UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

TODD RICHARDSON, a/k/a
MICHAEL TODD RICHARDSON
and CHRISTINE RICHARDSON, a/k/a
CHRISTINE GUILMETTE,

Debtors.

Chapter 7
Case No.: 02-16234

MARC S. EHRLICH, CHAPTER 7 TRUSTEE,

Plaintiff,

v.

TODD RICHARDSON and
CHRISTINE RICHARDSON,

Defendants.

Adv. Pro. No.: 04-90044

APPEARANCES:

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Of Counsel to the Chapter 7 Trustee
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Michael J. O'Connor, Esq.

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the court is an adversary proceeding commenced by the Chapter 7 Trustee, Marc S. Ehrlich, Esq. (the "Trustee"), against Todd and Christine Richardson (the "Debtors"), to revoke their

discharge pursuant to section 727(d)(3)[1] of the United States Bankruptcy Code, 11 U.S.C. §§ 101–1330 (the "Code"). The adversary complaint, filed February 20, 2004 (the "Complaint"), avers that revocation is warranted on the ground that the Debtors refused to obey this court's post-discharge order directing them to turnover certain non-exempt assets for administration by the Trustee. (Pl.'s Ex. 5.) On March 31, 2004, the Debtors filed an Answer denying the material allegations of the Complaint and asserting the affirmative defense of inability to comply with the subject order.[2] (Pl.'s Ex. 6.) On May 19, 2004, the court issued a Scheduling Order, and a trial in this proceeding was held on December 20, 2004.

The Trustee and Mr. Richardson were the only witnesses to appear at trial; Mr. Richardson testified that his wife was unable to attend the trial because of her overriding employment obligations. Following closing arguments, the court gave the parties an opportunity to submit post-trial memoranda of law by January 3, 2005. The parties accepted and complied by December 29, 2004, and the matter was submitted for decision on that date. The court, having heard sworn testimony and arguments of counsel and having considered the parties' pleadings and submissions in this proceeding, makes the following findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052, which incorporates Federal Rule of Civil Procedure 52.

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[1] "[T]he court shall revoke a discharge granted under subsection (a) of [§ 727] if the debtor committed an act specified in subsection (a)(6) of this section." 11 U.S.C. § 727(d)(3). Subsection (a)(6) of Code § 727 lists, among other things, a refusal by the debtor to obey any lawful order of the court. *See* 11 U.S.C. § 727(a)(6)(A).

[2] The Answer was deemed timely pursuant to the parties' agreement that the Debtors' answering time would be extended for thirty days and, thus, would expire on April 23, 2004. (*See Mar. 10, 2004 Letter of Michael J. O'Connor, Esq.*, Dkt. No. 6.)

JURISDICTION

The court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(J), and 1334(b).

FACTS

The Debtors filed a Voluntary Petition, related schedules, and statements for Chapter 7 relief on September 27, 2002 (collectively, the "Petition"). (Pl.'s Ex. 1.) Pursuant to the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines served by the Clerk's Office on the Trustee and all parties-in-interest on October 3, 2002, the deadline to file a complaint objecting to discharge was set for December 30, 2002. The docket shows that neither the Trustee nor any interested party moved to extend the deadline and, accordingly, the court granted the Debtors' discharge by order dated February 20, 2003.[3] (Pl.'s Ex. 3.)

Under paragraph 23 of Schedule B, entitled "Automobiles, trucks, trailers, and other vehicles and accessories," the Debtors listed, *inter alia*, a "1994 23' Maxium" (the "Boat"); they listed the current market value of the Boat as $15,000.[4] In addition, the Debtors indicated that there might be a "perfection problem" with respect to the Boat. On Schedule D, the Debtors identified Key Bank as the holder of a secured claim in the amount of $17,000, which originated in an October 31, 2003

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[3] The court takes judicial notice of the record in the main case. *See In re Emmett*, Case No. 04-61064, Adv. No. 04-80148, slip. op. at 7 n.2 (Bankr. N.D.N.Y. Nov. 1, 2004) ("A bankruptcy judge may take judicial notice of the court's records.") (citing *Matter of Holly's, Inc.*, 172 B.R. 545, 553 n.5 (Bankr. W.D. Mich. 1994); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990)).

[4] Although not listed on Schedule F, the Debtors advised the Trustee that they also owned a boat trailer (the "Trailer").

loan transaction. According to their Statement of Intention, they planned to retain the Boat and continue making payments to Key Bank. (Pl.'s Ex. 1.)

