EXHIBIT F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: JEFFREY F. OSCARSON, Debtor. IN RE: OSCAR F. OSCARSON, Debtor.	In Chapter 7 Case No.: 05 B 52582 Judge Manuel Barbosa reassigned to Judge Pamela S. Hollis and consolidated with Case No.: 05-B-52473 Judge Pamela S. Hollis
GREEN BAY PACKAGING, INC., Plaintiff, v. JEFFREY F. OSCARSON and OSCAR F. OSCARSON, Defendants.	Case No.: 06-AP-511 Appealed as: 07-C-2233 Motion Date: July 24, 2008 Motion Time: 10:00 a.m.

NOTICE OF MOTION

TO: Scott N. Schreiber, Esq.,
Stahl Cowen Crowley LLC
55 W. Monroe , Suite 1200
Chicago, IL 60603

PLEASE TAKE NOTICE THAT on July 24, 2008 at the hour of 10:00 a.m., we shall appear before the Honorable Judge Pamela S. Hollis in Courtroom 644 at 219 South Dearborn, Chicago, Illinois, and then and there present **DEFENDANT, JEFFREY F. OSCARSON'S MOTION TO RECONSIDER**, a copy of which is attached hereto and thereby served upon you. You may appear if you so see fit.

QUERREY & HARROW, LTD.

AFFIDAVIT OF SERVICE

I, Eileen M. Sethna, an attorney, certify that a true copy of the foregoing Notice of Motion and the document referred to therein were served up on the parties listed below via ECF electronic transmission to sschreiber@stahlcowen.com.

/s/Eileen M. Sethna

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	In Chapter 7
JEFFREY F. OSCARSON,	)	Case No.: 05 B 52582
	)	Judge Manuel Barbosa
Debtor.	)	reassigned to Judge Pamela S. Hollis
	)	and consolidated with
IN RE:	)	
OSCAR F. OSCARSON,	)	Case No.: 05-B-52473
	)	Judge Pamela S. Hollis
Debtor.	)	
	)	
GREEN BAY PACKAGING, INC.,	)	
Plaintiff,	)	
v.	)	Case No.: 06-AP-511
	)	Appealed as: 07-C-2233
JEFFREY F. OSCARSON and	)	Motion Date: July 24, 2008
OSCAR F. OSCARSON,	)	Motion Time: 10:00 a.m.
	)	
Defendants.	)	

DEFENDANT, JEFFREY F. OSCARSON'S MOTION TO RECONSIDER

Defendant, JEFFREY F. OSCARSON, ("Jeff") by and through his attorneys, QUERREY & HARROW, LTD., timely moves this court to reconsider its Memorandum Opinion of July 2, 2008. In support thereof, Jeff states as follows:

I. BACKGROUND

A. Background of Business

The underlying suit arose out of a business relationship between Green Bay and Midwest. (Exhibit "C", p. 1, Trial B, p. 95). Fred, Jeff's father, started Midwest, a one-man corrugated boxing brokerage business in 1968. (Exhibit "C", p. 2; Trial A, p. 33, 38; Trial B, pp. 59-60, 92-93, 95; Exhibit "E", p. 2). Midwest's business boomed for twenty-seven years. (Trial B, pp. 100, 102, 137). In the late 1990's, after Jeff spent "a semester or two at Northern," and obtained a

two-year electronic technician degree from Elgin Community College, Fred hired Jeff to work for him at Midwest. (Trial A, pp. 37-38; Trial B, pp. 94, 135; Exhibit "E", p.2). In 2003, Fred retired and sold his interest in Midwest to Jeff, who admittedly could not say that "knew it (the business) inside and out." (Trial A, pp. 39, 93-95; Trial 2, pp. 60, 94, 136; Exhibit "C", p. 2, 12).

Midwest's business did not do so well after the sale to Jeff. (Trial 2, p. 141). "Although Fred was able to successfully run Midwest for many years, Jeff ran Midwest into the ground in 2 years." (Exhibit "C", p.18). Jeff received complaints about Green Bay's products from all of his customers and did not even keep track of them. (Trial 2, p. 141). Despite Midwest's failing business, Green Bay continued to ship out product and invoice Midwest. (Trial 1, p. 145; Trial 2, pp. 143-244; Exhibit "C", p. 3). Midwest closed its doors in June 2005. (Exhibit "C", p. 13).

