CASE NO. 22-13642-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeal from the United States District Court
for the Southern District of Florida

District Court Case No. 21-civ-61099-Smith
Bankruptcy Court Adv. Proc. No. 20-1255-SMG

George P. Wagner, III,

Appellant,

vs.

OHI Asset (Va) Martinsville SNF,
LLC, *et al*.,

Appellees

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellees, OHI Asset (VA) Martinsville SNF, LLC; OHI Asset (FL) Sebring, LLC; OHI Asset (NC) Martinsville ALF, LLC; and OHI Asset (NC) Warsaw, LP (collectively, "Appellees" or "OHI"), certify to the Court that the following individuals and corporations have an interest in the outcome of this appeal:

1. Aiken, Leighton (Counsel for Appellee)
2. BlackRock Fund Advisors (ticker symbol "BLK")
3. BRFLALFCO, LLC (Entity related to Appellant)
4. BRALFCO, LLC (Entity related to Appellant)
5. BRNURSCO, LLC (Entity related to Appellant)
6. BRVA Properties, LLC (Entity related to Appellant)
7. Ferguson Braswell Fraser Kubasta PC (Counsel for Appellee)
8. Gray Robinson, P.A. (Counsel for Appellant)
9. Grossman, Scott M. (United States Bankruptcy Judge)
10. Hildreth, Mark D. (Counsel for Appellee)
11. Hoffman, Larin & Agnetti, P.A. (Counsel for Appellant)
12. Hoffman, Michael S. (Counsel for Appellant)
13. OHI Asset (FL) Sebring, LLC (Appellee)

14. OHI Asset (NC) Warsaw, LP (Appellee)
15. OHI Asset (VA) Martinsville ALF, LLC (Appellee)
16. OHI Asset (VA) Martinsville SNF, LLC (Appellee)
17. Omega Healthcare Investors Inc. (ticker symbol "OHI")
18. Scott, Patrick S. (Counsel for Appellant)
19. Shumaker, Loop & Kendrick, LLP (Counsel for Appellee)
20. Smith, Rodney (United States District Court Judge)
21. Sovran Senior Living, LLC
22. Wagner, Anderson
23. Wagner, George P., III (Appellant)
24. Wagner, Melissa

Appellee OHI Asset (FL) Sebring, LLC is a Delaware limited liability company. Appellee OHI Asset (NC) Warsaw, LP is a Delaware limited partnership. Appellee OHI Asset (VA) Martinsville ALF, LLC is a Delaware limited liability company. Appellee OHI Asset (VA) Martinsville SNF, LLC is a Delaware limited liability company. Omega Healthcare Investors Inc. ("Omega") is the indirect parent company of the Appellees. BlackRock Fund Advisors ("BLK") and The Vanguard Group, Inc. (no ticker symbol) each own 10% or more stock in Omega, the indirect parent company of Appellee. Except to the extent set forth above, I hereby certify

that no publicly traded company or corporation has an interest in the outcome in the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument should be heard so as to assist the Court in understanding that the District Court correctly ruled that the Bankruptcy Court's sole reliance on the testimony of Appellant (and his immediate family) that his failure to disclose his interest in and benefits from a show horse was not a "false oath" made knowingly and fraudulently, was clear error because all of the objective, documentary evidence contradicted such testimony and mandated sustaining Appellee's objection to Appellant's discharge under 11 U.S.C. § 727(a)(4)(A).

TABLE OF CONTENTS

Page(s)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

I. JURISDICTIONAL STATEMENT 1

A. This Court Did Not Derive Jurisdiction Under 28 U.S.C. § 158(d)(1) 1

B. Rule 4(a)(4)(A)(B)(i) Has No Application to an Appeal Pursuant to 28 U.S.C. § 158(d)(1) 2

C. The Motions Panel Clearly Erred in Concluding That Appellant's Motion for Clarification Did Not "Suspend The Finality" of the Order From Which the Appeal Was Taken 3

D. To Invoke Subject Matter Jurisdiction Under 28 U.S.C. § 158(d)(1), Appellant was Required to Take an Appeal After the District Court Denied Appellant's Motion For Clarification 5

II. STATEMENT OF ISSUES 6

III. STATEMENT OF THE CASE 7

A Course of Proceedings and Dispositions Below 7

B. Statement of Facts 9

(i) Overview 9

(ii) Relationship of the Parties: Master Lease and Appellant's Guaranty 10

(iii) Appellant's Undisclosed Horse 11

(iv) Appellant's Intended Use of his Bankruptcy Proceeding 14

C. Standard of Review 15

IV. SUMMARY OF ARGUMENT 15

TABLE OF CONTENTS (*CONTINUED*)

Page(s)

V. ARGUMENT 17

A. Standard of Review 17

B. The District Court Properly Held That Appellant Is Not Entitled to a Discharge Under § 727(a)(4)(A) Due to The Failure By Appellant To Disclose Clover, The Clover Lease, And The Clover Lease Payment 19

(i) Elements of §727(a)(4)(A) 20

(ii) Appellant's Ownership of or Interest in Clover Was Conclusively Established 22

(iii) Appellant's Testimony (and That of His Immediate Family) Does Not Trump Appellant's Documented Interest In Clover 26

VI. CONCLUSION 35

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS 36

CERTIFICATE OF SERVICE 37

TABLE OF CITATIONS

Page(s)

Cases

Aeromar, C. Par A. v. Dep't of Transp.,
767 F.2d 1491 (11th Cir. 1985).. 6

Anderson v. City of Bessemer City, N.C.,
470 U.S. 564, 105 S. Ct. 1504 (1985)..Passim

Anthony v. Georgia,
2023 WL 3729639 (11th Cir. May 31, 2023) 23

Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co., Inc.,
773 F.2d 1193 (11th Cir. 1985).. 18

Calhoun v. Lillenas Publ'g,
298 F.3d 1228 (11th Cir. 2002).. 23

Chalik v. Moorefield (In re Chalik),
748 F.2d 616 (11th Cir. 1984)... 21, 32

Charles v. Daley,
799 F.2d 343 (7th Cir. 1986).. 4

Dulbina v. Sklarin (In re Sklarin),
69 B.R. 949 (Bankr. S.D. Fla. 1987)... 21

EPIC Aviation, LLC v. Phillips (In re Phillips),
418 B.R. 445 (Bankr. M.D. Fla. 2009) 21

Finch v. City of Vernon,
845 F.2d 256 (11th Cir. 1988).. 3

Griffin v. City of Omaha,
785 F.2d 620 (8th Cir. 1986).. 18, 19

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56, 103 S. Ct. 400 (1982) 4

Herrera Cedeno v. Morgan Stanley Smith Barney, LLC,
154 F. Supp. 3d 1318 (S.D. Fla. 2016) 25

In re Alfonso,
94 B.R. 777 (Bankr. S.D. Fla. 1988).. 21

In re Calvert,
907 F.2d 1069 (11th Cir. 1990).. 17

TABLE OF CITATIONS (*CONTINUED*)

Page(s)

