UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 03-50144
	)	Chapter 7
ROBERT HOLWAY	)	
Soc. Sec. No. XXX-XX-1119	)	
Debtor.	)	
	)	
LALEINE M. VAN LEUVEN	)	Adv. No. 03-5009
	)	
Plaintiff,	)	
	)	DECISION RE: COMPLAINT
-vs-	)	FOR DENIAL OF DISCHARGE
	)	
ROBERT HOLWAY	)	
	)	
Defendant.	)	

The matter before the Court is Plaintiff LaLeine M. Van Leuven's complaint seeking a denial of Defendant-Debtor Robert Holway's general discharge of debts. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompany order and judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Defendant-Debtor's general discharge will denied under 11 U.S.C. § 727(a)(4)(A).

I.

LaLeine Van Leuven ("Van Leuven") and Robert Holway ("Holway") were divorced on April 3, 2002. Pursuant to findings and conclusions made by the divorce court that day, Van Leuven received the marital home, Holway was obligated to pay her monthly alimony of $3,000, and the parties each assumed the credit card debts they

had personally incurred. In making this division, the divorce court found that Holway was the "true and sole" owner of an adult book store called Video Blue, formally known as Video Blue, L.L.C. ["Video Blue"]; the court did not recognize a claimed interest in Video Blue by Holway's son, Thomas Holway. The divorce court also found that Video Blue was worth more than $72,000. It ordered that Holway could not transfer any interest in Video Blue without that court's permission.[1]

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[1] On April 3, 2002, the divorce court specifically found, in pertinent part:

> 24. The Court values Video Blue at one hundred per cent (100%) to the Defendant [Robert Holway] for the reason that it appears that the LLC was formed for the purpose of siphoning off the Defendant's interest in the business. The Articles of Incorporation indicate Tom Holway contributed $165,000 towards the capital of this corporation which is not true. He transferred $165,000 worth of debt for a piece of business property that was going to be paid by the corporation. Defendant transferred into the LLC $100,000 in value of property which he did have equity in and $50,000 in inventory which he also had equity in. The amount of equity is not clear but probably ranged from $30,000 to $50,000. Those are the only actual capital outlays that went into the business. Defendant ran the business and it appears to the Court that he still manages this business and calls all the shots.
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> 25. A mortgage was presented to the Court at trial which was intended to reaffirm the original $165,000 debt to Tom Holway. This mortgage was executed one day prior to trial by Tom Holway and Bob Holway [Robert Holway]. There was testimony that the papers documenting the original debt are in the possession of either the IRS or the Treasury Department. The new mortgage placed a lien on Video Blue property which was already mortgaged or previously subject to lien through a contract for deed.
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> 26. The Court is aggrieved by this mortgage, which may or may not be any good, presented today. This indicates poor planning on the part of the Defendant when he had been ordered not to transfer property without the Court's permission. The Defendant also failed to provide a copy of this mortgage to Plaintiff and her attorney prior to the trial.
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> 27. The Court prohibits the Defendant from divesting himself of

Holway filed a Chapter 7 petition in bankruptcy on March 24, 2003. Among the personalty listed by Holway in his bankruptcy schedules were golf clubs valued at $100, two term life insurance policies valued at zero, no cash on hand, no jewelry, a zero balance for his checking account at Greatwestern Bank, and $100 in a Highmark Federal Credit Union savings account. Holway also stated on his schedules that he was not holding any accounts receivable or other debts or claims owed to him. He listed his interest in Video Blue as "Membership in Video Blue, LLC - value unknown $10,000+."[2]

On his schedule of income, Holway stated he receives monthly $1,183.00 in Social Security and a distribution of $3,780.72 from an "LLC," presumably Video Blue, though that was not stated. Based on his schedule of expenses, it appears this distribution from the

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> any interest in Video Blue without further order of the Court. The Defendant may choose to set up an annuity as a method to make sure that the Plaintiff has $300,000 in insurance and then the Court will relieve the Defendant from his duty not to encumber Video Blue.

The divorce court concluded, in pertinent part:

> 5. That the Defendant [Robert Holway] is the true and sole owner of the business Video Blue and shall be responsible for all debt and liability thereon. The Defendant may not transfer any interest without a court order to insure to the Court's satisfaction that alimony has been secured.

[2] Holway's bankruptcy attorney's assistant, Nancy Sleeper, affied that she put the "unknown $10,000+" value in the property description column because her software program would not accept that phrase in the correct property value column, where she just placed "0.00."

