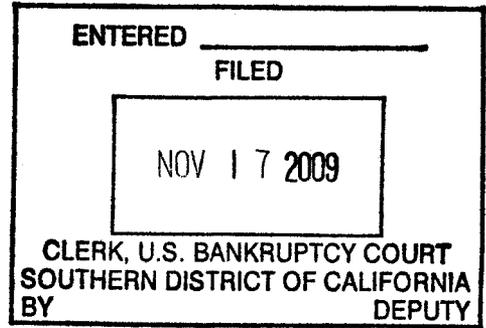


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**WRITTEN DECISION - NOT FOR PUBLICATION**



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: Donald A. Yates  Debtor.	}	Bankruptcy No. 04-05619-JH7 Adversary No. 07-90596-LT
Gregory A. Akers, Chapter 7 Trustee  Plaintiff,  v. Donald A. Yates, the Debtor  Defendant.	}	MEMORANDUM DECISION

Debtor Donald A. Yates ("Debtor") initiated his chapter 7<sup>1</sup> case (the "Case") on June 24, 2004 (the "Petition Date") and received his discharge on September 22, 2004. In December of 2004, chapter 7 trustee, Gregory Akers (the "Trustee"), filed the first of several adversary proceedings naming Debtor and others as defendants. This memorandum

<sup>1</sup> Unless otherwise indicated, all references to chapter and code sections are to Title 11 of the United States Code, also referred to as the Bankruptcy Code, and all references to "Rules" are to the Federal Rules of Bankruptcy Procedure. The docket in this Adversary Proceeding shall be cited as "Dkt # \_\_\_ at \_\_\_". The docket in related matters will be similarly phrased with initial references to the relevant case or adversary proceeding.

1 decision follows the Trustee's Motion for Summary Judgment (the "Motion") in his fourth  
2 adversary proceeding, which seeks to revoke Debtor's discharge ("Discharge Revocation")  
3 and to recover a judgment based on Debtor's alleged conversion and fraudulent concealment  
4 of certain estate assets ("Conversion Claims").

5 Given the gravity of a proceeding seeking to revoke discharge, the Court carefully  
6 reviewed all relevant facts<sup>2</sup> and carefully considered the arguments of the parties as well as  
7 relevant law. Based on this analysis and review, the Court grants the Motion as to the  
8 Discharge Revocation under 11 U.S.C. § 727(d)(2) and (3), but denies the Motion as to the  
9 Conversion Claims.

10  
11 **BACKGROUND**  
12

13 **1. Debtor Is An Attorney Who Initiated The Case With The Assistance Of A**  
14 **Bankruptcy Attorney.**

15 Debtor, a member of the California bar, obtained a law degree in 1998. He initiated  
16 the Case on June 24, 2004. In so doing, he utilized the services of an experienced  
17 bankruptcy attorney. In early testimony and disclosures, he described himself as a criminal  
18 law practitioner and denied that he represented clients in personal injury cases.

19 **2. Debtor's Health Issues Contributed To His Financial Problems.**

20 Debtor suffered pre-petition and suffers today from medical conditions including, but  
21 not limited to, diabetes. Debtor alleges that these health issues were a significant cause of  
22

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23 <sup>2</sup> From case initiation through December of 2007, the Honorable John J. Hargrove presided  
24 over the Case. Upon Judge Hargrove's retirement, the Case was transferred to the author of this  
25 memorandum decision. In order to assure a fair consideration of the Motion, the author carefully  
26 reviewed the entirety of the docket in the Case and in the various adversary proceedings arising  
27 therein and read numerous documents and transcripts filed in the Case. The author, thus, is  
28 confident in her ability to speak for the Court as to its actions and opinions prior to January of 2008  
to the extent set forth herein and does not distinguish between Judge Hargrove's actions and her  
own, except in limited circumstances. The Court's ability to take notice of items on the docket of  
the case at hand is clear. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F. 2d. 1169, 1172  
(10th Cir. 1979).

1 his chapter 7 filing. In particular, Debtor contends that in 2002 he was hospitalized three  
2 times, had two operations, and spent an entire year in bed with a life threatening post-  
3 surgical infection. Immediately after the Court ordered Debtor's eviction in 2005, the  
4 Debtor claimed diabetic foot ulcers. More recently, Debtor claims multiple amputations.  
5 Immediately prior to his 2004 bankruptcy filing, however, he was well enough to go on a  
6 Caribbean cruise.

7 **3. Debtor's Schedules And Statement Of Affairs Do Not List Any Contingent Fee**  
8 **Receivables, Income Tax Refunds, Litigation Claims Capable Of Recovery, Equity In**  
9 **Real Property In Excess Of Exemptions, Or Potential Preference Recoveries.**

10 Debtor's schedules (the "Schedules") initially appeared unremarkable and, among  
11 other things, described Debtor's assets and pre-petition activities as follows:

- 12 a. Debtor scheduled pre-petition unsecured debt totaling \$227,304 and  
13 consisting of medical expenses of \$24,643; a judgment held by  
14 TACI Corp. of \$110,175; legal expenses of \$46,854; credit card and  
15 unsecured loan debt of \$42,392; and a small amount of miscellaneous  
16 debt.
- 17 b. Debtor scheduled a single real property asset, a condominium located at  
18 5885 El Cajon Boulevard (the "Condo"), valued at \$240,000, and  
19 allegedly encumbered by three liens, a first trust deed owed to an  
20 institutional lender and second and third trust deeds owed to Debtor's  
21 personal friends, Terry Babler and Thomas Durisoe, respectively.
- 22 c. Debtor scheduled minimal personal property assets including a single  
23 bank account at Union Bank of California and a single \$15,000 account  
24 receivable owed by Wade Hughes. The Schedules state that the  
25 Hughes receivable is "considered uncollectable". Debtor did not  
26 schedule any other receivables and, in particular, did not schedule any  
27 tax refunds, contingent fee receivables, or litigation claims.

1 d. Debtor stated in his Statement of Financial Affairs at paragraph 3 that  
2 he made no payments to creditors of over \$600 within the 90 days prior  
3 to filing the Case.

4 **4. At Debtor's 341(a) Meeting, Debtor Received Instruction On The Importance**  
5 **Of Candor And Guidance As To What Assets Properly Are Includable In His Estate,**  
6 **And Indicated His Understandings In Connection Therewith.**

7 Debtor's 341(a) meeting took place on July 23, 2004. In filling out the  
8 341(a) Meeting of Creditors Questionnaire (the "341(a) Questionnaire")<sup>3</sup>, Debtor declared  
9 under penalty of perjury, among other things, that:

- 10 a. He reviewed his Schedules and Statement of Financial Affairs and  
11 discussed them with his attorney prior to signing them.
- 12 b. He neither has nor had an offshore account.
- 13 c. He did not make any payment or transfer any property in excess of  
14 \$5,000.00 within four years of filing bankruptcy except for regular  
15 periodic required payments on contracts.
- 16 d. He advised that he was seeking recovery in a current lawsuit or had a  
17 belief that he had grounds to do so, but identified this claim as:  
18 "possible personal claim minimal value < small PL case vs state 2000  
19 (?) may have S/L problem."
- 20 e. Debtor demonstrated his understanding of the importance of candor in  
21 the bankruptcy process. In particular, he answered "yes" to the  
22 question "Do you understand that you are required to disclose all  
23 present and future property and money to the Trustee and to not do so  
24 could result in civil as well as criminal penalties?"

