

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case Chapter 7  
No. 05-11381-GLP

PETER R. OSTERMAN, JR.,

Debtor.

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BUCKEYE RETIREMENT CO., LLC,  
LTD.,

Plaintiff,

vs.

Adv. No. 06-23

PETER R. OSTERMAN, JR.,

Defendant.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This proceeding is before the Court upon the complaint filed by Buckeye Retirement Company, LLC, Ltd., seeking a denial of Peter R. Osterman, Jr.'s, discharge pursuant to 11 U.S.C. §§ 727(a)(2), 727(a)(4) and 727(a)(5).<sup>1</sup> After hearings held on September 15, 2006, October 19, 2006, December 12, 2006, and January 25, 2007, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Peter R. Osterman, Jr. ("Osterman") has worked predominately in accounting and finance positions since graduating from college in 1970. (Tr. 1 at 17).<sup>2</sup> Since 2001, Osterman has worked at W&O Supply, Inc. ("W&O"). (Tr. 2 at 158).

2. Osterman is married to Sylvia B. Osterman and has two adult sons, Michael and Adam. In 2004 and 2005, Osterman provided substantially all of the

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<sup>1</sup> Buckeye dismissed its § 727(a)(5) claims.

<sup>2</sup> "Tr. 1" refers to the transcript of September 15, 2006; "Tr. 2" refers to the transcript of October 19, 2006; "Tr. 3" refers to the transcript of December 12, 2006; "Tr. 4" refers to the transcript of January 25, 2007.

support for Mrs. Osterman and Adam, who is a college student. (Tr. 4 at 7).

3. Prior to working for W&O, Osterman owned a corporation named PROJ, Inc., which operated a business known as "LK Erectors." (Tr. 1 at 18). Osterman financed the purchase of PROJ, Inc., by obtaining a \$750,000.00 loan from Transamerica Small Business Capital, Inc. ("Transamerica"), and signing a personal guaranty for the loan. (Tr. 1 at 22-23).

4. In November 2001, Transamerica sent Osterman a delinquency letter after there were "payment issues" with the loan. (Tr. 1 at 48, 51-52).

5. In early 2002, Transamerica contacted Osterman and informed him that the loan he had personally guaranteed was in default. (Tr. 1 at 45-47). Subsequently, through a series of transfers, Buckeye Retirement Co., LLC, Ltd. ("Buckeye"), became the holder of the loan documents. (Pl. Ex. 1, Exs. A and B). Following unsuccessful settlement negotiations, Buckeye sued Osterman in state court in October 2004 for breaching the personal guaranty. (Tr. 1 at 22, 47; Pl. Ex. 11).

6. In November 2004, Osterman retained the services of attorney Edwin W. Held, Jr., of the firm Held & Israel, for advice concerning the Buckeye lawsuit. (Tr. 1 at 30; Tr. 2 at 138). On Mr. Held's advice, Osterman opened a wage account, and in late 2004 he began depositing all of his wages and bonuses into the account. (Tr. 1 at 29; Tr. 2 at 151-152).

7. Osterman maintained only one other bank account, a joint checking account that he and his wife opened approximately twenty (20) years ago at Barnett Bank (now Bank of America). (Tr. 1 at 23-24; Pl. Ex. 2). When the account was opened, the signature card did not provide an option for it to be designated as tenants by the entirety. In February 2005, Osterman and his wife filled out a new signature card designating the account as "Tenants by Entireties," in order to clarify the operation and ownership of the account. (Tr. 1 at 24-25; Pl. Ex. 5).

8. On October 3, 2005 (the "Petition Date"), Osterman filed for relief under Chapter 7 of the Bankruptcy Code (the "Code"). (Tr. 2 at 138).

9. Osterman listed Buckeye's claim in his bankruptcy schedules as an unsecured claim in the amount of \$852,722.36. (Pl. Ex. 2). As of the Petition Date, Buckeye alleges that it is owed

\$919,558.43. (Pl. Ex. 77). Osterman did not owe any other unsecured debt on the Petition Date, other than a guaranty on a loan from AmSouth Bank that was not delinquent at the time. (Tr. 2 at 136; Pl. Ex. 2).

10. In 2004, Osterman earned \$216,764.60 from W&O, including a bonus in the net amount of \$56,123.45, for work he performed in 2003. (Pl. Ex.'s 21, 68). In 2005, Osterman earned \$223,280.06 as of the Petition Date. His earnings included a bonus for work he performed in 2004, in the net amount of \$61,121.18, which he deposited into his wage account. (Pl. Ex.'s 26, 31, 73). Osterman testified that the bonuses he received from W&O were completely discretionary, and not guaranteed on an annual basis. (Tr. 2 at 110, 158).