LLC pays for his alimony obligation to Van Leuven and possibly a life insurance premium on a policy for which Van Leuven is the beneficiary. On his Statement of Financial Affairs, where he was directed to state his income from employment or operation of a business for the current calendar year to the petition date and the two years immediately preceding the current year, Holway listed "-14,178.00" for "Wages from LLC" in 2001; nothing was provided for 2002 or 2003 to the date of his petition. Also on his Statement of Financial Affairs, Holway stated he did not make any property transfers within the year preceding his bankruptcy other than in the ordinary course of business, he was not holding or controlling any property owned by another person, and he did not have a bookkeeper or accountant who kept or supervised his records within two years before his petition in bankruptcy.

Holway listed four vehicles in his schedules: a 1998 VW Bug, a 2002 Camaro, a 2002 Chevy Tahoe, and a 2003 Chevy Avalanche. On his schedule of creditors holding secured claims, he said GMAC was fully secured on the Camaro and Tahoe, and that Highmark Federal Credit Union was undersecured by $1,894.52 on the Bug. No secured creditor was listed for the Avalanche. Holway did not declare any of the four vehicles exempt. His schedule of expenses did not list any monthly auto payments. On April 28, 2003, Holway indicated on his Statement of Intention that he would reaffirm the vehicle debts

with GMAC (the Camaro and Tahoe) and the credit union (the Bug).

On June 11, 2003, Van Leuven filed a complaint seeking a denial of Holway's discharge under 11 U.S.C. § 727(a)(4)(A). She alleged Holway had failed to schedule two golf carts, a leather couch and love seat, a digital video camera, and his interest in two life insurance policies, and that Holway had understated the value of Video Blue and his 2002 and 2003 year-to date income from that business. Van Leuven also sought a denial of Holway's discharge under § 727(a)(2) and (a)(4). She alleged Holway had transferred vehicles to his children in an attempt to conceal them from his bankruptcy estate. Alternatively, Van Leuven sought a declaration that her pre-petition claims against Holway for alimony and indemnification of certain credit card debts, in particular to Menards and Wells Fargo Bank, were excepted from discharge under 11 U.S.C. § 523(a)(5) as family support debts.

In his answer, Holway said he had scheduled the life insurance policies correctly and that they had no value since they were term policies. He said one of his sons owned the leather couch and love seat. He further answered that Video Blue owned the golf carts and digital camera referenced by Van Leuven. Holway argued that on his schedules he had not "grossly undervalued" his interest in Video Blue, and he said the value "may be impacted by the recent passage of an Adult Oriented Business Ordinance in Rapid City." As to the

nondischargeability claims under § 523(a), Holway admitted that his alimony obligation was nondischargeable, but he contended Van Leuven did not have any liability to either Menards or Wells Fargo for credit card debts.

On September 16, 2003, the day his deposition was taken in this adversary proceeding, Holway amended his schedule of personalty and schedule of exemptions. He added to his schedule of personalty three cell phones or telephones valued at $60; hand tools, $5; towels, bedding, and linens, $20; a Pentax camera, $40; a bowling ball, bag, and shoes, $20; and two firearms, described as ".25 cal and .35 cal," $50. Though he did not clearly itemize the changes on his amended schedule of exemptions, it appears that Holway declared all this additional personalty exempt.

By motion filed December 4, 2003, the case trustee proposed to sell the estate's interest in Video Blue for $35,000 to Holway's son, Thomas Holway. In the motion, the case trustee stated that on the petition date Holway "owned a minority equity shareholder interest" in Video Blue, and he restated the description and valuation given by Holway on his schedules. The case trustee described Thomas Holway as the "majority shareholder" in Video Blue.

The trustee said the proposed sale price was based on valuations performed by Certified Public Accountant Kenneth G.

Campbell, who was retained by the trustee,[3] and Certified Public Accountant Paul J. Thorstenson, whom the trustee described as Video Blue's accountant.[4]

The trustee's proposed $35,000 sale price was in the lower range of values placed on Holway's share by CPA Campbell in a letter to the trustee dated August 5, 2003. As stated in the letter, Campbell and his office were directed by the trustee to value Holway's "48% interest."[5] Campbell calculated a value range of $32,600 to $100,000 based on different valuation methods. Campbell noted for the trustee that Holway probably wields greater control over Video Blue than his claimed 48% interest would indicate and so Campbell did not discount Holway's interest as a minority interest. Campbell also noted that the business' value is

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[3] The case trustee has not yet filed an application to employ Campbell as an accountant for the bankruptcy estate.