B. Background of the Bankruptcy

On October 13, 2005, Jeff reviewed, signed, and filed his sworn bankruptcy schedules and statement of financial affairs for protection under Chapter 7 of the United States Bankruptcy Code. (Exhibit "C", pp. 9, 13; Trial 2, pp. 152-153). "Jeff subsequently filed four amendments to the schedules." (Exhibit "C", p. 9). Jeff believed that the values he assigned to his assets were "truly accurate." (Trial 2, p. 154). He did not hide anything from Green Bay or undervalue any of his personal property. (Trial 2, p. 154).

C. Background on the Trial

"Dischargeability actions are always – you know, the plaintiff has the burden of proof, and it's always, you know, a pretty heavy burden. And, you know, we'll see where we go with that. We'll focus on that issue. I mean, I've certainly entered judgments of nondischargeability and I've entered one where I haven't agreed with the plaintiff. So, it's not an easy thing to prove." (Trial A, p. 26, lines 8-15).

In its opening statement as to the §727(a)(4) claim against Jeff, Green Bay stated, "Section 727 of the Bankruptcy Code creates an affirmative obligation on behalf of the debtor to fully disclose all of their assets. What we're going to find from the evidence is that Jeff Oscarson failed to disclose at least three bank accounts, failed to disclose tens of thousands of dollars that was transferred to his wife, failed to disclose assets that he should have disclosed." (Trial A, p. 30, lines 22-25, p. 31, lines 1-5).

On January 17-18, 2007, a two-day trial of the Green Bay Packaging, Inc. ("Green Bay's") consolidated cases proceeded against Jeff and Oscar Fred Oscarson ("Fred") in the United States Bankruptcy Court for the Northern District, Eastern Division ("Bankruptcy Court" or "this court"; Exhibit "A", hereinafter "Trial A"[1] and Exhibit "B", hereinafter "Trial B"[2]). At the close of evidence, Green Bay, in its closing argument as to its §727(a)(4) claim against Jeff, stated: "The issue before the court is not Green Bay's business practices. The issue before the court is whether the debtor was accurate in his financial statements and his bankruptcy schedules, and we say that he was not." (Exhibit Trial B, (pg. 182, lines 22-25; p. 183, line 1). No where in the four hundred and three page trial transcript does Green Bay ever request this Court to shift the burden. Further, no where in the trial transcript does the Court establish that the burden shifted from Green Bay to prove Jeff's intent to Jeff to disprove his intent.

On March 6, 2007, the Bankruptcy Court issued a twenty-eight (28) Memorandum Opinion, ruling that Green Bay failed to meet its burden of proof under §523(a)(2)(B) and that its

[1] Exhibit "A" is a true and accurate copy of the trial transcript from January 17, 2007.
[2] Exhibit "B" is a true and accurate copy of the trial transcript from January 18, 2007.

claims against Jeff were dischargeable. (Exhibit "C"[3]). Additionally, the Court ruled that Green Bay had failed to prove that Jeff's discharge should be denied under §727(a)(4). (Exhibit "C").

D. Background on Appeal

On March 15, 2007, Green Bay filed its notice of appeal under 28 U.S.C. §158(a) to the United States District Court for the Northern District, Eastern Division ("District Court"). After briefing, on November 7, 2007, the District Court affirmed the Bankruptcy Court's ruling as to the §523(a)(2)(B) issue and reversed/remanded the issue of whether Green Bay met its burden under 11 U.S.C. §727(a)(4). (Exhibit "D[4]").

E. Background on Remand

On remand, this Court requested the parties submit supplemental briefs as to the one issue of law under 11 U.S.C. §727(a)(4), which they respectively did. On July 2, 2008, this Court entered a Memorandum Opinion and Judgment reversing its own order of March 6, 2007 and denying Jeff's discharge. (Exhibit "E[5]"). In so doing, this Court stated, "After a direct appeal, the District Court instructed this court as to the rule of law it must follow. This instruction is binding precedent in this particular adversary proceeding. This court is bound by the District Court's remand to shift the burden of proof to Jeff on the issue of whether he lacked intent to deceive." (Exhibit "E", p. 7). Despite this shift in burden which neither party nor this Court anticipated at the original trial, the Court refused to reopen the case to allow Jeff to meet the shift in the burden of proof.

