IT IS ORDERED as set forth below:

Date: September 23, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 07-75011
Michael Anthony Nelson,	CHAPTER 7
Debtor.	JUDGE MASSEY
Donald F. Walton, United States Trustee,	
Plaintiff,	
v.	ADVERSARY NO. 08-6025
Michael Anthony Nelson,	
Defendant.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a trial in this adversary proceeding on September 16, 2008. Based on the evidence presented at trial, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052, which incorporates Rule 52 of the

Federal Rules of Civil Procedure. These Findings of Fact and Conclusions of Law supercede the findings of fact and conclusions of law stated orally at the conclusion of the trial.

In this adversary proceeding, Plaintiff Don Walton, the United States Trustee, seeks a judgment denying a discharge to Debtor and Defendant Michael Anthony Nelson under 11 U.S.C. §§ 727(a)(2)(A), 727(a)(4)(A) and 727(a)(5). It is undisputed that in a period of approximately eighteen months prior to filing bankruptcy, Defendant borrowed more than $500,000 using credit cards and converted most of the borrowed funds to cash. Defendant contends that he no longer has possession or control of the money he borrowed.

With respect to the claim made under section 727(a)(5), Plaintiff contends that Defendant has no satisfactory explanation for the loss or disposition of a large portion of the funds borrowed on credit cards. With respect to the claim made under section 727(a)(2), Plaintiff contends that Defendant transferred cash and other assets within the year preceding the petition date with intent to hinder, delay or defraud his creditors or the trustee. With respect to the claim made under section 727(a)(4)(A), Plaintiff contends that Defendant knowingly and fraudulently made false statements in his Schedules of Assets and Liabilities and Statement of Financial Affairs concerning transactions that are the subject of the other two counts.

Defendant contends that during the year preceding the filing of his bankruptcy case, he was the victim of a theft of $215,000 in cash, that he was duped into transferring $197,000 in cash and some computer equipment to an individual whom he did not know and to a charity about which he had no reliable information and that he honestly provided the information on his bankruptcy filings concerning the loss of his assets.

Findings of Fact

1. The Defendant was born in Iran in 1947. In 1992, he immigrated to the United States and became a United States citizen in 1986.
2. Upon becoming a United States citizen, Defendant changed his name from Abdonreza Razmkhahkia to Michael Anthony Nelson.
3. Defendant lives in a mobile home located at 4498 Buford Highway, Lot 309, Norcross, Georgia 30071.
4. In Iran Defendant received a college education with a decree in general science and a MBA in accounting and finance. In Iran, he owned a clothing factory. That business was the source of approximately $100,000 he brought with him when he came to the United States.
5. After arriving in the United States, he obtained a Master's degree in military science and further obtained a decree in computer information systems from Georgia State University.
6. Between 1982 and 1985, Defendant attended school and did not work. After 1985, he worked for Northern Telecom as a programmer and later as a project leader. He was fired by Northern Telecom in 1989. He obtained new employment for six months but was asked to leave by that employer.
7. In 1990 Defendant was injured in a car accident. He received approximately $100,000 in 1992 in connection with the settlement of his claim arising from that accident, and those funds lasted until about 2005.
8. Defendant testified that in 1995, 1996 and 1997, he did consulting work under short term contracts, but there is no evidence that he earned any significant amount of money from

such alleged work. He further testified that he owned a company called Future Software, Inc., which never made any money.

9. Defendant testified that he believes that he lost jobs in the 1980's and was unable to find work or to make money in his computer business because of surveillance by, and actions of, the United States Government.

10. Defendant's primary source of income after the 1990 accident, without regard to credit card borrowing, was Social Security disability payments. He currently receives approximately $720 per month in such payments or perhaps a little more due to cost of living increases. Defendant testified that during the period 2005 to 2007 his source of income also included approximately $60,000 in an IRA account, $30,000 in certificates of deposit and about $5,000 in securities, but other than his testimony there is no evidence he owned such assets prior to borrowing money using credit card transfer balance checks.