11. In December 2004, Osterman and his wife transferred title to a 1998 Nissan Maxima to their son, Michael, as well as the title to a 1999 Honda Accord to their son, Adam. Although Osterman and his wife jointly owned the vehicles prior to the transfer, Michael has always been the primary driver of the Nissan and Adam has always been the primary driver of the Honda. (Tr. 2 at 140, 145; Tr. 3 at 12, 14). At the time of the transfer, each vehicle had been driven approximately 100,000 miles and both were in poor condition. (Tr. 2 at 142, 146). Michael and Adam have continued to own the vehicles since the transfer. (Tr. 3 at 14-15).

12. Osterman testified that he and his wife transferred the vehicles to their sons on the advice of counsel, in order to eliminate potential liability in the event their sons were involved in an accident. (Tr. 1 at 35; Tr. 3 at 13, 15). Prior to consultation with counsel, the Osterman's were unaware of this potential liability situation. (Tr. 1 at 35).

13. Osterman's Statement of Financial Affairs lists the value of his one-half interests in the vehicles as \$1,380.00 for the Nissan and \$1,735.00 for the Honda. (Tr. 3 at 54-55, 57; Pl. Ex. 2). The September 2006 edition of Kelley Blue Book indicates that a similar Nissan in fair condition is worth \$2,590.00, and a similar Honda in fair condition is worth \$2,745.00. (Tr. 2 at 144, 146-147; D. Ex. 27, 30).

14. On June 8, 2005, Osterman transferred \$38,000.00 from his wage account to his wife, who then transferred the money to their son, Michael, to help him purchase his first house. (Tr. 1 at 32; Tr. 3 at 22; Pl. Ex. 18). Osterman testified that the decision to help Michael with a down payment was

made a year earlier, when Michael first began searching for a house. (Tr. 2 at 151; Tr. 3 at 21). The transaction was structured to take advantage of federal gift and estate tax provisions. (Tr. 1 at 32-33).

15. On August 16, 2005, Osterman sold a watch, bracelet, necklace, ring and cuff links to his wife's company, K&I Creative Plastics, Inc. ("K&I"). K&I paid Osterman \$4,550.00 for the jewelry, an amount equal to its appraised value. (Tr. 1 at 36-38; Tr. 3 at 18; Pl. Ex. 13-14). The jewelry sale was Osterman's wife's idea, and she obtained an appraisal on the advice of counsel. (Tr. 3 at 16-18). The proceeds from the sale were deposited into the Ostermans' joint checking account at Bank of America, and spent on living expenses. (Tr. 1 at 38-39, 41; Tr. 3 at 19).

16. Osterman obtained the jewelry during the course of his marriage as gifts from his wife, except for the ring, which was passed down to him from his now deceased father. (Tr. 1 at 39; Tr. 3 at 16). Thus, the Osterman's testified that the jewelry has significant sentimental value, and explained that the sale to K&I was a way to ensure that the jewelry would remain in the family, so that it could be passed down to future generations. (Tr. 1 at 39-40; Tr. 3 at 16-17, 20). Since the sale, the jewelry has remained in a safe deposit box owned by Osterman's wife, to which only she and her son (Michael) have access. (Tr. 2 at 149-150; Tr. 3 at 19-20).

17. On November 2, 2005, Osterman made various amendments to his schedules and Statement of Financial Affairs.

18. Osterman amended Schedule I to clarify that his average monthly income, as listed, did not include the discretionary bonuses he received from W&O. (Tr. 3 at 60; Pl. Ex. 31).

19. Osterman also amended item one (1) of his Statement of Financial Affairs to include his year-to-date income from W&O, from January 1, 2005, through the Petition Date. (Tr. 3 at 60; Pl. Ex. 31). Although Osterman originally disclosed on Schedule I that he worked for W&O in 2005, he initially listed only the amount of regular monthly income he received from W&O. (Tr. 2 at 157-158).

20. Item seven (7) of Osterman's Statement of Financial Affairs was amended to disclose the \$38,000.00 transfer from his wage account to his wife, as well as the August 2005 jewelry sale to K&I. (Pl. Ex. 31).