Cases

In re Chadwick,
335 B.R. 694 (W.D. Wis. 2005).. 32

In re Donovan,
532 F.3d 1134 (11th Cir. 2008).. 1

In re Greene,
340 B.R. 93 (Bankr. M.D. Fla. 2006) 32

In re Herman,
495 B.R. 555 (Bankr. S.D. Fla. 2013)... 21

In re Ingersoll,
124 B.R. 116 (M.D. Fla.1991) 31

In re Khanani,
374 B.R. 878 (Bankr. M.D. Fla. 2005) 30

In re Lordy,
214 B.R. 650 (Bankr. S.D. Fla. 1997)... 21

In re Mitchell,
496 B.R. 625 (Bankr. N.D. Fla. 2013).. 29

In re Murray,
249 B.R. 223 (E.D.N.Y. 2000)... 32

In re Prevatt,
261 B.R. 54 (Bankr. M.D. Fla. 2000) 32

In re Robert,
2003 WL 24027476 (Bankr. M.D. La. 2003) 32

In re Ross,
217 B.R. 319 (Bankr. M.D. Fla. 1998) 32

In re Stevens,
250 B.R. 750 (Bankr. M.D. Fla. 2000) 29

In re Sublett,
895 F.2d 1381 (11th Cir. 1990).. 17

In re Trafford,
377 B.R. 387 (Bankr. M.D. Fla. 2007) 21

TABLE OF CITATIONS (*CONTINUED*)

Page(s)

Cases

In re Transbrasil S.A. Linhas Aereas,
860 Fed. Appx. 163 (11th Cir. 2021) 1

In re Unger,
333 B.R. 461 (Bankr. M.D. Fla. 2005) 20

In re Waugh,
95 F.3d 706 (8th Cir. 1996) 18, 19

MCC-Marble Ceramic Center, Inc. v. Ceramic Nuova d'Agostino, S.p.A.,
144 F.3d 1384 (11th Cir. 1998) 24

Menotte v. Moore (In re Moore),
375 B.R. 696 (Bankr. S.D. Fla. 2007) 21

Miller v. Burns (In re Burns),
395 B.R. 756 (Bankr. M.D. Fla. 2008) 21

Rease v. AT&T Corp.,
353 Fed. Appx. 399 (11th Cir. 2009) 23

Rojas v. City of Ocala, Florida,
40 F.4th 1347 (11th Cir. 2022) 4

Shin v. Cobb Cnty. Bd. of Educ.,
248 F.3d 1061 (11th Cir. 2001) 1

Silver v. Countrywide Home Loans, Inc.,
760 F. Supp. 2d 1330 (S.D. Fla. 2011) 24

Stephens v. Caruthers,
97 F. Supp. 2d 698 (E.D. Va. 2000) 33

Sultanem v. Bright House Networks, LLC,
2012 WL 4711963 (M.D. Fla. Oct. 3, 2012) 25

Swicegood v. Ginn,
924 F.2d 230 (11th Cir. 1991) 20

Swift v. North American Company For Life And Health Insurance,
677 F. Supp. 1145 (S.D. Fla. 1987) 25

United States v. Dieter,
429 U.S. 6, 97 S. Ct. 18 (1976) 1

TABLE OF CITATIONS (*CONTINUED*)

Page(s)

Cases

United States v. Ibarra,
502 U.S. 1, 112 S. Ct. 4 (1991) 1

United States v. Kapelushnik,
306 F.3d 1090 (11th Cir. 2002) 6

United States v. Milian-Rodriguez,
759 F.2d 1558 (11th Cir. 1985) 5

Wizenberg v. Wizenberg,
2019 WL 13234164 (S.D. Fla. Aug. 23, 2019) 4

Wooldridge v. Marlene Indus. Corp.,
875 F.2d 540 (6th Cir. 1989) 18

Statutes

Fla. Stat. § 710.111 27

11 U.S.C. § 101(54)(D) 22

11 U.S.C. § 523(a)(6) 19

11 U.S.C. § 727(a)(4)(A) .... Passim

28 U.S.C. § 158(a) 3

28 U.S.C. § 158(b) 3

28 U.S.C. § 158(d)(1) .... Passim

Rules

11th Cir. R. 27-1(g) 4

Fed. R. App. P. 4(a)(1) 3

Fed. R. App. P. 4(a)(4) 2, 3, 4, 5

Fed. R. App. P. 4(a)(4)(A) 2

Fed. R. App. P. 4(a)(4)(B)(i) 2

Fed. R. App. P. 6(b)(1)(A) 2, 3

TABLE OF CITATIONS (*CONTINUED*)

Page(s)

Rules

Fed. R. App. P. 6(b)(2)(A)(i) 5
Fed. R. Bankr. P. 8013 17

I. JURISDICTIONAL STATEMENT

A. This Court Did Not Derive Jurisdiction Under 28 U.S.C. § 158(d)(1)

Contrary to Appellant's assertion, this Court did not derive subject matter jurisdiction under 28 U.S.C. § 158(d)(1). Rather, this Court has jurisdiction under 28 U.S.C. § 158(d)(1) "over only final judgments and orders arising from a bankruptcy proceeding." *In re Transbrasil S.A. Linhas Aereas*, 860 Fed. Appx. 163, 166 (11th Cir. 2021), *cert. denied sub nom. Estate of Fontana v. ACFB Administracao Judicial*, 212 L. Ed. 2d 235, 142 S. Ct. 1229 (2022)(citing *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008)).

It is well-established that a timely motion for rehearing or reconsideration renders the underlying judgment nonfinal until the district court disposes of that post-judgment motion. *See United States v. Ibarra*, 502 U.S. 1, 5, 112 S. Ct. 4, 116 L.Ed.2d 1 (1991) ("'[T]he consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment non-final for purposes of appeal for as long as the petition is pending.'") (quoting *United States v. Dieter*, 429 U.S. 6, 8, 97 S. Ct. 18, 19 (1976)); *Shin v. Cobb Cnty. Bd. of Educ*., 248 F.3d 1061, 1064 (11th Cir. 2001) ("we find [the *Healy-Dieter-Ibarra* line of] cases persuasive and can today think of no good reason to deviate from the general rule that a motion for reconsideration tolls the time to appeal.").

Accordingly, Appellant's Notice of Appeal, filed during the pendency of Appellant's Motion for Clarification, could not invoke the jurisdiction of this Court under 28 U.S.C. § 158(d)(1).

B. Rule 4(a)(4)(A)(B)(i) Has No Application to an Appeal Pursuant to 28 U.S.C. § 158(d)(1)

The long-standing rule established in the *Healy-Dieter-Ibarra* line of cases is reflected in Federal Rule of Appellate Procedure 4(a)(4). Rule 4(a)(4) states that the time to file an appeal does not begin to run until the district court has disposed of those post judgment motions set forth therein, including motions for reconsideration. Fed. R. App. P. 4(a)(4)(A):

> (A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion….

Federal Rule of Appellate Procedure 4(a)(4) further provides that if a notice of appeal is filed "after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i).

However, Federal Rule of Appellate Procedure 6(b)(1)(A) expressly provides that Federal Rule of Appellate Procedure 4(a)(4) does not apply to an appeal to a

court of appeals under 28 U.S.C. § 158(d)(1). Specifically, Fed. R. App. P. 6(b)(1)(A):

> (1) *Applicability of Other Rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:
>
> (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply….