The Trustee conducted the meeting of creditors pursuant to Code § 341(a) on October 31, 2002, during which he asked the Debtors to clarify the reference in the Petition to the "perfection problem" with the Boat. In response, the Debtors testified that both Key Bank and M & T might have had liens on the Boat. (Compl. ¶¶ 10–11; Pl.'s Ex. 5.) The Certificate of Title listed the owner as Christine Richardson, but it identified the sole lienholder as Manufacturers and Traders Trust Co. (Pl.'s Ex. 2.) In accordance with his duty of due diligence, however, the Trustee ultimately determined that neither bank had a lien on the Boat. (Compl. ¶ 10–11; Pl.'s Ex. 5.)

On September 23, 2003, nearly one year after the filing date and seven months after issuance of the Debtor's discharge, the Trustee filed a motion for turnover of the Boat and Trailer pursuant to Code § 547.[5] On October 20, 2003, the court issued a default Order granting the motion and directing the Debtors to turnover the Boat, Trailer, and the original, executed Certificate of Title for each asset (the "Turnover Order"). (Pl.'s Ex. 4.) The language of the Turnover Order was clear and definite (Compl. ¶ 14; Pl.'s Ex. 5), but it did not specify a so-called "drop dead" date for delivery of the assets to the Trustee.[6]

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[5] The Trustee's motion papers referred to Code § 547, entitled "Preferences," but the proper procedural vehicle for turnover is Code § 542. Since the Debtors did not oppose the turnover motion, however, this procedural challenge was avoided.

[6] The decretal paragraphs of the Turnover Order provided:

> [I]t is hereby
>
> ORDERED that Todd Richardson and Christine Richardson, the debtors herein, shall turn over to the Trustee their 1994 Maxum Boat, boat engine and boat trailer, pursuant . . . . And it is further
>
> ORDERED that Todd Richardson and Christine Richardson, the debtors herein, shall turn over to the Trustee the original of the Certificate of Title for

On October 31, 2003, despite having obtained the Turnover Order, the Trustee sent correspondence to the Debtors' attorney, Michael J. O'Connor, Esq., indicating that he would entertain an offer from the Debtors if they wished to retain the Boat.[7] (*Attach. to the Compl.*; Pl.'s Ex. 5.) Neither the Debtors nor their counsel responded to the letter. After three months of silence, the Trustee sent a second letter on January 29, 2004, again offering to make arrangements with the Debtors for their purchase of the Boat.[8] Mr. Richardson's trial testimony established that the Debtors did communicate an offer to the Trustee, but that was not done until March 2004. When questioned during his direct case, the Trustee did not immediately recall whether his office received

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both the 1994 Maxum boat and boat trailer, and execute same.
(Pl.'s Ex. 4.)

[7] The October 2003 letter stated:

> I previously served you with an Order for turnover of the debtors' 1994 Maxum boat. To the best of my knowledge, all title issues have been resolved.
>
> Please advise whether your clients want to make an offer to retain the boat or whether I should take possession of the boat to sell it at a subsequent auction sale. In the event that your clients do not wish to make an offer, please advise whether I should have [the auctioneer] contact them directly or if I should work through your office.

(*Attach. to the Compl.*; Pl.'s Ex. 5.)

[8] The January 2004 letter stated:

> As you know, I am the Chapter 7 Trustee in the above case.
>
> On October 20, 2003, Judge Littlefield signed an Order directing the debtors to turn over to me, as Trustee, their 1994 Maxum boat, boat engine and boat trailer together with the original certificate of title to same signed by the debtors.
>
> It has been more than three months and debtors have not turned over these items.
>
> If debtors do not make arrangements with me to turn over the boat assets or make an acceptable offer to buy out same by the close of business on February 10, 2004, I will then have no choice but to commence and [*sic*] adversary proceeding seeking revocation of debtors' discharge for failure to comply with the lawful Order of the Court pursuant to 11 U.S.C. Section 727(a)(6)(A).

(*Attach. to the Compl.*; Pl.'s Ex. 5.)

the offer. But upon further examination, the Trustee acknowledged that his office received a March 3, 2004 letter offer from the Debtors to purchase the Boat and Trailer for $5,000. (Pl.'s Ex. 10.) Without explanation, that offer was subsequently withdrawn by the Debtors' counsel.

