Dynamics Group Corporation, Flozone Services, Inc., Fiberzone Technologies, Inc., G.F. Corporation, Blasingame Farms, Inc., The Blasingame Family Business Investment Trust, the Blasingame Family Development Generation Skipping Trust, The Blasingame Residence Trust, The Blasingame Trust, Katherine Blasingame Church and Earl Benard Blasingame, Jr., as Defendants in Adversary Action Number 09-00482." The affidavits are followed in the appendix by five additional documents. The court has been able to discover no authenticating affidavit for the various trust agreements and the final five documents included in the Debtors' Appendix.

On July 12, 2010, the Plaintiffs filed a Reply to the Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment on Discharge Claims, together with an exhibit that purports to be a copy of a sale listing for a pistol offered in the name of "Benard Blasingame" dated October 2009. Adv. Doc. No. 106. There is no accompanying affidavit. In their Reply, the Plaintiffs object to the court's consideration of the affidavits filed by the Debtors and incorporate their prior objection to the Joint Affidavit, which was originally filed in connection with the Non-Debtor Defendants' Amended Motions to Dismiss (Summary Judgment). The original Joint Affidavit was filed April 22, 2010 (Adv. Doc. No. 73), and the Plaintiffs' Objection and Motion to Strike was filed June 1, 2010 (Adv. Doc. No. 88). The Defendants have not filed a response to the Objection and Motion to Strike. In their Reply, the Plaintiffs renew their objection and ask that their Motion to

Strike be extended to the separate affidavits filed in the Debtors' Response to the Motion for Partial Summary Judgment because the Debtors have created separate affidavits, but with language virtually identical to the language of the original Joint Affidavit.

The Plaintiffs object to the Joint Affidavit filed by the various non-Debtor Defendants on the basis that it does not comply with the requirements of Rule 56(e). Specifically, the Plaintiffs allege the following with respect to the Joint Affidavit:

> The Joint Affidavit should be struck and disregarded because, on its face, it does not comply with the requirements of Rule 56(e). It does not state or show that any fact is made upon personal knowledge of any of the affiants. It does not evidence the competency of the multiple affiants. It contains legal conclusions based on inadmissable evidence. It contains the testimony of multiple affiants. Even if the affidavit somewhere stated or evidenced that it was made upon the personal knowledge of a competent witness, which it does not, it would be impossible for Plaintiffs to determine which statement came from which witness. Each witness in this affidavit is testifying from a different basis of personal knowledge and they cannot or do not personally know the same facts. The affidavit does not attempt to evidence the base of knowledge of each affiant, nor does it attempt to attribute particular facts to the affiant with personal knowledge of that fact. The joint affidavit is akin to each of the affiants taking the witness stand together and testifying at the same time. It would not be permitted in this Court as evidence at trial, and, therefore, it should not be permitted in the context of evidence submitted in support of a motion for summary judgment.

Plaintiffs' Objections to and Motion to Strike Joint Affidavit in Support of Non-Debtor Defendants' Amended Motions to Dismiss (Summary Judgment), Adv. Doc. No. 88, p. 4. Affidavits filed in support of or in opposition to a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated [and i]f a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit." Fed. R. Civ. P. 56(e)(1). An affidavit that does not meet these requirements is subject to a motion to strike. *Roberts v. Oliver (In re Oliver)*, 414 B.R. 361, 368 (Bankr. E.D. Tenn. 2009) citing *Collazos-Cruz v. United States*, 117

F.3d 1420 (table), 1997 U.S. App. LEXIS 17196, at *6-7, 1997 WL 377037, at *2 (6th Cir. 1997). Without belaboring the point, each of the objections raised by the Plaintiffs to the Joint Affidavit is well-taken: the Joint Affidavit in no way complies with the requirements of Rule 56(e)(1) and will be disregarded by the court.

The Debtors attempted to remedy the defects in the Joint Affidavit by filing the various affidavits included in their Appendix. While these affidavits are troubling, there has been some attempt on the part of the various affiants to indicate portions of the affidavit made by them. The court will consider these affidavits only insofar as they set forth facts known to the affiant as made manifest in the affidavit. *Evans v. Technologies Application & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (Court could consider portions of affidavits based on personal knowledge and properly struck and disregarded portions that were conclusory and outside personal knowledge of affiant.). The various affidavits also contain much that can only be characterized as legal argument. This will not be regarded by the court. See, *Pfeil v. Rogers,* 757 F.2d 850, 862 (7th Cir. 1985) (Legal argument in an affidavit "is not a recitation of a 'fact' to which an affiant is competent to testify" and may be disregarded.). Likewise, there are numbers of factual assertions and legal arguments based on factual assertions included in the Debtors' responses to the Plaintiffs' Statement of Undisputed Facts that are not supported by the record. These will not be regarded by the court, which will be made known in connection with specific arguments of the parties. Further, there are a number of documents included in both the Plaintiffs' Appendix and the Debtors' Appendix that have not been authenticated. As noted, documents submitted in support of a motion for summary judgment should satisfy the requirements of Rule 56(e). Otherwise, upon objection, they may be disregarded by the court. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 89 (6th Cir. 1993); *Moore v.*

Holbrook, 2 F.3d 697, 699 (6th Cir. 1993). Absent objection, however, such documents may be considered by the court. *Johnson v. U.S. Postal Serv*., 64 F.3d 233, 237 (6th Cir. 1995). "[I]t is a well accepted principle that 'as is true with other material introduced on a summary judgment motion, uncertified or otherwise inadmissable documents may be considered by the court if not challenged.'" *In re Mezvinsky,* 265 B.R. 681, 693, n.19, (Bankr. E.D. Penn. 2001), quoting, 10A Charles A. Wright, et al, FED. PRAC. AND PROC. § 2722 at 384 (1998). Moreover, the failure to object to evidentiary material submitted in support of a summary judgment motion constitutes a waiver of the objection. *Johnson at 237; Wiley v. U.S.*, 20 F.3d 222, 225-26 (6th Cir. 1994). Accordingly, if necessary in this proceeding, the court may consider otherwise inadmissable documents to which no objection has been raised.

