Honorable Gary Spraker
United States Bankruptcy Judge

Entered on Docket
July 13, 2015

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: STAN BRYAN VAUGHAN and TATIANA VAUGHAN, Debtors.	Case No.: 13-14399-GS Chapter 7
YVETTE WEINSTEIN, Chapter 7 Trustee, Plaintiff, v. STAN BRYAN VAUGHAN and TATIANA VAUGHAN, Defendants.	Adversary Case No. 14-01128-GS **Date: June 23, 2015** **Time: 9:30 a.m.**

MEMORANDUM ON TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT and DEBTORS' COUNTERMOTION FOR SUMMARY JUDGMENT[1]

Trustee Yvette Weinstein has sued debtors Stan Bryan Vaughan and Tatiana Vaughan to revoke their discharge under 11 U.S.C. § 727(d). She asserts two claims. First, she claims that their discharge must be revoked under § 727(d)(1) for an alleged fraudulent failure to disclose the prepetition transfer of a trademark. Second, the trustee asserts revocation of discharge is

[1] Unless otherwise specified, all "Section" and "Code" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "Rule" are to the Federal Rules of Bankruptcy Procedure, unless otherwise noted. References to "ECF No." are to the ECF number as assigned on the docket for documents filed electronically through CM/ECF in Debtors' above-referenced bankruptcy case, and References to "ADV No." are to the ECF number as assigned on the docket for documents filed electronically through CM/ECF in the above-referenced adversary proceeding.

appropriate under §§ 727(d)(3), and (a)(6), because the debtors refused to obey the court's order directing them to attend examinations under Rule 2004. The trustee has filed her *Motion for Partial Summary Judgment as to Count II of Trustee's Complaint* ("*MPSJ*") (ADV No. 189), seeking summary judgment on the latter claim. As evidence of the debtors' refusal to obey a lawful order, the *MPSJ* relies heavily upon this court's prior determination, in its *Order on Motion to Compel Attendance for Examination Under Bankruptcy Rule 2005* ("*Order on Motion to Compel*")(ECF No. 232), that the debtors evaded the order directing them to attend the Rule 2004 examinations. The debtors oppose the *MPSJ*, and have filed a separate *Countermotion for Summary Judgment* (ADV No. 241) which substantially mirrors their opposition. They challenge the lawfulness of the *Order on Trustee's Motion for Order Directing Examinations Under Rule 2004 as to Debtors Stan Bryan Vaughan, Tatiana Vaughan, and Certain Non-Debtor Affiliates as Identified Herein* ("the *Rule 2004 Order*")(ECF No. 98), as vague and contrary to this court's local rules. They also argue that revocation of their discharge is inappropriate because they eventually attended their Rule 2004 examinations. For the reasons stated below, the *Trustee's Motion for Partial Summary Judgment as to Count II of Trustee's Complaint* (ADV No. 189), will be GRANTED and the defendants' *Countermotion for Summary Judgment* (ECF No. 241), will be DENIED.

FACTS[2]

The material facts of this case are undisputed, and have played out in the filings and hearings within the main case. This discharge action, as well as the related activity in the main case, are centered upon the debtors' interests in the trademark, "World Chess Federation Hall of Fame." The trademark is not directly implicated in the trustee's claim for revocation of discharge under § 727(d)(3) currently before the court. It was, however, the impetus for the trustee's desire to conduct the Rule 2004 examinations of both debtors, which lies directly at the heart of this claim. For this reason, the court will address some of the history involving the

[2] The facts elicited herein are from those portions of the record designated in the *MPSJ* and the *Countermotion*, as well as other pertinent portions of the record which the court feels are necessary for the purposes of this decision. *See* Fed. R. Civ. P. 56(c)(3).

trademark to provide context to the trustee's motion.

Stan and Tatiana Vaughan filed their chapter 7 petition on May 20, 2013, together with their schedules and a Statement of Financial Affairs. Within the schedules, the debtors did not disclose any interest in the mark "World Chess Federation Hall of Fame." The Statement of Financial Affairs, however, did list several lawsuits involving Mr. Vaughan, World Chess Museum, and World Chess Federation, Inc. ("WCF"), including a pending action in the United States District Court for the District of Nevada, captioned *World Chess Museum, Inc. d/b/a World Chess Hall of Fame v. World Chess Federation, Inc., and Stan Vaughan, individually*, No. 2:13-CV-00345-RCJ-GWD ("the Nevada suit").[3] The Nevada suit was filed by plaintiff World Chess Museum, Inc., d/b/a World Chess Hall of Fame ("WCHOF") to recover monetary damages, obtain injunctive relief and other remedies against WCF and Stan Vaughan, for infringement of its trademark, "World Chess Hall of Fame ®." Vaughan and WCF filed counterclaims against WCHOF for WCHOF's alleged infringement of the claimed trademarks "World Chess Federation ®" and/or "World Chess Federation Hall of Fame."[4]

Although the debtors listed the Nevada suit, they did not schedule WCHOF as a creditor. Nor did they list any interests in WCF, the trademark, or the counterclaims against WCHOF in their initial Schedule B. Ostensibly, this was because Mr. Vaughan had personally transferred the trademark to WCF four days prior to their bankruptcy filing, on May 16, 2013.[5] The debtors did not disclose the transfer in response to Question No. 10 on the Statement of Financial Affairs, which requires debtors to list all transfers of property outside of the ordinary course of business made within two years of the petition date. This omission forms the basis for the

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[3] In addition to the Nevada suit, the Statement of Financial Affairs listed three other civil actions, all dismissed, and a proceeding pending before the United States Patent and Trademark Office. All of these involved the same litigants: the debtors, WCF, and WCHOF, and centered around the same trademark dispute involved in the Nevada suit.

[4] Mr. Vaughan and WCF have two marks at issue in the Nevada suit: "World Chess Federation ®" and "World Chess Federation Hall of Fame." The opposing litigant, WCHOF, alleges that the former is registered as a federal mark, and the latter is registered as a Nevada State mark. For the purposes of this decision, the distinction between the two marks is immaterial.

[5] The debtors' own exhibits reflect that this transfer occurred. *See Opp'n to Trustee's Mot. to Employ Bryan Cave LLP as Special Counsel*, ECF No. 45, Exs. 3-5.

trustee's first cause of action to revoke the debtors' discharge. The debtors contend they were not required to list this transfer, because it was made in their ordinary course of business.[6]

The debtors' discharge was entered on August 20, 2013. Sometime thereafter, the trustee discovered the prepetition transfer of the trademark. On March 6, 2014, she filed her *Motion for Order Directing Examinations Under Rule 2004 as to Debtors Stan Bryan Vaughan, Tatiana Vaughan, and Certain Non-Debtor Affiliates as Identified Herein* ("the *Rule 2004 Motion*").[7] One of the non-debtor affiliates to be examined was WCF, the entity to whom Mr. Vaughan had transferred the trademark. In her motion, the trustee asserted that the debtors were officers and/or directors of WCF, and that Mr. Vaughan had transferred the trademark to WCF four days before filing his bankruptcy petition.[8] The trustee sought to examine the debtors about their relationship with WCF, and the transfers between them. Towards this end, the *Rule 2004 Motion* requested a court order:

> directing Debtors Stan Bryan Vaughan and Tatiana Vaughan (collectively, "Debtors"), and the Person Most Knowledgeable of certain non-debtor affiliates World Chess Federation, Inc. ("WCF"), American Chess Association, Inc. ("ACA"), and Nevada State Chess Association, Inc. ("NSCA") (collectively, "Non-Debtor Affiliates") to appear for examination at SULLIVAN, HILL, LEWIN, REZ & ENGEL, located at 228 S. Fourth Street, 1st Floor, Las Vegas, NV 89101 on a date determined by the Court, and continuing from day to day until concluded[.][9]

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[6] After the trustee commenced this § 727 adversary case, the debtors amended their Schedule B to list "contingent and unliquidated counterclaims of undetermined as yet amounts" with respect to the Nevada suit, but reiterated that they were not required to list the transfer of the trademark itself, because that act was done in the ordinary course of business. *See Amended Schedule B* and *Amended Statement of Financial Affairs*, filed Oct. 22, 2014 (ECF No. 248), at 2, 3; *Corrected and Amended Schedule B and Amended Statement of Financial Affairs*, filed Oct. 31, 2014 (ECF No. 251), at 3, 10.