During direct examination, Mr. Richardson testified that he and his family used the Boat during the summer of 2003, and that the Trustee never advised them not to do so. They also had $300 in repairs done to the Boat before winterizing and storing it that fall at Brown's Beach and Marina, Saratoga Lake, New York. (*See Answer to Interrogs.* ¶ 4, Def.'s Ex. A.) Mr. Richardson further testified that Brown's "changed hands" in 2004 and, although he was not billed for outstanding charges by the new owners, he knew the "meter was running." Because he couldn't pay the storage or repair bills, he believed the Boat was collateralized by a mechanic's lien held by D & D Mobile Marine Service, Clifton Park, New York. (*Id.* ¶ 5.)

In defense of this adversary proceeding, the Debtors' offered five reasons for the their failure to timely respond to the Trustee's letter requests of October 2003 and January 2004. First, they did not know whether the Trustee intended to administer the Boat because of the long delay between the filing of the case and the Trustee's first indication that he was interested in the Boat. (*Debtors' Post-Trial Mem. of Law* at 1, Dkt. No. 20.) Second, the Debtors were attending to family emergencies and focused on little else between the time the Trustee made the first request for turnover and the filing of the Complaint. (*Id*.) Third, they were confused about the Boat's lien status, but believed that a valid lien existed which would have left no value for the estate. (*Id.* at 2.) In that regard, Mr Richardson testified that his uncertainty about ownership of the Boat stemmed from a number of factors, including identification of KeyBank National Association as the lienholder on the Notice of Lien and transfer documents in the Debtors' possession despite M & T's

name on the title. (Def.'s Exs. B, C.) Moreover, the Debtors offered into evidence an Insurance Requirement Form that listed KeyBank National Association as the lender and the Boat as collateral for a May 15, 2000 loan in the principal amount of $19,000. (Def.'s Ex. D.) Mr. Richardson further testified that he believed the New York State Department of Motor Vehicles had incorrectly listed M & T on the Certificate of Title. Fourth, because the Debtors believed that the Boat was subject to a mechanic's lien both prior to and following the Trustee's efforts to compel turnover, they believed that they were unable to regain possession of the Boat for immediate delivery to the Trustee. (*Debtors' Post-Trial Mem. of Law* at 3.) Finally, because both of the Trustee's letters offered them the option of either turnover or buyout, the Debtors were confused about what was required of them. (*Id.* at 4.) In fact, based on the Trustee's seeming willingness to strike a deal with the Debtors, Mr. Richardson testified that he had continued attempts to secure financing so that he could make the solicited offer to the Trustee to purchase the Boat from the bankruptcy estate.

When the Debtors failed to respond to the Trustee's letters, however, the Trustee commenced this adversary proceeding and began entertaining offers from other interested bidders, including USR Group, Inc. ("USR"). Though the Trustee had in other cases sent an auctioneer to inspect and appraise estate property, he acknowledged that he did not do so in this case. When asked during cross-examination why he allowed a year to lapse before marshaling the Boat and Trailer, the Trustee responded that he did not move for turnover until he was satisfied that the assets were in fact unencumbered. On May 3, 2004, the Trustee moved to sell the Boat and Trailer to USR for $2,500. (Main Case, *May 3, 2004 Aff. of Marc S. Ehrlich*, Dkt. No. 38.) The terms of the sale included (1) the buyer to effectuate turnover of the assets from the Debtors, and (2) that the sale would be subject to whatever clouds existed against title to the Boat. (*Id.* ¶¶ 5, 7.) The Debtors objected to the

proposed sale on the basis that they wished to submit a higher offer of $4,000 (Main Case, *Debtors' Affirmation in Opp'n* ¶ 4, Dkt. No. 41.) The Debtors' offer did not materialize on the day of sale, however, and the court therefore issued an Order on June 2, 2004 approving the sale of the Boat and Trailer to USR. (Main Case, Dkt. No. 42.) At trial, the Trustee confirmed that USR had obtained full cooperation from the Debtors following entry of the sale Order.