[3] Exhibit "C" is a true and accurate copy of the Bankruptcy Court's Memorandum Opinion and Judgment entered on March 6, 2007.
[4] Exhibit "D" is a true and accurate copy of the District Court's opinion dated November 7, 2007.
[5] Exhibit "E" is a true and accurate copy of the Memorandum Opinion and Judgment Order signed by the Honorable Pamela S. Hollis on July 2, 2008.

III. ARGUMENT

The Seventh Circuit established that a motion to reconsider is appropriate where: (1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented to the court by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in the law since the submission of the issue to the court; or (5) there has been a controlling or significant change in the facts since the submission of the issue to the court. *Ramada Franchise Systems, Inc. v. Royal Vale Hospitality of Cincinnati, Inc.*, 2004 U.S. Dist. LEXIS 24036, *112, (N.D Ill. 2004).

A district court when reviewing the decision of a bankruptcy court, must accept the bankruptcy court's findings of fact unless they are clearly erroneous, and the court of appeal's review of the bankruptcy judge's findings of fact is also governed by the clearly erroneous standard of review. *In re: the Pearson Bros. Company*, 787 F. 2d 1157, 1161 (7th Cir. 1986). A finding of clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *In re: Kenneth Leventhal & Company v. Spurgeon Holding Corporation,* 152 B.R. 511, 513 (N.D. Ill. 1993). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Federal Rule of Civil Procedure 52 if it undertakes to duplicate the role of the lower court. *Id.*

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *In re: Kenneth Leventhal & Company*, 152 B.R. at 513;

citing; Fed. R. Bankr. P. 8013. A district court, acting as an appellate court in a bankruptcy case, may consider only evidence which was presented before the bankruptcy court and made a part of the record. *Edgewater Walk Apartments v. Mony Life Insurance Company of America*, 1993 U.S. Dist. LEXIS 17679 *5 (N.D. Ill. 1993).The issue before the reviewing court "must be answered based on evidence which the bankruptcy judge had before him [at the time of the ruling]. *Id.* Matters submitted after that date are not properly before [the reviewing court] in determining the propriety of the bankruptcy judge's decision. *Id*

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. *In re: Pearson Bros. Company*, 787 F. 2d at 1162. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." *Id.*

Although the District Court expressly states that it did not find that the Bankruptcy Court's findings of fact as the 11 U.S.C. §523(a)(2) were clearly erroneous, no where does it state that it found the same as to 11 U.S.C §727(a)(4)(A). (Exhibit "E", p. 7-10). Instead, the District Court, at p. 9, states that "In determining Jeff's intent, the bankruptcy court should have looked at Jeff's entire course of conduct leading up to his filing for bankruptcy and then considered the factors articulated by the Seventh Circuit in Village of San Jose", which is a case examining §727(a)(2) and not §727(a)(4) which was the basis for Green Bay's objection to discharge. *Id.*

I. 11 U.S.C. §727(A)(4)(A) Requires No Burden Shifting. The Trial Was Conducted Pursuant To Both Rule 4005 And Case Law Which Requires Plaintiff Prove By Preponderance Of The Evidence The Elements Of The Objection They Are Raising.

Evidence closed on January 18, 2007. Not until, June 1, 2007, six months after evidence closed, after all else failed, did Green Bay raise its novel idea of shifting the burden to Jeff. As expressly stated in his response brief, Jeff warned the District Court that Green Bay's unsubstantiated theory was not raised at trial and was therefore waived. "Given Green Bay's failure to meet its burden of proof, it [Green Bay] attempts to create a new standard whereby when the creditor/objector fails to meet its burden, the burden of proof should shift to the defending debtor. (Exhibit "F"[6], p. 20). In its vain attempt to divert this Court's focus or to raise new issues on appeal it failed to raise or preserve at trial, Green Bay inexplicably cites to and discusses case law involving irrelevant areas of law including: the trustee's avoidance powers under 11 U.S.C. §548, badges of fraud under 11 U.S.C. §727(a)(2), and the preference value computations under 11 U.S.C. §547. Jeff can only deduce that because Green Bay failed to prove "fraud in fact" that Jeff knowingly intended to deceive his creditors, Green Bay seeks to find "fraud in law" which implies intent." *Id.*