21. Osterman testified that the \$38,000.00 transfer to his wife, and the sale of his jewelry to K&I, was initially omitted from his filings due to an oversight by himself and his counsel. (Tr. 2 at 150, 152).

22. On November 15, 2005, Osterman filed another amendment to his schedules and Statement of Financial Affairs to reflect that he and his wife own a 1999 Mercedes Benz as tenants by the entireties. (Pl. Ex. 32). Osterman testified that his wife is the primary driver of the vehicle, the statements are mailed to her company's office, and her company makes the monthly payments. As a result, Osterman claims that he initially forgot that he possessed an ownership interest in the vehicle. (Tr. 2 at 153-154).

23. The same day, Osterman also amended item two (2) of his Statement of Financial Affairs to reflect income in the amount of \$1,500, that he received in 2005 as compensation for his position as a director of Intrepid Capital ("Intrepid"). (Pl. Ex. 32). Item two (2) was amended again on August 7, 2006, to adjust the amount of income Osterman received from Intrepid in 2005, from \$1,500.00 to \$3,000.00. Osterman testified the discrepancy was due to the fact that although he earned \$1,500.00 for his services in 2004, he did not receive the money until 2005, and did not remember this until beginning to prepare his 2005 tax return. (Pl. Ex. 35; Tr. 2 at 125, 156-157).

24. On January 2, 2006, Osterman amended Schedule B of his petition to disclose an account at Bank of America that he jointly held with his son, Adam. As of the Petition Date, the joint account had a balance of \$550.00. (Pl. Ex. 34). Osterman explained that the account was opened in 1999, in order to provide Adam with living expenses while he was in college, and that he never used the account other than to deposit money for Adam's expenses. As all the associated statements were mailed to Adam's Tallahassee address, Osterman testified that he did not consider the account to be his; thus, he neglected to initially list it on his schedules. (Tr. 2 at 123-124, 155-156).

25. On January 13, 2006, Buckeye filed this adversary proceeding seeking a denial of Osterman's discharge pursuant to 11 U.S.C. § 727 of the Code.

### **CONCLUSIONS OF LAW**

The issue before the Court is whether Osterman's discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4).

The primary purpose of the Bankruptcy Code is to provide honest but unfortunate debtors with a fresh start through a discharge of their debts. In re Allen, 210 B.R. 861, 866 (Bankr. M.D. Fla. 1997) (citing In re Moran, 107 B.R. 359, 361 (Bankr. M.D. Fla. 1989)). Thus, the discharge provisions of 11 U.S.C. § 727 are liberally construed in favor of the debtor, as opposed to the creditor. Id. According to the Federal Rules of Bankruptcy Procedure, the objecting party bears the burden of proving the necessary elements, regarding an objection to discharge. Fed. R. Bankr. P. 4005.

#### **A. Section 727(a)(2) Analysis**

11 U.S.C. § 727(a)(2)(A) provides that the court shall grant the debtor a discharge, unless:

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed ---

(A) property of the debtor, within one year before the date of the filing of the petition;

11 U.S.C. § 727(a)(2)(A).

Consequently, in order to deny Osterman a discharge under § 727(a)(2)(A), Buckeye must establish that:

- (i) a transfer occurred;
- (ii) the property transferred was property of Osterman;
- (iii) the transfer occurred within one year of the Petition Date; and
- (iv) at the time of the transfer, Osterman possessed the requisite intent to hinder, delay, or defraud Buckeye.

In re Milam, 172 B.R. 371, 374 (Bankr. M.D. Fla. 1994). In the instant proceeding, the sole issue under § 727(a)(2)(A) is whether Osterman possessed the requisite intent to hinder, delay, or defraud Buckeye at the time of transferring his property.

The intent to hinder, delay, or defraud a creditor must be actual intent, not merely constructive intent. In re Hunter, 229 B.R. 851, 856 (Bankr. M.D. Fla. 1999) (citing In re Kindorf, 105

B.R. 685, 689 (Bankr. M.D. Fla. 1989)). In determining intent, “the Court can consider circumstantial evidence or can infer it from the totality of the circumstances.” In re Hunter, 229 B.R. at 857. This Court has previously identified the following “badges of fraud,” which indicate a debtor’s intent to hinder, delay, or defraud creditors:

- (1) the lack or adequacy of consideration;
- (2) the family, friendship or close association between the parties;
- (3) the retention of possession, benefit or use of the property in question;
- (4) the financial condition of the party sought to be charged both before and after the transaction in question;
- (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, after onset of financial difficulties, or pendency or threat of suits by creditors; and
- (6) the general chronology of the events and transactions under inquiry.