11. On September 17, 2007, Defendant filed the Chapter 7 petition initiating this bankruptcy case.

12. Defendant signed and filed with his bankruptcy petition a Statement of Financial Affairs, Summary of Schedules, and Schedules A through J. In the declaration attached to the Statement of Financial Affairs, Defendant declared under penalty of perjury that he had read the answers contained in the Statement of Financial Affairs and any attachments thereto and that they are true and correct. Defendant also executed a declaration attached to his Schedules and Summary in which he declared under penalty of perjury that he had read the foregoing Summary and Schedules, consisting of 26 sheets, and that they are true and correct to the best of his knowledge, information, and belief.

13. The first numbered inquiry in Defendant's Statement of Financial Affairs is entitled "1. Income from employment or operation of business." That inquiry instructed Defendant to state the gross amount of income he received from employment, trade, or profession or from operation of a business from the beginning of "this calendar year"(2007) to the date of the petition and to state the "gross amounts" received during the prior two years (2006 and 2005). Defendant provided no information concerning any such income or earnings and checked the box below the word "None" adjacent to those instructions.

14. The second numbered inquiry in Defendant's Statement of Financial Affairs is entitled "2. Income other than from employment or operation of business." That inquiry instructed Defendant to state the amount of income he received other than from employment, trade, profession or operation of a business during the two years immediately preceding the commencement of the case. Defendant provided no information concerning any such income and checked the box below the word "None" adjacent to those instructions.

15. In his Schedules, Defendant stated that his only assets were a 1982 mobile home valued at $6,000 and personal property valued at $7,750, including $1,200 in cash.

16. On Schedule F, Defendant listed 12 creditors, each of which holds one or more of 21 separate claims, totaling in the aggregate $551,372.79 and all relating to credit card advances made to Defendant 2005, 2006 and 2007. To Bank of America alone, Defendant listed debts totaling $310,656.75.

17. Defendant borrowed on credit cards by using so-called balance transfer checks and deposited those checks in money market accounts and moved those funds to his bank accounts.

18. Between September 19, 2006, and October 16, 2006, Defendant wrote and cashed 22 checks drawn on two of his bank accounts made payable to "cash" and totaling in the aggregate at least $172,164. He kept that cash in his mobile home. He testified that he had no fear that he would be robbed because he had nearby neighbors who were vigilant at all times and because, he testified, he was under surveillance by the United States Government.

19. Defendant testified that in the summer of 2006, he was contacted by Investment Rarities Incorporated, a dealer in precious coins, located in Minnesota (hereinafter "IRI"). He testified that he had previously had an account with a Florida company dealing in gold and had lost money in a transaction and lacked funds to pursue arbitration of his contention that the loss was due to the conduct of the Florida company. Defendant stated that the price of gold began to rise after he was contacted by IRI and that he made a decision to buy gold. He had further contacts with IRI for the purpose of arranging the cash purchase of a few hundred one-ounce gold coins. He testified that he had insisted on paying cash for the coins in a face to face meeting because he did not trust IRI to keep its end of the bargain and because he feared the loss of the coins if transported to him by a commercial delivery service.

20. Defendant had several bank accounts in his name and was familiar with transferring money by wire transfers and by check. He gave no explanation why he could not have

opened a bank account in Minnesota, transferred cash to that account and met with IRI representatives in a Minnesota bank to effect a face to face exchange of coins for a certified check.

21. Defendant testified that on October 20, 2006, he placed $215,000 in cash in a bag and drove in his own car to a Budget rental location to rent a car for the purpose of driving to Minnesota, where he planned with individuals at IRI to purchase gold coins. He testified that he transferred the bag containing the cash from his own vehicle to the rented car.