ARGUMENTS

The Trustee recognizes that revocation of a discharge is a drastic measure, one contrary to the Code's objective of granting honest debtors a fresh start (*see Trustee's Post-Trial Statement and Mem. of Law* at 6, Dkt. No. 21), yet he contends that revocation is warranted in this case because he has established a *prima facie* case of civil contempt by the Debtors (*id.* at 9). He argues that the civil contempt standard should be applied under subsections (a)(6)(A) and (d)(3) of Code § 727, rather than the higher standard of willfulness to disobey a court order. *See In re Magack*, 247 B.R. 406, 409 (Bankr. N.D. Ohio 1999) ("Since the enactment of § 727(a)(6) in 1978, . . . the exact circumstances under which a debtor is deemed to have 'refused' to obey a lawful order of the court have not been clearly established."). *Compare, e.g., id.* at 410 ("To hold a party liable for civil contempt, the complainant must establish three elements by clear and convincing evidence: (1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite."), *with, e.g., In re Constantini*, 201 B.R. 312, 315–16 (Bankr. M.D. Fla. 1996) ("Denial of a discharge for refusal to obey a court order must be a result of 'wilful, intentional disobedience or dereliction' and not merely inadvertence or mistake." (citation omitted)). As support for his position, the Trustee cites *Magack*, 247 B.R. at 410 (the legally sound approach is to treat an action

brought under Code § 727(d)(3) as a civil contempt proceeding), *In re Dreyer*, 127 B.R. 587, 599 (Bankr. E.D. Ky. 1991) (discharge denied, in part, for failure to obey a lawful order of the court, without legal analysis of Code § 727(d)(3)), and *In re Davenport*, 157 B.R. 172, 181 (Bankr. E.D. Mo. 1992) (discharge denied, in part, on ground of refusal to obey a TRO, without legal analysis of Code § 727(d)(3)).

Addressing the particular facts and circumstances of this case, the Trustee argues that, because the Turnover Order required immediate compliance, none of the Debtors' defenses bear fruit. The Trustee suggests that the Debtors' defenses are self-serving and overdue; if at all, they should have been raised in opposition to either the turnover or the sale motion.

The Trustee does, however, specifically address the Debtors' two main defenses–confusion about the estate's interest in the Boat and their perceived ability to make an offer notwithstanding the Turnover Order, which were not separately plead but developed over the course of the proceeding. The Trustee takes the following position regarding his post-Turnover Order correspondence to the Debtors' attorney:

> The letter gave the debtors the option of making an offer to purchase the Trustee's interest in the boat, subject to Court approval, if the debtors sought to keep the boat. If an acceptable offer to purchase was communicated to the Trustee, the Trustee would then have brought a Motion to Approve Sale of the boat back to the debtors; the granting of such a Motion would have rendered the turnover Order moot.

(*Trustee's Post-Trial Statement and Mem. of Law* at 2.) According to the Trustee, because the Debtors' failed to make a viable offer even after they had enjoyed post-petition use of the Boat for one season, he was prevented from adequately marketing the Boat and realizing its full value for the benefit of the estate and unsecured creditors. To refute Mr. Richardson's statement that he failed

to respond to the Trustee's correspondence because he was confused about the perfection issue and, therefore, misunderstood the nature of the Trustee's interest in the Boat, the Trustee points out that the Debtors failed to make any post-petition payments on the Boat, yet neither Key Bank nor M & T sought to lift the automatic stay pursuant to Code § 362(a). According to the Trustee, the Debtors knew–or should have known–that the Boat was unencumbered. In sum, the Trustee argues that nothing in the record justifies the Debtors' refusal to comply with the Turnover Order and, as such, they are not entitled to the privilege of a discharge.

The Debtors acknowledge their lax responsiveness to the Trustee, but they argue that inattentiveness alone does not warrant revocation of their discharge. They contend that semantics and supporting precedent are on their side; though they concede that they did not comply with the Turnover Order (*Debtors' Post-Trial Mem. of Law* at 7), they argue that Code § 727(d)(3) and its counterpart, subsection (a)(6)(A), require a willful and intentional refusal to obey a court order. Consequently, the Debtors suggest that they cannot be charged with thumbing their noses at this court or the Trustee when the Trustee had given them the option of either complying with the Turnover Order or rendering the same moot by purchasing the assets from the estate. Unlike many of the cases relied upon by the Trustee, the Debtors remind the court that the record in this case is void of non-disclosure or fraudulent intent. (*Id.* at 5–7.) Drawing from the Second Circuit's sentiment in *In re Kokoszka*, 479 F.2d 990, 997 (2d Cir. 1973) ("The denial of a discharge can work a serious deprivation upon a debtor, and there are many circumstances where a bankrupt's disobedience may have been inadvertent or otherwise excusable."), *aff'd sub nom. Kokoszka v. Belford*, 417 U.S. 642 (1974), the Debtors ask not for this court's blessing, but for it to allow them to exit bankruptcy with their discharge in place.