C. The Motions Panel Clearly Erred in Concluding That Appellant's Motion for Clarification Did Not "Suspend The Finality" of the Order From Which the Appeal Was Taken

Based on the plain language of Federal Rule of Appellate Procedure 6(b)(1)(A), cases distinguishing between "tolling motions", which toll the filing period under Federal Rule of Appellate Procedure 4(a)(4), and those that do not, have no application to a bankruptcy appeal brought pursuant to 28 U.S.C. § 158(d)(1). Accordingly, the motions panel's reliance upon *Finch v. City of Vernon*, 845 F.2d 256, 258 (11th Cir. 1988) was clearly misplaced.[1] Specifically, the question presented in *Finch* was whether the post-judgment motion "was a Rule 59 motion, which would toll the filing period, or a Rule 60(b) motion, which would not":

> The Federal Rules of Appellate Procedure provide that a notice of appeal must be filed within thirty days of a final judgment. *See* Fed. R. App. P. 4(a)(1). However, ***if any party files a postjudgment motion under Rule 59, the filing period for all parties is tolled, and any notice of appeal filed during this period is a nullity. Fed. R. App. P. 4(a)(4);***

[1] *See* Dkt. No. 20, p. 2.

> *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S. Ct. 400, 74 L.Ed.2d 225 (1982).
>
> * * *
>
> ***It therefore makes a great deal of difference whether the City of Vernon's October 20 motion was a Rule 59 motion, which would toll the filing period, or a Rule 60(b) motion, which would not.***

Id. (Emphasis supplied). Thus, the motions panel clearly erred in relying upon a case construing Federal Rule of Appellate Procedure 4(a)(4) in concluding that that Appellant's post-judgment Motion for Clarification did not "suspend the finality" of the order appealed from and thereby render Appellant's notice of appeal premature and ineffective.[2]

Even assuming, *arguendo*, that Federal Rule of Appellate Procedure 4(a)(4) applied, the motions panel's conclusion that a motion for clarification does not "suspend the finality" of the order appealed from is without precedent. Numerous courts have held that a motion for clarification suspends the finality of a judgment and precludes an appeal. *See Charles v. Daley*, 799 F.2d 343, 344 (7th Cir. 1986) (timely motion for clarification "suspended the finality of the judgment and precluded appeal"); *Wizenberg v. Wizenberg*, No. 19-CIV-60466-RAR, 2019 WL 13234164, at *2 (S.D. Fla. Aug. 23, 2019) ("Appellee's filing of a Motion for

[2] The decision of the motions panel is not binding upon this panel. *See* 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it.") *See also Rojas v. City of Ocala, Florida*, 40 F.4th 1347, 1349 (11th Cir. 2022), *cert. denied*, __ U.S. __, 143 S. Ct. 764 (2023).

Clarification rendered the Appellant's Notice of Appeal ineffective until a ruling on the Motion for Clarification.").

D. To Invoke Subject Matter Jurisdiction Under 28 U.S.C. § 158(d)(1), Appellant was Required to Take an Appeal After the District Court Denied Appellant's Motion For Clarification

While Federal Rule of Appellate Procedure 4(a)(4) does not apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1), Federal Rule of Appellate Procedure 6(b)(2)(A)(i) provides that "[i]f a timely motion for rehearing under Bankruptcy Rule 8022 is filed…. [a] notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered."

Appellant concedes that his Motion for Clarification was not a Rule 8022 motion that invoked Federal Rule of Appellate Procedure 6(b)(2)(A)(i).[3] In the absence of an applicable statute or rule, the "general rule" established by the *Healy-Dieter-Ibarra* line of cases governs. *See United States v. Milian-Rodriguez*, 759 F.2d 1558, 1562 n.1 (11th Cir. 1985) ("The case law clearly establishes that the timely filing of a motion for rehearing can render the dismissal of an indictment non-final, and extend the period during which an appeal may be taken, regardless of whether

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[3] *See* Appellant's Opening Brief, p. 1 ("the parties agreed in their responses to the court's jurisdictional question that Mr. Wagner's motion for clarification was not a Rule 8022 motion.")

such extension is explicitly sanctioned by any statute or rule."). Accordingly, to invoke subject matter jurisdiction under 28 U.S.C. § 158(d)(1), Appellant was required to take an appeal after the District Court denied his Motion for Clarification. Having failed to do so, this Court is without jurisdiction under 28 U.S.C. § 158(d)(1). *See United States v. Kapelushnik*, 306 F.3d 1090, 1094 (11th Cir. 2002) ("[a]n attempt to appeal a non-appealable order remains just that, an attempt. It is a nullity and does not invest the appellate court with jurisdiction''); *Aeromar,* C. *Par A. v. Dep't of Transp.,* 767 F.2d 1491, 1494 (11th Cir. 1985) ("a premature notice of appeal is insufficient to sustain the jurisdiction of this court.")

Based upon the above, this Court lacks jurisdiction to consider this appeal.

II. STATEMENT OF ISSUES

1. Whether the District Court's ruling should be affirmed because, as a matter of law, the subject horse (Clover) was owned by Appellant within one year of the Petition Date and Appellant knowingly failed to disclose such ownership and the benefits thereof (receipt of rental income).

2. Whether the District Court, after considering all of the objective, documentary evidence presented at trial, properly ruled that the Bankruptcy Court erred in overruling OHI's objection to Appellant's discharge under 11 U.S.C. § 727(a)(4)(A) when such documentary evidence entirely contradicted the testimony

of Appellant and his immediate family concerning his interest in the horse and the benefits therefrom within one year of the Petition Date.[4]

III. STATEMENT OF THE CASE

A Course of Proceedings and Dispositions Below

Appellant filed his voluntary chapter 7 petition on December 6, 2019 (the "Petition Date") (R. 8-8, pp. 1-7).[5] Subsequently, Appellant filed his bankruptcy schedules of assets and liabilities and statement of financial affairs (*id.*, pp. 8-82), as well as his Amended bankruptcy schedules of assets and liabilities ("Schedules") and amended statement of financial affairs ("SOFA") (*Id.*, pp. 114-49).

On July 8, 2020, OHI filed its Complaint Objecting to Discharge (R. 8-3, pp. 1-8) and, subsequently, upon approval of the Bankruptcy Court, its Amended Complaint Objecting To Discharge (the "Complaint") (*Id.*, pp. 9-11, 403-14). The adversary proceeding on the Complaint was tried before the Bankruptcy Court on May 10 and 11, 2021 (R. 10, p. 31). At the conclusion of the trial, the Bankruptcy Court overruled OHI's objections to Appellant's discharge (*id.*, pp. 310-20) and entered a judgment (the "Final Judgment") in favor of Appellant (R. 8-3, pp. 512-13).

[4] These issues are in addition to the issue as to whether this Court has jurisdiction to hear this appeal.

[5] All references herein to the record are displayed as "R. __, p. __". All references herein to the Supplemental Appendix filed by OHI are displayed as "Supp. App., Tab __". All references herein to pleadings filed as "Dkt. No. ___."

OHI timely filed an appeal of the Final Judgment to the United States District Court for the Southern District of Florida ("District Court") (R. 12-2, pp. 1-3). On September 30, 2022, the District Court reversed the ruling of the Bankruptcy Court in its Order Vacating Final Judgment (Supp. App., Tab 1). On October 14, 2022, (i) Appellant filed his Motion for Clarification of the District Court's Order Vacating Final Judgment ("Motion for Clarification") (*id*., Tab 2), and (ii) the Bankruptcy Court entered its Final Judgment After Remand ("Final Judgment After Remand") (*Id*., Tab 3).