[4] Thorstenson may not have been Video Blue's accountant. He did not sign Video Blue's 2002 tax return that was offered in evidence during the adversary trial. Van Leuven testified that Thorstenson valued Video Blue at the request of both parties as part of their divorce proceedings.

[5] Neither Holway's schedules nor his Statement of Financial Affairs identified his interest in Video Blue as a minority interest or as a 48% share. In the sale motion, the trustee refers only to a minority interest, though he apparently told CPA Campbell that Holway owned 48% of Video Blue. The first time Holway stated on the record that he holds a minority interest in Video Blue is in his July 10, 2003, Answer in this adversary proceeding. The first time in the record that Holway described his minority interest as 48% was in his September 5, 2003, answers to Van Leuven's interrogatories in this adversary proceeding.

probably higher because it has little competition in Rapid City. CPA Thorstenson, in a letter to divorce counsel dated October 24, 2001, said his projected value of Video Blue was based on a "35 percent equity interest" in a "going concern" made on May 31, 2001, in preparation for Holway and Van Leuven's divorce. When Thorstenson's earlier valuation of Video Blue, which was based on a claimed 35% interest, was recalculated by Campbell for a 48% interest, Thorstenson's value became $35,000. Both accountants noted in their valuation letters the poor state of Video Blue's financial records. Nothing in the record explained how and when Holway's claimed interest in Video Blue increased from 35% in May 2001 to 48% in August 2003.

No objection to the trustee's sale motion was filed, and an order approving the sale was entered December 31, 2003. However, the sale motion did not state the wide range of values calculated by Campbell, and contrary to Campbell's assessment, the sale motion stated that "the value of [Holway's] shareholder interest is limited by the nature of the business (adult bookstore and related items) and by his minority interest therein." Further, and most important, the trustee's sale motion did not recognize that the divorce court had concluded that Holway was the 100% owner of Video Blue and that Holway could not transfer an interest in Video Blue except upon the divorce court's order. Thus, it appears that the

case trustee did not pursue any issues regarding whether Thomas Holway had validly acquired, with the divorce court's blessing, a 52% interest in Video Blue for adequate compensation *after* Debtor Robert Holway's divorce on April 3, 2002, but *before* Debtor Robert Holway filed bankruptcy on March 24, 2003.

On December 22, 2003, while a deadline was pending for Holway to file a response and brief regarding Van Leuven's summary judgment motion in this adversary proceeding, Holway again amended his schedule of personalty. This time, he stated that the correct total in his Wells Fargo account was $162.34.[6] Holway also amended that day his Statement of Financial Affairs regarding income from employment or operation of business. For 2001, he now stated he received "$9,600.00 1099 misc. income [and] $29,500.00 distribution from LLC, paid out as alimony, etc." for a "Total adjusted gross income" of "$-34,078.00." For 2002, he stated he received "$34,474.00 'wages' from LLC, less alimony, etc., paid $45,034.00" for a "Total adjusted income" of "$-5,560.00." For 2003 through March 24, 2003, he stated, "Distribution from LLC at least $11,888.60 (paid to Robert Holway $546.44, balance to LaLeine Van Leuven for alimony and insurance)."

Holway amended his schedule of personalty a third time on

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[6] Holway did not declare this sum exempt so the Court presumes he has turned the funds over to the case trustee.

November 10, 2004, just a few days before the adversary trial was held, but over a year and a half after his petition was filed. This time he included as estate assets two 1993 golf carts. He valued them at $1,500.[7]

The adversary proceeding trial was held November 15, 2004. Holway conceded that Van Leuven's alimony claim, including his obligation to pay a portion of her divorce attorney's fees, was nondischargeable under § 523(a)(5), and the parties agreed that any pre-petition credit card claims against Van Leuven by Menards or Wells Fargo would be nondischargeable under § 523(a)(15). The evidence presented thus focused on Van Leuven's request for a denial of Holway's discharge.

Van Leuven testified that around the time the couple separated, Holway purchased a video camera. She also said that Holway owned two trailers, one of which she described as a "bed on wheels" that was used to haul golf carts. She said her former husband had two golf carts and that he seldom used them for business-related rounds. Although Holway did not schedule any jewelry, Van Leuven testified that she had given him a gold nugget necklace, which was valued at $737.50 on January 23, 1989, and that he also had a gold nugget ring with stones, which was appraised at

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[7] Holway did not declare these golf carts exempt so the Court presumes he has turned them over to the case trustee.