Finally, the Plaintiffs have chosen to rely upon testimony taken in connection with Rule 2004 examinations of various parties. In an adversary proceeding, discovery is governed by Rules 26 through 37 of the Federal Rules of Civil Procedure, incorporated by Rules 7026 through 7037 of the Federal Rules of Bankruptcy Procedure. Once an adversary proceeding is commenced, discovery must proceed according to those rules. See*, In re Oliver*, 414 B.R. at 371, citing *In re Enron Corp.,* 281 B.R. 836, 840-42 (Bankr. S.D.N.Y. 2002) ("Contrasting the 'broad and unfettered ... fishing expeditions' allowed under Bankruptcy Rule 2004 with the discovery procedure allowed under the Federal Rules of Civil Procedure once an adversary proceeding or contested matter is commenced."). In this case, however, the examinations were taken in anticipation of the filing of the complaint. Thus, the examination transcripts will not be categorically excluded from the court's consideration. See, *In re Southeastern Materials, Inc*., 2010 WL 5128608, *5 (Bankr. M.D.N.C. 2010). The court's task has been made extremely difficult, nonetheless, because of the numerous

references in the examination transcripts to documents that cannot be easily identified.

III. FINDINGS OF FACT

Although the Plaintiffs have listed numerous facts in support of their motion for partial summary judgment, many of these are disputed by the Debtors. The court has chosen to focus on the following facts, which are not in dispute, because it believes that these are more than adequate to support the Plaintiff's motion.

The Debtors are residents of Adamsville, Tennessee, and filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on August 15, 2008. The Schedules, Statement of Financial Affairs, and amendments to these documents were signed by the Debtors under penalty of perjury. Plaintiff Edward L. Montedonico was appointed trustee on August 15, 2008. Plaintiff, Church Joint Venture holds an unsecured claim against the Debtors in excess of $4 million evidenced by a judgment entered January 22, 1996. Plaintiff Farmers & Merchants Bank holds an unsecured claim against the Debtors in excess of $5 million evidenced by a judgment entered November 2, 1998.

The Plaintiffs timely filed their Complaint to Recover Property of the Bankruptcy Estate, For Declaratory and Injunctive Relief, To Object to and Avoid Discharge, and to Object to Claimed Exemptions on September 29, 2009. On April 26, 2010, Plaintiffs filed their Motion for Partial Summary Judgment on Discharge Claims. Plaintiffs assert that the Debtors' general discharge should be denied pursuant to 11 U.S.C. § 727(a)(2)(A) (transfer of concealment of property of the debtor within one year before the filing of the petition); 11 U.S.C. §727(a)(2)(B) (transfer or concealment of property of the estate); 11 U.S.C. §727(a)(4) (false oath); and/or 11 U.S.C. §727(a)(5) (failure to explain a loss or deficiency of assets to meet the debtors' liabilities).

The Debtor's original Schedule B listed personal property consisting of $100 cash in hand, $4,000 in household goods, $500 in wearing apparel, a 1985 Mercedes Sedan (not running), and a 1985 Mercedes station wagon, for a total of $5,700. All of this property was claimed as exempt. The Debtors attended their meeting of creditors on October 9, 2008. Following their meeting of creditors, on December 2, 2008, the Debtors filed an amended Schedule B to add Heritage Apartments Limited (partnership interest 16.46%) at item 35 with a value listed as "unknown."

The Plaintiffs conducted Rule 2004 examinations of Joyce Long, the Debtors' bookkeeper, of each of the Debtors, and of their daughter, Katherine Blasingame Church, during the period December 2008 to February 2009. In the course of these examinations, the Debtors revealed that they enjoy the use of substantial amounts of property and funds not reflected in their Schedules and Statement of Financial Affairs. Some of these were the subject of subsequent amendments to the Schedules and Statement.

On April 9, 2009, well after the completion of these examinations, Schedule B was amended again to add the following items of personal property: UBS account, $477; Regions bank account, $6.00; term life insurance policy, face value of $400,000, no actual value; Lincoln Financial Group Annuity, $15,000.00; SAFECO/Symetra Annuity, indeterminate; Horace Mann Annuity account 403b, $24,946.00; Dominion account, $1,672.00; accounts payable, indeterminate; 3 dogs, $0.00.

On their original Schedule A filed August 15, 2008, the Debtors listed no interests in real property and on their original Schedule B they listed no interests in trusts. Schedule B, Question 20, requires that debtors disclose, *inter alia*, contingent or noncontingent interests in trusts. The Debtors are co-trustees for the Blasingame Family Residence Generation Skipping Trust, which was established by Mavoureen Blasingame, Benard Blasingame's mother, on December 30, 1993, and

the Debtors are also trustees of the Blasingame Family Business Investment Trust, also established by Mavoureen Blasingame on January 2, 1995. The Debtors are also life beneficiaries of the Blasingame Family Residence Generation Skipping Trust and the Blasingame Family Business Investment Trust.

Among the assets of the Blasingame Family Residence Generation Skipping Trust is the residence occupied by the Debtors in Adamsville, Tennessee, consisting of an 8,700 square foot home, a 3,000 square foot guest house, a swimming pool and pool house, a tennis court, stable, barn and pasture, situated on 28± acres. Among the assets of the Blasingame Family Business Investment Trust are certain bank and/or investment accounts, together with the stock of GF Corporation and Blasingame Farms, Inc. The largest of the accounts was valued at $179,803.43 at the time the bankruptcy petition was filed.

In the years preceding the filing of the bankruptcy petition, Debtor Earl Benard Blasingame used a debit card drawn on a bank account in the name of Mavoureen Blasingame and himself to pay personal expenses. Mavoureen Blasingame died in 2004. This account was not one of those disclosed in subsequent amendments to Schedule B.

