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8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 In re) Case No. SA 06-10195 JR
12 LLOYD MYLES RUCKER,) Chapter 7
13)
14) **MEMORANDUM DECISION**
15 Debtor.) Date: August 4, 2006
Time: 10:00 A.M.
Courtroom: 5A

16
17 **I. INTRODUCTION**

18 Ronald Cunning, D.D.S. and Ronald Cunning D.D.S., Inc.
19 (collectively, "Movant") filed an objection to the Lloyd Myles
20 Rucker's ("Debtor") claim of exemption regarding the amounts
21 held in a defined benefit pension plan and multiple 401(k)
22 plans. Debtor responded, defending the propriety of his
23 exemptions. An evidentiary hearing was conducted on June 29,
24 July 5, July 21, and August 4, 2006, and I took the matter under
25 submission to determine whether Debtor used his various
26 retirement plans "primarily for retirement purposes".
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1 **II. JURISDICTION**

2 I have jurisdiction over this matter under 28 U.S.C.
3 § 157(b)(1). This is a core proceeding under 28 U.S.C. § 157
4 (b)(2)(B).¹

5 **III. STATEMENT OF FACTS**

6 On October 12, 2005 (the "Petition Date"), Debtor filed a
7 voluntary chapter 7 petition in the Southern District of
8 Florida. On February 24, 2006, Debtor's case was transferred to
9 the Central District of California. Thomas H. Casey is the duly
10 appointed chapter 7 trustee ("Trustee").

11 Prior to the Petition Date, Movant obtained a civil
12 judgment in the amount of approximately \$3.2 million (the
13 "Judgment"). On May 15, 1997, Movant recorded an abstract of
14 judgment to secure the amount owed, which is currently more than
15 \$6.5 million.

16 In 2001, Debtor engaged the Kagan Company ("Kagan"), an
17 enrolled actuary,² to set up and administer a qualified defined
18 benefit plan, the Lloyd Rucker Defined Benefit Pension Plan (the
19 "Pension Plan").³ The Pension Plan was notably aggressive,

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21 ¹ Unless otherwise indicated, all chapter, section, and rule
22 references are to the Bankruptcy Code (the "Code"), 11 U.S.C.
23 §§ 101-1330, prior to its amendment by the Bankruptcy Abuse
24 Prevention and Consumer Protection Act of 2005 (the "Act"), Pub.
L. 109-8, 119 Stat. 23, because this case was filed before the
Act's effective date (October 17, 2005), and to the Federal Rules
of Bankruptcy Procedure (the "Rules"), Rules 1001-9036.

25 ² An enrolled actuary is an actuary who has been admitted to
26 practice before the Internal Revenue Service, typically, by
27 passing an exam.

28 ³ A retirement plan is "qualified" and therefore, entitled
to favorable tax treatment, if it complies with the requirements

1 providing for the maximum benefit of \$1.8 million by the age of
2 55 with contributions over a 10-year period. Debtor's wholly-
3 owned company, Vision Capital, Inc. ("Vision"), is the
4 administrator of the Pension Plan. Secure Capital, Inc.
5 ("Secure"), another company wholly owned by Debtor, is a
6 participating employer in the Pension Plan. Debtor was the sole
7 participant in the Pension Plan.

8 From 2001 through 2005, Kagan calculated and communicated
9 to Debtor the minimum and maximum contributions that could be
10 made to the Pension Plan each year.⁴ Debtor provided Kagan with
11 documentation substantiating the amount of contributions he made
12 to the Pension Plan. Based on this information, Kagan prepared
13 an annual return and actuarial report for Debtor to sign and
14 file.⁵

15 _____
16 established by the Internal Revenue Code. See 26 U.S.C. §
17 401(a).