On October 28, 2022, Appellant filed his notice of appeal to this Court ("Notice of Appeal") (*Id*., Tab 4). On November 30, 2022, the District Court entered its Order Denying [Appellant] George P. Wagner, III's Motion for Clarification ("Order Denying Motion for Clarification") (*Id*., Tab 5).

On January 20, 2023, this Court posited its "Jurisdictional Question" (Dkt. No. 13-1). On May 3, 2023, this Court entered its Order on the Jurisdictional Question (Dkt. No. 20). On May 3, 2023, the Clerk of this Court forwarded a letter advising that "[t]his appeal was treated as dismissed on 2/16/2023." (Dkt. No. 21) (emphasis in original). On May 5, 2023, Appellant filed Appellant's Motion to Set Aside Dismissal and Remedy Default ("Motion to Reinstate"). (Dkt. No. 22). On May 8, 2023, the Court granted Appellant's Motion to Reinstate. (Dkt. No. 27-2).

B. Statement of Facts

(i) Overview

The District Court properly reversed the Bankruptcy Court's ruling in favor of Appellant and found that Appellant was not entitled to a discharge because he knowingly and fraudulently, or with reckless disregard, failed to disclose in his Schedules or SOFA his interest in Clover - a valuable show horse. The District Court relied upon some, but not all, of the mountain of evidence introduced by OHI at trial that established Appellant's knowledge of his ownership of, or interest in, the horse and his deliberate failure to disclose his ownership of or interest in the horse, including Appellant's failure to schedule rental income received from his lease of the horse within one year of the Petition Date. Further, and importantly, the District Court properly found that it was clear error for the Bankruptcy Court not to draw an adverse inference from Appellant's failure to disclose his interest in Clover and for relying "on witness testimony at trial to the exclusion of the cumulative facts." This holding is consistent with binding United States Supreme Court authority ruling that, "[d]ocuments or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. . . [in which event] the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Anderson v. City of Bessermer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985).

Against this backdrop, Appellant now seeks reversal of the District Court's ruling.

(ii) Relationship of the Parties: Master Lease and Appellant's Guaranty

Pursuant to that certain Master Lease, dated as of July 30, 2015, as amended by that certain First Amendment to Consolidated Master Lease, dated as of August 30, 2016, as amended by that certain Second Amendment to Consolidated Master Lease, dated as of January 31, 2017, and as amended by that certain Third Amendment to Consolidated Master Lease, dated as of June 22, 2017 (collectively, the "Master Lease"), OHI, as Landlords, leased those certain Facilities (as defined in the Master Lease) to BRVA Properties, LLC ("BRVA"), as Tenant. The sole member of BRVA is BRVA Properties Holding, LLC ("BRVA Holdings"), and Appellant owns seventy-five percent (75%) of the equity of BRA Holdings (R. 8-3, p. 33).

The day-to-day operations of the Facilities were managed by Sovran Management Company, LLC ("Sovran"), a limited liability company in which Appellant served as President and owned ninety percent (90%) of the equity (*Id.*). Mike Marshall was the chief financial officer of Sovran (R. 9, p. 156).

In connection with the execution of the Master Lease, on or about July 30, 2015, Appellant, as Guarantor, executed that certain Limited Guaranty (the "Guaranty") for the benefit of OHI (R. 8-3, p. 33).

On or about January 25, 2018, OHI, by and through its counsel, sent a letter (the "January Demand Letter") to BRVA, copying Appellant, providing notice of an Event of Default under the Master Lease and making demand upon BRVA and Appellant for payment of all amounts due and owing under the Master Lease (R. 8-3, p. 35).

After receiving the January Demand Letter, Appellant did not pay or otherwise perform his obligations under the Guaranty (*Id.*).

On February 7, 2018, OHI filed a lawsuit in Maryland state court (the "State Court Lawsuit") against, among others, Appellant, to which Appellant filed an answer (*Id.*). The State Court Lawsuit culminated in a final judgment (the "Judgment") against Appellant on September 24, 2019 in the principal sum of $4,667,254.67 (*Id.*).

(iii) Appellant's Undisclosed Horse

On February 5, 2016, Appellant paid the sum of $180,000.00 from a bank account jointly held by Appellant and Melissa Wagner ("M. Wagner"), Appellant's wife (the "Joint Account") for an Irish Sport Horse named Clover (*Id.*). From the time of the purchase of Clover through sometime in 2019, all expenses and insurance

in respect of Clover were paid from the Joint Account, and never by Anderson Wagner ("A. Wagner"), the daughter of Appellant (*Id.*).

On February 27, 2019, Appellant leased Clover to Michelle Deubel pursuant to a written lease agreement (the "Clover Lease") (*Id.* p. 36). In the Clover Lease, Appellant represented and warranted that "he has clear title to the animal, free of any liens…." (R. 12-1, p. 482). After deduction of a brokerage commission, the net proceeds of the rent payment made by Michelle Deubel to Appellant for the lease of Clover totaling $41,357.00 were deposited on March 4, 2019 into the Joint Account ("Clover Lease Payment") (R. 8-3, p. 36). The Clover Lease Payment was never transferred to A. Wagner (R. 9, pp. 69, 75, 164). At the time of the Clover Lease and Clover Lease Payment, A. Wagner was not a minor (*id.*, pp. 164-65), and had a checking and savings account (*Id.*, p. 165). Appellant had "no power of attorney" for A. Wagner that authorized his executing the Clover Lease or keeping the Clover Lease Payment if indeed the horse was owned by A. Wagner (R. 8-3, p. 159).

During the course of the adversary proceeding, Appellant testified falsely twice, under oath, that he never owned and, hence, leased Clover (R. 9, pp. 152-53; R. 12-1, pp. 440-42). (Notwithstanding undisputed evidence to the contrary, Appellant insisted during the trial that "I don't believe I did own any horse.") (R. 9, p. 153).

On May 30, 2019, in connection with a mediation during the course of the State Court Lawsuit, Appellant's counsel forwarded a personal financial statement of Appellant to OHI's counsel, on which Appellant represented to OHI that he owned a horse (R. 8-5, pp. 56-62; R. 12-1, p. 472).

Until at least June 18, 2019, a time in which Appellant was contemplating bankruptcy (R. 9, p. 159), Appellant was the named insured on Clover's insurance policy (*Id.*, pp. 155, 158; R. 12-1, pp. 465-68, 474-77). In late May, 2019, Appellant's attorneys were questioning why Appellant was listed as the named insured on Clover's insurance policy (R. 12-1, p. 471). At the same time, M. Wagner, who was concerned about the family's financial condition, wrote the insurance agent for Clover inquiring about removing Appellant as the named insured for "asset protection" (*Id.*, pp. 465-68). As a result, on June 18, 2019, Appellant was removed as the named insured and replaced by A. Wagner (*Id.*, p. 476).

On July 1, 2019, in connection with the preparation of his bankruptcy petition, Appellant's bankruptcy counsel sent an email to Appellant requesting information from Appellant as to Clover and the Clover Lease (the "Clover Request) (*Id.*, pp. 478-81; R. 9, p. 161). Appellant forwarded the Clover Request to M. Wagner because M. Wagner maintained all of the relevant documentation (*Id.*, p. 70; R. 9, p. 161). Upon receipt of the Clover Request, M. Wagner (i) sent Appellant a copy of the Clover purchase agreement (R. 9, p. 71); (ii) knew that Clover was leased

pursuant to the Clover Lease (*id.)*; (iii) knew that the Clover Lease contained a representation that Appellant was the owner of Clover, (*id.)*; (iv) knew that the Clover Lease Payment was never transferred to A. Wagner (*id.*, p. 74); and (v) knew that there was no documentation of a gift or transfer of Clover to A. Wagner (*Id.*, p. 71). Similarly, at the time of the Clover Request, Appellant also knew there was no documentation evidencing the transfer or gifting of Clover to A. Wagner (*Id.*, pp. 161-62).

