

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

|   |   |                                |
|---|---|--------------------------------|
| <b>In re:</b>                                       | : | <b>Case No. 02-01433-rjh-7</b> |
|   | : |                                |
| <b>BRYAN ALAN LUTTIG and<br/>PATTI ANN LUTTIG,</b>  | : | <b>Chapter 7</b>               |
|   | : |                                |
| <b>Debtors.</b>                                     | : |                                |
| -----   |   |                                |
| <b>HABBO G. FOKKENA, UNITED<br/>STATES TRUSTEE,</b> | : | <b>Adv. No. 03-30020</b>       |
|   | : |                                |
| <b>Plaintiff,</b>                                   | : |                                |
|   | : |                                |
| <b>v.</b>   | : |                                |
|   | : |                                |
| <b>BRYAN ALAN LUTTIG and<br/>PATTI ANN LUTTIG,</b>  | : |                                |
|   | : |                                |
| <b>Defendants.</b>                                  | : |                                |

**ORDER—COMPLAINT TO REVOKE DISCHARGE**

On October 1, 2003, trial was held on Plaintiff's Complaint to Revoke Discharge. Assistant United States Trustee, James L. Snyder, represented Plaintiff Habbo G. Fokkena, United States Trustee for Region 12. David G. Hicks represented Debtor/Defendants Bryan Alan and Patti Ann Luttig. At the conclusion of the trial, the court took the matter under advisement on a briefing schedule. Post-trial briefs have been received, and the court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

## FINDINGS OF FACT

1. On March 21, 2002, Bryan Alan and Patti Ann Luttig (hereinafter Debtors) filed a petition for relief under chapter 7 of title 11, the Bankruptcy Code. On the same day, the clerk of the United States Bankruptcy Court for the Southern District of Iowa served notice of the commencement of the bankruptcy case, deadlines, the scheduled first meeting of creditors, and the appointment of Deborah L. Petersen (hereinafter Trustee) as the trustee for the case.

2. On their Schedule B – Personal Property, in response to item #20, which asks for the disclosure of debtor’s rights to contingent or unliquidated claims of any nature, including tax refunds, Debtors indicated that they had none. Debtors did not claim a right to tax refund.

3. On April 26, 2001, Trustee held the first and only meeting of creditors in Debtors’ bankruptcy case. At the meeting, Debtors provided disparate testimony concerning whether they had received an income tax refund after filing for bankruptcy protection. In order to clarify the matter and determine whether an interest of the bankruptcy estate was involved, Trustee requested that Debtors provide copies of their 2001 state and federal income tax returns along with copies of their paycheck stubs. Trustee sent Debtors’ counsel, David Hicks (hereinafter Hicks), a follow-up letter, dated April 26, 2002, outlining the request and asking for a response within two weeks of the date of the letter so that a formal request would not need to be filed with the court.

4. Debtors did not respond to the letter, and on May 9, 2002, Trustee sent a copy of the letter stamped “second request” to Hicks.

5. On May 29, 2002, Trustee received a “memo letter” from the office of Debtors’ counsel along with pay stubs. The tax returns were not furnished to Trustee, and the memo letter makes no mention of the tax returns or the refund.

6. On June 2, 2002, Trustee made a final demand for information and documentation. She forwarded a copy of the demand letter with a handwritten notation to Hicks stating, “DAVE – PLEASE SEND THESE! Deb 6-3-02.” Trustee did not receive a response to this request.

7. On June 26, 2002, Debtors received a discharge.

8. On July 26, 2002, Trustee filed a motion seeking the turnover of copies of Debtors’ 2001 state and federal income tax returns, any refunds, and any wages that were accrued but not paid before the filing of the bankruptcy petition. As per local rules in effect at that time, Trustee also filed notice of a twenty-day bar date for objections. Trustee served the motion and bar date notice by first class mail on the United States Trustee, Debtors, and Hicks.

9. Neither Debtors nor Hicks contacted Trustee or the court regarding the motion. Debtors did not file an objection to the motion.

10. On August 26, 2002, the court entered an order granting Trustee’s motion for the turnover of property. The order includes a finding that notice of the motion and bar date for objections were given to the interested parties, and no objection was filed. It required Debtors to provide Trustee with copies of all state and federal tax returns for the year 2001, all state and federal tax refunds received related to that year, and all accrued unpaid wages as of the filing date, such sum amounting to \$789.00. Debtors were ordered to turn over this property within twenty days of the entry of the order.