22. After traveling a short distance in the rental car, Defendant stopped at a Quik Trip gas station located at 4086 Pleasantdale Road in Dekalb County, Georgia at approximately 9:30 a.m. He testified that he went inside to buy a cup of coffee and upon returning to his car discovered that the bag of cash and a camcorder were missing. Defendant did not remember whether he locked the car. He had put his luggage in the trunk but left the bag of money under a seat.

23. Defendant called the police. A uniformed Dekalb County officer arrived after a few minutes. Because of the large amount of money that Defendant claimed had been stolen and the need for investigation, the uniformed officer called for a detective to come to the scene. The detective assigned to the case was David McClaus. Detective McClaus testified at trial that the rental car showed no sign of having been broken into and that it was odd that the car had not been locked. Defendant told McClaus had he had entered the vehicle and touched the door handles before the police arrived, which Detective McClaus stated would have obliterated finger prints of the alleged perpetrator. Defendant could identify no suspect, and the police had none. Detective McClaus credibly testified that

Defendant seemed nonchalant about the loss of $215,000. He testified that a normal person who lost such a large sum of money would have been distraught but that Defendant seemed indifferent. Defendant's calm emotional state struck Detective McClaus as odd. He stated that it was rare to have a car break-in case involving so much money, and that fact as well as Defendant's unemotional demeanor enabled him to recall the incident at trial.

24. Detective McClaus referred the case to the Homeland Security Division of the Dekalb County Police Department, and the case was assigned to Detective P.M. Mitchell, who also testified at trial. Detective Mitchell spoke with Defendant by telephone between 6 and 10 times, beginning on October 21, 2006 and thereafter over a few months. He too remembered the contact with Defendant because of the amount of money alleged to have been stolen and because Defendant seemed unconcerned about the loss. Defendant never once called Detective Mitchell to inquire whether he had a lead in the case. There has never been any lead, and the case is dormant.

25. Defendant's accounts of the alleged theft of $215,000 in cash from a rental car and of his perceived need for cash to purchase gold coins from IMI were not credible.

26. In February 2007, Defendant claimed that he received an email from someone holding himself out to be David Stranack, a trustee of a UK-based international charity called SOS Children. The email proposed that Defendant serve as a representative of the charity to receive payments from other representatives of the charity, to deposit those payments in his bank account and to forward the proceeds to Stranack after retaining a 10% commission.

27. The first three items that Stranack allegedly sent to Defendant failed to clear because they were forged traveler's checks. Defendant deposited a later check allegedly sent to him by Stranack that bounced.

28. There is no evidence that Stranack or anyone connected with him had any legitimate reason for using Defendant to cash checks, and there is no credible evidence that Stranack or the charity provided any checks for Defendant to cash after the first four checks failed to clear.

29. Defendant testified that Stranack or someone else with the charity then proposed that the charity would pay off Defendant's credit card accounts if Defendant would provide funds to Stranack or another designated person when instructed to do so. (This scheme is also described in an attachment to Defendant's Statement of Financial Affairs. See page 19 of Document no. 1 filed in the main bankruptcy case, 07-75011.)

30. Between December 28, 2006 and June 11, 2007, Defendant wrote and cashed 32 checks payable to cash totaling in the aggregate more than $185,000.

31. Defendant never saw or spoke to Stranack. All communications were conducted by email. There is no evidence Defendant undertook any serious investigation regarding the bona fides of Stranack or his alleged charity. He testified that he viewed the charity's website and dialed a telephone number shown on the website and was connected to voice mail.

32. At the alleged direction of Stranack, Defendant stated that he turned over cash to a man who identified himself as "Tom Jones," whom Defendant admits he did not know and about whom Defendant knew nothing. Defendant claims he delivered to Jones $50,000

in cash on May 11, 2007, $50,000 in cash on May 18, 2007 $47,000 in cash on May 31, 2007, and $50,000 in cash on June 12, 2007.