As of the Petition Date, the value of Clover was not less than $150,000.00 (*Id.*, p. 55). Neither Clover, the Clover Lease, nor the Clover Lease Payment were disclosed on Appellant's Schedules or SOFA (*Id.*, p. 121).

Conveniently, shortly after the Petition Date, Clover was leased by A. Wagner for in excess of $60,000.00, and such lease payment was received and retained by A. Wagner (*Id.*, pp. 185-87; R. 12-1, pp. 777-86).

(iv) Appellant's Intended Use of his Bankruptcy Proceeding

Prior to the filing of his bankruptcy petition, Appellant advised M. Wagner: "As I said before my only concern was you keeping hold of as much as possible and with the bankruptcy me having as little as possible [My bankruptcy attorney] is working that that goal." R. 8-5, p. 102.

C. Standard of Review

See Section V(A), *infra*, which is incorporated herein by reference for all purposes.

IV. SUMMARY OF ARGUMENT

The District Court's ruling should be affirmed on multiple grounds. First, under binding Eleventh Circuit law, Appellant's execution of the Clover Lease within one year of the Petition Date wherein he represented that he was the owner of Clover, is dispositive, as a matter of law, of Appellant's ownership or interest in the horse. When Appellant's ownership of Clover is coupled with (a) the mountain of evidence establishing Appellant's knowledge of ownership and attempts in preparation of his bankruptcy filing to distance himself from such ownership, (b) the specific requirements in the Schedules and SOFA to list or identify his ownership or interest in Clover, and (c) Appellant's inexplicable failure to disclosure his receipt of the Clover Lease Payment within one year of the Petition Date after express inquiry by his bankruptcy counsel, Appellant's deliberate concealment of such ownership or interest mandated the denial of a discharge under § 727(a)(4)(A).

Second, Appellant's testimony that he did not "believe" he owned or had an interest in Clover cannot trump all of the evidence to the contrary. Appellant's Opening Brief ignores Supreme Court and Eleventh Circuit precedent holding that a lower court's (in this case, the Bankruptcy Court) finding that witness testimony

was credible is clear error where, as in this case, such testimony (i) was contradicted by documentary evidence, and/or (ii) is inconsistent or implausible in light of such documentary evidence. It is undisputed that Appellant knowingly intended not to disclose an interest in Clover when, within one year of the Petition Date, Appellant (a) entered into the Clover Lease expressly representing himself as the owner, (b) received and retained the Clover Lease Payment from the Clover Lease (which income was not disclosed), (c) paid for maintenance of Clover prior to the Clover Lease, (d) was the named insured on Clover's insurance policy, (e) in connection with the mediation in the State Court Lawsuit, represented to OHI that he owned the horse, (f) was requested to provide information concerning Clover to his bankruptcy counsel in preparation for bankruptcy, (g) testified falsely on two occasions in the adversary proceeding as to his interest in the horse, and (h) failed to introduce any documentary evidence that ownership of Clover was transferred to his daughter after his purchase of the horse.

Finally, OHI reasserts its contention that this Court lacks jurisdiction to adjudicate this appeal by virtue of Appellant's failure to timely file a notice of appeal in accordance with applicable rules.

V. ARGUMENT

A. Standard of Review

In a bankruptcy case, the district courts function as an appellate court, thus rendering this Court as second court of review. *In re Sublett*, 895 F.2d 1381, 1384 n.5 (11th Cir. 1990). As such, this Court's standard of review is the same as the standard applied by the district court to both factual and legal determinations of the bankruptcy court. *Id*. A bankruptcy court's factual findings may not be set aside unless they are clearly erroneous. Fed. R. Bankr. P. 8013. However, conclusions of law made by either the bankruptcy court or the district court are subject to *de novo* review. *In re Calvert*, 907 F.2d 1069, 1071 (11th Cir. 1990).

Appellant devotes nearly half of its opening brief trumpeting the notion that, "[i]n applying the clearly erroneous standard, the reviewing court 'will give *even greater deference* to fact findings of the [trial] court that are based on determination of the credibility of witnesses.'" Opening Brief, pp. 17-18. But Appellant ignores Supreme Court precedent that, as applied in this case, the Bankruptcy Court's finding on witness credibility is not sacrosanct. Specifically, in *Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512, the Supreme Court ruled: "[d]ocuments or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit

it. . . [in which event] the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Indeed, the principle espoused by the Supreme Court in *Anderson* has been followed in this Circuit. In *Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co., Inc.*, 773 F.2d 1193, 1206 (11th Cir. 1985), the Court held:

> We find neither the documentary evidence nor the testimony of Petrucci, Snay, and Diaz to support the trial court's finding. **To the extent portions of the testimony of Petrucci's, Snay and Diaz may indicate Cabriolet lacked knowledge of or was not told about the allocation system, we find their testimony to be so contradicted by documentary evidence (*i.e.*, the contact reports), so internally inconsistent (*i.e.*, Petrucci's and Snay's own testimony indicating their awareness of the system), and so implausible that a "reasonable factfinder would not credit it." For these reasons, the trial court's finding, resting as it does on any such testimony, is clearly erroneous.** *Anderson*, 105 S. Ct. at 1512-13.

(Emphasis supplied). Other circuit courts of appeals have also following the principle espoused in *Anderson*. *See Griffin v. City of Omaha*, 785 F.2d 620, 626 (8th Cir. 1986); *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 543 (6th Cir. 1989).

Contrary to Appellant's implication that there are no cases where a bankruptcy court's decision that a debtor's testimony that he did not intend to act fraudulently or with reckless disregard trumps the mountain of documentary evidence to the contrary,[6] Opening Brief, pp. 23-24, the Eighth Circuit's decision in *In re Waugh*,

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[6] *See, infra*, p. 21 regarding proving intent to defraud.

95 F.3d 706 (8th Cir. 1996) is particularly instructive. In *Waugh*, the debtor appealed a district court's ruling that reversed the decision of the bankruptcy court and held that the debtor's contingent indebtedness was not dischargeable. 95 F.3d at 713. After citing *Anderson* for the proposition that the bankruptcy court's finding of witness credibility was not "completely insulated," the Eighth Circuit ruled:

> After carefully studying the record before us, we hold that the bankruptcy court's findings regarding Waugh's conduct under section 523(a)(6) of the Bankruptcy Code were clearly erroneous. **As illustrated by the district court's opinion, the record is replete with documentary evidence and inconsistencies that contradict Waugh's testimony and the findings of the bankruptcy court.** *See Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512; *Griffin*, 785 F.2d at 626.
>
> * * *
>
> We realize that the bankruptcy court found that Waugh had been candid with it, and that Waugh did not remove assets from the corporation in violation of the Eldridges' rights. While *Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512, underscores the great deference that is given to credibility findings such as these, it also demonstrates that there is a limit to that deference when "the story itself [is] so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." **We conclude that the bankruptcy court's findings, even though based on credibility determinations, were clearly erroneous under the scope of review outlined in *Anderson*.**

95 F.3d at 711, 713 (emphasis supplied).

B. The District Court Properly Held That Appellant Is Not Entitled to a Discharge Under § 727(a)(4)(A) Due to The Failure By Appellant To Disclose Clover, The Clover Lease, And The Clover Lease Payment

In reversing the ruling of the Bankruptcy Court, the District Court properly held:

> The Court finds that when Debtor completed the SOFA and the Amended SOFA he was under a duty to disclose the existence of Clover, the lease, and the Clover lease payment. . . [T]he Bankruptcy Court did not draw any adverse inferences from Debtor's failure to disclose Clover and the proceeds from leasing Clover which he obtained within one year of filing for bankruptcy. The Bankruptcy Court relied on witness testimony at trial to the exclusion of the cumulative facts. This is clear error.