[7] ECF No. 79.

[8] In support of the *Rule 2004 Motion*, the trustee provided copies of annual reports that the non-debtor affiliates, WCF, ACA, and NSCA, had filed with the state of Nevada since at least 1999. *See Rule 2004 Motion*, Ex. B (ECF Nos. 80-1 through 80-4). These reports indicated that both debtors had served as officers, agents, and/or directors for these entities for at least the six years preceding the filing of their petition. Moreover, the reports reflected that the mailing address for each of these entities matched the debtors' residential address as of the date of filing.

[9] *Rule 2004 Motion*, ECF No. 79 at 1-2.

The debtors vigorously opposed the *Rule 2004 Motion*.[10] They reasserted their continuing objection to the trustee's employment of special counsel Bryan Cave on the ground that this firm also represented WCHOF, the party adverse to Mr. Vaughan and WCF in the Nevada suit.[11] The debtors further argued that the trustee was seeking "repetitious discovery" because they had already submitted to discovery in the trademark litigation, and complained that the trustee was engaging in a fishing expedition for the purpose of discovering confidential information for WCHOF. They also asserted their examination was unnecessary because the trustee had sufficient assets to pay all creditors' claims and contended "that the disclosure of the Non-Debtor Affiliates' membership information would violate the members' privacy rights and reveal protected trade secrets and confidential commercial information."[12]

The court rejected the debtors' objections, and granted the trustee's *Rule 2004 Motion* on May 27, 2014.[13] In the *Rule 2004 Order*, the court found that the trustee had established cause for her Rule 2004 request, and noted that the debtors' opposition actually buttressed its findings:

> Amongst the variety of items included in the Debtors' response to the Motion appears to be a document prepared as an attachment to their SOFA, but which was not included in the SOFA that was filed with the court. Exhibit "32" to the Opposition consists of two pages, the first of which is a copy of page 7 of the Debtors' SOFA filed with the court on May 20, 2013. The second page of Exhibit "32" is entitled "Statement of Financial Affairs" and appears to be a separate sheet prepared to respond to Item 18(a). That item requires an individual debtor to list "the names, addresses, taxpayer identification numbers, nature of businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full or part-time within six years immediately preceding the commencement of this case, or in which

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[10] *See Response and Opposition to Trustee's Motion for Order Directing Examination Under Rule 2004 as to Debtors*, ECF No. 86. Both debtors signed this document.

[11] The history of the debtors' ongoing challenges to the employment of Bryan Cave as the trustee's special counsel have been extensively documented in the main case and the instant adversary. *See Order Granting in Part and Denying in Part, Debtors' Motion for Revocation of Employment of Special Counsel Bryan Cave, LLP by Trustee, and Modifying Order Authorizing Employment of Special Counsel* (ECF No. 296; ADV No. 199).

[12] *Rule 2004 Order*, ECF No. 98 at 3:8-12. (*MPSJ* Ex. 1).

[13] *Id.*

> the debtor owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement of this case." The second page of Exhibit "32" lists the Non-Debtor Affiliates as well as two other limited liability companies that were formed but dissolved within six years of the bankruptcy filing. As the attachment appears to have been omitted from the actual SOFA filed with the court by the Debtors, the Trustee's need to investigate the Debtors' interest in and transactions with the Non-Debtor Affiliates is buttressed by the Debtors' own response to the instant Motion.[14]

The court found that "[t]he Debtors did not disclose the existence of the Non-Debtor Affiliates on their Schedules, but their response to the instant Motion discloses the existence of those entities and more."[15] The court directed that "the Chapter 7 trustee may schedule the examinations, production of documents, and inspection of premises, to take place no earlier than fourteen calendar days from the date of entry of this Order."[16]

A copy of the *Rule 2004 Order* was served on each of the debtors, by first class mail, on May 29, 2014.[17] The debtors clearly received this order, because on June 3, 2014, they filed a *Motion for Reconsideration*, in which they recited the court's directive that the "trustee may schedule the examinations . . . to take place no earlier than fourteen calendar days from the date of entry of this order."[18] This motion was signed by both of the debtors. In it, they argued that there was no justification for their examinations because "no valid proofs of claim have been filed," and asserted the *Rule 2004 Order* should be vacated or, alternatively, that any Rule 2004 examination should be suspended until valid claims had been filed. The *Motion for Reconsideration* was scheduled for hearing on July 9, 2014.

On June 24, 2014, after the debtors filed their *Motion for Reconsideration*, the trustee filed and served her *Notice and Schedule of 2004 Examinations, Production of Documents and*

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[14] *Id.* at 4:25-5:13.

[15] *Id.* at 6:13-15.

[16] *Rule 2004 Order*, ECF No. 98 at 7:16-18.

[17] *Certificate of Notice*, ECF No. 99.

[18] *Motion for Reconsideration of Order on Trustee's Motion for Order Directing Examination Under Rule 2004 as to Debtors* ("*Motion for Reconsideration*"), ECF No. 100 at 2. (*MPSJ* Ex. 3).

Inspection of Premises Pursuant to Court Order ("*Notice*").[19] Because the trustee's general counsel, Christine Roberts, was transitioning from the firm of Sullivan Hill to the Furnier Muzzo Group during this time, the *Notice* directed the debtors to appear for examination at the law firm of Campbell & Williams, rather than Sullivan Hill, as originally proposed in the *Rule 2004 Motion.*[20] Mrs. Vaughan was directed to appear at Campbell & Williams for her examination on July 16, 2014, and Mr. Vaughan was directed to appear the following day, July 17, 2014.

The debtors unquestionably received the *Notice*, because they referenced it in numerous pleadings, beginning with their *Reply* to the trustee's opposition to their *Motion for Reconsideration*, filed on July 1, 2014.[21] In the *Reply*, the debtors argued that the *Notice* was in contempt of court because it directed them to appear for examination at Campbell & Williams rather than Sullivan Hill, as originally requested in the trustee's *Rule 2004 Motion*. The debtors also seized upon the fact that the *Notice* itself came from the Furnier Muzzo Group rather than Sullivan Hill, as being significant.[22]

The debtors also challenged the *Notice* in four motions also filed on July 1, 2014, contemporaneously with their *Reply*. In their *Motion for Entry of Protective Order*, they sought

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[19] ECF No. 114 (*MPSJ* Ex. 2). The record reflects that this *Notice* was mailed to each of the debtors the same day, June 24, 2014. *See* ECF No. 116.

[20] *Id*. The trustee has explained that Campbell & Williams offered her the use of a conference room during the time her general counsel was transitioning from Sullivan Hill to Furnier Muzzo Group. *See Trustee's Reply to Opp'n to Mot. to Extend Time to Revoke Discharge*, ECF No. 191 at 3 n.1. The debtors were also familiar with the location of Campbell & Williams, because they had been involved with that firm in earlier litigation. *See Decl. of Tatiana Vaughan*, ECF No. 205 at 4 ¶ 7. However, Mrs. Vaughan avers that process servers attempted to "kidnap" her from outside of this firm on two occasions. *Id.*

[21] *Reply to Trustee's Response to Debtor's Motion for Reconsideration* ("*Reply*"), ECF No. 131 (*MPSJ* Ex. 4).

[22] On June 20, 2014, four days before the *Notice* was filed and served, the trustee filed an application to retain her general counsel at the firm of Furnier Muzzo Group. *See Trustee's Application to Employ the Furnier Muzzo Group as Counsel*, ECF No. 108. The debtors filed four objections to this routine motion. *Response and Objection to Trustee's Application to Employ Furnier Muzzo Group as Counsel*, ECF No. 132; *Debtors' Surreply in Opposition to Trustee's Application to Employ Furnier Muzzo Group as Counsel*, ECF No. 172; *Response and Objection to Trustee's Application to Employ Furnier Muzzo Group as Counsel*, ECF No. 189; *Surreply to Reply to Response and Objection to Trustee's Application to Employ Furnier Muzzo Group as Counsel*, ECF No. 199.

an order:

> to govern the designation and handling of certain confidential information being illegally sought through Trustee by the initiative of Bryan L Cave, LLP special counsels [sic] debtors reassert should not have been allowed to be appointed as such due to bias as they represent World Chess Museum, Inc. which has filed a fraudulent proof of claim and represents said World Chess Mueseum, Inc. in a lawsuit whereby they have illegally sued debtor Stan Vaughan, individually, in violation of the Federal Volunteer Protection Act."[23]

In their *Motion to Suspend, Terminate, or in the Alternative Limit 2004 Examinations due to Bad Faith*, they again challenged the *Rule 2004 Motion* as having been filed in bad faith and for an improper purpose.[24] The debtors also filed a *Motion for Sanctions* and a *Motion to Show Cause for Contempt of Order* that largely repeated the allegations of their *Motion for Protective Order* and *Motion to Suspend*, based upon their view that the Rule 2004 examinations were being undertaken in bad faith.[25] The motions reiterated the debtors' objections to the trustee's employment of Bryan Cave as special counsel, and their assertions that the trustee was using Rule 2004 to abuse and harass them. The debtors asked for monetary sanctions against both the trustee's general and special counsel, and a public reprimand of those attorneys.