In its March 6, 2007 Memorandum Opinion, this Court found that, "The proper issue is whether Jeff's omission of these transfers from his Statement of Financial Affairs was done with the intent to deceive his creditors or with reckless disregard for the truth. The court finds that the evidence does not support such a finding." (Exhibit "C", pp. 24). In its November 7, 2007 ruling, the District Court held that "[i]n determining intent, the bankruptcy court should have looked at Jeff's **entire course of conduct** leading up to his filing for bankruptcy and then

[6] Exhibit "F", is a true and accurate copy of Jeffrey F. Oscarson, Appellee's Brief and Argument filed July 26, 2007.

considered the factors articulated by the Seventh Circuit in *Village of San Jose."* (*Village of San Jose v. McWilliams*, 284 F. 3d 785, 791 (7th Cir. 2002). (Exhibit "D", p. 9).

The District Court accepted Green Bay's untimely, unfounded theory and in so doing, identified five (5) factors, or possible badges of fraud, for the Bankruptcy Court to review on remand and a ; (1) [Jeff] failed to disclose three transfers of funds that were made to Laura (the vacation check, the tax refund check, and the college checks); (2) failed to disclose the Edward Jones account which contained approximately $2,600 on the date of Jeff's bankruptcy filing; (3) scheduled his personal property with a value of $1,000 even though he insured such personal property for over $26,000 during the time period just before filing; (4) failed to disclose his alleged interest in Laura's Washington Mutual accounts; and (5) failed to schedule any liability to Fred that might still be due and owing under the agreement by which Fred transferred his membership rights in Midwest to Jeff. (Exhibit "D", p. 9).

II. This Court's Finding That Jeff Lacked Intent Under §727(A)(4)(A) Was Supported By The Record. The District Court Did Not Find That The Bankruptcy Court's Findings Of Fact Were Clearly Erroneous.

This Court's finding in its opinion of March 8, 2007, that Jeff did not possess intent was supported and not clearly erroneous. This Court, yet again, conducted a lengthy review of the evidence and testimony and in its July 2, 2008 Memorandum Opinion, upheld its own findings from its observations after two days of trial testimony and memorialized in its March 8, 2007 opinion. In so doing, this Court reviewed each of the five (5) factors identified by the District Court, in reverse order, and held that:

(5) Jeff Did Not Schedule Fred as a Creditor

> **COURT**: "As Jeff pointed out, Fred is his father and was unlikely to try to collect his debt. A very reasonable reason for omitting him from his schedules. Moreover, scheduling Fred as a creditor would only have diluted the

distribution available to other creditors. In fat, if Jeff had possessed the intent to defraud his creditors he would have scheduled Fred with as large a claim as possible." (Exhibit "E", p. 7).

(4) Jeff's Valuation of His Household Goods

COURT: "The third piece of evidence also compels no change in the court's finding. Green Bay proved that Jeff scheduled his personal property with a value of $1,000 even though he insured that personal property for over $26,000 during the time period just before filing his bankruptcy case.

Jeff's valuation of his personal property does not raise a red flag. This court has reviewed thousands of Schedule B itemizations of personal property. The importance of valuing property on Schedule B is to provide the case trustee with an idea of whether it would be worth his or her time to inventory the property and conduct a liquidation sale for the benefit of the creditors. This court recalls very few cases – out of the thousands reviewed as a panel trustee, attorney or judge – in which a trustee determined that the personal property of an individual, that is the contents of the debtor's home, was so valuable that a sale would be held. Moreover, at best Jeff only owns a one-half interest in the personal property he scheduled. Laura is not a debtor.

In this case, the court viewed a video taken of Jeff's personal property. The video shows the contents of Jeff's house, room by room. Having reviewed this video, the court found in its original opinion that Jeff's valuation of his personal property at $1,000 does not support a finding that he possessed an intent to defraud creditors."