18 ⁴ A plan must not provide for benefits or contributions that
19 exceed the limitations established by § 415. Id. § 401(a)(16).
20 Specifically, § 415 limits the amount payable as a benefit. Id.
21 § 415(b). In contrast, § 412 sets a minimum funding standard
22 designed to ensure that a qualified pension plan has the assets
23 necessary to pay its beneficiaries the promised benefit. Id. §
24 412. Taken together, §§ 415 and 412 establish complex formulas
25 for ensuring that an employer does not over fund or under fund a
26 qualified pension plan.

27 ⁵ The Internal Revenue Code establishes a variety of
28 reporting requirements and penalties to promote transparency and
prevent abuse. Every employer who maintains a qualified pension
plan must file an annual return containing information with
respect to the "qualification, financial condition, and
operations of the plan" Id. 6058(a). "The annual return
is one of several reports the administrator of an employee
benefit plan must file with the [IRS]." 6 MERTENS LAW OF FED. INCOME
TAX'N § 25B-1:30. "The forms and schedules of the Form 5500

1 On October 15, 2004,⁶ Debtor filed a Form 5500EZ for the
2 year 2003. In that report, Debtor declared under penalty of
3 perjury that the Pension Plan received a total of \$83,170 in
4 cash contributions during the 2003 plan year.⁷ In addition,
5 Debtor disclosed in the 2003 annual return that the value of the
6 Pension Plan assets was \$447,507 by year end.

7 In June 2005, Movant sought and obtained a temporary
8 restraining order, alleging that Secure, Vision, and the Pension
9 Plan were the alter egos and/or assets of Debtor. Due to
10 Movant's allegations regarding the propriety of the Pension
11 Plan, Debtor disclosed to Kagan that, as of the end of 2004, the
12 value of the Pension Plan assets was \$710,963. Kagan noticed
13 that the Pension Plan assets were unusually high and requested
14 that Debtor provide additional documentation regarding the
15 Pension Plan's administration. Debtor provided evidence that he
16 contributed \$148,658 more to the Pension Plan during 2003 than
17 he had previously reported. Therefore, Debtor's 2003 Form
18 5500EZ substantially misrepresented the actual contributions to
19 the Pension Plan for that year.

20
21 series satisfy the annual reporting requirements" Id.
22 Moreover, the plan administrator must file an actuarial report
23 prepared and signed by an enrolled actuary certifying, among
24 other things, that the plan satisfies the minimum funding
25 requirements. 26 U.S.C. § 6059.

26
27 ⁶ According to Kagan, the filing deadline for any given year
28 was October 15 of the succeeding year.

29
30 ⁷ The \$83,170 consisted of contributions made on January 8
31 and 11 and September 15, 2004. According to Kagan, the
32 contribution deadline for any given year was September 15 of the
33 succeeding year. Therefore, Debtor could count contributions
34 made by September 15, 2004 towards 2003.

1 As a result, Kagan prepared a revised 2003 Form 5500EZ and
2 a 2004 Form 5500EZ. Kagan removed the \$83,170 in contributions
3 originally reported in the 2003 Form 5500EZ and included it in
4 the contributions reported in 2004. The revised 2003 Form
5 5500EZ disclosed that Debtor contributed \$148,658 to the Pension
6 Plan for 2003, \$48,262 over the funding limit.⁸ The 2004 Form
7 5500EZ disclosed that Debtor contributed \$183,170 to the Pension
8 Plan that year, \$85,986 over the funding limits. Therefore, the
9 total over funding for 2003 and 2004 was \$134,248. The revised
10 2003 Form 5500EZ and the 2004 Form 5500EZ were filed in late
11 July 2005. Around this same time, Debtor filed excise tax
12 returns on behalf of Vision and paid from his personal funds the
13 excise taxes charged to Vision for the excess contributions in
14 2003 and 2004.⁹

15 Debtor also disclosed to Kagan that, in 2003, he caused the
16 Pension Plan to purchase real property located at 21 Saraceno,
17 Newport Coast, California (the "Property") and that he resided
18 at the Property rent free. The Property was sold approximately
19 six months after its purchase, on January 2, 2004. The Pension
20 Plan's ownership of the Property was not disclosed in Debtor's
21

22 ⁸ Kagan calculated that the 2003 funding limit was \$100,396.