11. Debtors did not respond to Trustee or the court regarding the order.

Debtors did not appeal the order.

12. The certificate of service for the turnover order shows that it was served by first class mail on Debtors at 32679 Windmill Lane, Missouri Valley, IA 51555 and Hicks at his office address as provided on the bankruptcy petition.

13. Trustee sent a letter, dated September 3, 2002, to Hicks along with a copy of the turnover order. The letter requested that Hicks advise Debtors of the consequences should they fail to comply with the order.

14. Trustee sent a letter, dated September 9, 2002, to Hicks notifying him that Bryan Luttig had left a voice mail message with her office informing her that he was mad about this situation and that she should contact Hicks concerning it. In the message, Bryan stated that he had given all the information to Hicks, and he did not need anymore notices or hassles. Trustee informed Hicks that she would not communicate directly with Debtors by telephone as long as Hicks represented them. Trustee demanded the copies of Debtors' tax returns, the payment of all tax refunds, and the payment of accrued unpaid wages pursuant to the court's order. Trustee sent copies of the letter to the United States Trustee and Debtors.

15. On October 7, 2002, Trustee sent a second copy of the above letter stamped "Second Request" to Hicks, the United States Trustee, and Debtors.

16. In a letter dated October 23, 2002, Hicks informed Trustee that he had sent the tax returns to her on two previous occasions; however, he did not provide any corroborating documentation. Hicks stated that Bryan informed him that the tax refunds were received prior to filing for bankruptcy and if he had testified differently at the

meeting of creditors, he was confused. This is the first time that Debtors raised this defense. Along with the letter, Hicks sent unsigned copies of Debtors' tax returns dated February 2, 2002.

17. In a letter dated October 30, 2002, Trustee acknowledged the receipt of the above letter from Hicks and the tax returns. Based on the tax returns and the pay stubs, Trustee calculated that Debtors were required to turn over \$6,056.00 (\$4,750.00 Federal refund, \$517.00 Nebraska refund, \$789.00 accrued wages) to the bankruptcy estate pursuant to the court's order. Trustee set a deadline of November 12, 2002, for the receipt of the funds.

18. On February 3, 2003, the United States Trustee filed the instant complaint praying for the revocation of Debtors' discharge.

19. On August 29, 2003, the Internal Revenue Service produced a document concerning Debtors' 2001 tax liability and refund. The document provides that their income tax return was filed, processed, and tax was accessed on March 4, 2002. The amount to be refunded was \$4,750.00.

20. At trial, Patti Luttig testified that they had received their tax refund on March 4, 2004. She ascribed her contrary testimony at the creditor's meeting to her nervousness, and testified that she was mistaken at that time. She testified that she did not respond to any of the letters and did not even open mail for a time. Patti admitted that she received a copy of the turnover order, but did nothing. Patti testified that the federal tax refund has been spent.

21. Brian testified that he did not respond to any of the communications because he had mental problems and suffered from chemical dependency. He removed

money from the couple's joint account to pay for his chemical dependency. Bryan knew at the creditors meeting that Trustee required copies of their tax returns and wage statements.

22. Patti and Bryan no longer live together. Bryan has not filed a change of address with the court.

23. Both Debtors offered to pay \$50.00 per month so that their discharge would not be revoked.

24. Debtors did not offer evidence concerning their receipt of their Nebraska income tax refund, or their accrued wages.

### **DISCUSSION**

The United States Trustee commenced this adversary proceeding seeking the revocation of Debtors' discharge. He asserts that Debtors refused to obey the court's order to turnover their tax refunds and accrued wages, which were property of the bankruptcy estate, and the revocation of their discharge is the appropriate sanction.

The United States Trustee may request the revocation of a discharge if the debtor refuses to obey a lawful order of the court. 11 U.S.C. § 727(d). Upon the showing that a debtor has refused to obey a lawful order of the court, the court shall revoke the discharge. 11 U.S.C. § 727(a)(6) & (d)(3). The revocation proceeding must be commenced before the later of one year after granting the discharge and the date the case is closed. 11 U.S.C. § 727(e). The party seeking the revocation bears the burden of showing that revocation is proper by a preponderance of the evidence. Bowman v. Belt Valley Bank (In re Bowman), 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994); Hazlett v. Gorshe (In re Gorshe), 269 B.R. 744, 746 (Bankr. S.D. Ohio 2001).