25 \_\_\_\_\_  
26 <sup>3</sup> The Trustee introduced the 341(a) Questionnaire into evidence, without any Debtor  
27 opposition, as Exhibit A to the Declaration of Nannette Farina in Support of Trustee's Supplemented  
28 Motion to Compel Debtor's Interrogatory Answers re Offshore Accounts and For Adjudication re  
Debtor's Claim of Fifth Amendment Privilege Against Self-Incrimination filed on April 16, 2008 as  
docket #240 in 04-5619.

1 In testimony at his 341(a) meeting, Debtor confirmed the statements in the Questionnaire  
2 generally and specifically under oath. And, in particular, Debtor affirmed that he listed all  
3 assets in his Schedules, had no receivables other than as already disclosed, and had no  
4 contingent fee cases as: "I don't do PI."

5 **5. The Trustee Initially Questions Only The Babler And Durisoe Liens, Begins**  
6 **Investigation As To Their Validity, But Allows The Debtor To Receive His Discharge.**

7 On August 24, 2004, the Trustee issued his initial report after conclusion of the  
8 341(a) meeting and advised that he was investigating the existence of assets. This  
9 investigation apparently focused initially only on questions as to the validity of the Babler  
10 and Durisoe trust deeds. As a result, the Trustee did not request additional time to object to  
11 Debtor's discharge, and Debtor received a discharge on September 22, 2004.

12 Ultimately, the Trustee obtained a judgment and a settlement resulting in complete  
13 disallowance of the Durisoe lien and a voluntary reduction of the Babler lien to \$5,000. In  
14 short, the Trustee established through trial or negotiation that these liens constituted a fraud  
15 on creditors or should otherwise be set aside. The Trustee, however, does not request that  
16 this Court vacate Debtor's discharge based on improprieties related to these liens. Instead,  
17 the Trustee asserts that the facts related to these liens and the Trustee's difficulty in  
18 obtaining a set aside of these liens evidence Debtor's general lack of candor and cooperation  
19 in the Case. The Durisoe litigation history is also relevant as discovery in relation to the  
20 Durisoe liens eventually led to the discovery of numerous unscheduled assets, including  
21 those directly involved in the Court's decision here to grant partial summary judgment. As a  
22 result, an overview of this litigation is appropriate.

23 **a. The Trustee discovers an improper attempt to transfer the Condo.**

24 On November 18, 2004, Debtor executed a grant deed dated November 15, 2004  
25 transferring title to the Condo to Durisoe and delivered it to an Arcadia Escrow account.  
26 And on December 1, 2004, Durisoe executed a grant deed dated November 16, 2004  
27 transferring title to the Condo to a Mr. Williams. Debtor subsequently denied any  
28 knowledge of the Durisoe-Williams transaction.

1 The Trustee learned of the alleged Condo sale on December 13, 2004 and  
2 immediately initiated an adversary proceeding seeking recoveries against Durisoe, Babler,  
3 and Yates. The Trustee refined his theories and, shortly thereafter, initiated a second  
4 adversary proceeding that added Mr. Williams as a defendant. The two adversary  
5 proceedings were consolidated thereafter (as so consolidated, the "Durisoe Lien Litigation")  
6 and allege that the Durisoe and Babler trust deeds were fraudulent transfers and that Debtor  
7 improperly sold the Condo. The Durisoe Lien Litigation also sought to recover title to the  
8 Condo. The Trustee alleged in the Durisoe Lien Litigation, among other things, that Yates  
9 stood to recover \$46,000 in connection with the Condo transactions.

10 **b. Debtor claims that the Condo transfer was an honest mistake.**

11 Debtor answered the Durisoe Lien Litigation complaint and in his affirmative  
12 defenses alleged his belief that he could appropriately transfer the Condo given discharge.  
13 This affirmative defense is significant as it begins a theme; throughout the Case, Debtor  
14 repeatedly claimed ignorance of the law or mistaken understanding of the law when caught  
15 in an improper action.

16 **c. The Court orders production of records, determines that the Trustee has**  
17 **the right to possess and control the Condo, and notes the Debtor's lack of cooperation.**

18 In June of 2005, the Trustee brought a motion to compel the production of banking  
19 records and a motion seeking summary judgment on Trustee's claim of a right to possession  
20 and control of the Condo. The Court ultimately granted both motions in full and, among  
21 other things, issued its order allowing eviction. In the eviction order, the Court made clear  
22 its concerns regarding Debtor's behavior up to that point in the Case:

23 Since December 2004, when the trustee discovered that the debtor had  
24 sold the [Condo] without notice or court approval, the case has been  
25 marked by a complete lack of cooperation by the debtor to assist the  
26 trustee in setting aside the unauthorized sale . . . [t]he most recent  
example . . . [is that the] debtor opposed the transfer of the [Condo]  
back to the trustee...

27 04-90530, Dkt. #53 at 2:19-27.  
28

1           **d.     The Debtor briefly converts the Case to chapter 13.**

2           After the Court ordered eviction, the Debtor converted the Case to a proceeding  
3 under chapter 13. The Trustee opposed conversion and filed a motion to reconvert (the  
4 "Reconversion Motion"). In the memorandum of points and authorities supporting the  
5 Reconversion Motion, the Trustee asserted that the Debtor lied under oath, concealed estate  
6 assets, and refused to provide information regarding his law practice income. The Debtor  
7 initially opposed the Reconversion Motion, but ultimately withdrew his opposition, and the  
8 case was reconverted.<sup>4</sup>

9           **e.     The Trustee obtains summary judgment in the Durisoe Lien Litigation**  
10 **and the Court describes Durisoe and those involved in his defense as "the gang who**  
11 **couldn't get their stories straight."**

12           In July of 2007, the Trustee brought a summary judgment motion seeking to set aside  
13 the Durisoe trust deed as constructively fraudulent. On reply, the Trustee outlined the  
14 various inconsistent stories Durisoe, Debtor, and other witnesses gave during the course of  
15 the Durisoe Lien Litigation. These inconsistencies also were clear to the Court; Judge  
16 Hargrove stated on the record that the declaration of a Mr. Parker regarding the alleged  
17 Durisoe loan to Debtor was a "sham," and he described Durisoe and his cohorts as the "gang  
18 who couldn't get their stories straight."<sup>5</sup> Significantly, Mr. Parker, who testified that he  
19 personally gave Debtor funds from Durisoe's store and kept accounts regarding the same,  
20 was uncooperative at his deposition and asserted the Fifth Amendment as to questions  
21

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22 <sup>4</sup>           Thereafter, the Trustee sought sanctions in connection with the conversion, but the Court  
23 denied the sanctions motion finding that Debtor's conversion was not inappropriate and that, as  
noted above, Debtor ultimately withdrew his opposition to reconversion.