As in their *Reply*, each of the four motions filed on July 1, 2014, contained arguments that the *Notice* violated the *Rule 2004 Order* because it scheduled their examinations at a different location than was proposed in the *Rule 2004 Motion.* In each motion, the debtors noted that, "[o]n June 24, 2014, Trustee (Doc 114) filed a Notice and Schedule of 2004 examinations, production of documents, etc allegedly pursuant to a court order (Doc 98)."[26] Moreover, in each motion, the debtors also argued that:

> [The *Notice*] is also in violation of the court order in that different from the locations for examinations requested in Trustee Motion

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[23] ECF No. 127 at 3 (*MPSJ* Ex. 5). Both debtors signed this document.

[24] ECF Nos. 133, (*MPSJ* Ex. 6,). Both debtors signed the document.

[25] *See* ECF Nos. 135, and 137 (*MPSJ* Exs. 7 and 8). Again, both debtors signed each of these documents.

[26] ECF No. 127 at 3 ¶7; ECF No. 133 at 2 ¶3; ECF No. 135 at 4 ¶9; ECF No. 137 at 2 ¶3 (*MPSJ* Exs. 5-8).

> (Doc 79) granted in court order (Doc 98) substitutes alternative locations, creating confusion.[27]

This group of motions was scheduled for hearing on August 27, 2014. The debtors did not seek to have them heard on shortened time so that they could be determined prior to their Rule 2004 examinations set for July 16 and 17, 2014. However, the court did hear oral argument on the debtors' *Motion for Reconsideration*, on July 9, 2014, a week before the examinations, and entered an order denying that motion two days later, on Friday, July 11, 2014.[28] In its *Reconsideration Order*, the court addressed the debtors' arguments at length, and concluded:

> Debtors have not identified nor demonstrated a manifest injustice that will be prevented by relief from the 2004 Order. This is not an involuntary bankruptcy proceeding where the Debtors have been forced unwillingly to comply with the disclosure and other requirements of the Bankruptcy Code. Instead, Debtors voluntarily filed for Chapter 7 protection to obtain the benefits of a discharge of their debts. The record provided by the Debtors reveal their connections and involvement with Non-Debtor Affiliates that the Debtors did not disclose in their Schedules. Here, the Trustee did not seek ex parte authorization to inspect the Debtors' residence, but instead filed the 2004 Motion on full notice. Debtors filed opposition and appeared at the hearing. The 2004 Order was entered on May 27, 2014, and the Trustee apparently served subpoenas pursuant to FRCP 45. Nothing in that order prevents the subpoena respondents from timely seeking protection under FRCP 45(d).[29]

The following Monday, on July 14, 2014, the debtors filed an emergency motion for leave to appeal,[30] an emergency motion for stay pending appeal,[31] a notice of appeal, and an amended notice of appeal.[32] Both debtors signed each of these documents, which were filed just two days before their examinations were to occur. The debtors again alleged that the *Notice* was

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[27] *Id.*

[28] *Order on Motion for Reconsideration of Order on Trustee's Motion [for Rule 2004 Examination]*("*Reconsideration Order*"), ECF No. 143 (*MPSJ* Ex. 9).

[29] *Id.* at 8:8-9:6.

[30] *Emergency Motion for Leave to Pursue an Appeal from Order per FRBP 8001(b), 8003 and in Accordance with 28 U.S.C. 158(b)(6)*, ECF No. 149 (*MPSJ* Ex. 12).

[31] *Emergency Motion for Stay Pending Appeal per FRBP 8005*, ECF No. 150 (*MPSJ* Ex. 13).

[32] *See* ECF Nos. 147, 148 (*MPSJ* Exs. 10, 11).

in violation of the *Rule 2004 Order* and created confusion.[33] They accused the trustee of pulling "a bait and switch" because the *Notice* "listed different law firm Campbell Williams which is unacceptable to debtors due to debtors previous involvement in litigation with that firm."[34] Included with the emergency motion for stay pending appeal was a declaration by Mr. Vaughan, which stated, "Debtor is willing to have examination by or at any law firm EXCEPT Bryan Cave LLP or Campbell Williams and is willing to allow inspection by trustee or anyone EXCEPT Campbell Williams or Bryan Cave LLP, . . . and that debtor has consistently said such employment is an abuse of discretion."[35] The debtors also included, as Exhibit 1, a copy of a letter dated July 11, 2014 from the trustee's special counsel which advised them that "the inspection, document production and 2004 examinations scheduled for Stan Bryan Vaughan and Tatiana Vaughan will proceed as scheduled . . . on the dates, times and locations indicated" in the *Notice*.[36] The letter indicates that a copy of the *Notice* was enclosed with the correspondence.

The trustee's counsel appeared at the office of Campbell & Williams on July 16 and 17, 2014, at the times scheduled for the debtors' Rule 2004 examinations.[37] The debtors admit they did not appear for examination at Campbell & Williams. They maintain that they instead appeared for examination at the offices of Sullivan Hill at the dates and times listed in the *Notice*, "and that no one representing trustee . . . appeared on information and belief to said location," but that the trustee's counsel "showed up elsewhere in disobedience to Trustee Motion

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[33] *Emergency Motion for Stay Pending Appeal per FRBP 8005*, ECF No. 150 at 8 ¶13.

[34] *Emergency Motion for Leave to Pursue an Appeal*, ECF No. 149 at 10-11.

[35] *Decl. of Stan Vaughan in Support of Emergency Motion*, ECF No. 150 at 15 (*MPSJ* Ex. 13 at 16)(emphasis in original).

[36] *Id.* at 18.

[37] *See* Ex. B and C to *Trustee's Mot. for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005*, ECF Nos. 183-2, 183-3 (*MPSJ* Ex. 16 at 17-29); *Decl. of J. Bennett Clark in Support of Trustee's Mot. for Order to Apprehend Debtors to Compel Attendance for Examination*, ECF No. 184 at 3 ¶12 (*MPSJ* Ex. 16 at 30-33).

Doc 79 and granted court order of Doc 98."[38]

On July 22, 2014, the Bankruptcy Appellate Panel denied the debtors' requests for leave to appeal and for a stay pending appeal. The Panel noted that the motion for stay should have been presented, in the first instance, to the bankruptcy court, but that even if the debtors had complied with this requirement, it would have denied the request for a stay.[39] The appeal was subsequently dismissed on September 3, 2014.[40]

On July 31, 2014, the trustee filed her *Motion for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005* ("*Motion to Compel*").[41] Her motion and its supporting exhibits show that her attorneys tried to contact the debtors by email and telephone to confirm their attendance at the Rule 2004 examinations, but the debtors did not respond to these communications, nor did they appear for examination at the scheduled times. The *Motion to Compel* argued that the debtors had willfully disobeyed the court's earlier orders – the *Rule 2004 Order* and the *Reconsideration Order* – directing them to submit to examination.

The debtors opposed the *Motion to Compel*, again restating their opposition to the trustee's employment of special counsel.[42] They also argued that the trustee's efforts were in "manifest injustice," given that their discharge had already been entered, and that she was using discovery for an improper purpose. In their opposition and a subsequent *Surreply*,[43] they again alleged confusion as to the location of their examinations, because the trustee's *Notice* set those

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[38] *Decl. of Tatiana Vaughan*, ECF No. 205 at 3 ¶¶ 14, 15 (*MPSJ* Ex. 18). To support this assertion, Mrs. Vaughan said she had a parking receipt dated July 16, 2014 from a parking lot next to Sullivan Hill, and business cards from Sullivan Hill, but these items were not included with her declaration.