A “fresh start” for debtors being the goal of bankruptcy, discharges are generally a favored result. Marquis v. Marquis (In re Marquis), 203 B.R. 844, 847 (Bankr. D. Me. 1997). Accordingly, under § 727(a)(6), the mere failure to comply with a court order alone is insufficient to warrant the revocation of a discharge. Concannon v. Costantini (In re Costantini), 201 B.R. 312, 316 (Bankr. M.D. Fla. 1996). The Bankruptcy Code requires that the debtor “refuse” to obey a lawful order in order for the discharge to be revoked. 11 U.S.C. § 727(a)(6). Courts are given a great deal of discretion in determining whether debtors have refused to obey an order. Yoppolo v. Walter (In re Walter), 265 B.R. 753, 758 (Bankr. N.D. Ohio 2001).

There is currently some disagreement among the courts as to the circumstances under which refusal to obey can be found. One line of cases requires a willful or intentional disobedience rather than inability to comply, inadvertence, or mistake. Wilmington Trust Co. v. Jarrell (In re Jarrell), 129 B.R. 29, 33 (Bankr. D. Del. 1991); Hays v. Cummins (In re Cummins), 166 B.R. 338, 358 (Bankr. W.D. Ark. 1994); In re Constantini, 201 B.R. at 315-16; Taunt v. Patrick (In re Patrick), 290 B.R. 306, 313 (Bankr. E.D. Mich. 2003). Other courts liken a § 727(a)(6) proceeding to one for civil contempt. Hunter v. Magack (In re Magack), 247 B.R. 406, 409 (Bankr. N.D. Ohio 1999) citing United States v. Richardson (In re Richardson), 85 B.R. 1008, 1011 (Bankr. W.D. Mo. 1988); In re Walter, 265 B.R. at 758. As “willfulness” is not required to find civil contempt, the intent requirement of the word “refused” is implicitly negated. In re Magack, 247 B.R. at 409. Those courts hold that the party requesting revocation must show that the debtor had knowledge of the order; the debtor did in fact violate the order; and the order was specific and definite. Id. at 410.

This court finds that the majority view, requiring intentional conduct in disobeying an order to deny or revoke a discharge is the better reasoned interpretation of the provision. The use of the word “refuse” by Congress indicates its intention to set a different standard than that of “failed” as used elsewhere in the section. In re Jarrell, 129 B.R. at 33. “Bankruptcy law recognizes that mere failure does not equal refusal where the creditor does not show willful or intentional disobedience....” Id. Further, 11 U.S.C. § 727(a)(6) contains essentially the same language as Section 14(c)(6) of the former Bankruptcy Act, 11 U.S.C. § 32(c)(6) which provided that “[t]he court shall grant the discharge unless satisfied that the bankrupt has...(6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court;...” See In re Kokoszka, 479 F.2d 990, 997 n.5 (2d Cir. 1973) aff’d, 417 U.S. 642 (1974). Courts interpreting that provision have held that consideration should be given to the intent behind debtors’ actions. Id.; Friendly Fin. Discount Corp. v. Jones (In re Jones), 490 F.2d 452, 456 (5th Cir. 1974).

In this case, Debtors received a discharge on June 26, 2002. On February 23, 2003, the United States Trustee filed a complaint seeking the revocation of the discharge. Accordingly the court finds that the proceeding was commenced less than one year after the discharge was entered, and therefore, is timely filed under 11 U.S.C. § 727(e)(2)(A).

Further, the court finds that Debtors’ refusal to comply with its turnover order was willful and deliberate. Debtors knew at the section 341 meeting of the creditors that Trustee claimed accrued wages and income tax refunds as property of the estate, and they were on notice that she required the pay stubs and income tax returns. Debtors knew, as they should have been informed by counsel prior to seeking the protection of the

bankruptcy court, that they were under an affirmative duty to cooperate with Trustee.

See 11 U.S.C. § 521(3); Fed. R. Bankr. P. 4002(4).

After the discharge was entered and fair notice given to Debtors, Trustee filed a motion for the turnover of property. Neither Debtors nor their counsel filed a responsive pleading, and the court entered its order requiring the turnover of the documents, accrued wages, and tax refunds. After the entry of the order, Debtors and their counsel continued to ignore Trustee.

Only after repeated requests from Trustee did Debtors eventually produce their income tax returns. The court notes that Hicks states in his letter that he sent copies of the returns on two previous occasions. As he provided no corroboration, such as cover letters or log entries, the court finds this assertion specious and unbelievable. In his letter, Hicks also suggested that the tax refunds were received prior to the filing of the bankruptcy petition, but provided no corroboration.