Id.; In re Milam, 172 B.R. at 374.

Buckeye asserts that Osterman made the following transfers with the actual intent to hinder, delay, or defraud a creditor, within one year of the Petition Date:

- I. June 2005 – Transferred \$38,000.00 from his wage account to his wife, who subsequently gave the money to their son, Michael, for a down payment on the purchase of his first house;
- II. December 2004 – Gifted, with his wife, two jointly owned vehicles (1998 Nissan Maxima & 1999 Honda Accord) to their two sons; and
- III. August 2005 – Sold a watch, bracelet, necklace, ring and cuff links to his wife’s company, K&I Creative Plastics, Inc.

### ***The \$38,000.00 Transfer***

“[A] transfer of an otherwise exempt asset should not be the basis of denying a debtor’s discharge.” In re Allen, 210 B.R. at 868. Osterman asserts that as the head of his family in 2005, the disposable earnings he deposited into his wage account at Bank of America were exempt for six (6) months after being deposited, pursuant to applicable Florida law. See Fla. Stat. § 222.11 (2005).<sup>3</sup> Osterman testified that he deposited his 2004 bonus, in the net amount of \$61,121.18, into his wage account on April 11, 2005. (Tr. 2 at 151-152; Pl. Ex.’s 8, 26, 73). Additionally, Osterman maintains that the wage account had a balance of \$51,803.50 before withdrawing the \$38,000.00 on June 8, 2005, and therefore, the \$38,000.00 transferred from the account to his wife was an exempt asset on the date of transfer. (Pl. Ex. 8).

Conversely, Buckeye argues that Osterman opened the wage account shortly after it sued him, for the express purpose of avoiding payment. In support, Buckeye points out that Osterman made the transfer to a family member, for no consideration, with the understanding that the funds were exempt at the time of the transfer. Thus, Buckeye claims that the chronology of events show that Osterman engaged in “creditor planning activity,” and that the transfer was made with the intent to defraud.

The Court finds that the circumstances surrounding the transfer of the \$38,000.00 show that

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<sup>3</sup> Florida Statutes § 222.11 (2005), provides, in pertinent part:

(2)(b) Disposable earnings of a head of a family, which are greater than \$ 500 a week, may not be attached or garnished unless such person has agreed otherwise in writing. In no event shall the amount attached or garnished exceed the amount allowed under the Consumer Credit Protection Act.

(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

Osterman lacked the intent to hinder, delay, or defraud Buckeye. The testimony of Osterman and his wife credibly illustrates that they decided more than a year before the transfer was made, which was well before Buckeye filed suit, to transfer the funds to their son to use as a down payment on his first house. (Tr. 2 at 151; Tr. 3 at 21). Additionally, Osterman retained no possession, benefit, or use of the funds. Further, the method of transfer, from Osterman to his wife, then to his son, was motivated by legitimate estate and gift tax concerns. Thus, Buckeye has failed to sustain its burden that Osterman transferred the \$38,000.00 with the actual intent to hinder, delay, or defraud his creditors.

### *The Vehicle Transfers*

Osterman asserts that he and his wife's decision to transfer two jointly owned vehicles to their sons was not done with the intent to defraud Buckeye. Instead, Osterman testified that the decision to transfer title to his sons was motivated by a legitimate desire to limit his and his wife's potential liability under Florida law, in the event either son was involved in an accident. (Tr. 1 at 35). Osterman also highlights the fact that his sons have been the primary drivers of the vehicles since they were initially leased, and he has not retained use, possession, or benefit of the vehicles. Further, Osterman claims that his financial condition remained substantially the same, before and after the transfers, given the minimal value of his one-half interests in the vehicles. Finally, Osterman cites Collier on Bankruptcy for the proposition that, "[t]he fact that the property transferred or concealed is of small value ... tends to negate fraudulent intent." 6 Collier on Bankruptcy, P. 727.02[3][b] (L. King ed., 15th ed. 2006).

In opposition, Buckeye points out that Osterman transferred the vehicles to his sons just two (2) months after it sued him, for no consideration. Further, Buckeye asserts that the vehicles would have been part of Osterman's bankruptcy estate, had he not transferred them to his sons, because they were not owned as tenants by the entirety with his wife. Buckeye also highlights the fact that Osterman still pays insurance on the vehicles transferred to his sons.