The Debtors also make use of an account in the name of their son, Defendant Earl Benard "Ben" Blasingame, Jr. Both of the Debtors as well as their bookkeeper, Joyce Long, have signatory authority over this account. This account is described by the Defendants as a "clearing account," which they claim should be treated by the court as a resulting trust. It is undisputed that funds from numerous different sources were deposited to this account and that it was used, in part, to pay personal expenses. This account was not one of those disclosed in any amendment to Schedule B.

On their bankruptcy petition, the Debtors indicated that their debts were primarily consumer

debts. The Debtors' original Statement of Financial Affairs listed no transfers to creditors within the 90 days prior to the filing of the bankruptcy petition (Item 3a). On November 20, 2008, following their meeting of creditors, the Debtors filed a second Amended Statement of Financial Affairs, which amended their response to Item 3b, *Debtor whose debts are **not** primarily consumer debts,* to show payments made to six credit card accounts in the 90 days immediately preceding the filing of their bankruptcy petition. The total amount of these payments was $17,160.16. The Debtors also filed a motion to add these creditors together with Wal-Mart to their schedule of unsecured creditors. This motion was granted by order entered December 19, 2008.

The Debtors' original Statement of Financial Affairs listed income for the Debtor Earl Benard Blasingame of $13,390 in each of years 2006 and 2007, and $8,928 year to date in 2008, the year of the filing of their petition. (Item 1). The Plaintiffs were able to discover some $284,960.52 in checks made payable to the Debtors during this three-year period. The Debtors were not able to identify the purpose for any of these checks.

The Debtors' original Statement of Financial Affairs listed no property held for another person (Item 14). On April 9, 2008, the Statement of Financial Affairs was amended by adding the names of three persons for whom the Debtors held property at the time of the filing of their petition: Katherine Blasingame, Ben Blasingame, and Grace Henley. Attached to the amendment were lengthy handwritten lists of personal property. No value is assigned to this property. The Plaintiffs obtained an appraisal of the personal property located at the residence of the Debtors. The appraisal report indicates that the appraiser valued approximately 80% of the personal property, and assigned a value to the items appraised of $194,470. Pl. Appx. 702-716.

The Debtors' original Statement of Financial Affairs listed no property within the hands of a court-appointed official (Item 6b). The April 9, 2008, amendment to the Statement of Financial Affairs indicates that within the year prior to filing, some $20,000 was in the hands of the McNairy County Circuit Court Clerk, and that this fund was transferred to Attorney Martin A. Grusin on August 8, 2008, seven days prior to the filing of the bankruptcy petition.

The Debtors' original Statement of Financial Affairs listed business interests in six corporations: Flozone Services, Inc.; Fiberzone Technologies, Inc.; Aqua Dynamaics, Inc.; Ozone Engineering Design; SIS, Inc.; and GF Corporation. (Item 18). In a subsequent amendment dated September 9, 2008, the Debtors added an asterisk beside the name of each corporation with the explanation that "Clients do not have a personal interest in the business and do not own any stock." In the course of discovery, the Plaintiffs learned that the Debtors maintain an interest in yet another corporation, Blasingame Farms, Inc., which is said to have been administratively dissolved in 2005, yet maintains a bank account at Hardin County Bank. E.B. Blasingame and Joyce Long are signatories on this account. Neither this corporation nor its bank account were disclosed in subsequent amendments to the Debtors' Schedules and Statement of Financial Affairs.

IV. DISCUSSION

A discharge in bankruptcy is a privilege intended for the "honest but unfortunate debtor." *See Grogan v. Garner,* , 498 U.S. 279, 287, 111 S. Ct. 654, 660 (1991), citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699 (1934) ("One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'"). The debtor is to be granted a discharge unless one or more specific exceptions applies. *See* 11

U.S.C. §727(a) ("The court shall grant the debtor a discharge unless . . ."). These exceptions are to be liberally construed in favor of the debtor, and the party objecting to discharge has the burden of proving the application of one or more of the exceptions by a preponderance of the evidence. *Keeney v. Keeney (In re Kenney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/American Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994); Fed. R. Bankr. P. 4005. The Plaintiffs object to the entry of discharge for the Debtors under four exceptions, sections 727(a)(2)(A) and (B); 727(a)(4)(A), and 727(a)(5).

A. Section 727(a)(2)(A)

Section 727(a)(2)(A) excepts from discharge those debtors who, with intent to hinder, delay or defraud a creditor, transfer or conceal property within one year before the filing of their petition. It consists of two elements: (1) the disposition of property, including transfer or concealment, within one year prior to filing; and (2) the debtor's subjective intent to hinder, delay, or defraud creditors by disposing of their property. *Keeney*, 227 F.3d at 683, citing *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997). Proof of an intent either to hinder, or to delay, or to defraud is sufficient. It is not necessary to prove all three. *See Roberts v. Montgomery (In re Montgomery)*, 2007 WL 625196, at * 2 (Bankr. E.D. Tenn. 2007). Section 727(a)(2) requires actual intent to hinder, or delay, or defraud. Proof of constructive fraud is not adequate. *Id.,* citing *E. Diversified Distrib., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 672 (Bankr. N.D. Ga. 2004). When an actor's state of mind is at issue, the court must often look to circumstantial evidence. "A debtor's intent 'may be inferred from the circumstances surrounding his objectionable conduct.'" *Keeney,* 227 F.3d at 684, quoting *In re Snyder*, 152 F.3d 596, 601 (7th Cir. 1998). In order to determine actual intent, the courts look to certain traditional "badges of fraud" including the following:

> (i) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question by the debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question; (v) the conveyance of all the debtor's property; (iv) the secrecy of the conveyance; (vii) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring debt, onset of financial difficulties, or pendency or threat or suit by creditors; and (viii) the general chronology of the events and transactions under inquiry.