[39] *Order 1) Denying Leave to Appeal, and 2) Denying Stay Pending Appeal*, ECF No. 175 (*MPSJ* Ex. 14).

[40] *Order Dismissing Appeal for Lack of Jurisdiction*, ECF No. 218 (*MPSJ* Ex. 15).

[41] ECF No. 183 (*MPSJ* Ex. 16).

[42] *Response to Trustee's Motion for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005*, ECF No. 204 (*MPSJ* Ex. 17).

[43] *Surreply to Trustee's Reply for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005*, ECF No. 217 (*MPSJ* Ex. 19).

examinations at the office of Campbell & Williams, rather than at the firm of Sullivan Hill, as stated in the initial *Rule 2004 Motion*. They accused the trustee of bad faith, asserting that they had shown up at Sullivan Hill to submit to examination, but the trustee's special counsel had failed to attend. They denied receipt of any emails or telephone calls from the trustee's counsel about confirming their attendance at the examinations. They again argued that their examination was unnecessary because no valid claims had been filed in the case.

The *Motion to Compel* was heard on August 27, 2014. The debtors' motions for protective order, to suspend or terminate the Rule 2004 examinations, for sanctions against the trustee's counsel, and to show cause for contempt regarding the Rule 2004 examination were also heard on that date. The court entered orders on all of these motions on October 7, 2014. It granted the trustee's *Motion to Compel*,[44] and denied all four of the debtors' motions.[45]

In its *Order on Motion to Compel*,[46] the court overruled the debtors' argument that the trustee was proceeding in bad faith, noting that she was instead seeking to satisfy statutory duties imposed by the Bankruptcy Code. The court noted that relief under Fed. R. Bankr. P. 2005 is proper on a showing "that the debtor has evaded service of a subpoena or of an order to attend for examination."[47] Based on the evidence before it, the court found that "both Debtors failed to appear at the Rule 2004 exams," and that "[t]hey have thus evaded" the *Rule 2004 Order*."[48] The debtors were ordered to appear in court on October 20 and 21, 2014, so these examinations could

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[44] *Order on Motion for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005*, ECF No. 232 (*MPSJ* Ex. 20).

[45] *See Order on Motion for Entry of Protective Order*, ECF No. 226; *Order on Motion to Suspend, Terminate, or in the Alternative Limit 2004 Examinations due to Bad Faith*, ECF No. 228; *Order on Motion for Sanctions*, ECF No. 230; *Order on Motion to Show Cause for Contempt of Order*, ECF No. 234.

[46] *Order on Motion for Order to Compel Attendance for Examination Under Bankruptcy Rule 2005* ("*Order on Motion to Compel*"), ECF No. 232 (*MPSJ* Ex. 20).

[47] *Id.* at 4:5-8 (quoting Fed. R. Bankr. P. 2005).

[48] *Id.* at 4:13-16.

occur.[49] The order further advised that "[f]ailure of either of the Debtors to appear will subject them to sanctions."[50]

As required by the *Order on Motion to Compel*, the debtors appeared in court for examination on October 20 and 21, 2014. However, they attempted one final protest by filing a *Request for Emergency Relief - Emergency Motion for Leave for Motion for Emergency Relief by Protective Order*, and an *Ex Parte Application for Order Shortening Time to Hear Emergency Motion for Protective Order* on the same day that Mr. Vaughan was to be examined.[51] Both debtors signed these motions. Because the motions were inappropriately filed in the instant adversary action, rather than the main bankruptcy case, they were not considered by the court.

DISCUSSION

Chapter 7 of the Bankruptcy Code embodies two ideals: (1) it offers a "fresh start" to an individual debtor through the discharge of most debts, and (2) it provides for the equitable distribution of a debtor's assets among competing creditors.[52] A chapter 7 discharge is governed by § 727, which directs that the court "shall" grant a debtor a discharge, with twelve exceptions. Section 727 is construed liberally in favor of the debtor and strictly against the party objecting to discharge.[53] However, the fresh start offered by the Code through discharge is not a constitutional right,[54] but is instead reserved for the "honest but unfortunate debtor."[55]

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[49] *Id.* at 4-5. Debtor Tatiana Vaughan was directed to appear on October 20th, and debtor Stan Vaughan was directed to appear on October 21st.

[50] *Order on Motion to Compel*, ECF No. 232 at 5:20.

[51] ADV Nos. 27, 28.

[52] *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005)(citing *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918)).

[53] *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010)(citing *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996); *see also First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342 (9th Cir. 1986); *Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994).

[54] *United States v. Kras*, 409 U.S. 434, 446 (1973).

[55] *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)(quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

The trustee seeks summary judgment for the debtors's refusal to obey the *Rule 2004 Order* under § 727(a)(6)(A) and § 727(d)(3). She contends that the debtors were aware of the court's order and of the *Notice* scheduling Rule 2004 examinations pursuant to that order, but that they refused to appear for such examinations. She argues that summary judgment is appropriate under the law of the case doctrine based on the court's prior finding in the *Order on Motion to Compel* that the debtors had "evaded" the court's *Rule 2004 Order* that authorized the trustee to conduct those examinations.

The debtors have not only opposed the *MPSJ*, but have also filed a separate *Countermotion for Summary Judgment* ("*Countermotion*").[56] Because the *Countermotion* largely mirrors their opposition, the court will treat it as a supplemental opposition rather than an independent motion for summary judgment.[57] In the opposition and *Countermotion*, the debtors

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[56] *Response to Trustee's Mot. for Partial Summ. J as to Count II of Trustee's Complaint*, ADV No. 239; *Countermotion for Summary Judgment*, ADV No. 241. At oral argument, Mr. Vaughan acknowledged that his countermotion did not seek affirmative relief, but rather sought only to defeat the trustee's motion.

[57] Contemporaneous with their *Countermotion* the debtors filed a *Statement of Undisputed Facts Made under Penalty of Perjury in Support of Countermotion for Summary Judgment* ("*Statement of Undisputed Facts*"), ADV No. 242, in which they reference interrogatories, requests for production, and requests for admission that they served upon the trustee in this proceeding. The debtors have attached copies of their discovery requests as exhibits to their *Statement of Undisputed Facts*, as well as a copy of the *Trustee's Response to Debtor's First Discovery Request for Admissions (1-19)*, dated May 14, 2015. The significance of these discovery requests is only superficially addressed in the *Countermotion*. The debtors argue, in general, that the trustee failed to timely respond to their discovery, that the requests for admission are deemed admitted, and that this action should be dismissed. However, the requests for admission were directed to issues that are immaterial to the trustee's discharge claim under § 727(a)(6). Further, it appears the *Trustee's Response to Debtor's First Discovery Request for Admissions (1-19)* was timely. See Fed. R. Bankr. P. 9006(f). Moreover, even assuming the trustee has failed to respond to discovery, a precondition to imposing sanctions for such failure, including the most drastic sanction of dismissal, is that the court has first entered an order directing specific compliance with a party's discovery requests. *See* Fed. R. Civ. P. 37(b); *Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470, 1474 (9th Cir. 1984)(emphasizing that a discovery order is required before sanctions can be imposed). The debtors have previously, and unsuccessfully, sought dismissal of this adversary case for the trustee's purported discovery abuses. *See Order Denying Defendants' Ex Parte Application for Order Shortening Time for Motion for Dismissal Sanction per Rule 37(b)(2)(v) for Trustee's Failure to Timely Respond to Requests for Interrogatories, Requests for Production of Documents, and Requests for Admissions*, ECF No. 217. The necessary precondition for dismissal under Rule 37(b) – an order directing the trustee's compliance with discovery – was not satisfied then, nor has it been satisfied now. For these reasons, the court construes the *Countermotion* as a supplemental opposition rather than a separate request for affirmative relief. To the extent the *Countermotion* does seek any affirmative relief, it will be denied.

contend the trustee's *MPSJ* cannot be granted because: (1) it was not supported by an affidavit or other sworn statement; (2) the debtors merely "failed," rather than "refused" to obey the *Rule 2004 Order*, and the trustee has not established, by clear and convincing evidence, that they were in civil contempt of that order; (3) the *Rule 2004 Order* was improper because the trustee failed to submit a proposed order with the motion as required by the local rules; (4) the *Rule 2004 Order* was improper because the order did not specify the location for examination; and (5) revocation of discharge is inappropriate in light of their eventual attendance at the Rule 2004 examination.