The Court finds that the vehicle transfers were motivated by legitimate concerns of limiting potential liability, and were not done with the intent to place the vehicles outside the reach of Osterman's creditors. Further, as Osterman made the vehicle transfers as soon as his counsel explained the potential liability situation, the Court does not

consider the timing of the transfers to be indicative of an intent to defraud creditors, as Buckeye alleges. Thus, Buckeye has failed to sustain its burden that Osterman transferred the vehicles with the intent to defraud.

### *The Jewelry Sale*

Buckeye claims that two (2) months prior to filing for relief, Osterman acted with fraudulent intent in selling some of his jewelry to his wife's company, K&I Creative Plastics, Inc.

In opposition to Buckeye's assertion, Osterman cites a previous decision of this court, In re Milam, 172 B.R. at 373-376. In Milam, several months prior to filing for relief, the debtors sold a diamond ring for \$4,000.00 to a close family member, although they originally paid \$7,000.00 for the ring. Id. at 373. The debtors subsequently used the proceeds from the sale of the ring as a partial down payment on their residence, an exempt asset. Id. at 373-374. Despite the presence of two "badges of fraud," sale to a relative and improvement in financial condition, this Court denied the movant's objection to discharge. Id. at 374, 376. This Court found that the presence of the two badges of fraud was insufficient to show that the debtors possessed the intent to hinder, delay, or defraud creditors. Id.

In further support of his position, Osterman points out that he sold the jewelry for fair market value, and that he has not retained possession, benefit, or use of it.<sup>4</sup> Osterman also testified that the jewelry has remained in a safe deposit box, accessible only by his wife and son. (Tr. 2 at 149-150). Additionally, Osterman argues that the totality of the circumstances surrounding the sale indicates that it was not part of a scheme to defraud Buckeye. In support, Osterman testified that he had not made the decision to file bankruptcy at the time of the jewelry sale, as efforts to settle with Buckeye were continuing. (Tr. 2 at 149). Further, Osterman testified that he conducted the jewelry sale not to defraud Buckeye, but to preserve the jewelry for future generations, as it has significant sentimental value to him and his family. (Tr. 1 at 39-40).

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<sup>4</sup> Osterman testified that the jewelry sale was his wife's idea, and that she had the jewelry appraised. (Tr. 2 at 148). After his wife had the jewelry appraised by a local jeweler, Osterman sold the jewelry to her company for an amount equal to the appraisal. (Tr. 1 at 38).

Conversely, Buckeye argues that there is direct evidence of Osterman's intent to defraud it, as he intended to keep the jewelry out of the bankruptcy estate by selling it to his wife's company. Buckeye points out that the jewelry would have been an asset of the estate, available to creditors, had Osterman not conducted the sale. In further support, Buckeye states that several badges of fraud are present: (i) the sale was to Osterman's wife; (ii) Osterman retained possession/use of the jewelry, because his wife of more than twenty (20) years has access to the safe deposit box where it is kept; (iii) the sale improved Osterman's financial condition; and (iv) the sale occurred just two (2) months prior to Osterman filing for relief.

Although the sale was to a close relative, and the proceeds improved Osterman's financial condition, there is no evidence to indicate that Osterman has retained possession/use of the jewelry. Additionally, the Court finds Osterman's testimony to be credible, that at the time of the sale, he had not yet decided whether to file for bankruptcy; therefore, Buckeye's argument that the timing of the sale is indicative of fraudulent intent, fails. Osterman also provided a legitimate reason for the jewelry sale by explaining his desire to preserve it for future generations due to its sentimental value. Thus, Buckeye has failed to demonstrate that Osterman intended to hinder, delay, or defraud it by conducting the jewelry sale.

#### **B. Section 727(a)(4) Analysis**

11 U.S.C. § 727(a)(4)(A) provides that the court shall grant the debtor a discharge, unless:

- (4) the debtor knowingly and fraudulently, in or in connection with the case ---
  - (A) made a false oath or account;
- 11 U.S.C. § 727(a)(4)(A).