Montgomery, at *2, quoting *Matus*, 303 B.R. at 672-73. Additional factors noted in *Montgomery* include:

> whether the transaction is at arm's length; whether the debtor is aware of the existence of a significant judgment or over-due debt; whether a creditor is in hot pursuit of its judgment or claim and whether the debtor knows this; and the timing of the transfer relative to the filing of the petition.

Montgomery, at *2, quoting *Adamson v. Bernier (In re Bernier)*, 282 B.R. 773, 781 (Bankr. D. Del. 2002). If the plaintiff establishes one or more of the badges of fraud, the burden shifts to the defendant to rebut the presumption. *Id.,*citing *Village of San Jose v. McWilliams,* 284 F.3d 785, 791 (7th Cir. 2002). The Sixth Circuit Bankruptcy Appellate Panel has concluded that concealment as used in section 727(a)(2) includes "the withholding of knowledge of an asset by the failure or refusal to divulge information required by law to be made known." *Buckeye Retirement Co, LLC. v. Swegan (In re Swegan)*, 383 B.R. 646, 655 (6th Cir. BAP 2008). Failure to disclose assets in a debtor's bankruptcy schedules, without more, however, does not constitute concealment *before* the bankruptcy filing. *Montedoncio v. Beckham (In re Beckham)*, 421 B.R. 602, 2009 WL 1726526, at *7 (6th Cir. BAP 2009).

Although the Plaintiffs gave numerous examples of events that they assert constitute transfers of property of the Debtors and/or concealment in the year prior to the filing of the bankruptcy petition, the Debtors have disputed these facts and/or the inferences to be drawn from

these facts in each case. In most instances, the Plaintiffs argue that the failure to disclose the interests of the Debtors in various assets in their bankruptcy schedules and statement of financial affairs amounts to a concealment. In light of the decision of the Bankruptcy Appellate Panel in *Beckham*, however, the court believes that the failure to disclose in connection with a bankruptcy filing is best dealt with under section 727(a)(4)(A). Summary judgment will not be granted with respect to section 727(a)(2)(A).

B. Section 727(a)(2)(B)

The Plaintiffs also object to the Debtors' discharge pursuant to section 727(a)(2)(B), which is concerned with transfer or concealment of property of the bankruptcy estate *after* the filing of the bankruptcy petition. The Plaintiffs assert that Earl Benard Blasingame continued to receive checks made payable to him personally after the filing of the bankruptcy petition. Adv. Doc. No. 74: Plfs. Stmt. Of Undisp. Facts, ¶ 42. The Debtors dispute this statement, saying, "Debtors have received no funds personally. The trusts and corporate accounts in the Clearing Accounts received said funds." Adv. Doc. No. 99: Defs' Resp. to Plfs' Mot. for Part. Summ. Jdgmt. on Disch. Clms. The court has reviewed the excerpts from the transcripts of the examination of Mr. Blasingame provided by the Plaintiffs, but was not able to discover a transfer dated after the filing of the bankruptcy petition. *See* Adv. Doc. No. 74: Plfs. Appx. 140-44; 149-61. Summary judgment cannot be granted with respect to section 727(a)(2)(B).

C. Section 727(a)(4)

The Plaintiffs object to the Debtors' discharge pursuant to section 727(a)(4), for which the debtor must prove: "(1) the Debtors made a statement under oath; (2) that was false; (3) they knew that the statement was false when they made it; (4) they fraudulently intended to make the statement;

and (5) the statement materially related to the bankruptcy case." *Montgomery*, 2007 WL 625196 at *3, citing 11 U.S.C.A. §727(a)(4); *Keeney*, 227 F.3d at 685. Judge Stair explains that this section extends both to false statements and to omissions, and that a statement is material if it "bears a relationship to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings, or the existence or disposition of property." *Id.* (citations omitted). A debtor's schedules and statements of financial affairs are executed under oath and penalty of perjury. *Id.,* citing *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (6th Cir. BAP 1999). Likewise, statements made at a section 341 meeting of creditors or in the course of depositions or 2004 examination are also made under oath. *Id.,* citing 11 U.S.C.A. §343, *Brumley v. Wingard,* 269 F.3d 629, 642 (6th Cir. 2001).

Reckless indifference to the truth may satisfy the requirement for fraudulent intent in denying discharge under section 727. *See, e.g., Montgomery,* 2007 WL 625197 at *4; *The Cadle Co. v. Taras (In re Taras)*, 2005 WL 6487202 at *4 (Bankr. N.D. Ga. 2005). "[A] series or pattern of errors or omissions may have a cumulative effect giving rise to an inference of intent to deceive." *Id.,* citing *Kalvin v. Clawson (In re Clawson)*, 119 B.R. 851, 852-53 (Bankr. M.D. Fla. 1990); *Buck v. Buck (In re Buck)*, 166 B.R. 106, 109 (Bankr. M.D. Tenn. 1993).

The evidence presented by the Plaintiffs overwhelmingly demonstrates that the Schedules and Statement of Financial Affairs originally filed by the Debtors in this case were fraught with omissions and misstatements, and were seriously misleading.

For example, the Debtors failed to disclose their interests in bank accounts. Although the Debtors ultimately amended their Schedule B on April 9, 2009, to disclose interests in two accounts, "UBS account" and "Regions Bank Account," these amendments came well after the meeting of

creditors, and only after a number of accounts were identified in connection with the examinations undertaken by the Plaintiffs. No account numbers were given. These accounts are listed as joint accounts, but based upon the amounts listed they appear to be accounts in the name of Margaret Blasingame. Other bank accounts regularly used by the Debtors for personal expenses were not disclosed, including the account at Regions Bank in the names of Mavoureen Blasingame and Benard Blasingame that was used for payment of Earl Benard Blasingame's personal expenses, and the account at Bancorp South in the names of Ben Blasingame, Jr., or E. Benard Blasingame or Margaret Blasingame or Joyce Long, called by the Debtors the "clearing account." According to the Debtors' bookkeeper, Joyce Long, this account was regularly used for the payment of personal expenses. Adv. Doc. No. 74: Pls.' Appx., pp. 229-30.