23 ⁹ Section 404 establishes the amount of contributions made
24 to a pension plan that an employer may deduct from its taxable
25 income. Id. § 404(a)(1). Any amount contributed in excess of
26 the deductible limitations established by § 404 may be carried
27 over to the succeeding year. Id. § 404(a)(1)(F). However,
28 § 4972 imposes a ten percent tax on any non-deductible
contributions made to a qualified plan payable by the *employer*
making the contributions.

1 original or revised 2003 annual report. Kagan advised Debtor
2 that his residing at the Property rent free was a "prohibited
3 transaction" under the Internal Revenue Code. As a result,
4 Debtor allocated \$15,600 of \$100,000 previously contributed to
5 the Pension Plan by EZ Equity, another of Debtor's wholly-owned
6 corporations, as rent for residing at the Property, and filed an
7 excise tax return on behalf of Vision and paid the excise tax on
8 the prohibited transaction.

9 In 2001, Debtor also established six separate 401(k) plans,
10 two for each of Debtor's wholly-owned corporations, Vision (the
11 "Vision Plans"), Secure (the "Secure Plans"), and EZ Equity (the
12 "EZ Equity Plans"; collectively, the "401(k) Plans").
13 Specifically, Debtor established three profit-sharing 401(k)
14 plans through Paychex for Vision (the "Vision Plan"), Secure
15 (the "Secure Plan"), and EZ Equity (the "EZ Equity Plan"), and
16 three "super simplified" 401(k) plans through Smith Barney for
17 Vision (the "Super Vision Plan"), Secure (the "Super Secure
18 Plan"), and EZ Equity (the "Super EZ Equity Plan").
19 Subsequently, Debtor rolled over the Secure and Vision Plans
20 into the Super EZ Equity Plan.¹⁰

21 From 2002 to 2004, Debtor consistently over funded the
22 Secure and Vision Plans. Specifically, in 2002, Debtor
23 contributed \$35,810 to the Vision Plan and \$11,000 to the Secure
24
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26 ¹⁰ In 2004, Debtor rolled over the Vision Plan to the Vision
27 Super Plan, and then rolled over the Vision Super Plan to the
28 Secure Super Plan. In 2005, Debtor rolled over the Super Secure
Plan and the Secure Plan to the Super EZ Equity Plan.

1 Plan, \$6,810 over the contribution limit for that year.¹¹ In
2 2003, Debtor contributed \$70,741 to the Secure and Vision Plans,
3 \$30,741 over the annual contribution limit,¹² and \$58,041 more
4 than disclosed in the annual reports filed for that year.¹³
5 Finally, in 2004, Debtor contributed \$115,832 to the Secure
6 Plan, \$74,832 over the annual contribution limit,¹⁴ and \$102,832

8 ¹¹ A 401(k) plan is a type of defined contribution plan.
9 The Internal Revenue Code places two independent limitations on
10 contributions to 401(k) plans. First, § 415 limits the amount of
11 total contributions, including employer and employee
12 contributions, per year. 26 U.S.C. § 415(c). Second, § 402
13 limits the amount that an employee may elect to contribute to his
14 or her 401(k) plan per year, commonly referred to as an "elective
15 deferral". Id. § 402(g)(3). For purposes of applying the annual
16 contribution limitations of § 415(c) "all defined contribution
17 plans . . . of an employer are to be treated as one defined
18 contribution plan." Id. § 415(f); see also id. § 401(a)(30).
19 Furthermore, a group of corporations controlled by a single
20 entity or individual are treated as a single employer. Id. §
21 412(b). In 2002, the elective deferral limit was \$11,000 and the
22 total contribution limit was \$40,000.

17 ¹² The total contribution limit for 2003 was \$40,000, of
18 which \$12,000 could be elective deferrals. Debtor contributed
19 \$12,000 as an elective deferral to the Vision Plan and \$21,650 as
20 an employer contribution to the Super Vision Plan. In addition,
21 Debtor contributed \$12,000 as an elective deferral to the Secure
22 Plan and \$25,091 as an employer contribution to the Secure Super
23 Plan.