To prove an objection to discharge under § 727(a)(4)(A), the creditor must show by a preponderance of the evidence that the debtor knowingly made a false statement or omission under oath, that was both fraudulent and material. In re Milam, 172 B.R. at 375 (citing Swicegood v. Ginn, 924 F.2d 230, 232 (11th Cir. 1991)). In order to be fraudulent, the statement must have been made with a knowing intent to defraud creditors. In re Hunter, 229 B.R. at 857-858 (citing Swicegood, 924 F.2d at 232). A statement or omission is material if it "bears a relationship to the bankrupt's business transactions or estate or concerns the discovery of assets, business dealings or the existence and disposition of his

property." In re Milam, 172 B.R. at 375 (quoting In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). In determining whether an omission is material, this Court has previously stated that, "[t]he value of the assets omitted is not the focus of the inquiry, rather the veracity of the debtor's statements is paramount." In re Milam, 172 B.R. at 375.

The focus of § 727(a)(4) is on a debtor's deliberate omission of information by giving false oaths or accounts regarding property of the estate. In re Ross, 217 B.R. 319, 324 (Bankr. M.D. Fla. 1998). Thus, § 727(a)(4)(A) "is not meant to punish debtors for their mistakes or inadvertence." In re Stevens, 250 B.R. 750, 754 (Bankr. M.D. Fla. 2000). Denying a debtor his/her discharge is a harsh penalty, and therefore, "courts generally recognize that 'the reasons for denying a discharge ... must be real and substantial, not merely technical and conjectural.'" Id. (footnote and citation omitted).

Buckeye asserts that Osterman's discharge should be denied because he fraudulently omitted from his bankruptcy schedules and Statement of Financial Affairs: (i) the \$38,000.00 transfer from his wage account to his wife; (ii) his interest in a 1999 Mercedes Benz owned jointly with his wife; (iii) his interest in a bank account held jointly with his son, Adam; (iv) the sale of his jewelry to his wife's company, K&I; (v) income received from Intrepid; and (vi) a bonus received in 2005 from his employer, W&O.

#### ***The \$38,000.00 Transfer***

On November 2, 2005, approximately one (1) month after filing his original bankruptcy schedules and Statement of Financial Affairs, Osterman amended his Statement of Financial Affairs to reflect the previously undisclosed \$38,000.00 transfer on June 8, 2005, from his wage account to his wife. (Pl. Ex. 31).

Osterman claims that the \$38,000.00 transferred to his wife was an exempt asset under Florida Statutes § 222.11, because he was the head of his family and the funds were transferred within six (6) months of being deposited into the wage account, consisting of disposable earnings. Thus, Osterman argues that creditors did not have a claim to the funds, as they were exempt. In support, Osterman cites a case from the Northern District of Florida which found that a transfer omitted from the debtor's schedules was not "material" because the property transferred was exempt, and therefore, "the failure to disclose [the transfer] did not prevent the creditors

from knowing any information about an asset available to them.” In re Cornelius, 333 B.R. 850, 865 (Bankr. N.D. Fla. 2005). Additionally, Osterman testified that the transfer was initially omitted from his schedules due to an oversight, not an intent to defraud Buckeye. (Tr. 2 at 150, 152).

In contrast, Buckeye maintains that Osterman intentionally omitted the \$38,000.00 transfer from his schedules. Buckeye asserts that Osterman’s actions were fraudulent and material, given the timing of the transfer, which took place shortly before the Petition Date. In further support, Buckeye argues that the omission was material because there are no other estate assets available to pay Osterman’s creditors, and that Osterman is not an honest debtor.

The Court finds Osterman’s explanation as to why he initially omitted the \$38,000.00 transfer to his wife, to be credible. As the omission was an oversight, the Court does not consider the transfer to be “material,” as required under 11 U.S.C. § 727(a)(4)(A), and Osterman should not be denied the right to a “fresh start.”

#### ***The 1999 Mercedes Benz***

Osterman claims that, as he and his wife have always owned the Mercedes as tenants by the entirety, it is an exempt asset and his failure to initially list it on the schedules did not materially affect Buckeye’s ability to discover his assets. In support of his position, Osterman testified that the non-disclosure was an oversight, as his wife is the primary driver of the Mercedes, and all related paperwork is mailed to her business office. (Tr. 2 at 153-154). Further, Osterman argues that the omission was not material, as his amended Schedule D shows that he has no equity in the Mercedes. Finally, Osterman points out that he readily acknowledged his mistake and promptly amended his schedules to reflect his ownership interest prior to the Section 341 meeting of creditors.

In response, Buckeye argues that Osterman’s non-disclosure of his interest in the jointly owned Mercedes was intentional, and not an innocent oversight by an honest debtor. Again, Buckeye asserts that Osterman’s failure to disclose his interest in the Mercedes was material, given the fact that there are no other estate assets available to pay his creditors. Further, Buckeye disagrees that Osterman’s non-disclosure was an oversight, and in support, references the other numerous omissions

made by Osterman as circumstantial evidence of his fraudulent intent.