This finding is not changed by the burden of proof shifting to Jeff. Jeff testified that he valued his property for the bankruptcy schedules based on what he could expect to receive at a garage sale. He also testified that he did not own the jewelry or the classical instruments on the insurance policy. Jeff may have insured the property at $26,000 to reflect its replacement value, but he has met his burden of proof on the issue of whether he lacked fraudulent intent when he valued his personal property at $1,000 on his Schedule B." (Exhibit "E", p. 9)

(3) Checks Written From Laura's Washington Mutual Account on Jeff's Behalf

COURT: "As the court determined in its original opinion, Green Bay appears to have attributed Jeff's ownership interest to the fact that he wrote out several checks, which Laura signed..... In its original opinion, the court found that Jeff did not have an interest in his account which he should have scheduled, and therefore his failure to list this account was not a false statement. Laura was the only signatory to the account, and the sole owner of the account. It was in her name. Jeff should not and properly did not include this account in his bankruptcy schedules." (Exhibit "E", p. 8)

The final two (2) issues this court reviewed were: the Transfers to Laura Oscarson, namely the ("Vacation Check" the "Tax Refund Check" and the "College Checks", numbered as (2) by the Court in its opinion) and (1) Jeff's Omissions of Interest in Financial Account, namely his Edward Jones account.

COURT: "In its original opinion, this court found that Laura was not a creditor, therefore Jeff did not need to disclose the Vacation Check, the Tax Refund Check, and the College Checks in response to this question. This finding still stands." (Exhibit "E", p. 10)

At the trial, Jeff was examined about those three checks: (Trial A, pp. 224-228).

"Vacation Check"

COUNSEL: What was the purpose of that check?
JEFF: That was to pay bills in our household.
COUNSEL: There is a memo portion on that check; is that correct?
JEFF: Yeah.
COUNSEL: What does it say?
JEFF: Vacation.
COUNSEL: What does that mean?
JEFF: She used her money to pay for our vacations.
COUNSEL: Okay.
JEFF: -- and whatever bills that kind of came with it.
COUNSEL: Now let's go to Exhibit 18. Counsel pointed out to you that in the middle of the page it shows that you're the primary owner of those accounts. Do you see that?
JEFF: Yes, I do.
COUNSEL: Okay. Take a look at the top. Whose names are on that account?
JEFF: Jeffrey and Laura Oscarson.
COUNSEL: It was a joint account as far as you're concerned; is that correct?
JEFF: Yes, it was.
COUNSEL: It wasn't primarily yours, it wasn't primarily Laura's, it was your family account?
JEFF: The account was for both of us. It was our family account.

"Tax Refund"

COUNSEL: Let me direct your attention now to Exhibit 25, check number 10658 for $20,000.

COURT: Exhibit 25?
COUNSEL: Yes. Page 3 of Exhibit 25.
JEFF: I see it.
COUNSEL: $20,000 check, number 10658.
COURT: Got it.
COUNSEL: Now, what does it say in the memo portion of the check, sir?
JEFF: Tax return.
COUNSEL: What does that mean?
JEFF: We received money back, and my wife had saved it in that account.
COUNSEL: So this was a refund from the IRS?
JEFF: Yes it was.
COUNSEL: Did you file a joint tax return?
JEFF: Yes, I did.
COUNSEL: So, it's based on her deductions and expenses as well as yours; is that correct?
JEFF: Yes, sir.

"College Checks"

COUNSEL: Okay. There is also check number 10658. Counsel pointed out check number – for $9,000, a check written by Laura. Do you see that?
JEFF: Yes, I do.
COUNSEL: And what does it say in the memo portion of that check?
JEFF: College.
COUNSEL: Okay. What does that indicate, that college payment?
JEFF: My wife saved up money to help my son pay for his college.
COUNSEL: What did she do with that money when she got it?
JEFF: I'm sure she helped him pay for college.
COUSNEL: Well, how would she do it?
JEFF: She wrote him checks or bought his books or many things.
COUNSEL: But that truly indicates what the money was used for?
JEFF: Yes, sir.
COUNSEL: Okay. Are these normal transfers you make to pay bills?
JEFF; Yes.

Ordinary Course (Trial A, p. 234, lines 5-25; p. 235, lines 1-15)

COUNSEL: Now, let's take a look at statement 10, paragraph 10 [Statement of Financial Affairs] on the next page.
JEFF: Um-hmm.
COUNSEL: Would you consider all of the transfers that were made to Laura as being ordinary transfers in conducting family business?
JEFF: Yes, I would.
COUNSEL: Okay. So take a look at 10. 10 says list all other property other than property transferred in the ordinary course of the

business or financial affairs of the debtors transferred either absolutely or as security within on e year immediately proceeding commencement of this case. So it asks there for transfers that were out of the ordinary course of business. Were there…

MR. SCHREIBER: Your Honor, I'm going to object. I would object on the basis that really ordinary course is for the court to decide, not for Mr. Oscarson. Many courts have held that –

COURT: Well, I guess you can make that argument on every answer to every schedule, though. You've put in the relevance of how they've answered the scheduled and what they understood, and so I've got to overrule it on that. I mean, you know, we could argue that everyone of the answers here is a legal – is sort of a legal question. But I think ordinary course can be a factual thing within the ordinary course of what this witness would normally do as opposed to the ordinary course term of art that might be used in bankruptcy. So, I'll overrule it.