$933.00 on April 7, 1990. She said she saw him wear the ring at his deposition on September 16, 2003. Although Holway originally did not schedule any firearms in his bankruptcy, Van Leuven said Holway received from her a small revolver after the divorce decree was entered.

Presented at trial was Video Blue's 2002 federal income tax return.[8] Though the return stated the two shareholders, Holway and his son Thomas, divided a net loss of $18,127, the return also said that "officers" were compensated $83,200 in 2002 and $83,160 in 2001.

Also presented at trial was Holway's 2001 federal income tax return. It showed that he received no "Wages, salaries, tips, etc.," that he lost $14,178 from "Rental real estate, royalties, partnerships, S corporations, trusts, etc.," and that he had other miscellaneous income of $9,600, for a negative net income of $4,578. Both the return and Holway's amended Statement of

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[8] The tax return, dated April 21, 2003, raised a red flag. The tax payer's name on the return is "Video Blue 2000, L.L.C." That is also the business name referenced by CPA Campbell in his August 5, 2003, valuation letter to Trustee Whetzal. However, the certificate of organization by the South Dakota Secretary of State dated October 27, 1999, was for "Video Blue, L.L.C.," and that is the business name referenced by CPA Thorstenson in his valuation letter to divorce counsel dated October 24, 2001. The record does not disclose whether Video Blue 2000, L.L.C., is a separate or successor entity and, if a successor entity, how and when assets were transferred. According to Holway's 2001 tax return and Video Blue 2000's 2002 tax return, however, Video Blue, L.L.C., and Video Blue 2000, L.L.C., have the same employer identification number.

Financial Affairs had the same negative adjusted gross income of $34,078.

The two tax returns in evidence, Video Blue's return for 2002 and Holway's return for 2001, both stated Holway held a 42% interest in the L.L.C. That contrasts with the 48% interest that the trustee told CPA Campbell to use in his August 5, 2003, valuation and the 35% interest that was claimed by Holway when CPA Thorstenson made his valuation for the divorce on May 31, 2001. There was no evidence regarding how and when this percentage ownership interest changed twice between May 2001 and August 2003.

At trial, Holway testified that his son Lee Holway sold a business in July 2003 and used the proceeds to repay Holway a debt of about $8,500[9] (the original debt was $45,000), with Video Blue possibly serving as a conduit for the funds. This account receivable was not set forth on Holway's schedule of assets.[10]

Holway acknowledged at trial that his son Thomas did not have an independent business of his own that he merged with Holway's business, Piretel Investments, when Video Blue was formed. Holway

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[9] Holway's testimony at this point is not clearly audible. While he initially appears to have agreed with the undersigned's statement that the debt Lee Holway repaid was about $8,500, Holway also seemed to state that the debt was between $7,000 and $10,000.

[10] Holway did not claim exempt the Lee Holway loan (as an account receivable) so the Court presumes he has turned over the post-petition loan proceeds to the case trustee.

essentially conceded that his schedules did not reflect the divorce court's conclusion that he, Holway, actually owned 100% of Video Blue. There was no explanation regarding why he claimed a 35% interest at the time of his divorce, a 42% on his 2001 tax return, and a 48% interest at the time of his bankruptcy, all apparently based on the same "creation" of Video Blue with his son Thomas before the divorce proceedings were begun.

Holway acknowledged that at one time he owned two trailers, though none were scheduled in his bankruptcy. He testified he and Van Leuven each got one after the divorce. He said his trailer was originally in his son Thomas Holway's possession, though he (Holway) still held title. Holway said his trailer was sold after he filed bankruptcy.[11]

As to the golf carts that Van Leuven alleged were not properly scheduled, Holway acknowledged he was awarded two golf carts in the divorce. He said the two carts were purchased new in 1993 for $7,000 with his home owner's insurance proceeds after some older carts were lost in a fire at a golf course storage shed. He said he initially felt that the carts were owned by Piretel, his earlier corporation, because they replaced golf carts that Piretel owned. He acknowledged that on November 10, 2004, upon the advice of his

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[11] The Court presumes Holway has now turned over to the trustee the proceeds received when the trailer was sold since the funds are an estate asset.

bankruptcy counsel and following an appellate decision on Van Leuven's summary judgment motion, he amended his schedules to include the golf carts as estate assets.[12]

Holway testified that he quit wearing jewelry because it bothered his skin as he aged. He said shortly after he left the marital home in September 2000, he gave away the gold nugget ring and other items he could not wear or did not want. He said he kept a watch and some other things he still needed. He said he was not wearing the gold nugget ring at the September 16, 2003, deposition, contrary to Van Leuven's testimony.