The Court finds Osterman’s testimony, as to why he forgot that he jointly owned the Mercedes with his wife, to be credible. Thus, the Court finds Osterman’s failure to list his interest in the Mercedes to be the result of inadvertence, not fraudulent intent. Additionally, the Court notes that Osterman amended his schedules as soon as he realized the mistake, which was prior to the meeting of creditors. Therefore, Buckeye has failed to show that Osterman’s non-disclosure was fraudulent and material, pursuant to § 727(a)(4)(A).

#### ***Joint Bank Account***

This Court has previously stated that, in the context of § 727(a)(4)(A), it “can consider the value [of a debtor’s non-disclosed asset(s)] to ascertain whether the defendant has the intent and motivation to deceive, and to determine the materiality of the omissions.” In re Wade, 189 B.R. at 526.

Osterman claims that he failed to list his interest in a joint checking account with his son, Adam, due to inadvertence. Osterman points out that the account in question was used to provide living expenses for Adam while he was away at college, and that Adam was the only person who withdrew money from the account. Additionally, Osterman asserts that all statements relating to the account were mailed directly to Adam’s Tallahassee address, and therefore, he did not consider the account to be his asset. Finally, Osterman highlights the fact that the value of his one-half interest in the account, as of the Petition Date, was only \$275.00.

Conversely, Buckeye asserts that Osterman intended to defraud his creditors by not disclosing his interest in the joint checking account. Buckeye argues that Osterman was required to list his interest in all of his assets, including the joint bank account, regardless of value. Thus, Buckeye argues that despite its insignificant value, Osterman’s failure to disclose his one-half interest in the joint checking account was a material omission.

The Court finds that Osterman’s initial failure to disclose his interest in the joint bank account was due to inadvertence, and that the non-disclosure was immaterial, as the value of his one-half interest in the account is only \$275.00, a minute sum compared to the \$900,000.00 claim filed by Buckeye. See Id.

### ***Sale of Jewelry***

Osterman also claims that his failure to initially disclose the sale of his jewelry to his wife's company was due to a mere oversight, not fraudulent intent. In support of his position, Osterman points out that he informed his counsel of the jewelry sale prior to the Petition Date, yet his counsel mistakenly failed to disclose it in his schedules. (Tr. 2 at 150). Osterman also highlights the fact that he readily acknowledged the sale after learning of its non-disclosure, and he immediately filed an amended Statement of Financial Affairs reflecting the transfer. Thus, Osterman asserts that he never intended to defraud Buckeye; rather, he and his counsel inadvertently failed to initially disclose the jewelry sale.

In opposition, Buckeye argues that Osterman sold the jewelry to his wife's company with the intent to defraud creditors and that the non-disclosure is "particularly material," given that there are no other estate assets available to pay Osterman's creditors. Buckeye also maintains that although the non-disclosure of the jewelry sale may seem insignificant, when the non-disclosed transfers are viewed in totality, they amount to a significant amount of money that would have been available to creditors of the estate.

Similar to the instant proceeding, the debtor in a previous case before this Court failed to disclose several assets and did not properly list other transactions involving his property in his initial bankruptcy schedules. In re Hunter, 229 B.R. at 858. Although the Court noted several inconsistencies between the debtor's paperwork and his testimony, it found that he did not act with fraudulent intent, as he did not try to hide his assets or recent transactions, and he admitted to owning the non-disclosed assets when given the opportunity. Id. Finally, the Court found that the debtor's omissions were due to an abundance of "confusion and misunderstanding, rather than an attempt to defraud a creditor." Id. Therefore, the creditor's objection under § 727(a)(4)(A) was overruled. Id.

The Court finds that Osterman did not act with fraudulent intent in failing to disclose the jewelry sale, as he never attempted to hide the transaction. See In re Hunter, 229 B.R. at 858. The evidence presented shows that upon realizing his mistake, Osterman voluntarily filed amended schedules to reflect the jewelry sale to K&I. Further, the Court finds that Osterman's initial non-disclosure of the jewelry sale was the result of an oversight,

rather than a knowing attempt to defraud creditors. Thus, Buckeye has failed to demonstrate that Osterman made a false oath by not disclosing the jewelry sale.