COUNSEL: Go ahead and answer the question. Are these payments made in the ordinary course to Laura?

JEFF: Yes, they are.

(2) Transfers to Laura. (Inter-spousal Transfers). The statement of financial affairs requires at Paragraph 3(c) that the debtor "list all payments made within one year immediately preceding the commencement of this a case to or for the benefit of creditors who are or were insiders." (Exhibit "C", p. 22). Laura Oscarson, Jeff's wife was not a creditor. *Id.* ("A spouse in circumstances where divorce proceedings are 'imminent' may qualify as a creditor… [but m]arriage alone, however, does not make a spouse a potential creditor" under Massachusetts law, which defines a creditor similarly to the Bankruptcy Code's definition in 11 U.S.C. §101.) (Exhibit "C", p. 22-23 citing *In re: Yacobian,* 508 N.E. 2d 1389, (Mass. App. Ct. 1987). Paragraph 10 requires a debtor "list all other property other than property transferred in the ordinary course of the business or financial affairs of the debtor transferred either absolutely or as security within two years immediately preceding the commencement of the case." (Exhibit "C", p. 23). The transfers to Laura were normal, family transactions that paid business or family expenses such as tuition income taxes, vacation etc. (Trial 2, p. 189, 230-232).

Bankruptcy Court. "Nevertheless, having heard Jeff's testimony, the court finds credible his assertion that he did not believe that he was answering Question 10 falsely when he failed to list the transfers to Laura. In fact, Laura and not Jeff, wrote the checks to cash, and she did so from accounts in which she held a joint interest." (Exhibit "C", p.23). "Having heard Jeff testify for several hours, and having reviewed the evidence submitted by Green Bay, the court cannot find by a preponderance of the evidence that Jeff intended to deceive his creditors when he did not disclose these transfers in this Statement of Financial Affairs." (Exhibit "C", p. 24).

"Edward Jones Account" (Trial A, p. 220, lines 12-25; P. 221, lines 1-2)

COUNSEL:	You've just recently located an account that was scheduled on – that was scheduled on – that wasn't scheduled on amended Schedule B, correct?
JEFF:	Yes, I did.
COUNSEL:	And that was the account Mr. Schreiber referred to as account number 233-08373-1-7?
JEFF:	Yes.
COUNSEL:	Okay. And that account has about $3,000.00 in it today; is that correct?
JEFF:	That is correct.
COUNSEL:	Okay. And was a joint account with your wife; is that correct?
JEFF:	That is correct.
COUNSEL:	Okay. You've disclosed that account to your trustee, Charlie Myler; isn't that correct?
JEFF:	That is correct.

(1) Edward Jones. Jeff disclosed the existence of the Edward Jones mutual fund account, which held approximately $2,600.00 to the Trustee. (Exhibit "C", p. 10). He further offered the Trustee, one-half interest in the account, including accrued post-petition interest. *Id.*

Bankruptcy Court. "Jeff failed to itemize one account out of several, and this account contained less than $3,000.00. (Exhibit "C", p. 25). This omission does not rise to the level of deceit require to deny a debtor's discharge. *Id.*

III. Shifting The Burden Of Proof To Defendant Without Affording Him An Opportunity To Be Heard Violates The Procedural Due Process Requirements For The Fourteenth Amendment Of The Constitution.

This Court improperly concluded that regardless of whether the issue was waived and or imperfected for appeal, followed a "binding precedent" in its use of a burden shifting test. In so doing, this Court reversed its own decision by finding that if the burden shifted back to Jeff. This Court then held that Jeff failed to meet its burden under 11 U.S.C. §727(a)(4) but without affording Jeff an opportunity to meet this burden.