The Debtors also failed to disclose other financial assets in their original Schedule B, including the Lincoln Financial Group annuity, the SAFECO/Symetra annuity, the Horace Mann annuity account, and the Dominion account. These accounts were revealed in the same amendment to Schedule B filed on April 9, 2009, after discovery and the taking of the examinations of the Debtors and their bookkeeper.

The Debtors failed to disclose their interests in two trusts, the Blasingame Family Business Investment Trust and the Blasingame Family Residence Generation Skipping Trust.

The Debtors failed to disclose significant amounts of personal property that they claim to hold for others. This was included in the April 9, 2009, amendment to their Statement of Financial Affairs.

The Debtors failed to disclose Margaret Blasingame's interest in funds on deposit with the McNairy County Circuit Court Clerk, and the transfer of those funds to her attorney, Martin A. Grusin. This was included in the April 9, 2009, amendment to their Statement of Financial Affairs.

The Debtors failed to disclose significant and ongoing transfers of funds by and among a number of bank accounts opened in the names of the trusts and related corporations. Included among these were transfers made to pay significant credit card charges made by the Debtors. These payments to credit card issuers were revealed in the second amendment to the Statement of Financial Affairs, filed November 20, 2008.

The Debtors failed to disclose the substantial numbers of checks made payable to Earl Benard Blasingame in the year leading up to the bankruptcy filing. Earl Benard Blasingame identified over $230,000 in checks made payable to him in the year preceding the bankruptcy filing, many of which were signed by him. *See* Adv. Doc. No. 74: Pls.' Appx. 140-44; 149-61. In no case could he identify the reason for the payment or the disposition of the funds. The Debtors counter that no funds were received by them "personally."

These are merely representative of the numbers of assets and transactions revealed in the course of discovery and described more fully in the exhaustive statement of facts submitted by the Plaintiffs, which is supported by the documents and testimony of the Debtors and their bookkeeper, Joyce Long. The Debtors respond in each case that they relied upon the advice of counsel in the preparation of their petition, schedules, statement of financial affairs and amendments thereto based upon three legal principles:

(a) that the Trusts (which are non-self-settled Trusts established by Earl Benard Blasingame's mother in 1992 through 1994 and contain spendthrift provisions) are

excluded from the bankruptcy estate pursuant to bankruptcy law 11 U.S.C. §541(c); and

(b) that the clearing accounts = resulting Trusts which were solely for accounting purposes to keep accurate records and avoid co-mingling under Tennessee law; and

(c) that the Tennessee law does not recognize reverse piercing of Trusts.

Adv. Doc. No. 99: Defs' Resp. To Plfs' Mot. For Part. Summ. Jdgmt on Disch. Clms. The Debtors assert that each of their actions was compatible with and appropriate to the existence of the trusts and corporations described in the Complaint. That is, the Debtors do not deny that they failed to disclose certain assets and transactions, but say that they were under no duty to disclose them, or that the omissions were inadvertent. By implication, they also assert that if they were under a duty to disclose these assets, their failure to do so was the result of the advice of their attorneys and that they should not be penalized for relying upon the advice of counsel. These are three separate inquiries. The question of whether the Debtors were under a legal duty to disclose the various assets and transactions described by the Plaintiffs is a question of law for the court. The questions of whether the Debtors' failure to make certain disclosures when under a duty to do so resulted from their reliance upon counsel or was inadvertent are questions of fact, but as these are defenses advanced by the Debtors, it is up to the Debtors to come forward with sufficient evidence to create an issue for trial. The court will address each of these issues in turn.

i. Were the Debtors Under a Legal Duty To Disclose Their Interests in the Trusts?

The Debtors' legal memorandum addresses the question of whether the trust assets are property of the bankruptcy estate. The Debtors have not addressed the issue of whether they were

under a duty to disclose their interest in these trusts whether or not they were excluded from the bankruptcy estate.

The purpose of disclosure in the course of a bankruptcy case has been described as follows:

> The purpose of section 727(a)(4)(A) "is to ensure that dependable information is supplied for those interested in the administration of the bankruptcy estate on which they can rely without the need for the trustee or other interested parties to dig out the true facts in examinations or investigations." *Guardian Indus. Prods. Inc. v. Diodati (In re Diodati)*, 9 B.R. 804, 807 (Bankr. D. Mass. 1981) (citations omitted). The success of the bankruptcy process depends upon a debtor's willingness to provide the creditors with full and accurate disclosure. *See In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974). The Bankruptcy Code does not allow debtors to play "fast and loose with their assets or with the reality of their affairs." *Boroff v. Tully (In re Tully),* 181 F.2d 106, 110 (1st Cir. 1987).

Peoples Bank of Charles Town v. Colburn (In re Colburn), 145 B.R. 851, 853 (Bankr. E.D. Va. 1992). If a debtor is uncertain whether certain property is legally required to be included in his or her schedules and statement of financial affairs, the debtor's duty is to disclose the asset so that the question can be resolved. *Banc One v. Braymer (In re Braymer)*, 126 B.R. 499, 503 (Bankr. N.D. Tex. 1991) citing *Butler v. Ingle (In re Ingle),* 70 B.R. 979, 983 (Bankr. E.D.N.C. 1987).