22 ¹³ Debtor filed an annual report for the Secure Plan,
23 disclosing only \$12,000 in employee contributions. Debtor did
24 not file an annual report disclosing the \$25,091 contributed to
25 the Super Secure Plan or the \$33,650 contributed to the Vision
26 Plans.

25 ¹⁴ The total contribution limit for 2004 was \$41,000, of
26 which \$13,000 could be elective deferrals. Debtor contributed
27 \$13,225 as an elective deferral to the Secure Plan and \$102,607
28 as an employer contribution to the Super Secure Plan. Debtor
asserts that the \$13,225 contributed to the Secure Plan was
offset by a \$22,768.22 distribution from the same. However, a

1 more than disclosed in the annual reports filed for that year.¹⁵
2 Therefore, by 2004, Debtor over contributed to the 401(k) Plans
3 by \$112,383.

4 As of the Petition Date, the EZ Equity Plan had a balance
5 of \$16,554, the Super EZ Equity Plan had a balance of \$339,566,
6 and the Pension Plan had a balance of \$823,000. Debtor claimed
7 the amounts held in the EZ Equity Plans and the Pension Plan as
8 fully exempt pursuant to California Code of Civil Procedure
9 ("CCP") § 704.115(b) (collectively, the "Exemption").

10 On April 14, 2006, Movant filed an objection to the
11 Exemption (the "Objection").¹⁶ Movant argued that Debtor was not
12 entitled to claim either the amounts held in the Pension Plan or
13 the EZ Equity Plans pursuant to § 704.115(b) because they were
14 not designed or primarily used for retirement purposes. Debtor
15 responded, arguing that he treated the Pension Plan and the
16 401(k) Plans in a manner consistent with planning for
17 retirement. Specifically, Debtor argued that his pattern of
18 contributions were dictated by the sporadic nature of his income
19 and his lack of retirement planning prior to 2001. After

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distribution from a 401(k) plan is a taxable event that does not
22 affect a statutory contribution limit for a given year. See
generally 26 U.S.C. § 402(g).

23 ¹⁵ Debtor filed annual report for the Secure Plan,
24 disclosing only \$13,000 in employee contributions. Debtor did
25 not file an annual report disclosing the \$102,607 contributed to
the Super Secure Plan.

26 ¹⁶ Movant also objected to the exemption claimed by Debtor
27 in real property located at 14 Vernal Spring, Irvine, CA and
28 accrued but not received salary from EZ Equity. However, in
response to the Objection, Debtor conceded that he was not
entitled to either of those exemptions.

1 evidentiary hearings conducted on June 29, July 5, July 21, and
2 August 4, 2006, I took the matter under submission to determine
3 whether Debtor used his various retirement plans "primarily for
4 retirement purposes".

5 IV. DISCUSSION

6 Section 704.115(a) defines a "private retirement plan" to
7 mean:

- 8 (1) Private retirement plans, including, but
not limited to, union retirement plans.
- 9 (2) Profit-sharing plans designed and used
for retirement purposes.
- 10 (3) Self-employed retirement plans and
individual retirement annuities or accounts
11 provided for in the Internal Revenue Code of
1986, as amended, including individual
12 retirement accounts qualified under Section
408 or 408A of that code, to the extent the
13 amounts held in the plans, annuities, or
accounts do not exceed the maximum amounts
14 exempt from federal income taxation under
that code.

15 CAL. CIV. PROC. CODE § 704.115. Section 704.115 provides a full
16 exemption for "private retirement plans" and a partial exemption
17 for "self-employed retirement plans". See CAL. CIV. PROC. CODE §§
18 704.115(a), (b) & (e); see also In re Cheng, 943 F.2d 1114, 1115
19 (9th Cir. 1991).