11 U.S.C. §727(a)(4) precludes discharge to a debtor who, among others, "knowingly and fraudulently, in or in connection with the case... made a false oath or account." (emphasis added) *Hudgens*, 2005 U.S. App. LEXIS at **17 (7th Cir. 2005); 11 U.S.C. §727(a)(4). In order for §727(a)(4) to apply, Green Bay had to prove, by a preponderance of the evidence, that: (1) Jeff made a statement under oath; (3) the statement was false; (3) Jeff knew it was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. 11 U.S.C. §727(a)(4) (emphasis added). *Id.* A creditor can establish fraudulent intent by showing that the debtor knowingly made a false and material statement. *Id.* (emphasis added).

There are several critical factors for this Court to review. Firstly, Green Bay brought a claim under 11 U.S.C. §727(a)(4) for false oath. Green Bay did not allege any another claim under any other subsection of §727. The burden of proof under §727(a)(4) requires the objector to prove the elements by preponderance of the evidence. There is no burden shifting in an action brought under this section of the code.

Secondly, no where in the four hundred fifty-three (453) page trial transcript does Green Bay request or preserve this burden shifting issue. Not only would its request to do so be

irrelevant and improper, but clearly the issue has been waived. Given Green Bay's failure to meet its burden of proof, it attempts to create a new standard whereby when the creditor/objector fails to meet its burden, the burden of proof should shift to the defending debtor. Green Bay's objection was based on 11 U.S.C. §727(a)(4) or "false oath". Therefore, the "badges of fraud" relevant to a §727(a)(2) objection to discharge do not apply to Green Bay's objection based upon §727(a)(4). Green Bay had the ultimate burden of proving that Jeff acted intentionally to deceive his creditors by his omissions and it failed.

In this case, this Court originally applied the correct analysis when examining the alleged omissions, materiality and intent under 11 U.S.C. §727(a)(4). In its opinion, the bankruptcy court held that "materiality and a false statement are not enough; Green Bay had the uphill battle of proving intent to defraud, and this it failed to do." (Exhibit "C", p. 25). Despite the efforts of Green Bay to distort standards, impose burdens, and introduce irrelevant statutes, no error was committed by this Court.

The denial of a discharge is a harsh remedy to be reserved for a truly pernicious debtor. *In re: Bostrom, et al.*, 286 B.R. 352, 359; 2002 Bankr. LEXIS 1384 **8 (N.D. Ill 2002). "Filing of false schedules with material omissions or misrepresentations with an intent to mislead creditors and the trustee as to a debtor's actual financial condition constitutes a false oath under section §727(a)(4)(A). (*citation omitted*). Jeff is not a pernicious debtor.

The bankruptcy court found Jeff credible when he testified that he did not believe he was answering Question 10[7] falsely when he failed to list the transfers to Laura. (Exhibit "C", p. 22). Further, the Court found that Laura wrote the checks from accounts in which she held a joint

[7] Question 10 requests a debtor disclose "all other property, other than property transferred in the ordinary course of the business of financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case."

interest, not Jeff. (Exhibit "C", p. 23). The court did not find that Jeff intended to deceive his creditors or acted with reckless disregard for the truth when he did not disclose the transfers in his Statement of Financial Affairs. *Id.*

This court did not abuse its discretion or commit error when it found that Jeff's omissions did not rise to the level of deceit to deny his discharge. However, this Court misconstrued a remand to be a binding instruction to impose a new standard of proof, without affording the witness hearing, and that, requires reconsideration. This court's findings of fact and conclusions of law at the two day trial were prudent and proper and should be affirmed.

Without waiving Jeff's position that District Court improperly burden of proof improperly shifted to him, the case should be reopened on remand to allow Jeff to offer testimony relative to his lack of intent. The unwarranted shift of burden without the opportunity to be heard would deprive Jeff of his due process rights under the Fourteenth Amendment to the United States Constitution.

IV. CONCLUSION

WHEREFORE, Defendant, Jeffrey F. Oscarson, by and through his attorneys, Querrey & Harrow, Ltd., respectfully requests:

A. That this Court reconsider its Memorandum and Opinion of July 2, 2008; or

B. Reopen the case to allow Jeff an opportunity to be heard on the issues raised by shifting the burden to him to disprove his intent under §727(a)(4); and

C. Any additional relief that this Court deems just.

Respectfully submitted this 17th day
of July, 2008
s/Eileen M. Sethna
One of the Attorneys for the Defendant

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