Order Vacating Final Judgment (Supp. App., Tab 1). The District Court's reversal of the Bankruptcy Court was proper for a number of reasons.

(i) Elements of §727(a)(4)(A)

Section 727(a)(4)(A) provides that:

> (a) The court shall grant the debtor a discharge, unless –
>
> * * *
>
> (4) the debtor knowingly and fraudulently, in connection with the case –
>
> (A) made a false oath or account . . . .

11 U.S.C. § 727(a)(4)(A).

In order to meet the initial burden under § 727(a)(4)(A), a plaintiff must establish that: (1) the debtor made a material false oath, and (2) the false oath was made knowingly and fraudulently. *See Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991); *In re Unger*, 333 B.R. 461, 465 (Bankr. M.D. Fla. 2005).

As to materiality of the false oath, the Eleventh Circuit has stated that "[t]he subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transaction or estate, or concerns the

discovery of assets, business dealings, or the existence and disposition of his property." *Chalik v. Moorefield (In re Chalik),* 748 F.2d 616, 618 (11th Cir. 1984) (citations omitted); *Miller v. Burns (In re Burns),* 395 B.R. 756, 767 (Bankr. M.D. Fla. 2008); *Menotte v. Moore (In re Moore),* 375 B.R. 696, 703 (Bankr. S.D. Fla. 2007); *In re Lordy*, 214 B.R. 650, 666 (Bankr. S.D. Fla. 1997). As to knowing and fraudulent intent, because intent is difficult to prove by direct evidence, "[t]he circumstances surrounding the fact may warrant the inference that the debtor, in fact, committed willfully and knowingly a false oath." *In re Trafford*, 377 B.R. 387, 394 (Bankr. M.D. Fla. 2007)(*citing Dulbina v. Sklarin (In re Sklarin),* 69 B.R. 949 (Bankr. S.D. Fla. 1987)). For purposes of an objection to discharge under Section 727(a)(4)(A), a debtor's failure to promptly amend schedules is considered a reckless indifference to the truth which is equivalent to fraud. *See In re Alfonso*, 94 B.R. 777, 778 (Bankr. S.D. Fla. 1988).

The goal of § 727(a)(4)(A) is to facilitate the administration of Chapter 7 cases without a need for creditors "to expend resources to confirm the veracity of the debtor's bankruptcy documents." *In re Herman*, 495 B.R. 555, 597-98 (Bankr. S.D. Fla. 2013) (citing *EPIC Aviation, LLC v. Phillips (In re Phillips),* 418 B.R. 445, 461 (Bankr. M.D. Fla. 2009)(recognizing that § 727(a)(4)(A)'s "purpose is to ensure that 'those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs.'").

(ii) Appellant's Ownership of or Interest in Clover Was Conclusively Established

Appellant's ownership of or interest in Clover was conclusively established by the evidence. Appellant's Schedules and SOFA thoroughly outline topics or questions for which the Debtor was required to have listed or responded with respect to his interest in Clover, the Clover Lease and the Clover Lease Payment. For instance:

Part 3 of the Schedules asks the debtor: Do you own or have any legal or equitable interest in any of the following items? Various topics are then listed in questions 6 through 14, including question 13: "Non-farm animals (Examples: Dogs, cats, birds, horses)" (R. 8-5, pp. 115-16);

Part 7 of the Schedules requires the debtor to "Describe All Property You Own or Have an Interest In that You Did Not List Above" (*Id*., p. 119-20);

The first page of the SOFA directs that in answering its questions, a debtor is to "Be as complete and accurate as possible" (*Id*., p. 139);

Question 18 of the SOFA asks: "Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?" (*Id*., p. 143). The answer to this question is governed by Section 101(54)(D) of the Bankruptcy Code, which defines a transfer to include *"each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting*

*with--**(i)** property; or **(ii)** an interest in property." Id.* (Emphasis supplied). Under any definition, the Clover Lease (having occurred within one year of the bankruptcy filing) should have been disclosed in response to this question.

While Question 4 of the SOFA inquires concerning a debtor's income from employment, Question 5 of the SOFA requires a debtor to disclose "*any other income* during this year or the two previous calendar years" and includes as one of several "examples" the term "rental income" (*Id*., pp. 139-40) (emphasis supplied). Appellant specifically answered question 5 by disclosing his receipt of insurance proceeds in 2019 (within one year of the Petition Date) in excess of $500,000.00, but failed to disclose the Clover Lease Payment (*i.e.* "rental income") paid to him under the Clover Lease (*Id.*).

Based upon the foregoing, the District Court properly ruled that Appellant's failure to list Clover, the Clover Lease, and the Clover Lease Payment in his Schedules and SOFA mandates the denial of discharge under 11 U.S.C. § 727(a)(4)(A). The undisputed evidence, some but not all of which was cited by the District Court,[7] established that: (i) Appellant purchased Clover in 2016 with money from the Joint Account (R. 8-3, p. 35); (ii) until his contemplation of bankruptcy, Appellant was the named insured on Clover's insurance policy (R. 9, pp.155, 158,

[7] This Court may affirm the District Court "on different grounds so long as 'the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.'" *Rease v. AT&T Corp*., 353 Fed. Appx. 399, 400 (11th Cir. 2009) (quoting *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1230 n.2 (11th Cir. 2002). *See Anthony v. Georgia*, 2023 WL 3729639, *9 n.15 (11th Cir. May 31, 2023).

159; R. 12-1, pp. 465-68, 474-77); (iii) all maintenance and insurance expenses associated with Clover were paid from the Joint Account (R. 8-3, p. 35); (iv) within one year of the Petition Date, Appellant (1) leased Clover under the Clover Lease (*id*., p. 36), (2) deposited the Clover Lease Payment into the Joint Account and never turned over the Clover Lease Payment to A. Wagner (*id*.), and (3) represented to OHI that he owned a horse (R. 12-1, p. 482), and (v) there is no documentation reflecting the transfer or gifting of Clover by Debtor to A. Wagner (R. 9, p. 71). This evidence establishes Appellant's ownership of Clover as a matter of law.

As a result, the Bankruptcy Court erred as a matter of law by ruling that Appellant's execution of the Clover Lease, in which he represented himself as the owner of Clover, was not dispositive of the ownership issue[8] because Appellant "didn't read it, or he didn't read it carefully. . . ." (R. 10, pp. 318-44).[9] This Court has held that "parties who sign contracts will be bound by them regardless of whether they have read or understand them." *Silver v. Countrywide Home Loans, Inc.,* 760 F. Supp. 2d 1330, 1341 (S.D. Fla. 2011)(quoting *MCC-Marble Ceramic Center, Inc. v. Ceramic Nuova d'Agostino, S.p.A.,* 144 F.3d 1384, 1387 n.9 (11th Cir. 1998)).