Of special note is the decision of the bankruptcy court in the case *The Cadle Co. v. Taras (In re Taras)*, 2005 WL 6487202 (Bankr. N.D. Ga. 2005), in which the court denied the debtor's discharge after trial on the basis, in part, of the failure of the debtor to list his interest in a trust. The debtor in that case did not list a family trust as a creditor despite the fact that he had borrowed substantial sums from the trust, including numerous transactions in the four months prior to filing and in the months following. *Id.* at *2. With respect to the duty to disclose his interest, the court stated:

> It is undisputed that at the time Debtor filed his Chapter 7 case, he had an interest as a beneficiary of the Trust which was not disclosed either on the Schedule of Personal Property or as a source of income in the years preceding the filing of the case. The

> debtor had an affirmative duty to fully disclose all assets and failing to do so constitutes a material omission. Courts have consistently required the disclosure of a trust as an asset debtors have a mandatory duty to disclose.

Id. at *4 (citations omitted). Even though the debtor in *Taras* was not represented by counsel, the court noted that a "reasonable person would understand the questions on the schedules and statements to encompass a disclosure of Debtor's relationships with the Trust." *Id.* Further, the court charged the pro se debtor with "knowing that a Chapter 7 Trustee would have an interest in examining the rights of creditors to his interests in the trust." *Id.* at *5. The court continues, "Creditors and the trustee are entitled to information pertaining to a debtor's income so they may investigate, among other things, whether the debtor has hidden funds to conceal them from creditors." *Id.*

Without question, the Official Bankruptcy Forms require that a debtor disclose a debtor's interests in checking, savings, and other financial accounts (Schedule B, Item 2); annuities (Schedule B, Item 10); contingent and non-contingent interests in a trust (Schedule B, Item 20); creditors holding unsecured, non-priority claims (Schedule F); income from whatever sources (Statement of Financial Affairs, Items 1 and 2); payments to creditors (Statement of Financial Affairs, Item 3); other transfers of property (Statement of Financial Affairs, Item 10); property held for another person (Statement of Financial Affairs, Item 14); nature, location, and name of businesses (Statement of Financial Affairs, Item 18). In each of these categories, the Plaintiffs have pointed to significant omissions in the Debtors' schedules and statement of financial affairs. Some, but not all, of these omissions have been corrected by subsequent filings.

The Debtors and their attorneys have attempted to explain most of these omissions with reference to the existence of the spendthrift trusts. It is not the case, however, that the Official

Bankruptcy Forms distinguish between spendthrift trusts and other trusts with respect to the requirement of disclosure. As the court stated in *Braymer*, when there is question, the disclosure should be made so that the court can sort out the question of whether the asset should be included within the assets of the bankruptcy estate. *Braymer*, 126 B.R. at 502. The bankruptcy debtor's discharge was denied in *Braymer*, when she failed to disclose her beneficial interest in a trust established by her father. *Id*. Similarly, the bankruptcy court in *Taras* ruled that a debtor has an affirmative duty to disclose his interest in a trust. *Taras,* 2005 WL 6487202 at *4-5.

Moreover, there is no question that once corpus or income is distributed to a beneficiary from a spendthrift trust, the funds or assets distributed lose their identity as trust assets. "Once distributed to a beneficiary, income paid from a valid spendthrift trust becomes subject to execution by creditors." *Atkins v. Marks,* 288 S.W.3d 356, 371 (Tenn. Ct. App. 2008). In numerous instances it appears in the record that the Debtors received distributions from one or other of the trusts. Their failure to account for these distributions in their schedules and statement of financial affairs is not explained. Indeed, the pattern of transactions admitted by the Debtors bears little if any resemblance to what would be expected if the separate identity of the trusts had been respected. In none of the factual statements filed by the Debtors or the testimony given by them was the court able to identify: (1) the assets of the trusts; (2) the sources of the assets of the trusts; (3) the income of the trusts; or (4) the dates and amounts of distributions from the trusts. Notwithstanding the Debtors' protestations that they have kept fifteen years of accurate records of transactions by and among the Debtors, trusts and corporations, all that they actually produced was a summary of less than one page that the court is unable to decipher. *See* Adv. Doc. No. 73*:* Exhibit A to Affidavits of Earl Benard Blasingame, Margaret Blasingame, and Joyce Long.

The Debtors' assertion that the bank account in the name of Ben Blasingame, Jr. is a "clearing account" that should be treated as a resulting trust does not address the issue raised by the Plaintiffs, *i.e.*, whether the existence of this account should have been disclosed in the Debtors' schedules. A resulting trust is an equitable trust that arises "where one person having funds of another, invests them without direction of the owner and takes title in himself." *Hoffner v. Hoffner*, 32 Tenn. App. 98, 103-04, 221 S.W.2d 907 (Tenn. Ct. App. 1949), citing *Perkins v. Cheairs,* 61 Tenn. 194, 199 (1872). In *Perkins v. Cheairs*, the Tennessee Supreme Court explains that the resulting trust arises by implication of law in three instances:

> 1. Where an estate is purchased in the name of one person but the money or consideration is paid by another. 2. When a trust is declared only as to part and nothing said as to the rest, what remains undisposed of results to the heir at law. 3. When transactions have been carried on mala fide.

Id. at *3, citing Lord Hardwicke. The resulting trust, like a constructive trust, is not an express trust, but an equitable remedy. The Sixth Circuit Court of Appeals, applying Kentucky law, has said that a constructive trust only comes into being when it is judicially declared, and therefore that if it is not declared before a bankruptcy petition is filed, it cannot defeat the strong-arm powers of the bankruptcy trustee. *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.),* 16 F.3d 1443, 1455 (6th Cir. 1994). Similarly, a resulting trust only comes into existence when one is judicially declared. *Smalling v. Terrell*, 943 S.W. 2d 397, 400 (Tenn. App. 1996). There is no assertion by the Debtors that the Ben Blasingame, Jr. account was declared to be a resulting trust prior to the filing of the Debtors' bankruptcy petition. Moreover, the question raised by the Plaintiffs' Motion for Partial Summary Judgment is whether the Debtors should have disclosed their interest in this account in their bankruptcy schedules. It is beyond dispute that the Official Bankruptcy Forms call for the disclosure of all bank accounts and contingent and non-contingent interests in trusts. The

Debtors were signatories to the Ben Blasingame, Jr. account. Further, even under the Debtors' theory that they need only disclose property of the estate, this account should have been disclosed, for property in which the debtor holds only legal title but not an equitable interest is property of the estate to the extent of the debtor's legal interest. 11 U.S.C. § 541(d).