I. Summary Judgment Standards.

As an initial matter, the debtors contend that the trustee's *MPSJ* must be denied because it is not supported by a proper affidavit or declaration. This argument misconstrues the requirements for summary judgment under Fed. R. Civ. P. 56.[58] By rule, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[59] The moving party bears the initial burden of showing that there is no genuine issue of material fact.[60] This burden is met if the movant identifies "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'" that demonstrate the absence of a

[58] This rule is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

[59] Fed. R. Civ. P. 56(a). A fact is material only if it is one that may affect the outcome of the case under substantive law. *Caneva v. Sun Communities Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 760 (9th Cir. 2008)(citing *Thrifty Oil Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003)). A factual issue is genuinely disputed only if "a jury could reasonably find in the nonmovant's favor from the evidence presented." *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 730 (9th Cir. 2012)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)(summary judgment requires determination of "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). While Rule 56 was substantially amended in 2010, the standard for granting summary judgment remains the same. *Martin v. Papillon Airways, Inc.*, 810 F.Supp.2d 1160, 1163 n.1 (D. Nev. 2011).

[60] *In re Caneva*, 550 F.3d at 755; *see also Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002).

genuine issue of material fact.[61] If the movant satisfies this burden, the non-moving party must "go beyond the pleadings" to set forth specific facts showing that a genuine issue of material fact remains for trial.[62] All evidence is viewed in the light most favorable to the non-moving party.[63] However, "if the factual context renders the [non-movant's] claim implausible . . . the [non-movant] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary."[64]

Both parties must support their positions by "citing to particular parts of materials in the record."[65] The debtors argue that these materials must include an affidavit or declaration in support of the motion. But, this is not what the rule requires. Rule 56(c)(1) requires only that a "party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, *including* depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, *or* other materials[.]"[66] The word "or" is not exclusive.[67] Because Fed. R. Civ. P. 56(c)(1)(A) is written in the disjunctive, summary judgment may be supported by citing to *any* portions of the record, including affidavits or declarations. Both the Supreme Court and the Ninth Circuit have indicated that summary judgment motions may be supported by "affidavits, *if any*," in addition to other portions of the

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[61] *In re Caneva*, 550 F.3d at 755 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

[62] *Id.*

[63] *Id.*; *see also Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010).

[64] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Celotex Corp.*, 477 U.S. at 249-50 ("If the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted."); *Hayes v. Palm Seedlings Partners (In re Agric. Research & Tech. Grp., Inc.)*, 916 F.2d 528, 534 (9th Cir. 1990); *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987).

[65] Fed. R. Civ. P. 56(c)(1).

[66] Fed. R. Civ. P. 56(c)(1)(A)(emphasis added).

[67] 11 U.S.C. § 102(5).

pleadings.[68]

In this instance, the trustee's *MPSJ* relies upon materials taken from the record in the main case.[69] No affidavit or declaration is required for the court to consider these materials. Moreover, the court "may consider other materials in the record," not cited by the parties, in determining summary judgment,[70] and it is well settled that the court may take judicial notice of the record herein "to place the evidence in appropriate context with events in the case and adversary proceedings."[71]

II. Revocation of Discharge Under § 727(a)(6).

Section 727(d)(3) directs that courts "shall" revoke a discharge if a debtor has committed an act specified in § 727(a)(6). In turn, § 727(a)(6)(A) precludes discharge if "the debtor has refused, in the case . . . to obey any lawful order of the court, other than an order to respond to a material question or to testify."[72] The trustee must prove that the debtors refused to obey a lawful order by a preponderance of the evidence.[73] If she meets this standard, the burden then

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[68] *In re Caneva*, 550 F.3d at 755 (citing *Celotex Corp.*, 477 U.S. at 323)(emphasis added).

[69] *See Trustee's Statement of Undisputed Facts* (ADV. No 190).

[70] Fed. R. Civ. P. 56(c)(3).

[71] Fed. R. Evid. 201, *Gugino v. Clark (In re Clark)*, 525 B.R. 442, 449 (Bankr. D. Idaho 2015)(referencing Fed. R. Evid. 201).

[72] 11 U.S.C. § 727(a)(6). While § 727(a)(6) sets out two additional grounds for denial of a debtor's discharge, based upon a debtor's refusal to testify or respond to material questions, neither is implicated in this proceeding.

[73] It is well settled in the Ninth Circuit that those seeking denial or revocation of discharge must establish their claim under the preponderance of the evidence standard. *See In re Retz*, 606 F.3d at 1196 (citing *In re Bernard*, 96 F.3d at 1281); *Searles v. Riley (In re Searles)*, 317 B.R. 368, 376 (B.A.P. 9th Cir. 2004)(citing *Grogan*, 498 U.S. at 289). The debtors argue that the trustee must prove her claim under the clear and convincing standard of proof required for civil contempt. Their argument is refuted by this controlling Ninth Circuit authority. Moreover, a majority of courts have adopted the preponderance of evidence, rather than clear and convincing, evidentiary standard for § 727(a)(6)(A) claims. *See, e.g., In re Clark*, 525 B.R. at 463; *Merena v. Merena (In re Merena*), 413 B.R. 792, 820 (Bankr. D. Mont. 2009), *aff'd*, 2009 WL 4914650 (B.A.P. 9th Cir. Dec. 10, 2009); *Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 324 (Bankr. N.D. Ohio 2006), *aff'd* 356 B.R. 786 (B.A.P. 6th Cir. 2007).

shifts to the debtors to explain their behavior to the court's satisfaction.[74] The court has broad discretion to determine whether a particular violation of its orders is sufficiently serious to justify denial of discharge under § 727(a)(6).[75] The Ninth Circuit has recognized that denial of discharge is a serious deprivation, but that courts should not condone a debtor's refusal to obey a lawful court order.[76]

A. The Debtors Were Aware of a Lawful Order of the Court.

To prevail on her *MPSJ*, the trustee must first prove that the debtors were aware of a lawful order entered in their bankruptcy case.[77] "An order is lawful if it is issued by a court with jurisdiction over the subject matter, and the person to whom the order is directed."[78] The debtors do not contest the bankruptcy court's jurisdiction to enter an order requiring them to attend a Rule 2004 examination, nor do they contest that the *Rule 2004 Order* did so. Further, they clearly understood that the *Rule 2004 Order* required them to attend a Rule 2004 examination to be scheduled by the trustee. Rather, the debtors attack the lawfulness of the *Rule 2004 Order* on the ground that it failed to specify the exact date, time and location of their examinations. Additionally, they assert that the trustee's failure to attach a proposed order with the underlying *Rule 2004 Motion*, as required by the local rules, renders the subsequent orders invalid and unenforceable.

The court has previously considered, and rejected, the debtors' arguments as to the invalidity of the *Rule 2004 Order* for its failure to specify the date, time and location of their examinations. The debtors raised this issue in their *Reply* when seeking reconsideration of the *Rule 2004 Order*. They also advanced variants of this argument in their *Motion for Sanctions*

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[74] *In re Clark*, 525 B.R. at 457 (citing *In re Retz*, 606 F.3d at 1196); *see also Hicks v. Decker (In re Hicks)*, 2006 WL 6810987 at *8 (B.A.P. 9th Cir. Feb. 1, 2006)(citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984)).

[75] *Devers v. Bank of Sheridan (In re Devers)*, 759 F.2d 751, 755 (9th Cir. 1985).

[76] *Id.*

[77] *In re Clark*, 525 B.R. at 462-63; *see also Decker v. Doolittle (In re Doolittle)*, 2007 WL 4328804 at *3 (Bankr. N.D. Cal. Dec. 10, 2007).