24 <sup>5</sup>           Judge Hargrove's exact comments were as follows:  
25           You know, this story —these stories—I was reading these declarations and the  
26 affidavits, and it reminded me of a—movie came out years ago. I think Tim Conway  
27 was in it . *The Gang Who Couldn't Shoot Straight*, I think was the name of the  
28 movie. And the thought came that this summary judgment motion and these  
affidavits [of Debtor, Durisoe, and Parker] remind me of the gang who couldn't get  
their stories straight, and that's clearly what this record shows. (July 31, 2007  
Hearing Transcript, 04-90530, Dkt. #141 at 37).

1 regarding his employment history.<sup>6</sup> The Court ultimately found inconsistencies as to the  
2 form of payment, the documents used for payment, the timing of the trust deed, the reason  
3 for the loan, and all of Mr. Parker's testimony. Thus, the Court granted summary judgment  
4 and avoided the Durisoe lien.

5 **6. The Trustee Also Pursues Recovery Of Post-Petition Payments To Durisoe.**

6 In the course of the Durisoe Lien Litigation, the Trustee obtained bank records that  
7 identified another Durisoe related concern. On August 16, 2004, Farmer's Insurance  
8 Company ("Farmer's") issued a \$235,000 check (the "Whiteman Check"). It is undisputed  
9 that the Whiteman Check relates to personal injury litigation that Debtor initiated on behalf  
10 of Mr. Whiteman in December of 2002. It is further undisputed that Debtor took an  
11 attorneys' lien on this recovery on June 7, 2003 and asserted an insurance claim against  
12 Farmer's in December of 2003. Finally, Debtor does not deny pre-petition communications  
13 with Farmer's in connection with the Whiteman case. Thus, there is no question that the  
14 Whiteman Check relates to a personal injury case that Debtor initiated pre-petition.<sup>7</sup>

15 Debtor deposited the Whiteman Check into his trust account on October 13, 2004,  
16 and on December 9, 2004 he paid \$16,300 to himself and advanced \$146,700 to  
17 Mr. Whiteman through a check made payable to Durisoe and Mr. Whiteman jointly. On  
18 that same day, Durisoe transferred funds into the Arcadia Escrow account.

19 The Trustee discovered these transactions when he obtained Debtor bank records and  
20 Durisoe records in connection with the Durisoe Lien Litigation. The Trustee, thereafter  
21 intensified efforts to obtain information regarding the Whiteman case and attempted to  
22 subpoena Farmer's records.

23 \_\_\_\_\_  
24 <sup>6</sup> The Court notes that Debtor acted as counsel for Mr. Parker at his deposition.

25 <sup>7</sup> Ultimately, the Trustee sought to recover a judgment equal to the amount of the Whiteman  
26 Check retained by Debtor alleging that it was an asset of the Debtor's bankruptcy estate (the  
27 "Estate"). The Court denied the Trustee's request for summary judgment on this issue as Debtor  
28 argued that a portion of the Whiteman Check is consideration for post-petition legal work and,  
therefore, that these Whiteman Check proceeds are not Estate assets. Significantly, however,  
Debtor concedes that a portion of this payment was an asset of the Estate. Thus, the issue is not  
whether Debtor converted Estate assets when he negotiated and retained a portion of the Whiteman  
Check; the only issue is the amount of Estate assets he converted.

1           **a.       The Debtor opposes all efforts to obtain information about the Whiteman**  
2 **litigation and the Whiteman Check and requires the Trustee to obtain information**  
3 **through Court order.**

4           Debtor strongly opposed Trustee's every effort to obtain records from Farmer's and  
5 expressed "outrage and objection" in a letter to Farmer's dated April 10, 2007. This letter  
6 instructed Farmer's not to release records without a court order. On April 25, 2007, he sent  
7 a second letter alleging that the entire Whiteman file was privileged. In response, the  
8 Trustee requested a 2004 exam order for Farmer's. The Debtor opposed production of these  
9 records on the ground that they included "medically private information" notwithstanding  
10 the Trustee's assurance that he was not seeking any such information.

11           On May 29, 2007, the Trustee also filed a motion seeking turnover of Debtor's law  
12 office records and an accounting of contingent and unliquidated Debtor claims (the "Law  
13 Office Accounting Motion"). The Debtor opposed the Law Office Accounting Motion,  
14 alleging, among other things, that he had provided everything he had.

15           At the June 26, 2007 hearing on the Law Office Accounting Motion and the Trustee's  
16 request for a 2004 examination of Farmer's, the Court took the unusual step of placing the  
17 Debtor under oath during his argument. Thereafter, the Debtor stated under oath that he had  
18 only "minimal civil contingency work" and almost no clients prior to filing. Debtor also  
19 alleged his understanding based on a review of cases that contingent fees were not earned  
20 until paid and that, as a result, post-petition recoveries on cases pending pre-petition were  
21 not Estate assets. After the Court told him this understanding was absolutely incorrect,  
22 Debtor admitted that he did not properly schedule the Whiteman account receivable. He  
23 then alleged a similar misunderstanding regarding tax refunds for pre-petition tax years.  
24 Thus, once again, Debtor alleged innocent mistake once caught in improper acts.

25           At hearing end, the Court granted both motions, carefully explained the law making  
26 pre-petition contingent fee case recoveries assets of the Estate, and required Debtor to  
27 provide a list of all matters he handled from 2001 to 2004. The Court especially  
28 emphasized the need for candor and completeness in this process and ordered the Debtor to

1 make a good faith attempt to identify all cases pending pre-petition so that the Trustee could  
2 conduct an investigation.

3 **b. The Debtor provides information regarding his pre-petition law practice,**  
4 **Farmer's also provides records, and the Trustee obtains an additional recovery from**  
5 **Durisoe.**

6 Consistent with the Court's requirement, the Debtor produced a writing on July 9,  
7 2007. The writing, among other things, listed several contingent fee cases and other  
8 accounts receivable previously omitted from the Schedules, alleged that Debtor had no bank  
9 records not already provided to the Trustee and no relevant writings, and stated that he made  
10 "every effort to re-create the requested items from memory."

11 Farmer's response to the Trustee's 2004 examination order included documents which  
12 evidenced that the Whiteman litigation was pending pre-petition, that Debtor was actively  
13 involved in this litigation immediately prior to the Petition Date, and that Debtor made a  
14 policy limits demand prior to the Petition Date.

15 After review of the newly available information regarding the Whiteman litigation  
16 and payment, the Trustee filed an adversary proceeding against Durisoe and Arcadia  
17 Escrow. The Trustee ultimately settled this litigation and recovered \$95,000 for the Estate  
18 from Durisoe and Arcadia Escrow proceeds.

19 **7. The Durisoe Discovery Leads To Discovery Of Other Omitted Assets.**

20 On September 28, 2007, the Trustee filed the adversary proceeding in which the  
21 Motion arises, Adv. No. 07-90596, and sought to recover assets from Debtor and to revoke  
22 Debtor's discharge. Through bank record subpoenas in the Durisoe Lien Litigation and  
23 other investigation, the Trustee identified numerous receivables or claims that constitute  
24 Estate assets in whole or in part. In addition to the Whiteman litigation proceeds, these  
25 assets include tax refund payments for pre-petition tax years, payments in relation to other  
26 litigation initiated pre-petition, and \$1,015 in connection with a pre-petition claim asserted  
27 by Debtor against Holland America Line, Inc. ("Holland America").