Holway acknowledged at trial that he did not originally schedule any cash on hand, that he had to amend his schedules to correct the amount of funds in his checking account, that he forgot to schedule coins he valued at $10 in a safe deposit box (he originally listed them only in his Statement of Financial Affairs)[13], and that he failed to disclose in his Statement of Financial Affairs that he had a bookkeeper, Karen Carlton, who prepared his tax returns before she became ill. He also acknowledged that he initially failed to schedule an older Pentax

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[12] Holway did not declare the two golf carts exempt so the Court presumes he has turned the carts over to the case trustee.

[13] Holway did not declare the safe deposit box contents exempt so the Court presumes he has turned the contents over to the case trustee.

camera that he felt had no value, though two cameras had been itemized during the couple's divorce and apparently valued at $400 each. Holway testified that his son owned a video camera but that he did not. Holway further acknowledged that he initially failed to schedule two pistols he owns.

Holway was not able to explain how his income figures were calculated. He acknowledged that Video Blue has paid his divorce attorneys' fees, credit card debts, and his alimony obligation, but he did not clearly explain how and when he received these distributions from Video Blue. Upon questioning from the Court, Holway further stated that he incurred credit card debt for purchases or cash advances on Video Blue's behalf. Though he had substantial credit card debt listed on his schedules, Holway testified that Video Blue did not owe him any money.

At the trial, Holway testified that when he told his car dealer that he (Holway) was headed toward bankruptcy, the car dealer urged him to trade-in leased vehicles and to purchase others that he would own outright. Holway said he drives only the Tahoe; he said his son Thomas drives the Camaro and Avalanche, and the Bug is a "lemon" that no one drives. Holway testified that the four vehicles on his schedules are titled in his name but that Video Blue makes all the car payments and pays all the insurance. The

amount of these payments was not established at trial.[14] Holway also testified that his country club membership is paid by his son. It was unclear whether these car and insurance payments made by Video Blue for Holway's vehicles or the country club dues paid for Holway by Thomas Holway were reflected on Holway's schedule of income or as income from employment or business on his Statement of Financial Affairs and the amendments to these documents.

II.

A Chapter 7 debtor is not entitled to a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account[.]" 11 U.S.C. § 727(a)(4)(A). "Statements made in schedules are signed under penalties of perjury and have 'the force and effect of oaths[.]'"

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[14] In his September 5, 2003, answers to Van Leuven's interrogatories, Holway said Video Blue owed a secured debt to GMAC on three vehicles, the Camaro, Tahoe, and Avalanche. The answer stated GMAC held a "[s]ecurity interest in vehicles purchased and owned by Piretel Investments, Inc., or Robert W. Holway and assigned to Video Blue, LLC." The answer further stated: $28,048.33 was owed on the Camaro with monthly payments of $553.85; $32,423.16 was owed on the Tahoe with monthly payments of $640.24; and $41,961.60 was owed on the Avalanche with monthly payments of $699.36. Neither party introduced documents to establish this information at trial. The present record indicates that all vehicles are titled in Robert Holway's name, that there are no secured claims against the Avalanche, and that Holway has not declared the Avalanche exempt. The Court, assumes, therefore, that the Avalanche has been turned over to the trustee and that equity in any of the other three vehicles has been or will be realized on behalf of the estate.

Korte v. Internal Revenue Service (*In re Korte*), 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001)(quoting *Golden Star Tire, Inc. v. Smith (In re Smith)*, 161 B.R. 989,992 (Bankr. E.D. Ark. 1993)(cite therein)).

For a false oath to bar a debtor's discharge, it must be both material and made with intent. *Korte*, 262 B.R. at 474 (citing, *inter alia*, *Mertz v. Rott* (*In re Mertz*), 955 F.2d 596, 598 (8th Cir. 1992); *Palatine National Bank v. Olson* (*In re Olson*), 916 F.2d 481, 484 (8th Cir. 1990)). The threshold for materiality is low. *Korte*, 262 B.R. at 474 (cites therein)(cited with approval in *Jordan v. Bren (In re Bren)*, No. 04-1522, slip op. at 2 (8th Cir. Jan. 27, 2005)). A statement is material

> if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of [the debtor's] property.

Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984)(cite therein)(cited with approval in *Mertz*, 955 F.2d at 598, and *Olson*, 916 F.3d at 484).

As for intent, since a debtor will rarely, if ever, admit he intended to deceive his creditors, "[i]ntent 'can be established by circumstantial evidence,' and 'statements made with reckless indifference to the truth are regarded as intentionally false.'" *Korte*, 262 B.R. at 474 (quoting *Smith*, 161 B.R. at 992 (cite therein))(cited in *Bren*, slip op. at 2). *See also Keeney v. Smith*

(*In re Keeney*), 227 F.3d 679, 686 (6th Cir. 2000)("A reckless disregard as to whether a representation is true will also satisfy the intent requirement."); *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)("[N]ot caring whether some representation is true or false . . . is . . . the equivalent of knowing that the representation is false and material."). Further,

> [w]here the debtor has engaged in a pattern of omissions or committed numerous inaccuracies a presumption may be made that the debtor acted with fraudulent intent or acted with such reckless disregard for the truth as to be equivalent of fraud.

Spencer v. Hatton (*In re Hatton*), 204 B.R. 470, 475 (Bankr. E.D. Va. 1996)(citation omitted).

> The Debtor had an excuse as to each falsely answered question; either he didn't understand that the item had to be included since it was primarily the obligation of another or was of no real value to his estate.
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> Individually, any one answer may have been the result of an innocent mistake. However, the cumulative effect of all the falsehoods together evidences a pattern of reckless and cavalier disregard for the truth serious enough to supply the necessary fraudulent intent required by § 727(a)(4)(A).

Guardian Industrial Products, Inc. v. Diodati (*In re Diodati*), 9 B.R. 804, 808 (Bankr. D. Mass. 1981)(cite therein). *See Bren*, slip op. at 6 ("It is reckless - perhaps even willful - to persist in ... a high degree of ignorance about one's financial affairs during and after bankruptcy."); *Camacho v. Martin (In re Martin)*, 88 B.R. 319, 324 (D. Co. 1988)(a "reckless disregard of both the

serious nature of the information sought and the necessary attention to detail and accuracy in answering may give rise to the level of fraudulent intent necessary to bar a discharge") (quoting therein *Diodati*, 9 B.R. at 808) (cited in *Bren*, slip op. at 6).

The party bringing a denial of discharge complaint has the burden of proof by a preponderance of evidence. *Farouki v. Emirates Bank International Ltd.*, 14 F.3d 244, 249 (4th Cir. 1994) (cited in *Cepelak v. Sears (In re Sears)*, 246 B.R. 341, 348 (B.A.P. 8th Cir. 2000)). Once the complainant has made a *prima facie* case, the burden may shift to the debtor to provide satisfactory, explanatory evidence. *Farouki*, 14 F.3d at 249. The ultimate burden rests with the complainant. *Id.*

III.

Van Leuven has identified several apparent deficiencies in Debtor's original schedules and statements. The Court will focus on two: Holway's valuation of his interest in Video Blue at $10,000+ on his schedule of personalty and Holway's failure to fully and accurately disclose his gross income for 2001, 2002, and 2003 to the petition date on his original Statement of Financial Affairs. These misdeeds by Holway can be jointly labeled as the cornerstone of his continuing effort to hide assets and income by using Video Blue as a shield or cover. The divorce court did not

accept this ruse, and the Bankruptcy Court will not, indeed cannot, do so either.

The state divorce court found that Holway was the 100% owner of Video Blue and that the value of Video Blue was at least $72,000. As discussed below, this Court is bound by the divorce court's findings and conclusions on that issue. S.D.C.L. § 25-4-44 and *Anderson v. Somers*, 455 N.W.2d 219, 221 (S.D. 1990)(absent fraud or grounds for relief under S.D.C.L. § 15-6-60(b), "[a] divorce decree which divides or allots property or provides for payment of a gross sum in lieu thereof is a final and conclusive adjudication and cannot be subsequently modified")(cites therein).