DISCUSSION

The bankruptcy court's power to revoke a debtor's discharge pursuant to Code § 727(d)(3) is discretionary. *See Matter of Klein*, Civ. A. No. 95-1118, 1995 WL 656696, at *3 (E.D. La. Nov. 7, 1995). Moreover, "[t]he failure of a [debtor] to obey a lawful order of the court is [not] an axiomatic bar that obviates the need to exercise any discretion." *In re Katz*, 146 B.R. 617, 621–22 (Bankr. E.D.N.Y. 1992) (quoting *In re Silverman*, 10 B.R. 727, 733 (Bankr. S.D.N.Y. 1981)). In making this determination, the court must construe the objection to discharge strictly against the objectant and liberally in the debtor's favor. *See In re Arcuri*, 116 B.R. 873, 878 (Bankr. S.D.N.Y. 1990) (citing cases). It is the objectant who bears the ultimate burden of persuasion regarding the essential elements of the alleged objection, *see In re Bodenstein*, 168 B.R. 23, 28 (Bankr. E.D.N.Y. 1994), which must be proven by a preponderance of the evidence, *see Grogan v. Garner*, 498 U.S. 279, 287 (1991).

Interestingly, in a case with striking similarities to the one *sub judice*, Chief Judge Gerling denied the trustee's cause of action seeking revocation of the debtor's discharge pursuant to Code § 727(d)(3). *See Collins v. Conz (In re Conz)*, Adv. No. 99-80017A, 2000 Bankr. LEXIS 1570 (Bankr. N.D.N.Y. Oct. 4, 2000). That neither party brought *Conz* to the court's attention is surprising considering that the trustee's objection to discharge involved, among other things, ownership and title issues regarding the debtor's 24' pontoon boat and trailer.

In *Conz*, the debtor had filed for bankruptcy relief in January and received his discharge in June 1997. *Id.* at *2. Prior to filing, he had sold a liquor store for which he received an initial lump sum of approximately $15,000, and several post-petition monthly installment payments of $250, the latter of which he used to make monthly payments on the boat and trailer to Chase Manhattan Bank.

He listed the monthly receipts as income and the payments to Chase as a monthly expenditure in his schedules. He also listed the boat and trailer in his schedules and valued the same at $8,200. He identified Chase Manhattan Bank as a secured creditor with a security interest in the boat and trailer, and indicated that he planned to retain the assets and reaffirm the debt owing to Chase. In response to the trustee's oral request made at the meeting of creditors, the debtor's counsel provided to the trustee a copy of the certificate of title for the boat and trailer, along with a statement from Chase regarding its lien on the assets. *Id*. at **2–3. The trustee had also requested copies of the debtor's tax returns and a copy of the Purchase Agreement for the liquor business. *Id.* at *4. In August 1998, the trustee obtained an order requiring that the debtor provide him with an accounting of all monies received from the sale of the liquor business, turnover of any monies received post-petition in connection therewith, and, in relation to the boat and trailer, a copy of Chase's security agreement and proof of Chase's perfection of a security interest in the assets. Following receipt of the order, the trustee sued the debtor alleging causes of action pursuant to Code §§ 727(d)(2) and (d)(3). The debtor testified at trial that he had not remembered receiving the order, but he knew that his attorney had mentioned it to him. He also acknowledged that he had used the boat and trailer in August 1998. He later placed the boat in storage, although he "knew that eventually someone would be taking the boat." *Id.* at *5.

While the court found the trustee "apparently never obtained a copy of the security agreement with Chase from the Debtor, the Debtor had provided him with evidence of Chase's perfection, or lack thereof, of its security interest in March 1997 by furnishing the Trustee with a copy of the certificate of title on the Boat." *Id*. at *15. Moreover, the court found there was no evidence that the debtor had refused to turnover the boat, or even that he had been ordered to do so.

Although the trustee "demonstrated that the Debtor retained property that rightfully belonged to the bankruptcy estate, including the Boat," *id.* at *12, the court did not find significant prejudice to the estate or harm to creditors so as to warrant revocation of the debtor's discharge, *id.* at *16.