20 According to the Ninth Circuit, retirement benefit plans
21 established by a corporation solely owned by a debtor constitute
22 fully exempt "private retirement plans," as opposed to partially
23 exempt "self-employed retirement plans." In re Cheng, 943 F.2d
24 at 1117. Nevertheless, for a plan to fit within the ambit of
25 CCP § 704.115 it must *be designed and primarily used for*
26 *retirement purposes*. In re Kim, 257 B.R. 680, 685 (9th Cir. BAP
27 2000); see also In re Bloom, 839 F.2d 1376, 1378 (9th Cir.
28

1 1988); In re Jacoway, 255 B.R. 234, 239 (9th Cir. BAP 2000). In
2 determining whether a plan has been used primarily for
3 retirement purposes, all factors are relevant. In re Jacoway,
4 255 B.R. at 239. Courts have considered such factors as

5 [1.] whether withdrawals or loans were made
6 following the procedures set out in the
7 plan, [2.] whether the debtor used the plan
8 to hide otherwise ineligible assets from
9 bankruptcy administration, or from
10 creditors, [3.] whether the withdrawals or
11 loans benefitted the plan's retirement
12 purpose by preserving and enhancing the
13 capital of the plan, and [4.] whether any
14 withdrawals diminished or will diminish the
15 assets in the plan to such an extent that
16 they are inconsistent with the majority of
17 the assets being used for long-term
18 retirement purposes.

13 Id. at 239-40 (internal citations and quotations omitted).

14 Moreover, while noncompliance with the terms of the plan and/or
15 the Internal Revenue Code is not determinative, it does support
16 a finding that the plan is not being used primarily for
17 retirement purposes. See id. at 240 n.5.

18 Here, Debtor excessively contributed to the Pension Plan
19 beyond the already aggressive limits calculated by Kagan in
20 accordance with the Internal Revenue Code. More importantly,
21 Debtor's excessive contributions were willful. Each year, Kagan
22 communicated to Debtor the maximum that he could contribute to
23 the Pension Plan. Nonetheless, in 2003, Debtor contributed
24 \$231,828.30 to the Pension Plan, \$131,432 over the funding
25 limit.¹⁷ By the end of 2004, Debtor had over funded the Pension
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27 ¹⁷ While Kagan reduced this excess contribution to \$48,262
28 by counting approximately \$83,000 towards 2004, the fact remains
that Debtor contributed more than double the 2003 funding limits.

1 Plan by \$134,248.

2 Debtor testified that the amount and timing of the
3 contributions to the Pension Plan were dictated by the
4 availability of funds. Debtor further testified that, as a
5 mortgage broker, his income fluctuates and that he was merely
6 pre-funding the Pension Plan for future years.

7 Debtor lacks credibility. Debtor repeatedly failed to
8 disclose the excess contributions that he made to the Pension
9 Plan. In 2003, Debtor contributed \$148,658.30 more to the
10 Pension Plan than he originally reported. Moreover, Debtor
11 failed to disclose that the Pension Plan had purchased the
12 Property, and that he resided at the Property rent free. It was
13 not until Movant raised questions as to the propriety of the
14 Pension Plan that Debtor fully disclosed the amount of
15 contributions, disclosed the purchase of the Property, and paid
16 from his personal funds the excise taxes owed by Vision and
17 Secure on the excess contributions.

18 Debtor's treatment of the 401(k) Plans was even more
19 egregious. Debtor created six different 401(k) plans, two
20 through each of his wholly-owned corporations. Debtor
21 contributed to the 401(k) plans with complete disregard of the
22 multiple contribution limitations and reporting requirements
23 established by the Internal Revenue Code. By 2004, Debtor over
24 contributed to the 401(k) Plans by \$112,383. Moreover, between
25 2002 and 2004, Debtor contributed \$161,572 more to the 401(k)
26 Plans than reported in the mandatory annual reports.