[78] *Rainsdon v. Anderson (In re Anderson)*, 526 B.R. 821, 825-26 (Bankr. D. Idaho 2015).

and *Motion to Show Cause for Contempt of Order*, in which they sought damages from the trustee and a public reprimand of her counsel, based upon the fact that the *Notice* scheduled their examinations at Campbell & Williams rather than at Sullivan Hill, as originally requested in the *Rule 2004 Motion*. These motions were denied. In both the *Order on Motion for Sanctions* and *Order on Motion to Show Cause for Contempt of Order*, the court found that: (1) the *Rule 2004 Order* did not provide a specific location for the examinations; (2) scheduling the examinations at Campbell & Williams was reasonable in light of the departure of the trustee's counsel from Sullivan Hill; (3) the *Notice* substantially complied with the *Rule 2004 Order*; and (4) the change in location "did not alter the underlying directive of the Order, which is that the Debtors must appear at the Rule 2004 exam."[79]

Contrary to the debtors' arguments, the *Rule 2004 Order* specifically authorized the trustee to "schedule the examinations . . . to take place no earlier than fourteen calendar days from the date of entry of this Order." This is consistent with Rule 2004(d), which authorizes the court to "order the debtor to be examined under this rule at any time or place it designates."[80] The court deferred the logistics for the debtors' examinations to the trustee. The trustee identified the date, time, and place for those examinations in the *Notice*, which scheduled separate examinations for Tatiana Vaughan and Stan Vaughan on July 16, and 17, 2014, respectively, to "take place at the office of Campbell & Williams, 700 South 7th Street, Las Vegas, Nevada 89101." The court had the authority to delegate the timing and location of the examinations to the trustee, and has previously held that the trustee's actions in scheduling those examinations were reasonable. The fact that the *Rule 2004 Order* itself did not designate the date, time, or place for the debtors' examinations does not affect the lawfulness of that order.

The debtors' argument that the *Rule 2004 Order* was unlawful because the trustee failed to attach a proposed order to the underlying motion is similarly unavailing. This is the first time

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[79] *See Order on Motion to Show Cause for Contempt of Order*, ECF No. 234 at 5:21-6:4; *Order on Motion for Sanctions*, ECF No. 230 at 10:22-11:5.

[80] Fed. R. Bankr. P. 2004(d) provides, in full, that "[t]he court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending."

the debtors have raised this argument. Having failed to raise this issue in their opposition to the *Rule 2004 Motion*, they have waived this argument. Even if this challenge was not waived, it is without merit. The debtors correctly observe that LR 2004(a) requires all requests for examinations under Rule 2004 "be made by motion and must be accompanied by a proposed order." But, this rule provides no consequences for failure to comply. Under LR 1001(e), the court *may* impose sanctions for a counsel's failure to comply with the local rules.[81] Such authority flows from the well accepted premise that litigants and courts must adhere to the local rules.[82] Equally well established is the court's considerable discretion as to when to enforce local rules strictly, and its inherent authority to overlook procedural defects when appropriate.[83] LR 1001(d) codifies this principle by recognizing that the "Rules are not intended to limit the discretion of the Court," and expressly provides that "[t]he Court may, on a showing of good cause, waive any of these Rules."[84] Under these circumstances, the trustee's failure to comply with LR 2004(a) by submitting a proposed order with the *Rule 2004 Motion* is a mere technicality; it did not affect the debtors' substantive rights nor does it affect the lawfulness of the *Rule 2004 Order*. This is particularly so considering that the court drafted its own order after full briefing by the parties and a hearing on the *Rule 2004 Motion*.[85]

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[81] LR 1001(e).

[82] *Weinstein v. Fed. Nat'l Mortg. Ass'n (In re Weinstein*), 2013 WL 4734488, at *8 (B.A.P. 9th Cir. Sept. 4, 2013)(citing *Alliance of Nonprofits for Ins., Risk Retention Grp. v. Kipper*, 712 F.3d 1316, 1327 (9th Cir.2013)).

[83] *Alliance of Nonprofits*, 712 F.3d at 1327 (quoting *Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994)(reversal is required only when a departure from local rules affects substantial rights, but is not justified where departure from local rules is "so slight and unimportant that the sensible treatment is to overlook it."); *see also Allen v. United States Fid. & Guar. Co.*, 342 F.2d 951, 954 (9th Cir. 1965)("It is for the court in which a case is pending to determine, except as it is bound by precedents set by higher authority in its own judicial hierarchy, what departures from statutory prescription or rules of court are so slight and unimportant that the sensible treatment is to overlook them.").

[84] LR 1001(d).

[85] *See, e.g., Frick v. United States Trustee (In re Frick)*, 2012 WL 3206527 at *8 (D. Nev. Aug. 3, 2012)(bankruptcy court did not err in granting motion for partial summary judgment, in spite of fact that United States Trustee submitted the order after the 28-day deadline found in LR 9021(a)(3)). Moreover, local rules are for the convenience of the court, and are not jurisdictional. *Klemm v. Astrue*, 543 F.3d

This court had jurisdiction over both the subject matter and the debtors when it entered the *Rule 2004 Order*. The order was therefore a lawful order entered in the debtors' bankruptcy case, as required by § 727(a)(6)(A). Having established this, the trustee must also demonstrate that the debtors were aware of that order. This point is undisputed. The debtors do not deny that they knew of the *Rule 2004 Order*, or that they received the *Notice*. They also knew of the *Reconsideration Order*, and received a letter from the trustee's counsel after the *Reconsideration Order* was entered, advising them that their examinations would proceed on the date, time, and location set out in the *Notice*. Indeed, their own filings establish, rather than refute, these facts. There is no genuine dispute, therefore, that the *Rule 2004 Order* was lawfully entered, as confirmed by the *Reconsideration Order*. Nor is there a genuine dispute that the debtors were aware of these orders, and of the *Notice* that scheduled their Rule 2004 examinations in compliance with the *Rule 2004 Order*.

B. Did the Debtors Refuse to Obey the Rule 2004 Order?

To revoke the debtors' discharge under §§ 727(d)(3) and (a)(6), the trustee must next prove that they "refused" to obey the *Rule 2004 Order*. The debtors correctly note that "refusal," as that term is used in § 727(a)(6)(A), requires more than a mere failure to comply with the order. The majority of courts interpreting § 727(a)(6)(A) have found that "refusal" requires a showing that the debtor "willfully or intentionally refused to obey the order (i.e., something more than a mere failure to obey the order through inadvertency, mistake or inability to comply)."[86] Because "refused" is not defined in the Bankruptcy Code, some courts construing

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1139, 1143 (9th Cir. 2008).

[86] *In re Anderson*, 526 B.R. at 826 (citing *Schwartzkopf v. Goodrich (In re Michaels)*, 2009 WL 7809926, at *5 (B.A.P. 9th Cir. Feb. 27, 2009)); *United States Trustee v. Lebbos (In re Lebbos)*, 439 B.R. 154, 164-65 (E.D. Cal. 2010)("refusal" requires finding that lack of compliance with court order was "willful and intentional."); *Grochocinski v. Eckert (In re Eckert)*, 375 B.R. 474, 480 (Bankr. N.D. Ill. 2007)("the majority of courts have found the word 'refused' requires the showing of a willful or intentional act as opposed to a mistake or the inability to comply."); *Smith v. Seferian*, 2011 WL 6753989, at *4 (N.D. Ill. Dec. 21, 2011)(citing *In re Eckert*, 375 B.R. at 480).

§ 727(a)(6)(A) have looked to the dictionary for guidance.[87] For example, the Bankruptcy Appellate Panel has cited the *Miriam-Webster OnLine Dictionary* definition of "refuse" – "to express oneself as unwilling to accept," or "to show or express unwillingness to do or comply with."[88] The Panel stated that this "common definition is clear and it requires a willful expression of noncompliance."[89]

Issues of intent are generally ill-suited to summary judgment, but "summary judgment is appropriate if all reasonable inferences defeat the claims of one side, even when intent is at issue."[90] The trustee argues summary judgment is appropriate in this instance because the debtors' intent has previously been determined in this court's *Order on Motion to Compel*, which found that "both Debtors failed to appear at the Rule 2004 exams" and that the debtors "have thus evaded" the *Rule 2004 Order*. She contends that these factual findings are law of the case, and are conclusive of the debtors' mental state for purposes of her summary judgment motion.

"Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'"[91] It is a "necessary doctrine" that "enables the court to treat its own interlocutory rulings as final and go on with the business of deciding the rest of the case."[92] The doctrine precludes relitigation of those facts or issues "decided explicitly or implicitly in the court's prior ruling."[93]

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[87] *Riley v. Tougas (In re Tougas)*, 354 B.R. 572, 578 (Bankr. D. Mass. 2006)(court adopted definition of "refuse" found in *Black's Law Dictionary*).