33. In May and June 2007, credits were posted from time to time to various bank and credit card accounts of Defendant but were reversed in most instances within a day or two. Defendant testified in effect that he believed that he could safely use the cash he had accumulated because of those deposits. This testimony was not credible for four reasons.

34. First, the scheme described by Defendant is bizarre. The arrangement made no business sense. The delivery of forged checks and a check that bounced to Defendant was a red flag signaling that the scheme was not legitimate. Second, Defendant is highly educated and as a business man could not have failed to realize that the arrangement was a scam. Third, Defendant presented no evidence showing that Stranack, who allegedly directed the payments to Jones, had anything to do with the credits to Defendant's accounts. Finally, Defendant made no credible showing that he was not aware of the reversals of the credits, the first of which occurred on May 3, 2007. See Plaintiff's Exhibit 37, p. 2. In summary, Defendant's explanation concerning the alleged loss of at least $197,000 in connection with his dealings with David Stranack is not credible.

Conclusions of Law

Plaintiff has the burden of proof under section 727. Fed. R. Bankr. P. 4005. The elements of each objection to discharge must be proven by a preponderance of the evidence. *Transp. Alliance Bank v. Owens (In re Owens),* 2006 Bankr. LEXIS 2211, *14 (Bankr. N.D. Ga. 2006); *see, e.g., In re Keeney,* 227 F.3d 679, 683 (6th Cir. 2000). Additionally, "denial of a discharge is an extraordinary remedy and therefore, statutory exceptions to discharge must be

construed liberally in favor of the debtor and strictly against the objecting party." *In re Matus*, 303 B.R. 660, 671 (Bankr. N.D. Ga. 2004).

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 157(b)(1). This is a core proceeding under 28 U.S.C. § 157(b)(2)(J). The Court has jurisdiction over Defendant because he is the debtor in Bankruptcy Case No. 07-75011 pending in this Court. Venue is proper in this Court under 28 U.S.C. § 1409(a).

Section 727(a)(5) of the Bankruptcy Code provides:

> (a) The court shall grant the debtor a discharge, unless – . . .
>
> > (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

11 U.S.C. § 727(a)(5).

The Eleventh Circuit has succinctly explained the parameters of proving and defending against a claim under section 727(a)(5).

> At trial, the party objecting to a discharge has the burden of proving the objection. Bankruptcy Rule 4005 (1983). But once that party meets the initial burden by producing evidence establishing the basis for his objection, the burden shifts to the debtor to explain satisfactorily the loss. 4 Collier on Bankruptcy ¶ 727.08 (15th ed. 1984). "The creditor's burden of persuasion does not obviate the necessity that the debtor provide a satisfactory explanation of the loss of his assets." *In re Reed*, 700 F.2d 986, 992-93 (5th Cir.1983). To be satisfactory, "an explanation" must convince the judge. *In re Shapiro & Ornish*, 37 F.2d 403, 406 (N.D.Tex.1929), aff'd, 37 F.2d 407 (5th Cir.1930). Vague and indefinite explanations of losses that are based upon estimates uncorroborated by documentation are unsatisfactory. *In re Reed*, 700 F.2d at 993 (debtor's explanation that $19,586 was consumed by business and household expenses and gambling debts was unsatisfactory); *Baum v. Earl Millikin, Inc.*, 359 F.2d 811, 814 (7th Cir.1966) (satisfactory explanation must consist of more than a vague, indefinite and uncorroborated hodgepodge of financial transactions). See 4 Collier on Bankruptcy, ¶ 727.08 (15th ed. 1984).

Chalik v. Moorefield , 748 F.2d 616, 619 (11th Cir. 1984) (footnote omitted).

It is undisputed that Defendant borrowed approximately $500,000 in 2006 and 2007, debt that Defendant had no means to repay because he had no significant income. It is undisputed that the loan proceeds were turned into cash and that the cash has disappeared. Plaintiff established by a preponderance of the evidence that Defendant's explanations for the disappearance of the cash are not "satisfactory" within the meaning of section 727(a)(5).