28

1 The Trustee sought revocation of discharge under section 727(a)(2) and (3) based on  
2 conversion and non-disclosure of Estate assets including, but not limited to, those listed in  
3 this complaint and Debtor's alleged failure to comply with three Court orders.

4 **8. Debtor Refuses To Answer Questions Regarding A Swiss Bank Account That**  
5 **Received Deposits Of Checks Written To Debtor And Bearing His Endorsement.**

6 In January of 2008, the Trustee continued his asset discovery efforts and sought a  
7 Rule 2004 examination of Debtor in regard to an offshore account at "Leu Bank" of  
8 Switzerland. He also subpoenaed Leu Bank records.<sup>8</sup> The Trustee also promulgated  
9 interrogatories related to the Leu Bank account including: Interrogatory 1, which asks  
10 whether Debtor had an offshore account at any time from 2001 to the present;  
11 Interrogatories 2 and 3, which ask for the account number at Leu Bank and confirmation  
12 that a specific check was deposited into a Leu Bank account in which Debtor had an  
13 interest; and Interrogatories 11 through 15, which request additional information regarding  
14 offshore accounts. Debtor did not answer the above referenced interrogatories and, instead,  
15 asserted his rights under the Fifth Amendment and refused to answer. The Debtor has  
16 asserted his Fifth Amendment rights consistently thereafter as to all questions related to the  
17 Leu Bank account.

18 **9. Trustee Discovery Identifies Yet Another Significant Asset.**

19 On or about April 9, 2009, the Trustee subpoenaed records from Cheong, Denove,  
20 Rowell & Bennett (the "Cheong Firm"). The Cheong Firm produced, among other things,  
21 two checks totaling \$37,904 (the "Stillman Checks"). The Cheong Firm production  
22 established that the Cheong Firm wrote the checks and sent them to Debtor during the  
23 ninety days prior to the Petition Date. The Stillman Checks bear a "for deposit only"  
24 endorsement by the Debtor and notations evidencing post-petition deposit into the Leu Bank  
25 account.

26  
27  
28 <sup>8</sup> The Trustee identified Leu Bank as a bank receiving checks payable to Debtor and endorsed  
by him for deposit through subpoenas on third parties.

1 The Trustee promptly initiated another adversary proceeding (09-90161) seeking  
2 turnover of the Stillman Checks or their value, among other things, and filed a summary  
3 judgment motion. The Debtor opposed summary judgment, alleging that he had assigned  
4 and transferred the proceeds of the Stillman Checks to Antonio Zarate Araiza ("Araiza").<sup>9</sup>  
5 The Court concluded, however, that his argument and evidence were insufficient to create a  
6 triable issue of material fact and granted summary judgment.

7 The Debtor timely sought reconsideration of this summary judgment order (the  
8 "Reconsideration Motion"). Final briefing and determination were delayed at Debtor's  
9 request, however, as the Federal Bureau of Investigation ("FBI") and Internal Revenue  
10 Service seized his computer and records pursuant to a warrant requiring turnover of records  
11 related to the Case. The Court will hear the Reconsideration Motion on November 19,  
12 2009.

13 **10. Debtor Has Never Provided Adequate Law Office Records And Has Provided**  
14 **Numerous Excuses For This Failure.**

15 Central to the Motion and to this Case is the Trustee's struggle to obtain information  
16 regarding Debtor's pre-petition law practice. As the above evidences, the Trustee ultimately  
17 turned up an abundance of evidence, but without any aid from the Debtor. Instead, the  
18 Debtor failed to produce adequate client records and to provide an adequate reason for this  
19 failure.<sup>10</sup> And the story regarding the Debtor's inability to produce his files continues to  
20 change.

21 \_\_\_\_\_  
22 <sup>9</sup> Debtor alleged that he had borrowed money from Araiza, and at that time he gave Araiza a  
23 lien on future attorneys fees to be received by Debtor. Debtor also filed a declaration purportedly  
24 from one of the Debtor's former clients, Manuel Gomez Garcia, who testified that he had introduced  
25 Debtor to Araiza and that Araiza was "not a nice man." 09-90161, Dkt. #27 at 19:17.

26 <sup>10</sup> The Debtor, a long-time practicing attorney, allegedly has a system of record keeping that is  
27 not consistent with his obligations as an attorney. In addition to poor practices as regards client  
28 files, the Debtor claims that he does not reconcile bank statements or trust accounts. Rather, the  
29 Debtor claims to just make "notations" on bank statements. This practice is troubling given that  
30 Rule 4-100 of the California Rules of Professional Conduct, requires Debtor to:

(3) Maintain complete records of all funds, securities, and other properties of a client  
coming into the possession of the member or law firm and render appropriate accounts to the  
client regarding them; preserve such records for a period of no less than five years after final  
appropriate distribution of such funds or properties; and comply with any order for an audit

1 The Trustee first took Debtor's deposition in September of 2005. In this deposition,  
2 counsel for the Trustee inquired as to the location of the Debtor's legal files. The exchange  
3 went as follows:

4 Q. (Ms. Farina): The testimony you gave was that you have some boxes  
5 packed and some records stored and some at your premises, I believe. Please  
6 indicate for me a list of all places in which you have data or client files or  
7 records relating to your law practice files. Let's do a list presently existing,  
8 wherever they are.

9 A. (Debtor): I believe there are some in my file drawers, there are some in  
10 boxes, there may be some at a friend's house. I don't really know. I mean,  
11 things just got scattered when I got evicted, so I - I'm not sure where things  
12 are. Like I say, I've been very disorientated since that time.

13 Dkt. #70-2, Ex. G at 20-21.

14 In a subsequent follow-up deposition, just weeks after the initial deposition, the  
15 Debtor again testified as to the location of his legal files and trust account statements. The  
16 Debtor stated that his files were either at a condominium or a friend's place of business.<sup>11</sup>

17 Dkt. #70-3, Ex. I at 17-18.

18 Approximately two years later, in connection with the Law Office Accounting  
19 Motion, the Debtor provided yet another explanation for being unable to produce legal  
20 records. In sworn testimony, the Debtor stated:

21 Q. (Judge Hargrove): What happened to these files? You had three drawers  
22 full of records.

23 A. (Debtor): What I want to make clear is, your Honor, that we're talking  
24 about different periods of time. And different files and things existed at  
25 different areas of time. Obviously, when I had a law office back in 1999, I  
26 had ten file cabinets full of records. When I lost my law office and moved my  
27 practice into my home, I destroyed nine of those file cabinets full of records  
28 and kept only what was the most current. When I got evicted from my home,  
I went through the files. And most of them have nothing in them. And I got

of such records issued pursuant to the Rules of Procedure of the State Bar.

<sup>11</sup> When the Trustee inquired further about the friend's place of business, the Debtor was  
unable to give the profession of his friend, the type of business, or the address or phone number of  
the business. According to the Debtor, he did not know any of this information despite being  
friends with the party retaining his documents for over 20 years. See Dkt. #70-3, Ex. I at 18-20.