At trial, Debtors reiterated this argument. They testified that the tax refunds were received on March 4, 2002. This testimony is contrary to testimony that they provided at the 341 meeting of the creditors. The only documentary evidence provided shows that their federal income tax returns were processed and a refund amount calculated on March 4, 2002. No evidence was introduced showing when Debtors received their federal income tax refund, and no evidence produced concerning the state tax refund or their accrued wages. Accordingly, the court finds that Debtors' testimony given at the 341 meeting of the creditors on April 26, 2001, being much closer in time to the actual events, is more likely than not to be the accurate rendition of the events, and Debtors received their tax refunds after they filed their bankruptcy petition. Hence, the federal income tax

refunds, along with the state tax refunds and accrued wages, are property of the bankruptcy estate, and the turnover order is lawful in that respect.

The court concludes that Debtors' conduct in ignoring their duty to assist Trustee and repeatedly ignoring her demands for information and turnover of property of the estate, along with their failure to comply with the order of the court, demonstrate a willful and deliberate refusal to obey a lawful order of the court.

Debtors also argue that the money has long since been spent and they do not have the ability to pay Trustee the full lump sum. They suggest that they could pay \$100.00 per month to satisfy the obligation and salvage their discharge.

While an inability to comply with an order is a defense under § 727(a)(6), Debtors must demonstrate present inability to comply with the order and show that they took reasonable efforts to attempt to comply with the order. See In re Magack, 247 B.R. at 410. Likewise, belated compliance may be sufficient to prevent the revocation of discharge. In re Costantini, 201 B.R. at 315.

The court finds that Debtors have failed to offer any credible evidence of either their inability to comply with the court's order, or that they made a reasonable attempt to comply with the order since its issuance. Rather, the court finds that Debtors and their counsel have ignored correspondence from Trustee and the order of the court. Further, Bryan Luttig and Patti Luttig, have been hostile and apathetic to Trustee's attempts to perform her duties under the Bankruptcy Code.

Consequently, the court views Debtors' offer to make payments as "too little, too late." The time for negotiating a payment plan has long since past. Further, Trustee is the person who should have been contacted with such a proposal, and contact should

have been made some time ago. Finally, under the terms proposed by Debtors, they would be making payments for over five years, meaning their case would remain open for over eight years. Such time frame is far too burdensome on Trustee, the estate, and creditors.

For all the forgoing reasons, the court finds that the United States Trustee has carried his burden to show that Debtors failed to obey a lawful order of the court. Accordingly, the court will revoke their discharge.

**ORDER**

IT IS THEREFORE ORDERED that judgment should be entered revoking Debtors Bryan Alan Luttig and Patti Ann Luttig's discharge.

Dated: \_\_\_\_\_, 2004.

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RUSSELL J. HILL, JUDGE  
U.S. BANKRUPTCY COURT

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

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| <b>BRYAN ALAN LUTTIG and<br/>PATTI ANN LUTTIG,</b>  | : | <b>Chapter 7</b>               |
|   | : |                                |
| <b>Debtors.</b>                                     | : |                                |
| -----   |   |                                |
| <b>HABBO G. FOKKENA, UNITED<br/>STATES TRUSTEE,</b> | : | <b>Adv. No. 03-30020</b>       |
|   | : |                                |
| <b>Plaintiff,</b>                                   | : |                                |
|   | : |                                |
| <b>v.</b>   | : |                                |
|   | : |                                |
| <b>BRYAN ALAN LUTTIG and<br/>PATTI ANN LUTTIG,</b>  | : |                                |
|   | : |                                |
| <b>Defendants.</b>                                  | : |                                |

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**ORDER - MOTION TO ALTER OR AMEND JUDGMENT**

This case pends upon the motion to alter or amend judgment by David G. Hicks and the law firm of Pollak & Hicks to alter or amend the Order - Complaint to Revoke Discharge filed on September 8, 2004 (DN 16).

Movant prays that the language "and their counsel" be stricken from lines 17 and 18 of page 10 of that order. The court finds that this motion should be granted and said language stricken from that order.

**IT IS ACCORDINGLY ORDERED** that the words "and their counsel" be stricken from lines 17 and 18 on page 10 of the order filed on September 8, 2004.

Dated: September 22, 2004.

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RUSSELL J. HILL, JUDGE  
U.S. BANKRUPTCY COURT