Plaintiff met his burden of proof by showing that Defendant's explanations rest solely on Defendant's own testimony and that Defendant is not a reliable witness. Defendant's testimony is not reliable in part because at times he showed a lack of a firm grip on reality. For example, he professed to believe that large amounts of cash he had accumulated were safe in his mobile home because the government was spying on him. His testimony is unreliable because contemporaneously with the alleged theft, Defendant showed no concern or emotion about the loss of $215,000.

Defendant's testimony is unreliable because he engaged in highly unusual and suspect conduct, such as depositing in his own accounts credit card checks intended to pay off credit card balances owed to other banks. His testimony was unreliable because he participated in highly unusual transactions such as carrying around a large amount of cash and giving large amounts of cash to a stranger, when he had sensible alternatives to protect the cash. The end of the road of these transactions was cash, which is easily hidden. The end to which Defendant testified abruptly terminated the paper and electronic trails that might have demonstrated that he was engaged in legitimate transactions.

Defendant has failed to rebut the showing made by Plaintiff that he provided no satisfactory explanation for the loss of the borrowed funds because his uncorroborated testimony is not remotely credible.

Section 727(a)(2)(A) of the Bankruptcy Code provides in pertinent part that:

(a) The court shall grant the debtor a discharge, unless–

> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–
>
> > (A) property of the debtor, within one year before the date of the filing of the petition[.]

In order to prevail under section 727(a)(2)(A), a plaintiff must prove by a preponderance of the evidence: (1) a transfer or concealment of property of the debtor or the estate, (2) with actual intent to hinder, delay, or defraud a creditor (3) within one year before the filing the petition. *In re Parnes*, 200 B.R. 710, 713 (Bankr. N.D. Ga. 1996). Constructive fraud is insufficient to support a denial of discharge under this section. *Id*.

Here, there is no dispute of any material fact concerning the transfers of property of Defendant within one year of the petition date. To determine if a debtor acted with fraudulent intent, courts typically consider whether any badges of fraud are present under the circumstances. Common badges of fraud include:

(1) the lack or inadequacy of consideration;

(2) the family, friendship or close associate relationship between the parties;

(3) the retention of possession, benefit or use of the property in question;

(4) the financial condition of the party sought to be charged both before and after the transaction in question;

(5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and

(6) the general chronology of the events and transactions under inquiry.

In re Kaiser, 722 F.2d 1574, 1582-83 (2d Cir. 1983). *See also In re Matus*, 303 B.R. at 672-73.

Factors 1, 4, 5 and 6 applied to the facts here all point to the conclusion that Defendant made the transfers with fraudulent intent. As to badge 1, Defendant made no showing that he received any consideration from David Stranack or SOS Children with respect to the transfers to Tom Jones.

As to Badge 4, Defendant's financial condition was poor when he began in 2005 to borrow heavily from credit card issuers by using checks provided for the purpose of paying off other credit card debt, which Defendant did not do. He had no means to repay that debt, was purportedly disabled and had not held a job since 1989.

As to Badge 5, the pattern of using convenience checks to borrow money and the withdrawal of funds by dozens of checks payable to cash and the accumulation of cash, which is easily hidden, gives rise to an inference of fraud under the circumstances described.

As to Badge 6, the timing of the withdrawals and the occurrence of the bankruptcy filing shortly after the funds became untraceable also imply fraudulent intent.

Defendant's explanations for his conduct do not describe plausible, legitimate investment strategies conducted by an educated person and hence do not rebut the inference of fraudulent intent drawn from his conduct and the surrounding circumstances.

Given the Court's conclusion on these two counts, it is unnecessary to address the remaining count under section 727(a)(4).

For these reasons, Defendant's discharge must be denied, and the Court will enter a separate judgment.

END OF ORDER