1 rid of most of them. I mean, I've moved to Texas. And I'm basically  
2 homeless as we speak. So I don't have boxes of files anywhere. I mean I just  
3 don't have them.

4 04-05619, Dkt. #240-6, Ex. K at 2.

5 And two years later, the Debtor provided yet another story. In a declaration  
6 submitted by the Debtor supporting his opposition to the Motion, the Debtor states:

7 37. Then, there was the problem of moving. I had no place to move to thus no  
8 place to store any of my furniture or boxes. So, if anyone had the room to  
9 store a dozen boxes, or a piece of furniture, they came and took what they  
10 could and put it in their storage, wherever that was. One friend even hired a  
11 Mexican laborer with a truck, out of a Home Depot parking lot, to come to my  
12 residence and move some boxes to her storage area. Turns out the laborer  
13 overloaded the truck, and an unknown number of boxes "fell off the truck"  
14 onto the highway. To this day, I have no idea what boxes were lost or what  
15 was in them.

16 38. So there were more than a hundred unmarked boxes, with unknown  
17 contents, scattered in six or seven different places. And it should be noted  
18 that, at the time, *I have been practicing law out of my home since 2001, so*  
19 *all of my law practice files and records were packed in and among these*  
20 *mystery boxes.*

21 39. So there were at least a hundred unmarked boxes, with unknown contents,  
22 scattered in at least six or seven different locations. I still don't know where  
23 many of these boxes are. Some of the boxes were lost forever. Some have not  
24 been unpacked to this day. The contents of every box that is found and  
25 opened is still a surprise.

26 Dkt. #77 at 7-8 (emphasis in original).

27 This most recent story is inconsistent with the previous sworn testimony that many of  
28 the files were destroyed when moving his law practice to his home and later when evicted  
from his home. Only two things are clear in relation to Debtor's records. First, he never  
provided anything that indentified a previously unknown Estate asset. And second,  
notwithstanding this lack of records, the Trustee identified numerous undisclosed Estate  
assets.

1 **11. As Discussed Below, Partial Summary Judgment Is Appropriate On This**  
2 **Record.**

3 Through the Trustee's persistence, bit by bit and document by document, a more  
4 complete picture of Debtor's pre-petition activities and assets emerged. The Debtor  
5 provided multiple excuses for his lack of disclosure. The Debtor also wove a web of  
6 inconsistent stories and hid behind the Fifth Amendment. In summary, the Case involves a  
7 tidal wave of omission and implausible theory. The Court, however, stops short of granting  
8 summary judgment on all issues given the stringent summary judgment standards and,  
9 instead, provides limited summary judgment as discussed below.

10 The Court provided the parties with an oral ruling consistent with this memorandum  
11 decision at a Pre-Trial Status Conference held on October 22, 2009. At that time, the Court  
12 was aware of the pending Reconsideration Motion and the FBI's execution of its warrant.  
13 The Court had not reviewed, however, the Declaration of FBI Special Agent, Marcie Soligo  
14 subsequently filed in opposition to the Reconsideration Motion that attaches copies of  
15 documents obtained from Debtor and related to the Leu Bank account. This evidence fully  
16 supports certain of the Court's prior conclusions. This new evidence also supports  
17 additional theories for summary judgment under section 727(d)(3) and (2). The Court,  
18 however, does not expand herein its grounds for summary judgment beyond those in its  
19 previous oral ruling.

20  
21 **LEGAL STANDARDS**  
22

23 **A. Statute Of Limitations For Revocation Of Discharge – 11 U.S.C. § 727(e).**

24 Under the Bankruptcy Code, a trustee, creditor, or the United States trustee may  
25 request revocation of a chapter 7 discharge. 11 U.S.C. § 727(e). In instances where the  
26 revocation is based on sections 727(d)(2) or (d)(3), the party seeking revocation of discharge  
27 must file an adversary proceeding before the later of one year after granting of discharge or  
28 the date the case is closed. 11 U.S.C. § 727(e)(2) (emphasis added).

1 **B. Summary Judgment Standard.**

2 Federal Rule of Civil Procedure 56(c) (incorporated into the Federal Rules of  
3 Bankruptcy Procedure by Rule 7056) provides that a party may move for summary  
4 judgment when there is no genuine issue as to a material fact and the moving party is  
5 entitled to judgment as a matter of law. "A genuine issue" is one where, based on the  
6 evidence presented, a fair-minded jury could return a verdict in favor of the non-moving  
7 party on the issue in question. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986);  
8 *Lang v. Retirement Living Pub. Co.*, 949 F.2d 576, 580 (2d Cir. 1991). A "material fact" is  
9 one for which the resolution could affect the outcome of the case. *Anthes v. Transworld*  
10 *Systems, Inc.*, 765 F. Supp. 162, 165 (D. Del. 1991).

11 All justifiable inferences must be drawn in favor of the non-moving party. *Anderson*,  
12 477 U.S. at 225. Likewise, all evidence must be viewed in the light most favorable to the  
13 non-moving party. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d  
14 872, 875 (9th Cir. 1987). However, once the moving party has met its burden, the non-  
15 moving party must do "more than simply show that there is some metaphysical doubt as to  
16 the material facts." *Matsushita Electric Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574,  
17 586-587 (1986). If the record, taken as a whole, cannot lead the trier of fact to rationally  
18 find for the non-moving party, "there is no 'genuine issue for trial.'" *Id.* at 587. The court is  
19 not required to draw every conceivable inference from the records, but only reasonable  
20 ones. *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883, 886 (7th Cir. 1989). If the  
21 "genuine issue for trial" is implausible, the non-moving party must support the claim with  
22 evidence more persuasive than otherwise necessary to survive a summary judgment motion.  
23 *Matsushita Electric Indus.*, 475 U.S. at 587.

24  
25  
26  
27  
28

1 **C. Acquiring Property Of The Estate And Failing To Report – 11 U.S.C.**

2 **§ 727(d)(2).**

3 A trustee, creditor, or the United States trustee can request a revocation of discharge  
4 if:

5 [T]he debtor acquired property that is property of the estate, or became  
6 entitled to acquire property that would be property of the estate, and  
7 knowingly and fraudulently failed to report the acquisition of or entitlement to  
8 such property, or to deliver or surrender such property to the trustee...

9 11 U.S.C. § 727(d)(2).

10 The court shall revoke discharge if the above finding is made after notice and a  
11 hearing. *Id.* Leaving no doubt, the Senate Report states that section 727(d) requires the  
12 court to revoke discharge. S. Rep. No. 95-989, at 99. Thus, this Court has no discretion in  
13 revoking discharge if the moving party meets its summary judgment burden.

14 The first element that a plaintiff must prove is that the debtor acquired property of the  
15 estate or became entitled to property of the estate. It is immaterial whether the debtor  
16 received the property before or after discharge. *See 6 Collier on Bankruptcy* ¶ 727.15[4]  
17 (15th ed. Rev. 2008).