[88] *Hicks v. Decker (In re Hicks)*, 2006 WL 6810987, at *9 (B.A.P. 9th Cir. Feb. 1, 2006).

[89] *Id.*

[90] *Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch*), 237 B.R. 160, 165 (B.A.P. 9th Cir. 1999); *see also In re Rivera*, 338 B.R. at 327.

[91] *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)(citing *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)).

[92] *Jeffries v. Wood*, 114 F.3d 1484, 1509-10 (9th Cir. 1997)(en banc), *overruled on other grounds, Lindh v. Murphy*, 521 U.S. 320 (1997).

[93] *United States v. Real Property Located at Incline Village*, 976 F.Supp. 1327, 1353 (D. Nev. 1997) (citing *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir.), *cert. denied* 516 U.S. 955 (1995)).

The Ninth Circuit has instructed courts to depart from the law of the case only in limited circumstances where reconsideration would be appropriate, such as where the first decision was clearly erroneous, an intervening change in the law has occurred or other changed circumstances exist, or if "a manifest injustice would otherwise result."[94] Absent such circumstances, the court's failure to apply the doctrine of law of the case "constitutes an abuse of discretion."[95]

Here, the court's finding that the debtors evaded the *Rule 2004 Order* was made when the court considered the trustee's *Motion to Compel* under Rule 2005. To obtain the order, the trustee was required to prove:

> (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or
>
> (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or
>
> (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination.[96]

Although the trustee originally sought relief under Rule 2005(a)(3) for willful disobedience of the *Rule 2004 Order*, the court specifically based its *Order on Motion to Compel* on a finding that the debtors had evaded its prior order under Rule 2005(a)(2). That factual finding was necessary for the relief granted. While the *Order on Motion to Compel* was entered in the main case, its factual finding that the debtors evaded the *Rule 2004 Order* is law of the case in this adversary proceeding.[97] This court is bound by that determination despite the

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[94] *United States v. Alexander*, 106 F.3d at 876.

[95] *Id.* (citing *Thomas v. Bible*, 983 F.2d at 155). *See also United States v. Real Property Located at Incline Village*, 976 F.Supp. at 1353-54 ("Under the law of the case doctrine, a previous decision on a factual or legal issue must be followed in all subsequent proceedings in the trial court or on a later appeal in the appellate court, unless the court is persuaded that one of these five exceptions requires otherwise.")

[96] Fed. R. Bankr. P. 2005(a).

[97] *In re Pilgrim's Pride Corp.*, 442 B.R. 522, 530 (Bankr. N.D. Tex. 2010)(citing *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990)("Adversary proceedings are part of a bankruptcy case," and the law of the case doctrine applies to all components of a bankruptcy case.).

interlocutory nature of the *Order on Motion to Compel*.[98] The debtors have not asserted a legitimate basis to justify reconsideration of that order, such as that it was clearly erroneous, or that there are changes in the law or other circumstances that would justify a departure from the findings therein. Consequently, the court's prior finding that the debtors "evaded" the *Rule 2004 Order* is established as the law of the case for purposes of this adversary proceeding.

Although the trustee has established evasion on the part of the debtors, this is not directly synonymous with a finding that the debtors "refused" to comply with a lawful order, as is required under § 727(a)(6)(A). Similar to the term "refused," the term "evade" is not defined in the Bankruptcy Code. However, the act of evasion includes the same components of willful and intentional conduct found in a refusal to obey. The trustee offers the definitions of "evade" listed in *Webster's New World Dictionary*, which include "to escape; get away," "to be deceitful or clever in avoiding or escaping something," "to avoid or escape from by deceit or cleverness; elude," and "to avoid doing or answering directly; get around; get out of."[99] The concept of avoidance inherent in the definition of "evade" requires both knowledge of the thing to be avoided and some affirmative action directed towards avoidance. In other words, evasion, like refusal, requires "something more than a mere failure to obey the order through inadvertency, mistake or inability to comply."[100] The court therefore concludes that evasion of an order necessarily requires a willful or intentional act of avoidance and satisfies § 727(a)(6)(A)'s requirement that the debtor "refuse" to obey a lawful court order.

Despite the court's prior ruling, the debtors argue that they merely failed to obey the *Rule 2004 Order* because they were confused as to where they were to appear for their examinations. This argument is precluded by the court's earlier determination that they evaded the *Rule 2004*

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[98] *United States v. Real Property Located at Incline Village*, 976 F.Supp. at 1354 (citing *Ridgeway v. Montana High Sch. Ass'n*, 858 F.2d 579, 587-88 (9th Cir. 1988)("The Ninth Circuit applies the law of the case doctrine to interlocutory orders, as well as final judgments.").

[99] *MPSJ* Ex. 21. Similarly, the *Merriam-Webster OnLine Dictionary* defines "evade" to include "to elude by dexterity or stratagem," or "to avoid facing up to," or "to avoid the performance of." *See* merriam-webster.com.

[100] *In re Anderson*, 526 B.R. at 826.

Order. Yet, even absent the prior determination, the debtors' protestations that they were simply confused are insufficient to create a genuine dispute as to whether they merely failed, rather than refused, to obey the *Rule 2004 Order*.[101]

A situation somewhat similar to the debtors' existed in *In re Rivera*.[102] In that case, the trustee sought to examine the debtor regarding a personal injury settlement, and moved for authority to conduct a Rule 2004 examination. The court granted the trustee's Rule 2004 motion, and the trustee subsequently sent the debtor a *letter* notifying him of the date set for examination.[103] As in the present case, there was no dispute that the debtor received the letter. The trustee sought revocation of discharge under §§ 727(d)(3) and (a)(6)(A) after the debtor failed to appear for examination.[104] The debtor argued that he was unable to appear due to emergency surgery, and that his attorney had told him the examination would be continued. However, he failed to substantiate these arguments.[105] The court noted that a debtor's claims of inadvertence or mistake could not be supported "if the evidence establishes that the debtor knew or should have known of the multitude of orders and notices sent to [him] and disregarded them."[106] Such is clearly the situation in this case.

The court's prior determination that the debtors evaded the *Rule 2004 Order* necessarily

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[101] *In re Eckert*, 375 B.R. at 480 (quoting *Solomon v. Barman (In re Barman)*, 237 B.R. 342, 349 (Bankr. E.D. Mich. 1999)(debtor cannot claim inadvertence or mistake "if the evidence establishes that debtor knew or should have known of the multitude of orders sent to [him] and disregarded them.").

[102] *Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318 (Bankr. N.D. Ohio 2006).

[103] *Id.* at 322.

[104] *Id.* at 329.

[105] *Id.* at 330. The debtor's medical records showed that he had been released from the hospital a week before his examination was set to take place, and nothing in the hospital's discharge instructions indicated that he could not testify. Further, there was nothing in the record to show that the debtor had actually asked his counsel about rescheduling the surgery, or that the debtor or his counsel had asked the trustee to reschedule the examination.

[106] *In re Rivera*, 318 B.R. at 329 (quoting *In re Barman*, 237 B.R. at 349). The *Rivera* court found that the record supported the trustee's claims for summary judgment under § 727(a)(6), but concluded that such a finding was unnecessary because the debtor's discharge was revoked on other grounds. *Id*. at 330.

rejected the debtors' arguments that they merely failed to appear for their examinations because they were confused. Yet, even without application of the law of the case doctrine, the debtors' numerous filings and arguments unequivocally demonstrate that they had actual knowledge of the *Notice*, and, therefore, the actual date, time and location of the examinations they had been ordered to attend. They challenged the location of their examinations, and argued confusion, in at least six different filings prior to their scheduled depositions, including their *Reply* filed in support of the *Motion for Reconsideration*. The court heard oral argument and entered its order denying that motion, despite such arguments, prior to the scheduled examinations. The debtors' argument as to confusion is also contradicted by the motions and declarations they filed with their appeal just days before the examinations were to occur. Mr. Vaughan proclaimed that they would appear at, and be examined by, anyone other than the trustee's special counsel Bryan Cave or Campbell & Williams.