The court holds that the Debtors were under a legal duty to disclose their interests in the trusts and the income that they derived from them, which includes the payment of personal expenses from one or more of the trust accounts. Either these payments were distributions from one or other of the trusts or they were loans. The Debtors' interests in the trusts were not disclosed, nor were the trusts treated as creditors of the Debtors. As a result, the Debtors' schedules and statement of financial affairs were seriously misleading and, in fact, false. Likewise, the Debtors were under a legal duty to disclose each of the accounts for which they had signatory authority, including the accounts identified as "clearing accounts" by the Debtors and their counsel. It was incumbent upon the Debtors to first disclose the accounts and then to explain their interests in them. Finally, with respect to the question of "reverse piercing," the court holds that whether or not the Plaintiffs are ultimately able to prevail on this theory, the Debtors were under a legal duty to disclose their various business interests, including Blasingame Farms, Inc., as they did with respect to Flozone Services, Inc.; Fiberzone Technologies, Inc.; Aqua Dynamics Systems, Inc.; Ozone Engineering Design; SIS, Inc.; and GF Corporation. It is the understanding of the court that the stock of each of these corporations is owned by someone or some entity other than the Debtors. The Debtors have offered no explanation for why Blasingame Farms, Inc., was omitted from the Statement of Financial Affairs when the other corporations were included.

ii. Are the Debtors Protected by Reliance Upon Counsel?

The Plaintiffs have shown that the Debtors made false statements. Next they must establish that these statements were made knowingly and fraudulently. Again, reckless indifference to the truth may satisfy this requirement. *Keeney,* 227 F.3d at 686. The Debtors do not deny the omissions from the schedules and statement of financial affairs, but rather respond that they relied upon their attorney to complete their schedules. Under certain circumstances, reliance upon the advice of counsel can show that a debtor lacked the requisite intent required to deny his discharge. *In re Rivera*, 356 B.R. 786, 2007 WL 130415, *7 (6th Cir. BAP 2007), citing *First Beverly Bank v. Adeeb (In re Adeeb),* 787 F.2d 1339, 1343 (9th Cir. 1986). This reliance, however, must be reasonable and in good faith. *Id.* citing *Adeeb; U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994); *Spring Works, Inc. v. Sarff (In re Sarff),* 242 B.R. 620, 629 (6th Cir. BAP 2000); *In re Colvin*, 288 B.R. 477, 483 (Bankr. E.D. Mich. 2003).

The Debtors introduced the question of reliance upon counsel in their Response to the Plaintiffs' Motion for Summary Judgment. Adv. Doc. No. 99. Neither this document nor the specific responses to the Plaintiffs' Statement of Uncontested Facts was signed by the Debtors or supported by the record. The Debtors have introduced no facts supporting their assertion of reliance upon counsel. The affidavits filed by the Debtors in this case are simply silent as to the process undertaken by them to provide their counsel with the information needed to prepare their schedules and statement of financial affairs. The mere assertion that Debtors relied upon the advice of counsel in determining which assets to disclose and which to omit is insufficient. The Debtors must show that their attorney was fully informed and that his or her advice was reasonable. *In re Oliver*, 414 B.R. 361, 376 (Bankr. E.D. Tenn. 2009).

Moreover, the court finds that the defense of reliance upon counsel is unreasonable in light of the volume of omissions and the evident attempt to conceal significant assets from the knowledge of the Trustee and of creditors. Even an unrepresented debtor may be held responsible for correctly disclosing his beneficial interest in a trust based upon the plain language of the Official Bankruptcy Forms. *Taras,* 2005 WL 6487202 at *4. As a result, the court concludes that the Debtors have failed to establish an issue for trial with respect to the question of their reliance upon counsel.

iii. Were the Misstatements and Omissions Inadvertant?

As an alternative to their reliance upon counsel defense, the Debtors claim that the omissions in their schedules and statement of financial affairs resulted from inadvertence. In their affidavits, however, the Debtors claim that they have kept meticulous and accurate records of all transactions by and among the Debtors, the trusts and the corporations over a period of fifteen years. This assertion flies in the face of the Debtors' claim that the serious omissions from their schedules and statement of financial affairs resulted from inadvertence. The shear volume of omitted information is telling. Further, the Debtors must do more than make mere conclusory statements. They must provide specific facts that support their claim of inadvertence. Fed. R. Bankr. Proc. 7056. The affidavits of the Debtors are silent with respect to the preparation of their schedules and statement of financial affairs.

In some instances, a debtor may avoid the loss of discharge if he promptly corrects inaccuracies in his schedules and statements. "[A] debtor who mistakenly or inadvertently provides false information and takes steps to amend his schedules in order to correct them prior to or during the meeting of creditors is not generally thought to possess the requisite fraudulent intent to deny discharge under §727(a)(4)(A)." *Keeney,* 227 F.3d at 686. In this case, however, the Debtors'

amendments came well after their meeting of creditors and, in most cases, only after the completion of the Plaintiffs' Rule 2004 examinations.

> [I]nterested parties should not be required to drag the truth from the debtor [and] a showing of good faith in a §727 (a)(4)(A) matter will often come down to whether a debtor has abided by this cardinal rule: when in doubt, disclose. For example, a debtor is likely to be forgiven for simply mislabeling an asset, where its existence is still initially disclosed. However, where a debtor only voluntarily discloses information after its existence is uncovered by a third-party (e.g., a trustee or creditor), good faith is unlikely to be found.