18 The second element the plaintiff must prove is that the debtor knowingly and  
19 fraudulently failed to report such property and/or to deliver the property to the trustee. In  
20 order to prove this behavior, the plaintiff may show that the debtor: "had access to omitted  
21 information and either knew that failure to disclose it would be seriously misleading or that  
22 the debtor acted so recklessly as to imply fraudulent intent." *6 Collier on Bankruptcy*  
23 ¶ 727.15[4]; *see also In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992). Fraudulent intent  
24 can be based on inferences drawn from a course of conduct and inferred from all of the  
25 surrounding circumstances. *In re Yonikus*, 974 F.2d at 905; *see also Devers v. Sheridan (In*  
26 *re Devers)*, 759 F.2d 751, 754 (9th Cir. 1985). While recklessness alone is not enough to  
27 infer intent, recklessness combined with other circumstantial evidence is. *In re Khalil*,  
28 578 F.3d 1167, 1168 (9th Cir. 2009).

1 **D. Refusing To Obey A Lawful Order Of The Court – 11 U.S.C. § 727(d)(3).**

2 A trustee, creditor, or the United States trustee also can request a revocation of  
3 discharge if the debtor committed an act specified in section 727(a)(6), which prevents  
4 discharge if the debtor refused to obey a lawful court order. For a debtor's refusal to obey  
5 an order to provide grounds for revocation of discharge it must be willful, intentional  
6 disobedience or dereliction, not merely inadvertent disobedience or inability to comply. *See*  
7 *6 Collier on Bankruptcy* ¶ 727.09[4]; *and see Concannon v. Costantini (In re Costantini)*,  
8 201 B.R. 312, 317 (Bankr. M.D. Fla. 1996).

9  
10 **DISCUSSION**

11  
12 **A. Statute Of Limitations.**

13 In his opposition to the Motion, the Debtor argues that this adversary proceeding is  
14 barred by the statute of limitations and that the Trustee must rely on the principles of  
15 equitable tolling. The Court need not address the equitable tolling argument, however, as the  
16 adversary proceeding with respect to the revocation of discharge falls clearly within the  
17 statute of limitations. Under section 727(e)(2), the adversary proceeding must be brought  
18 within one year of the chapter 7 case being closed. The Case has not been closed, and thus  
19 this adversary proceeding for revocation of discharge is timely.<sup>12</sup>

20 **B. A Fresh Start Through Bankruptcy Is Intended For The Honest But**  
21 **Unfortunate Debtor, And The Trustee Bears The Burden Of Establishing That Debtor**  
22 **Is Not Entitled To The Discharge That Allows This Fresh Start.**

23 As a general policy matter, bankruptcy provides a fresh start for the honest but  
24 unfortunate debtor. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). As such: "[a]  
25 bankruptcy court is entitled to insist upon filings and representations made in the utmost

26  
27 <sup>12</sup> The Debtor also asserts a laches defense of a sort, but given the record in the Case such a  
28 defense is meritless. And equitable tolling, if in fact an issue, also is appropriate. As discussed  
above, the Debtor was not cooperative and the Trustee was appropriately diligent.

1 good faith." *Hannigan v. White (In re Hannigan)*, 409 F.3d 480, 483 (1st Cir. 2005). In  
2 fact, Rule 4002 expressly requires that the debtor: " cooperate with the trustee in . . . the  
3 administration of the estate." In short, it is not initially the Trustee's duty to find and  
4 recover assets of the Estate, but rather the Debtor's obligation to disclose and turnover.  
5 Thus, candor in the disclosure of assets and cooperation with the liquidation of assets for the  
6 benefit of creditors are the behaviors that best exemplify the honest debtor.

7 The Case, as discussed above, provides scant evidence of cooperation and candor. It  
8 is noteworthy that Debtor not only failed to disclose Estate assets, but also failed to amend  
9 his Schedules or similarly to cooperate.

10 In considering the Motion, however, the Court was mindful that the Trustee has the  
11 burden in seeking to revoke discharge. *Anderson v. Poole (In re Poole)*, 177 B.R. 235, 239  
12 (Bankr. E.D. Pa 1995). This burden is a heavy one. *Bowman v. Belt Valley Bank (In re*  
13 *Bowman)*, 173 B.R. 922, 924 (9th Cir. BAP 1994) (revocation of discharge must be  
14 construed strictly against the objector). Thus, in this case, the Court must balance the twin  
15 policy considerations of allowing the honest but unfortunate Debtor to obtain a fresh start  
16 against the need for integrity in the bankruptcy process.

17 Here, the Trustee raises a virtual blizzard of allegations. In connection with some,  
18 Debtor advanced arguments that would require an evidentiary hearing even if the Court  
19 believes it unlikely that the Debtor's testimony will provide him with a victory. The Court,  
20 however, identified three instances that sufficiently justify a summary judgment revoking  
21 discharge.

22 **C. 11 U.S.C. § 727(d)(2) – Failure To Report And Turnover Property Of The**  
23 **Estate.**

24 **1. The Holland America Assets.**

25 Approximately two weeks before the Petition Date, the Debtor took cruises with  
26 Holland America. The Debtor claims that during the cruises his cabin air conditioning  
27 failed, Holland America failed to promptly remedy this problem, and, as a result, his trip  
28 was ruined. He, therefore, demanded a twenty-five percent refund, at a minimum. The

1 Debtor sent a demand letter to Holland America on June 26, 2004, two days after filing the  
2 Case. Then, prior to receiving his discharge, he filed a small claims action against Holland  
3 America in San Diego County Superior Court. Finally, in November of 2004, Holland  
4 America paid \$1,015 to the Debtor in satisfaction of the Holland America claim judgment.  
5 The Debtor never reported this claim, the action thereon, or the proceeds received in  
6 connection therewith (collectively, the "Holland America Assets") to the Trustee. Similarly,  
7 he failed to surrender these proceeds to the Trustee. Indeed, the Trustee discovered the  
8 Holland America Assets only through discovery in connection with the Durisoe Lien  
9 Litigation. Thus, there is no genuine issue of material fact as to whether or not the Holland  
10 America Assets are property of the Estate as all are rooted in a cause of action arising pre-  
11 petition. Indeed, the correct outcome of this issue is so clear that Debtor conceded this point  
12 through lack of any opposition or argument to the contrary.

13 Debtor, similarly, failed to advance a single piece of evidence or word of argument to  
14 dispute the contention of the Motion that he knowingly and fraudulently failed to report or  
15 surrender the Holland America Assets. Thus, summary judgment revoking discharge under  
16 section 727(d)(2) is appropriate based solely on the Debtor's silence.