Perhaps most damaging is the debtors' contention that they actually appeared at Sullivan Hill on the dates and times scheduled in the *Notice.* Assuming that this is true, the debtors honored the date and time for their examinations set out in the *Notice*, but disregarded the location. Their contention that they were simply complying with the *Rule 2004 Order* and the underlying motion is unconvincing, considering that neither of those documents specified a date or time for examination, as did the *Notice*. Yet, they ask the court to accept that once they arrived at Sullivan Hill, and discovered that the Rule 2004 examinations were not taking place there, they reasonably did nothing, even though they knew, having received the *Notice*, that the examinations were scheduled to take place at Campbell & Williams' offices. The core of the debtors' argument, therefore, is that, despite having actual knowledge of the date and time for their examinations, and having personally established that such examinations were not taking place at Sullivan Hill (because they physically went to those offices over a two day period), their failure to then go to the offices of Campbell & Williams was not a willful act in defiance of the *Rule 2004 Order.*[107] This argument is simply implausible under the circumstances of this case.

[107] At oral argument, Mr. Vaughan claimed that the debtors relied on advice of counsel in deciding not go to Campbell & Williams' offices for the scheduled examinations. But, the debtors have

The facts do not support such an inference. While the court must construe all reasonable inferences in favor of the debtors, as the nonmovants, the only conclusion to be drawn from this record is that they willfully chose not to attend their scheduled Rule 2004 examinations, either originally or upon their discovery that the examinations were not being held at Sullivan Hill.

III. The Debtors' Explanation for Failing to Attend the Rule 2004 Examination.

The trustee's *MPSJ* establishes that the debtors have refused to obey a lawful order of this court. The burden of proof thus shifts to the debtors to explain why their discharge should not revoked.[108] The debtors' argument that they should be excused for their noncompliance because they were confused has been addressed above. The debtors also argue that their discharge should not be revoked because they eventually appeared for examination and provided testimony. In appropriate circumstances, a debtor's eventual compliance with a court order may be a valid defense to a § 727(a)(6)(A) action.[109] Here, the debtors rely upon *In re Knott.*[110] In that case, the trustee sought summary judgment revoking discharge for the debtors' failure to appear at three scheduled Rule 2004 examinations and to produce documents required by a court order.[111] The debtors admitted they failed to appear at the examinations, but alleged that they were prevented from attending due to circumstances beyond their control. Prior to the hearing on the trustee's motion for summary judgment, the debtors appeared for examination. Based upon the debtors' eventual attendance and production of documents, the court declined to grant

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been proceeding without representation throughout the main case and this adversary. As a result of their pro se status, they have been given considerable latitude. Here, Mr. Vaughan has argued at length, in opposing the trustee's *MPSJ*, that facts not otherwise in the record must be supported by an affidavit or declaration. Yet, the debtors have not provided an affidavit or declaration, nor have they developed any argument, regarding their contention that they acted on advice of counsel. Unsubstantiated and conclusory allegations of reliance on advice counsel do not raise a genuine dispute concerning a debtor's refusal to obey court orders for purposes of § 727(a)(6). *In re Rivera*, 338 B.R. at 330.

[108] *In re Clark*, 525 B.R. at 457 (citing *In re Retz*, 606 F.3d at 1196).

[109] *See generally Commerce Bank & Trust Co. v. Burgess (In re Burgess)*, 955 F.2d 134, 138 (1st Cir. 1992)(affirming court's finding that debtor had not refused to obey court order where he belatedly filed schedules and statements "and there was no evidence either of harm to creditors or contumacy.")

[110] *Graham v. Knott (In re Knott)*, 2013 WL 1314989 (Bankr. N.D. Ohio Mar. 28, 2013).

[111] *Id.* at *1-2.

summary judgment. In reaching its decision, the court reasoned that it was "better to err" in favor of the debtors and permit them the opportunity to offer evidence as to the reasons for their failure to attend the earlier scheduled examinations.[112]

Recently, the bankruptcy court in *In re Casab*,[113] considered the application of *In re Knott*. In *Casab*, the chapter 7 trustee moved for an order to conduct the Rule 2004 examination of the debtor. As in the instant case, the debtor opposed the motion. Although the parties agreed to a stipulated order for the production of documents, the debtor failed to produce the documents by the deadline. The trustee then sought an order holding the debtor in contempt. Again, the debtor responded. After a hearing, the court found the debtor to be in contempt for failing to produce the required documents. It entered an order granting the motion for contempt, but gave the debtor the opportunity to purge the contempt by producing the documents or showing that production was impossible. The debtor provided the trustee with a smattering of documents over the next couple of months, but failed to purge the contempt under the court's order. The trustee sued to revoke the debtor's discharge under § 727(d)(3), and moved for summary judgment. The debtor opposed summary judgment on the basis that there was no evidence that he intentionally failed to comply with the Rule 2004 order. He relied upon *In re Knott* for "a new opportunity to argue that he is not in contempt."[114]

The *Casab* court noted that its prior finding of contempt distinguished it from *Knott*. Moreover, unlike *Knott,* the debtor had never fully complied with the original order. Finally, the court concluded that the debtor had been given ample opportunities to explain his failure to comply with the underlying order, "all of which he has squandered."[115] Instead, the court held that the law of the case doctrine precluded the debtor from relitigating the impossibility defense. It also found that the contempt orders entered in the main case, and the evidence submitted in

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[112] *Id.* at *6.

[113] *Lewis v. Casab (In re Casab),* 523 B.R. 543 (Bankr. E.D. Mich. 2015)

[114] *Id*. at 553.

[115] *Id*.

support of them, established a refusal to obey lawfully entered orders warranting summary judgment revoking the debtor's discharge. In making this determination, the court concluded that no genuine disputes existed regarding additional factors that would preclude summary judgment.

The present case falls much closer to *Casab* than *Knott*, given the court's prior order and its factual finding of evasion. As in *Casab*, the court's order in the main case establishes the debtor's refusal for purposes of the trustee's claim to revoke the debtor's discharge under § 727(a)(6). Having been given the opportunity to litigate that matter, the law of the case doctrine precludes relitigation of that matter.

Although the debtors' "eventual compliance" does not negate their earlier refusal to obey the *Rule 2004 Order*, the court may consider it within its evaluation of whether their refusal was sufficiently serious to justify denial of discharge under § 727(a)(6).[116] The debtors knowingly elected to evade their examinations, lawfully ordered by the court and properly scheduled by the trustee. Further, their belated compliance with the *Rule 2004 Order* was far from voluntary. Rather, their compliance was mandated by the *Order on Motion for Contempt*, which directed the debtors to appear for examination under Rule 2005 and threat of significant sanctions. Pursuant to Rule 2005, the court could have directed the United States Marshals to compel their attendance by bringing them "before the court without unnecessary delay."[117] Considering that the debtors' "eventual compliance" was done under threat of sanctions, the fact that they ultimately appeared for examination does not preclude entry of summary judgment.

CONCLUSION

The trustee seeks partial summary judgment that the debtors' discharge should be revoked under §§ 727(d)(3) and (a)(6)(A) for their refusal to obey the *Rule 2004 Order*. The debtors' excuses for noncompliance are insufficient to overcome this court's prior finding that they evaded that order. Further, the debtors' conduct and their own filings in the main

[116] *Devers v. Bank of Sheridan (In re Devers)*, 759 F.2d 751, 755 (9th Cir. 1985).

[117] Fed. R. Bankr. P. 2005(a).

bankruptcy case refute their contention that they were simply confused as to the location for their examinations. Rather, they show that the debtors knowingly and willfully chose not to attend their examinations as scheduled. Given this record, the debtors' arguments in opposition to summary judgment are implausible. To defeat the trustee's *MPSJ*, they were required to "come forward with more persuasive evidence to support [their] claim than would otherwise be necessary."[118] They have failed to do so. Nor have they justified their conduct.

For the foregoing reasons, the *Trustee's Motion for Partial Summary Judgment as to Count II of Trustee's Complaint* (ADV No. 189) will be GRANTED. The debtors' *Countermotion for Summary Judgment* (ADV No. 241) will be DENIED. With respect to Count I of the *Complaint*, which remains for adjudication, the trustee shall be given an opportunity to file either a notice of her intent to proceed to trial or, alternatively, a notice of dismissal of Count 1. An *Order* will be entered consistent with this *Memorandum*. It shall be an interlocutory order, not subject to direct appeal. A final judgment will be entered herein after conclusion of trial or, alternatively, upon the trustee's dismissal of Count I of the *Complaint.*

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[118] *Matsushita Electric*, 475 U.S. at 587.