Although pertinent to the court's decision on the trustee's Code § 727(d)(2) cause of action, this court cannot help but notice that the facts of this case, in some instances, are identical to those in *Conz*:

> [N]othing in the evidence presented at trial support[ed] a finding by the Court that the Debtor's actions were in any way fraudulent or that there was a pattern of deception on his part. Not only had the Debtor revealed the assets in his Petition, he also appear[ed] to have openly responded to the Trustee's questions at the meeting of creditors and promptly provided the Trustee with the information requested regarding those assets. The Trustee allowed the discharge to be granted without objection and gave no direction as to the disposition of the Debtor's postpetition assets relating to the sale of his liquor store until almost a year after the Debtor's discharge.

Id. at **12–13. Speaking to the trustee's delay marshaling the assets, the court stated that "[t]hough a Trustee may request the revocation of a discharge until the case is closed, the Trustee . . . had an obligation to investigate the Debtor's assets and liabilities that were listed in his Petition prior to the granting of his discharge." *Id.* at *13. The court continued:

> The Court is not convinced that the Debtor's actions have been so egregious as to merit the severe remedy of the revocation of his discharge. The Trustee has offered no meaningful evidence to demonstrate that the Debtor's actions, in failing to fully comply with the . . . Order, have significantly prejudiced the estate or harmed his creditors. . . .
>
> While the Court certainly does not condone the actions of anyone who chooses to ignore its orders, the Court also believes in this situation that the Debtor should not be penalized for the Trustee's delay in acting on information contained in the Debtor's schedules and the information provided to the Trustee immediately following the meeting of creditors . . . . Had the Trustee sought an order . . . when he first learned of the Purchase Agreement, requiring [the liquor store purchaser] to pay him directly, there would have been no need for the Debtor to provide the Trustee with an accounting of the monies received from [the purchaser] postpetition. Once the Trustee received the copy of the certificate of title from the Debtor . . . the

> Trustee certainly was in a position to make inquiry of Chase concerning its alleged security interest in the Boat and to take appropriate actions to avoid the transaction and seek turnover of the Boat. Through no fault of the Debtor and without explanation, the Trustee waited for over a year to act on the information provided to him by the Debtor.

Id. at **15-17.

This case diverges from *Conz* in that the Debtors here were specifically ordered to turnover the Boat to the Trustee. But the court cites *Conz* because, in many ways, it shares the sentiments of Chief Judge Gerling. Here, the Debtors make no attempt to thrust blame entirely upon the Trustee. This court has often emphasized that debtors must fulfill their statutory duties under the Code, *see* 11 U.S.C. § 521 (the debtor shall, for example, file a list of creditors, schedules, and a statement of financial affairs, cooperate with the trustee, and surrender to the trustee all property of the estate); it is a well-known principle that debtors simply cannot reap the benefits of the system without fully accepting its burdens, s*ee, e.g., In re Raymonda*, Adv. No. 99-91199, slip. op. at 10 (Bankr. N.D.N.Y. Feb. 16, 2001) ("Debtors must never lose sight of the fact that, ordinarily, they come into this court voluntarily and request relief, ultimately leading to a discharge. The price for that discharge is [compliance with the requirements of] the Code."). The system works properly, however, only when panel trustees also zealously and vigorously fulfill their statutory obligations.

While the court certainly does not condone the actions of the Debtors, it cannot penalize them for the Trustee's delay or for his second chance approach to allow the Debtors to purchase the Boat after issuance of the Turnover Order. The court rejects the Trustee's contention that a year was a "reasonable" period of time to resolve the perfection issue before making the turnover motion. (*See Trustee's Post-Trial Statement and Mem. of Law* at 10.) Similarly, the court rejects the Trustee's representation that such an administrative lapse is common in the practice of panel

trustees. What is most troubling, however, is the manner in which the Trustee sought to enforce the Turnover Order. If there is one point of precedential value that the court wishes to make on the facts and circumstances of this case, it is that panel trustees cannot unilaterally give debtors the option of retaining property once a turnover order has been entered. All negotiations should be completed and exhausted prior to entry of the turnover order, or else the motion itself is premature. Contrary to the Trustee's assertion, he could not simply "moot out" the Turnover Order once issued.[9]

CONCLUSION

Because of the ambiguity created by the Trustee after issuance of the Turnover Order, the court need not decide whether the willful disobedience standard or the civil contempt standard should be applied under Code § 727(d)(3). Rather, it suffices to note that, under either standard, the Trustee cannot prevail.

Accordingly, it is hereby

ORDERED that the Complaint is denied and the instant adversary proceeding is dismissed.

Dated: 8/10/05
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

[9] The court is necessarily critical of the Trustee in this instance, but it is compelled to note that the Trustee's actions in this case have deviated from his usual, exemplary practice.