17 And in addition to this silence there is powerful evidence of the intentional and  
18 fraudulent nature of Debtor's omissions. First, there is timing; the Holland America claim  
19 arose immediately pre-petition, the Debtor made demand two days after the Petition Date,  
20 and he received payment on the Holland America claim less than six months post-petition.  
21 Second, it is clear that Debtor understood the requirement that he disclose pre-petition  
22 claims like the Holland America claim. Debtor listed a valueless pre-petition receivable  
23 claim on the Schedules and yet another valueless pre-petition litigation claim on his 341(a)  
24 Questionnaire. Further, the Schedules, 341(a) Questionnaire, and 341(a) process prompted  
25 Debtor to disclose claims like the Holland America claim. Finally, Debtor never claimed  
26 prior to his response to the Motion that he did not know that a pre-petition litigation claim  
27 was not an Estate asset. Debtor previously claimed "mistake" in relation to his failure to  
28 schedule and turnover tax refunds for pre-petition tax years and proceeds from pre-petition

1 contingent fee representations received post-petition. But Debtor never took such a position  
2 in relation to a claim like the Holland America claim and, indeed, is estopped from doing so  
3 given his previous disclosure of similar albeit valueless claims.<sup>13</sup>

4 Debtor may have ignored the Holland America claim on the theory that it was only  
5 worth \$1,015 and, therefore, was too small to form the basis for a revocation of discharge.  
6 But section 727(d)(2) does not contain an explicit materiality requirement. And in areas in  
7 section 727 where materiality is required, case law makes clear that materiality is not a  
8 function of amount or the extent of creditor harm. *See, In re Roberts*, 331 B.R. 876, 883  
9 (9th Cir. BAP 2005) (holding that a statement or omission can be material even if not  
10 prejudicial to creditors). Instead, materiality looks at the area of impropriety; and a false  
11 oath as to the existence of an asset is always material. *Id.* Thus, while a \$1,015 recovery  
12 may not provide significant additional value to the Estate, the omission is material. It  
13 involves an Estate asset, actually had value, and the failure to disclose its existence impeded  
14 the Trustee's efforts.

15 Therefore, given that the Debtor fails to offer any evidence, explanation, or argument  
16 in connection with his failure to disclose or surrender the Holland America Assets, given the  
17 timing in relation to this claim which arose immediately pre-petition, was pursued  
18 immediately after the Petition Date, and was recovered shortly after the Petition Date, and  
19 given the general pattern of duplicitous Debtor conduct, the Court finds that the Debtor  
20 knowingly and fraudulently failed to report and surrender the Holland America Assets, and,  
21 as a result, that a summary judgment revoking discharge is appropriate.

22  
23  
24  
25 <sup>13</sup> Indeed, in Debtor's opposition to a motion for partial summary judgment filed January 6,  
26 2009 by Trustee in this proceeding, based on conversion of Estate assets, Debtor took no position as  
27 to most of the receivables he recovered post-petition. He provided evidence and direct argument  
28 only as to the smallest and as to the largest of such claims advising that his alleged success in  
connection with those claims was dispositive of all other issues. Debtor, obviously, was wrong, and  
the Court previously granted summary judgment determining that the Holland America Assets  
were Estate assets.

1           **2.     The "Famous" Stillman Case.**

2           Prior to filing the Case, the Debtor represented Ms. Stillman in a suit against CBS  
3 and the producers of the reality-show *Survivor*<sup>14</sup> (the "Stillman Case"). Ms. Stillman was  
4 one of the contestants on the very first *Survivor* series in 2000. The Debtor eventually  
5 associated the Cheong Firm as co-counsel. The Stillman Case settled in early 2004, and the  
6 Debtor received attorney fees totaling \$37,904 in March and April of 2004. The Stillman  
7 Checks were not negotiated prior to the Petition Date.

8           The Trustee asserts that the Debtor intentionally and fraudulently failed to list the  
9 Stillman Checks in his Schedules. In response, the Debtor contends that he pledged the  
10 Stillman Checks to Araiza and believed these proceeds were not property of the Estate. In a  
11 separate adversary proceeding, this Court granted summary judgment in favor of the Trustee  
12 and held that the Stillman Checks were property of the Estate.

13           Having held that the Stillman Checks are property of the Estate, the Court now must  
14 consider whether the Debtor knowingly and fraudulently failed to report the Stillman  
15 Checks and/or failed to surrender them to the Trustee. The central facts surrounding intent  
16 involve the Debtor's alleged belief that the proceeds were not property of the Estate. In  
17 support of this contention, the Debtor submitted a declaration to the Court stating that he  
18 granted Araiza a lien on Stillman fees and therefore never believed them to be property of  
19 the Estate. Thus, the Debtor alleges an honest and innocent mistake, not knowing and  
20 fraudulent hiding of assets. Specifically the Debtor states:

21                     16. Therefore, when I received checks from these cases, they were  
22 immediately signed and given over to Mr. Araiza. I believed at the time, and  
23 still believe, that this was his money that I received for him, and not my  
24 money that belonged to the bankruptcy estate, as the Trustee now claims.

24                     17. Because of these liens, that were given before I even contemplated  
25 bankruptcy, I believed it had become Mr. Araiza's money as soon as I gave  
26 him liens on the proceeds of the cases. I did not consider any of the money to

27 <sup>14</sup> *Stillman v. CBS Corporation*, Case No. BC 248733 (California Superior Court,  
28 Los Angeles); *SEG, Inc. v. Stillman*, Case No. BC 245328 (California Superior Court,  
Los Angeles).

1 be "my money." It never even occurred to me that it was, or even could be  
2 considered to be, part of the bankruptcy estate.

3 09-90161, Dkt. #27 at 22.

4 Unfortunately for Debtor, however, the byzantine story in relation to the Stillman  
5 Checks does not bear careful scrutiny and leads to the inescapable conclusion that it is a  
6 fabrication.

7  
8 In support of the Motion, the Trustee submitted copies of the Stillman Checks along  
9 with the affidavit of a partner at the Cheong Firm. The Stillman Checks were dated  
10 March 26, 2004 and April 30, 2004 and were subsequently deposited on July 26, 2004 (three  
11 days after the section 341(a) creditors meeting) in the Leu Bank Account. Both check  
12 endorsements clearly read "FOR DEPOSIT ONLY" and then contain the signature of the  
13 Debtor. This evidence clearly contradicts the declaration of the Debtor that he signed the  
14 checks over to Araiza. Further, Debtor offers no proof that Araiza received the Stillman  
15 Checks other than his own testimony. And Debtor has no proof that Araiza negotiated the  
16 Stillman Checks, and, indeed, the evidence is to the contrary. Both Stillman Checks were  
17 clearly received by Debtor as he endorsed both "for deposit only." And both checks passed  
18 through the Leu Bank account, the bank account as to which Debtor took the Fifth  
19 Amendment and refused to provide information. Further support for the Trustee's position  
20 is provided by the fact that four checks, not just the two Stillman Checks, were deposited  
21 into the Leu Bank account on June 26, 2004. One check, written by Lurnie Durisoe,<sup>15</sup>  
22 however, on its face states "replenish retainer". In connection with this check, the Debtor  
23 never argues that it was paid over to Araiza and previously argued that it counter-balanced a  
24 check he wrote from his own account in a greater amount to Ms. Durisoe to "refund  
25 retainer." These facts support the Court's conclusion that the Debtor's story about Araiza is  
26 not credible.

27  
28 <sup>15</sup> Lurnie Durisoe, also referred to by Debtor as Lurnie Jackman, is Durisoe's spouse.

1 Further, at the hearing on the Motion, the Debtor provided further contradiction of  
2 his story. The Court asked why the Debtor did not schedule the alleged Araiza liens. The  
3 Debtor responded to the Court's questions as follows:

4 Q. (Judge Taylor): Did you list [the case liens] on your schedules?

5 A. (Debtor): What's that?

6 Q. Did you list the liens on your schedules?

7  
8 A. No. Because they were paid. They were done deals. It was money I had earned  
9 in 1999 and paid out in 2003. I mean, you know, it was a done deal. And I mean, I  
didn't see any problem with it. I still don't see any problem with it.