27 In short, Debtor systematically stuffed the Pension Plan
28 and 401(k) Plans in excess of the legal limits. Moreover,

1 Debtor repeatedly failed to accurately disclose the
2 contributions made to the plans.¹⁸ The Internal Revenue Code
3 creates a system of funding limits, public reporting
4 requirements, and penalties to promote public scrutiny and
5 prevent abuse. See H.R. REP. NO. 93-533, pt. 4639, at 4649
6 (1974); see also H.R. REP. NO. 93-807, pt. 4670, at 4673 (1974).
7 Debtor completely disregarded these limits and reporting
8 requirements with the primary intent of frustrating Movant's
9 collection efforts by hiding these funds. Debtor consistently
10 broke the rules to accomplish this goal. Movant presented
11 substantial evidence demonstrating a pattern of lying,
12 misrepresentations, and questionable transactions designed to
13 frustrate his efforts to collect on the Judgment. The setting
14 up of the Pension Plan and the 401(k) Plans and the excessive
15 funding are part of Debtor's overall effort not to pay one cent
16 on the Judgment. When asked about payment on the Judgment,
17 Debtor responded "it is a black hole."

18 Therefore, based on all the facts and circumstances, I find
19 that Debtor set up and funded the Pension Plan and 401(k) Plans
20 primarily to shield and hide assets from Movant and not for
21 retirement purposes.

24 ¹⁸ Debtor attempted to pass the blame for his failure to
25 accurately disclose the contributions that he made to the Pension
26 Plan and the 401(k) Plans to his accountant, Jon Lavine
27 ("Lavine"), and Kagan. However, the annual reports were prepared
28 based on information Debtor provided to Kagan. Moreover, Debtor
signed the annual reports under penalty of perjury. Therefore,
the blame for failing to timely file accurate annual reports lies
with Debtor.

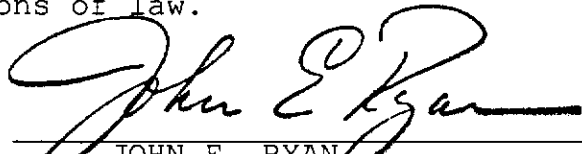
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V. CONCLUSION

Debtor knowingly and excessively over funded the Pension Plan and the 401(k) Plans. Moreover, Debtor repeatedly under-reported or failed to report the amounts contributed to the Plans. Therefore, I conclude that the Pension Plan and 401(k) Plans were not set up and funded primarily for retirement purposes, but rather to improperly shield and hide assets to frustrate Movant's efforts to collect on the Judgment.

Accordingly, Movant's objection to the Exemption is sustained. This memorandum decision shall constitute my findings of fact and conclusions of law.

Dated: September 22, 2006,



JOHN E. RYAN
United States Bankruptcy Judge

1
2 UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

3 In re) Case No. SA 06-10195 JR
4 LLOYD MYLES RUCKER,)
5 Debtor.)
6)

NOTICE OF ENTRY OF ORDER

TO:

7 OFFICE OF THE UNITED STATES TRUSTEE
411 WEST FOURTH STREET
8 SANTA ANA, CA 92701-8000

9 EVAN SMILEY
WEILAND, GOLDEN, SMILEY, WANG EKVALL & STROK, LLP
10 650 Town Center Drive, Suite 950
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13 26632 Towne Centre Drive, Suite 300
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15 LLOYD MYLES RUCKER
110 Washington Ave #1724
16 Miami Beach, FL 33139

17 THOMAS H. CASEY
18 22342 Avenida Empresa, Suite 260
19 Rancho Santa Margarita, CA 92688

20 You are hereby notified, pursuant to Bankruptcy Rule 7055
and 9022 that a judgment or order entitled MEMORANDUM DECISION
21 and ORDER SUSTAINING THE OBJECTION TO DEBTOR'S CLAIM OF OBJECTION
was entered on **SEP 22 2006**.

22 I hereby certify that I mailed a copy of this notice to the
23 above-named persons on **SEP 22 2006**.

24 Dated: **SEP 22 2006**

JON D. CERETTO

By 

Deputy Clerk

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