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[8] Appellant concedes that ownership of the horse and Appellant's knowing failure to disclose such ownership is a question of law to which *de novo* review applies. Appellant's Opening Brief, p. 29.

[9] Any attempt to justify or excuse the failure of A. Wagner to sign the Clover Lease as the lessor because she was "in college" lacks any merit. First, the Clover Lease does not, on its face, state that Appellant was executing the Clover Lease "on behalf of" A. Wagner; rather, Appellant represented and warranted that he was the owner of Clover. Second, Appellant never turned over the Clover Lease Payment to A. Wagner. Third, while in college and (conveniently) after Appellant's filing for bankruptcy, A. Wagner had the ability to and did sign a new lease for Clover.

Florida federal district courts have accordingly followed this precedent. *See Herrera Cedeno v. Morgan Stanley Smith Barney, LLC,* 154 F. Supp. 3d 1318, 1325 (S.D. Fla. 2016) ("a person is deemed to have read a contract that they have signed.") (quoting *Sultanem v. Bright House Networks, LLC,* 2012 WL 4711963 (M.D. Fla. Oct. 3, 2012)). In turn, "a person who signs a contract is *presumed to know its contents*". (Emphasis supplied.) *Swift v. North American Company For Life And Health Insurance,* 677 F. Supp. 1145, 1150 (S.D. Fla. 1987) (citing cases).

In this case, Appellant not only signed the Clover Lease, but represented and warranted in that lease that he was the owner of Clover. Thus, by virtue of the "presumption" espoused in *Swift*, *supra*, Appellant's acknowledgement that he signed the Clover Lease imputes to him knowledge of his ownership of the horse. As such, the Clover Lease is dispositive of Appellant's ownership of Clover (at least during the term of the Clover Lease), and his representation in the Clover Lease that he indeed was the owner is sufficient, without more, of establishing fraudulent intent in not disclosing such interest.[10] Therefore, the failure to list the horse, the Clover

[10] Accordingly, and contrary to Appellant's suggestion, Appellant's Opening Brief, p. 29, the District Court did not alter the "knowingly and fraudulent" element of § 727(a)(4)(A).

Lease and/or the Clover Lease Payment on Appellant's Schedules and SOFA mandates affirmance of the District Court's ruling.[11]

(iii) Appellant's Testimony (and That of His Immediate Family) Does Not Trump Appellant's Documented Interest In Clover

The gravamen of Appellant's argument is that the District Court erred in reversing the Bankruptcy Court's decision by invading the Bankruptcy Court's province to adjudicate witness testimony. Specifically, Appellant takes issue with the District Court's ruling that: "[t]hus, the Bankruptcy Court ignored Debtor's conduct in the months leading up to the filing of his petition in favor of testimony at trial because prior to the filing of his bankruptcy petition, Debtor represented to Appellants that he was Clover's owner." Order Vacating Final Judgment (Supp. App., Tab 1).

As mandated by *Anderson* and its progeny, in the case *sub judice*, all of the documentary evidence contradicts the testimony of the Wagners, including the unexplained retention of the Clover Lease Payment if, indeed, Clover was not owned by Appellant but rather his daughter. Neither the Bankruptcy Court nor Appellant have or can explain Appellant's retention of the Clover Lease Payment **and** the failure to report such income received within a year of the Petition Date.

[11] Appellant's contention that A. Wagner was the registered owner of Clover with the United States Equestrian Federation ("USEF") is not proof of ownership. The USEF is a governing body for equestrian competition, and there is no evidence that ownership of a horse for competition establishes ownership of the horse. Apparently, for this reason, the Bankruptcy Court did not rely on the USEF's records as proof of ownership, opting rather to base its ruling entirely on Appellant's (and his immediate family's) "belief" as to ownership.

Further, affirmance of the District Court's ruling is mandated by the undisputed evidence establishing that:

(i) Appellant purchased Clover in 2016 for $180,000;

(ii) there is no evidence that ownership of Clover was ever transferred or gifted to Appellant's daughter, A. Wagner;[12]

(iii) other than when Clover was leased, Appellant and M. Wagner, not A. Wagner, paid for all expenses and maintenance of Clover;

(iv) Appellant was the named insured on the insurance policy for Clover until he was removed for "asset protection" at the time Appellant was contemplating the filing for bankruptcy protection;

(v) within one year of the filing of his bankruptcy petition, Appellant entered into the Clover Lease, in which Appellant warranted that he was the owner of Clover;

(vi) within one year of the filing of his bankruptcy petition, Appellant received the Clover Lease Payment, which was deposited into the Joint Account and never turned over to A. Wagner;

(vii) within one year of the filing of his bankruptcy petition, Appellant represented to OHI that he owned the horse;

[12] *See* Fla. Stat. 710.111, which requires a writing to document the transfer of property to a minor.

(viii) during the one year preceding his bankruptcy petition, Appellant was involved in the State Court Lawsuit with OHI in which he faced exposure to a significant money judgment (which judgment was, in fact, entered against him within three (3) months of the Petition Date);

(ix) in preparation for the filing of bankruptcy protection, Appellant's counsel requested information on Clover;

(x) during the adversary proceeding, Appellant testified falsely, under oath, regarding his ownership and leasing of Clover; and

(xi) as of the Petition Date, the value of Clover was $150,000.

See supra, at pp. 11-14.

In its oral ruling, the Bankruptcy Court acknowledged some, but not all,[13] of this mountain of evidence, noting:

> Maybe this distinction suggests that Mr. Wagner did intentionally choose not to list Clover on his schedules, because Clover was so valuable, and he didn't want a trustee to take it and sell it, or worse, maybe this distinction suggests a misguided effort by Mr. Wagner to protect his daughter and her interest in horse riding. . . .

(R. 10, p. 316). However, the Bankruptcy Court concluded that Appellant's and his family members' testimony was enough to ignore such uncontroverted evidence.

[13] For example, the Bankruptcy Court ignored Appellee's false interrogatory response, opting instead to find Appellant credible.

In addition to the authority cited previously that witness credibility cannot trump documentary evidence to the contrary, several decisions by bankruptcy courts in Florida recognize that a debtor's implausible explanations for failing to make proper disclosures will result in a denial of discharge under § 727(a)(4)(A). In *In re Stevens,* 250 B.R. 750 (Bankr. M.D. Fla. 2000), a debtor listed his ownership in one parcel of property on his bankruptcy schedules. However, he failed to list a second piece of property that he received in a divorce. 250 B.R. at 753. Debtor testified that he forgot that he owned the property, but also testified he received several tax notices on the property. *Id.* The court held that, based on the size and value of the asset, it was not plausible that the debtor forgot that he owned the property. 250 B.R. at 756. The court also said that the substantial value of the assets supports the inference that it was omitted purposefully and, therefore, discharge was denied. *Id.*

In *In re Mitchell*, 496 B.R. 625 (Bankr. N.D. Fla. 2013), the court addressed a denial of discharge on summary judgment. The debtors, a husband and wife, misstated the value of several assets on their disclosure schedules and failed to disclose a sale of stock two years before filing their petition for bankruptcy. 496 B.R. at 628-29. The debtors blamed their counsel for the failure to list the subject assets. 496 B.R. at 630. The court was unsympathetic to this explanation and held that the debtors were educated and sophisticated individuals, who should have known the

contents of the schedules that they signed. 496 B.R. at 639. The court granted the motion for summary judgment and denied the discharge. 496 B.R. at 643.