### ***Income Received from Intrepid***

Osterman amended his Statement of Financial Affairs twice, regarding \$3,000.00 of income he received as of the Petition Date, for serving as a director of Intrepid.<sup>5</sup> (Pl. Ex. 32, 35). In the fourth quarter of 2004, Osterman became a director of Intrepid; however, he did not receive any income from Intrepid until 2005. On November 15, 2005, Osterman amended his Statement of Financial Affairs to reflect income he had received from Intrepid, in the amount of \$1,500.00. Then on August 7, 2006, Osterman filed a second amendment, to adjust the amount of income he received from Intrepid in 2005, from \$1,500.00 to \$3,000.00. Osterman testified that his failure to initially disclose the income was due to an unintentional oversight, evidenced by the fact that he did initially disclose his position with Intrepid. (Tr. 2 at 124-125). Further, Osterman testified that he did not remember receiving the income until he began to prepare his 2005 income tax return, and that once he realized the mistake, he amended his Statement of Financial Affairs to reflect the amount that he was compensated. (Tr. 2 at 125). Therefore, Osterman maintains that he did not intend to fraudulently omit the \$3,000.00, but merely inadvertently failed to list it as income.

In contrast, Buckeye argues that Osterman's non-disclosure of the compensation he received from Intrepid was an attempt to defraud creditors, as evidenced by his pattern of failing to disclose assets on the original schedules. Again, Buckeye argues that Osterman's non-disclosure was material, due to the fact that no other estate assets are available to pay creditors. Buckeye further asserts that Osterman is not an honest debtor, given the number of omissions from his original schedules, coupled with the timing of the property transfers in question.

Although Osterman initially failed to disclose the income he received from Intrepid, he did originally list his position with Intrepid on his schedules; thus, the Court finds that his actions do

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<sup>5</sup> Directors of Intrepid earn \$1,000.00 per calendar year and \$500.00 per board meeting that they attend. (Tr. 2 at 156-157). In 2004, Osterman earned \$1,500.00 for his services to Intrepid; in 2005, he earned the same amount. (Pl. Ex. 35).

not demonstrate an intent to deliberately omit information/assets from his creditors. Further, once Osterman realized his mistake, he amended his Statement of Financial Affairs to provide full disclosure of the \$3,000.00 of income he had received. Thus, Buckeye has failed to sustain its burden of showing that Osterman made a false oath, regarding the compensation he received from Intrepid.

#### ***2005 Income Received from W&O***

When Osterman originally filled out Schedule I, which asks for a debtor's current monthly income, he listed his average monthly income from W&O but failed to include the \$61,121.18 bonus he received in early 2005, for work performed in 2004. Osterman testified that the bonus was completely discretionary in amount and receipt, and that he did not consider it as regular monthly income to be included in his Schedule I calculation. (Tr. 2 at 158). Thus, Osterman maintains that he mistakenly thought that he had initially provided all of the necessary information regarding his 2005 income from W&O.

On November 2, 2005, while amending his schedules, Osterman noted that his estimate of average monthly income in his original Schedule I did not include the discretionary bonus from W&O. (Tr. 2 at 59-60; Pl. Ex. 31). After realizing that the bonus should be included in his calculation of regular monthly income, Osterman amended his Schedule I and Statement of Financial Affairs to reflect the bonus. Osterman asserts that his initial non-disclosure of the bonus was the product of an oversight, which he promptly corrected.

In response, Buckeye argues that Osterman intentionally omitted the bonus from his schedules and Statement of Financial Affairs as part of a larger scheme to defraud creditors, by failing to provide full and accurate information regarding his assets and income. Thus, Buckeye argues that Osterman's non-disclosure of the bonus was a material omission, done with fraudulent intent.

The Court finds Osterman's testimony, that he mistakenly omitted the bonus from his monthly income calculation, to be credible, especially in light of the fact that he corrected the mistake as soon as he realized it. Thus, the Court finds that there is no evidence that Osterman intended to hide his income from Buckeye; rather, he initially misinterpreted what to include in his average monthly income calculation. Thus, Buckeye has failed to prove that Osterman

made a false oath regarding the partial non-disclosure of his 2005 income, pursuant to § 727(a)(4)(A).

#### **CONCLUSION**

Based on the above, Buckeye's objection to Osterman's discharge is overruled, pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4). The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

**ORDERED** on May 15, 2007, in Jacksonville, Florida.

/s/ George L. Proctor  
George L. Proctor  
United States Bankruptcy Judge

#### **Copies to:**

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U.S. Trustee