Ayers v. Babb (In re Babb), 358 B.R. 343, 356 (Bankr. E.D. Tenn. 2006), quoting, *U. S. Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 630 (Bankr. N.D. Ohio 2005). In this case, numerous assets, including the trusts and the "clearing accounts" are still not reflected in any way on the Debtors' schedules or statement of financial affairs, reinforcing the conclusion that these assets were intentionally and recklessly omitted.

iv. Were the Misstatements and Omissions Material?

The Plaintiffs must also show that the omissions and false statements made by the Debtors relate materially to the bankruptcy case. "The threshold for materiality is [fairly] low." *Taras,* 2005 WL 6487202 at *6. A statement 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. *See also*, *In re Jarrett*, 417 B.R. 896, 903 (Bankr. W.D. Tenn. 2009); *Montgomery*, 2007 WL 625196 at *3 (citations omitted). Without question, the information omitted by the Debtors was material, in that it concerned assets and income of the Debtors.

The Debtors filed their bankruptcy schedules and statement of financial affairs with numerous, serious omissions. Even when the court considers those omissions that are reflected in

subsequent amendments by the Debtors, the Debtors' conduct demonstrates a reckless indifference to their responsibilities as bankruptcy debtors to provide full and complete disclosure to their creditors. The seriousness of these omissions cannot be expunged by subsequent amendment resulting only from the diligence of the Plaintiffs in discovering assets. "'The operation of the bankruptcy system depends on honest reporting. If debtors could omit assets at will, with the only penalty that they had to file an amended ... [schedule] once caught, cheating would be altogether too attractive.'" *Clean Cut Tree Service v. Costello (In re Costello)*, 299 B.R. 882, 900 (Bankr. N.D. Ill. 2003) quoting *Rogers v. Boba (In re Boba)*, 280 B.R. 430, 435-36 (Bankr. N.D. Ill. 2002). "'Complete financial disclosure' is a prerequisite to discharge." *Keeney* 227 F.3d at 685, quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998).

Summary judgment will be entered against the Debtors because the Plaintiffs have proved that the Debtors made false oaths and accounts within the meaning of §727(a)(4)(A).

C. Section 727(a)(5)

Finally, the Plaintiffs object to Debtors' discharge under section 727(a)(5), which requires proof that "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. §727(a)(f). "When invoking §727(a)(5), it is simply the adequacy of the explanation that is at issue," not the propriety of the reasons for the loss. *In re Reed*, 310 B.R. 363, 368 (Bankr. N.D. Ohio 2004).

In support of their position, the Plaintiffs point to some $269,910.03 in checks made payable to Earl Benard Blasingame written on various accounts, some of which were signed by him. In support of their statements, the Plaintiffs point to pages of the Rule 2004 Examination of Benard

Blasingame in which he was asked about these checks, but he could not explain their purpose or disposition. Adv. Doc. No. 74: Pl. Appx. 140-44; 149-61. The Plaintiffs' Appendix also includes a summary of checks payable to Earl Benard Blasingame over an unspecified period of time which total $284,960.52, together with copies of checks. Adv. Doc. No. 74: Pl. Appx. 315-409. In response to the Plaintiffs' description of these facts, the Debtors counter that, "Debtors have received no funds personally. The trusts and corporate accounts in the Clearing Accounts received said funds. Adv. Doc. No. 99: Appx. 0001-0057; 0092-0313." Defendants' Response to Statement of Undisputed Facts, ¶42. The parts of the Debtors' appendix pointed to encompass six trust agreements and all of the affidavits filed by the Debtors. Nowhere do any of these documents address the numerous transactions described by the Plaintiffs. In the face of the Plaintiffs' motion for summary judgment, it was incumbent upon the Debtors to raise a genuine issue for trial.

The loss of assets must be explained by "more than a 'vague, indefinite, and uncorroborated hodgepodge of financial transactions.'" *In re Costello,* 299 B.R. at 901 (citations omitted). The explanation must satisfy two criteria: "it must be substantiated by documentation," and "the documentation provided must be adequate to 'eliminate the need for the Court to speculate as to what happened to all the assets.'" *Id.* (citations omitted).

The Plaintiffs have met their burden to show numbers of unexplained transactions which appear to involve substantial payments to Earl Benard Blasingame in the years preceding the bankruptcy filing. The burden then shifts to the Debtors to explain these transactions with documentary evidence that is adequate. The explanation provided by the Debtors does not meet this test. Earl Benard Blasingame failed to explain why these numerous checks were written to him and what became of them after they were written. In many cases, the checks were signed by himself.

At best, the Debtors' explanation, through their attorneys, indicates that these checks were used to transfer assets from one account to another. Notwithstanding the Debtors' assertion that they kept more than adequate account records for the various entities, the Debtors have failed to produce the documentary evidence that would be required to account for these transactions.

The Plaintiffs' allegations under section 727(a)(5) concern Earl Benard Blasingame only. Accordingly, summary judgment will be entered against him, but not against Margaret Gooch Blasingame, because he has failed to explain satisfactorily, within the meaning of section 727(a)(5), the loss of assets to meet his liabilities. For this additional reason, the discharge of Earl Benard Blasingame must be denied.

IV. CONCLUSIONS

Issues of fact prevent the entry of summary judgment as to the Plaintiffs' claims under section 727(a)(2)(A) and (B), but summary judgment may issue with respect to section 727(a)(4)(A) as to both of the Debtors who made numerous false oaths in connection with the filing of their bankruptcy schedules and statement of financial affairs. In addition, summary judgment may be entered pursuant to section 727(a)(5) with respect to Earl Benard Blasingame, but not with respect to Margaret Gooch Blasingame, as the result of his failure to satisfactorily explain the loss of assets preceding the filing of his bankruptcy petition. The court will enter a separate judgment consistent with its conclusions.

cc: Debtors/Defendants
Attorneys for Debtors/Defendants
Plaintiffs
Attorneys for Plaintiffs
Defendants
Attorneys for Defendants