In *In re Khanani,* 374 B.R. 878 (Bankr. M.D. Fla. 2005), a debtor failed to disclose the transfer of a parcel of property that he owned to a trust. When the transfer was revealed, the debtor did not provide information about who owned the trust or why the property was transferred. 374 B.R. at 884. The debtor also failed to provide bank statements, credit card statements, tax returns, or W-2s. *Id.* The court held that, by not disclosing the transfer of the property and failing to provide the requested documents, the debtor "crossed the line between being merely dilatory and unresponsive . . ." and, therefore, was denied discharge for those reasons. 374 B.R. at 890.

In the case *sub judice*, Appellant was a sophisticated businessman, having been the head of a robust nursing home management company (R. 8-3, p. 33). As the Bankruptcy Court found, Appellant's Schedules and SOFA were "extensive" (R. 10, pp. 313, 317). Appellant's sophistication, his "extensive Schedules," and the fact that Appellant's counsel inquired about Clover in preparing Appellant's bankruptcy, belie that the horse was omitted from the schedules because Appellant's alleged "subjective belief" that his daughter was the owner of the horse. Again, there is simply no plausible explanation for not disclosing, at a minimum, the existence of the Clover Lease and the Clover Lease Payment, all of which occurred within one

year of the Petition Date. Given the exhaustive evidence of ownership of or interest in the horse by Appellant, it was clearly erroneous for the Bankruptcy Court to hold that "[Appellants] have offered no evidence to contradict [Appellant's belief that his daughter owned the horse] in order to establish fraudulent intent." (*Id*., p. 319).

Indeed, "badges of fraud" are factors strongly indicating the existence of fraudulent intent. *In re Ingersoll*, 124 B.R. 116, 121-22 (M.D. Fla.1991). Common badges of fraud include: (1) the lack or inadequacy of consideration for the property transferred; (2) the existence of a family, friendship or other close relationship between the transferor and the transferee; (3) the transferor's retention of the possession, control, benefits or use of the property in question; (4) the financial condition of the transferor both before and after the transfer took place, *i.e.* whether the transfer resulted in insolvency; (5) the cumulative effect of these transactions and course of conduct after the onset of financial difficulties or dependency or threat of suit by creditors; and (6) the general chronology and timing of the transfer in question. *Id.*

The presence of several of these factors leads inescapably to the conclusion that a debtor possessed the necessary fraudulent intent to support a denial of discharge pursuant to § 727(a)(4)(A). 124 B.R. at 124. The presence of only one of these factors has been held to justify a finding of actual fraudulent intent. *Id.*

Furthermore, it is well established that following a creditor's showing of a *prima facie* objection to discharge, the burden of persuasion shifts to the debtor to prove discharge is, in fact, proper. *In re Greene*, 340 B.R. 93, 97 (Bankr. M.D. Fla. 2006) ("once a creditor meets the initial burden, the debtor has the ultimate burden of persuasion." (citing *In re Chalik*, 748 F.2d 616, 619 (11th Cir. 1984)). In the context of § 727(a)(4), a court may impute fraudulent intent on a debtor who fails to provide such evidence and credibly explain his misrepresentations. *See In re Prevatt*, 261 B.R. 54, 59-60 (Bankr. M.D. Fla. 2000); *In re Murray*, 249 B.R. 223, 228 (E.D.N.Y. 2000) ("Where it reasonably appears that the oath is false, the burden falls upon the debtor to come forward with evidence to prove that it was not an intentional misrepresentation. If the debtor fails to provide such evidence or a credible explanation for his failure to do so, a court may infer fraudulent intent.").

To overcome the inference of fraudulent intent, debtor must present a credible explanation through corroborating evidence. *See In re Ross*, 217 B.R. 319, 324-25 (Bankr. M.D. Fla. 1998); *In re Robert*, 2003 WL 24027476, at *5 (Bankr. M.D. La. 2003) ("[debtor's explanation] is not credible, considering the lack of corroborating evidence"). Where there is no corroborating evidence of his representations, the credibility of his explanation is in question. *See id.* Corroborating evidence must be in the form of documentation or independent testimony that effectively increases the probability that debtor's statements are truthful. *See In re Chadwick*, 335 B.R. 694,

702-03 (W.D. Wis. 2005); *Stephens v. Caruthers*, 97 F. Supp. 2d 698, 707-08 (E.D. Va. 2000). Therefore, when the other evidence in the record actually diminishes the probability of the testimony's truthfulness, it is not sufficiently corroborated. *See id.*

In this case, the only corroborating evidence that Appellant presented was the testimony of his wife and daughter—interested witnesses by any definition. Therefore, the Bankruptcy Court was required to look to the other evidence of record, *i.e.*, the insurance policy, maintenance records, the Clover Lease, the Clover Lease Payment, Appellant's counsel's inquiry of Clover in preparing the bankruptcy filing, and representations to OHI of Appellant's ownership of the horse, all of which reflect that Appellant was the owner of or had an interest in the horse. Based upon the aforementioned legal authorities, the District Court properly afforded no credit to the testimony of the Appellant's wife and daughter to corroborate his "belief" as to ownership. In turn, as Appellant's corroborating evidence was insufficient to overcome the inference of fraudulent intent or satisfactorily explain his failures to disclose, the District Court properly ruled that the documentary evidence established that the Bankruptcy Court's ruling that Appellant's testimony – that he "did not believe that he owned the horse"– warranted a discharge was clear error.

Likewise, not only did the Bankruptcy Court not conduct the "badges of fraud" analysis, the District Court properly held that the Bankruptcy Court ignored evidence establishing the same. For instance, on the one hand, Appellant (i) signed

a lease affirmatively stating that he owned Clover and received over $40,000 in a rental payment on account of that lease, (ii) was the named insured on the insurance policy for the horse, and (iii) listed the horse as one of his assets with a zero dollar value on his personal financial statement provided to OHI. However, after an impasse at mediation on May 30, 2019, Appellant then (i) changed the named insured on the horse's insurance policy for "asset protection", (ii) retained bankruptcy counsel, and (iii) began a process to distance himself from involvement with the horse in favor of his daughter (even though, as reflected in the inquiries from his bankruptcy counsel, there was an abundant paper trail indicating his ownership of the horse). On these facts, the District Court properly ruled that the Bankruptcy Court's blind reliance on Debtor's testimony is clear error. [14]

The District Court conducted a proper analysis of the evidence and found the Wagners' testimony to be insufficient to overcome the inference of fraudulent intent. If the District Court's ruling is reversed, it signals that any debtor can defeat a challenge to discharge for failing to disclose assets on his/her schedules by simply testifying that "I did not believe that I owned the assets." The Bankruptcy Code and applicable case law does not mandate such a result.

[14] This is particularly true where the uncontroverted evidence demonstrates that a debtor, like Appellant, lied under oath during an adversary proceeding.

VI. CONCLUSION

Based upon the foregoing, this Court lacks jurisdiction to hear this appeal or, in the alternative, the District Court's ruling should be affirmed.

Respectfully submitted,

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/s/ Mark D. Hildreth
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I HEREBY CERTIFY that on June 9, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all registered CM/ECF recipients and by First Class U.S. Mail, postage prepaid, mail to counsel of record for Appellant.

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