10 Dkt. #91 at 62.

11 Given that the Stillman Checks were paid in 2004 and endorsed in 2004, the Debtor's  
12 statement that he paid Araiza prior to 2004 contradicts his defense and claim of innocent  
13 error.

14 Finally, in the Debtor's Statement of Financial Affairs, the Debtor states under oath  
15 that he made no payments to creditors of more than \$600 within the 90 days pre-petition.  
16 As the Stillman Checks were sent to Debtor during this 90-day period, his new story is  
17 directly contradictory to his sworn statement in 2004.

18 In short, while the Court is required to assume facts in a manner favorable to the non-  
19 moving party on a summary judgment motion, the Court is not required to believe the  
20 inherently unbelievable. Similarly, where the Debtor takes different positions under penalty  
21 of perjury, the Court is not required to believe that this time he is telling the truth. Merely  
22 presenting contradictory declarations, with no satisfactory explanation for the inconsistency,  
23 does not create a genuine issue of material fact. *Cleveland v. Policy Mgmt. Sys. Corp.*,  
24 526 U.S. 795, 806 (1999); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir.  
25 1991). And where the Debtor asserts his Fifth Amendment rights in a civil matter, the Court  
26 is entitled to make an adverse inference provided corroborating evidence exists, as it does  
27 here. *Leonard, Jr. v. Coolidge (In re National Audit Defense Network)*, 367 B.R. 207, 216  
28

1 (Bankr. Nev. 2007). The Court believes that no rational trier of fact could come to any other  
2 conclusion than that the Debtor knowingly and fraudulently failed to report and turnover the  
3 Stillman Checks to the Trustee. Thus, the Court finds that misappropriation of the Stillman  
4 Checks, yet again, establishes grounds for revocation of discharge under section 727(d)(2).<sup>16</sup>

5 **3. Other Incidents Involving Failure To Turnover Property Of The Estate.**

6 The Trustee asks the Court to grant summary judgment revoking discharge under  
7 section 727(d)(2) based on seven additional incidents where Debtor allegedly failed to  
8 report and turnover property of the Estate. This property consists of various fees earned for  
9 legal services performed by the Debtor and \$621 in tax refunds. In each case, Debtor  
10 currently and/or previously claims honest mistake. As a result, and given the clear basis for  
11 revocation of discharge discussed above, the Court declines to revoke discharge based on  
12 these incidents through the Motion.

13 **C. 11 U.S.C. § 727(d)(3) – Failing To Obey Court Orders.**

14 **1. Court Order To Turnover Records And Provide Accounting Of Clients.**

15 The Trustee argues that the Debtor failed to obey the Court order of June 2, 2007  
16 requiring the Debtor to produce client records, or a list of client engagements and fees  
17 earned, for the three year period immediately prior to the Petition Date. In response to the  
18 Order, the Debtor faxed over a "recollection" of his client list for the period (the "Client  
19 List") and claimed that he did not have any "writings" to produce. Since the Debtor claimed  
20 to have no "writings," the Debtor provided the following caveat as to the Client List:

21 Debtor has no "writings" (with the exception of one (1) provided herewith) in his  
22 possession, custody or control. However, in accordance with the Court's instruction,  
23 Debtor has made every effort to re-create the requested items from memory. It  
24 should be understood that the Debtor was in poor health during much of the time  
25 period in question and his memory is far from perfect. The following recreation is  
26 the best memory will allow.

27 Dkt. #70-4, Ex. P at 36.

28 <sup>16</sup> As discussed above, recent evidence conclusively supports this determination.

1 The Debtor did not list or mention his representation of Ms. Stillman in the Client  
2 List. The Court believes that no rational trier of fact could come to any other conclusion  
3 than that the Debtor intentionally and willfully failed to disclose the Stillman engagement.  
4 This determination is supported by the numerous moving papers and declarations the Debtor  
5 filed in a separate, but related, adversary proceeding and, in particular, in connection with  
6 the Reconsideration Motion. For example, in the most recent declaration the Debtor  
7 submitted in support of the Reconsideration Motion, the Debtor declares:

8 7. Trustee did say that I had "hidden" the STILLMAN representation from the  
9 Trustee but this is a claim without credibility. STILLMAN was one of the original  
10 contestants on CBS "reality" show, "Survivor." The story of STILLMAN suing CBS  
11 for cheating, and my representation of STILLMAN, was the most widely reported  
12 news event in the United States<sup>17</sup> in 2001.

13 8. Since most news stories have only their "15 minutes of fame," it is truly  
14 remarkable that a Google search under the my (sic) name today, returns ANY story  
15 on this case, let alone more than twenty (20) stories, more than five (5) years after the  
16 case was settled and became old news.

17 9. I would occasionally "Google" myself while the STILLMAN case was ongoing.  
18 It was not uncommon to get over 20,000 "hits". The case didn't settle until 2004 so  
19 even then, a search of my name would get between 2,500 and 5,000 "hits".

20 09-90161, Dkt. #51 at 2.

21 It is impossible for this Court to believe that the Stillman case was famous enough  
22 that Debtor argues that the Trustee was on constructive notice of its existence; yet at the  
23 same time, the Debtor failed to recollect this client when creating the Client List. To believe  
24 this illogical argument would require the Court to reach into the metaphysical, which the  
25 Court is not required to do. The only plausible conclusion is that the Debtor willfully and  
26 intentionally disobeyed the Court order in order to hide his conversion of the Stillman  
27 Checks. There simply is no evidence offered by the Debtor, viewed in the utmost favorable  
28 light, that convinces the Court that a genuine issue of material fact exists. Thus, the Court

---

<sup>17</sup> The underscoring is the Debtor's own emphasis. One questions the suggestion that the Stillman case was more widely covered than the horrific attacks of September 11th, 2001.

1 finds that Debtor willfully failed to comply with this order and that a revocation of  
2 discharge under section 727(d)(3) on this basis is appropriate.<sup>18</sup>

3  
4 **CONCLUSION**

5  
6 The Court recognizes that revocation of discharge is an extraordinary measure.  
7 Equally, the Court recognizes that the bankruptcy fresh start is intended for the innocent but  
8 unfortunate debtor. Thus, given the totality of the surrounding circumstances and the  
9 behavior of the Debtor, and based on all evidence and argument before the Court, the Court  
10 **GRANTS** the Trustee's motion for summary judgment and revocation of discharge under  
11 11 U.S.C. §§ 727(d)(2) and (d)(3) as discussed above.

12 The Court **DENIES** summary judgment as to the Conversion Claims. There are  
13 genuine issues of material fact as to whether some portion of the payments at issue were on  
14 account of post-petition legal services and, thus, properly excludable from the estate.

15  
16 DATED: November 17, 2009

17   
18 LAURA S. TAYLOR, JUDGE  
19 United States Bankruptcy Court  
20  
21  
22  
23  
24  
25  
26

27 <sup>18</sup> The Court does not consider the other theories for revocation of discharge under  
28 section 727(d)(3).