Issue preclusion (also known as collateral estoppel) "applies to legal or factual issues 'actually and necessarily determined,' with such a determination becoming 'conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" *W.A. Lang Co. v. Anderberg-Lund Printing Co. (In re Anderberg-Lund Printing Co.)*, 109 F.3d 1343, 1346 (8th Cir. 1997)(citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). Federal courts, including this Bankruptcy Court, must give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered. *North Star Steel Co. v. Midamerican Energy Holdings Co.*, 184 F.3d 732, 737 (8th Cir. 1999); *Anderberg-Lund Printing Co.*, 109 F.3d at 1346 (citing *Katchen v.*

Landy, 382 U.S. 323, 334 (1966)). Under South Dakota law, a party may be collaterally estopped from re-litigating an issue if:

> (1) [t]he issue decided in the prior adjudication was identical with the one presented in the action in question;
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> (2) [t]here was a final judgment on the merits;
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> (3) [t]he party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
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> (4) [t]he party against whom the plea is asserted had a full and fair opportunity to litigate the issue in the prior litigation.

SDDS, Inc. v. State of South Dakota, 569 N.W.2d 289, 293-94 (S.D. 1997) (citing *Grand State Property, Inc. v. Woods, Fuller, et al.*, 556 N.W.2d 84, 87 (S.D. 1996) (cite therein)). All those factors are present here regarding the issue of Holway's ownership interest in Video Blue and Video Blue's minimum value in 2002.

The divorce court's findings could not be clearer. It found that Holway was the 100% owner of Video Blue. It ordered that Holway could not transfer an interest in Video Blue except with its permission. There is no evidence that between his divorce on April 3, 2002, and his petition date of March 24, 2003, Holway never received permission from the divorce court to transfer an interest in Video Blue to his son Thomas or that Thomas thereafter ever gave Holway valid consideration for any interest in Video Blue. Thus, Holway is estopped from re-litigating the issue of the

extent and value of his interest in Video Blue.

Despite the divorce court's ruling, when Holway filed his bankruptcy, he tried to hide his net worth and his income by again claiming only a minority interest in Video Blue and by saying Video Blue did not compensate him regularly but just "helped him out" as needed with his expenses. For Holway to make those claims before the Bankruptcy Court when the divorce court had disregarded them entirely less than a year earlier is, at a minimum, a reckless disregard for the truth but more likely an outright falsehood. Moreover, Holway's claim that the value of Video Blue has decreased due to community pressure on adult businesses has little merit. There was no evidence presented that this community pressure affected the value of Video Blue at the time of his petition. Further, Holway never quantified the impact of this perceived community pressure or substantiated that it even existed with any evidence other than his cursory, self-serving testimony. Accordingly, Holway's discharge will be denied under § 727(a)(4)(A) because his schedules did not accurately reflect the value of his interest in Video Blue.

That Holway did not fully and accurately disclose on his Statement of Financial Affairs his income from employment or operation of a business is equally troubling and is also cause for denying Holway's discharge under § 727(a)(4)(A). When Holway

commenced his bankruptcy case, income information for 2001 and 2002 should have been readily available from his and Video Blue's tax returns, assuming, of course, the returns were accurate. There was no justification for listing only a brief entry for just one year, 2001. Moreover, Holway's December 22, 2003, amendment to his Statement of Financial Affairs, in which he purported to disclose his income from Video Blue in 2002 and 2003 to the petition date and to correct his disclosure for 2001, was certainly not timely, and it offered only a slight improvement in the quality of information disclosed. The amendment was difficult to decipher, and it did not follow the instruction on this official form to list gross income. Instead, for 2001, Holway listed "adjusted gross income"; for 2002, he listed "adjusted income"; and for 2003, he did not list any total and only stated he had received a "[d]istribution from LLC [of] at least $11,888.60" in the form of direct payments or alimony payments to Van Leuven. Thus, the amendment only reinforced the conclusion reached by the divorce court and the two CPAs that Video Blue and Holway kept very poor financial records and the conclusion reached by this Court that the poor record keeping has been intentional.

The other inaccuracies in Holway's schedules further underscore Holway's cavalier attitude toward the Bankruptcy Court and his creditors and his recklessness in preparing his schedules

and Statement of Financial Affairs. Why did Holway not disclose that he had an accountant who kept his financial records, a simple question that required only a simple answer? Why did Holway's original schedule of personalty fail to include two golf carts, a trailer, safe deposit box contents, and two fire arms, in addition to some typical household goods that he owned, and why did he fail to provide an accurate balance for his Wells Fargo account? Why did Holway not list as an asset a debt owed to him by his son Lee? Holway has offered no satisfactory answer to these questions, and none appears from the record.

The Court cannot conclude that Holway transferred title of any of his four vehicles in order to keep the vehicles outside the bankruptcy estate. There was insufficient evidence to make any determinations regarding the vehicles and thus deny Holway a discharge under § 727(a)(2) and (a)(4) on those grounds. The Court will leave it to the case trustee to determine if equity exists in any of the four vehicles, which Holway admits are all titled in his name, and to recover the same.

IV.

Finally, this Court must state for the record that Holway's Chapter 7 case is an embarrassment to this Court and the entire bankruptcy system. But for this adversary proceeding, many of these problems may have gone undetected. Whether Holway filed for

Chapter 7 relief in an attempt to delay his financial obligations to his former spouse or whether he was trying to discharge business debts that he conveniently placed on personal credit cards, his motivation was for filing the case was never appropriate. And once filed, the case has been poorly administered.

Foremost, from the beginning of his bankruptcy case and apparently with his bankruptcy counsel's blessing, Holway continued before this Court a misguided attempt to place a large portion of Video Blue's value with Thomas Holway. The divorce court clearly negated that effort earlier. Holway's attempt to circumvent the Chapter 7 liquidation process with the same ploy is deplorable.

Second, when the case was commenced, Holway and his counsel never made a sincere effort to file complete and accurate schedules and a Statement of Financial Affairs. Holway's subsequent amendments to these required documents were filed only when deadlines or possible consequences loomed, and the amendments themselves were often deficient and certainly not models of clarity.

Third, while during the adversary trial Holway claimed that he did not understand what disclosures were required of him, he was nonetheless obligated to fulfill his duties as set forth under 11 U.S.C. § 521 and the official forms. He was required to declare, and indeed did declare, that his schedules were true and

correct to the best of his knowledge, information, and belief, and that his answers on his Statement of Financial Affairs were true and correct. Moreover, it was Holway's attorney's responsibility to guide Holway through the bankruptcy process and insure that Holway understood and fulfilled his duties as set forth in the Code and the official forms. The consequences for an ignorant debtor, *see* 11 U.S.C. § 727(a) and 18 U.S.C. §§ 152 and 157, and the consequences for that debtor's attorney, *see* Fed.R.Bankr.P. 9011(c), can be profound.

Fourth, the case trustee does not appear to have actively managed the case.[15] Notably, the trustee appears to have been satisfied with information provided informally by Holway and his attorney regarding Holway's assets and their value, especially Video Blue. He even apparently discounted the Video Blue valuation performed by his own CPA. The case trustee also did not recognize the legal import of the divorce court's findings regarding Video

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[15] Some actions by the trustee do not appear timely. For example, although Holway's *original* schedules indicated the estate had significant assets (Video Blue with a scheduled value of "10,000+," the US Bank money market account scheduled at $7,362.50, equity in the Camaro scheduled at $1,951.67, and equity in the Avalanche scheduled at $40,000 for total available assets of not less than $59,314.17), the case trustee did not request proofs of claims until nearly a year after the petition. Also, although Holway's interest in Video Blue was never claimed exempt or encumbered, the trustee did not move to sell that interest until about eight months after the case was commenced and about four months after CPA Campbell completed his valuation.

Blue's value and Holway's interest in it.

It is unknown whether the case trustee has recovered the $7,362.50 in money market funds and the $162.34 in the Wells Fargo account that were not claimed exempt, the Avalanche that is apparently free and clear of liens and not declared exempt, the unscheduled loan proceeds from Lee Holway, the two golf carts that were not declared exempt, the proceeds from the trailer that Thomas Holway had in his possession and then sold, the items in Holway's safe deposit box, or the estate's share of any income Video Blue earned from the petition date until that interest was sold on December 31, 2003. In fact, based on the case trustee's status letter to the Court dated August 18, 2004, it appears he had not yet identified or recovered any assets except the $35,000 in Video Blue proceeds and that he had recently met with Holway's counsel to discuss any nonexempt personalty "that may exist." Thus, what is known about the case is there has been a complete and utter failure by the trustee to fulfill his duties under 11 U.S.C. § 704.

Finally, Van Leuven and her counsel added to the disorder in Holway's bankruptcy case by not objecting to the sale of Video Blue as proposed by the case trustee. That would have been the time to bring to the Court's attention the divorce court's finding that Holway was the 100% owner of Video Blue and that the value of that

interest had already been valued at not less than $72,000.

All in all, Holway's bankruptcy case has been a model for how the bankruptcy system should *not* work. And a case like it should not be repeated.

An order and judgment denying Holway a discharge under § 727(a)(4)(A) will be entered.

Dated this 31st day of January, 2005.

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

JAN 3 1 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By _____

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By _____ Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 3 1 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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