UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 16-50207
	)	Chapter 7
DOUGLAS JOHN KERKVLIET	)	
SSN/ITIN xxx-xx-1121	)	
	)	
Debtor.	)	
	)	
ACE OILFIELD RENTALS, LLC	)	Adv. No. 16-5009
	)	
Plaintiff	)	
-vs-	)	
	)	DECISION RE: DENIAL OF DISCHARGE
DOUGLAS JOHN KERKVLIET	)	
	)	
Defendant.	)	

The matter before the Court is Plaintiff Ace Oilfield Rentals, LLC's complaint seeking a denial of Debtor-Defendant Douglas John Kerkvliet's discharge of debts.[1] This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.R.Bankr.P. 7052. For the reasons discussed below, the Court will deny Kerkvliet's discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and § 727(a)(4)(A).

I.

Douglas John Kerkvliet and Tucker Don Pankowski formed, owned, and operated Western Dakota Welding and Fabrication, LLC ("Western"). Kerkvliet held a 51% interest and Pankowski held the remainder.[2] Ace Oilfield Rentals, LLC ("Ace")

[1]Because Kerkvliet's discharge will be denied, the Court does not reach Ace Oilfield Rentals, LLC's alternative request that its particular claim be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2), (4), or (6).

[2]Exhibit A to Western's Operating Agreement indicates Kerkvliet made a $150,000.00 capital contribution for his 51% interest and Pankowski made a

contracted with Western to fabricate trailer-mounted hydraulic catwalks for "wrangling pipe" over oil rigs. Though not referenced in the parties' Manufacturing Agreement, a manufactured unit became known as a "HydraCat."[3] The Manufacturing Agreement provided Western would be Ace's "sole and exclusive Manufacturer" of the HydraCats and also provided:

> **8. Confidentiality**
> Manufacturer in the course of performing the Services hereunder may gain access to certain confidential or proprietary information of the Client. Such "Confidential Information" shall include all information concerning the business, affairs, products, marketing, systems, technology, customers, end-users, financial affairs, accounting, statistical data belonging to the Client and any data, documents, discussion, or other information developed by Manufacturer hereunder and any other proprietary and trade secret information of Client whether in oral, graphic, written, electronic or machine-readable form. The Manufacturer agrees to hold all such Confidential Information of the Client in strict confidence and shall not, without the express prior written permission of Client, (a) disclose such Confidential Information to third parties; or (b) use such Confidential Information for any purposes whatsoever, other than the performance of its obligations hereunder. Manufacturer shall hold its employees to the same terms of this confidentiality agreement. The obligations under this Section shall survive termination or expiration of this Agreement.
>
> **9. Non-Compete Clause**
> In exchange for the independent and valuable consideration described above, Manufacturer will not solicit, contact, or communicate with any person,

---

$5,000.00 capital contribution for his 49% interest. This seeming disparity was not addressed on the record.

[3]Some documents refer to a unit as a "Hydra Cat," with a space in the middle, and less often as a "Hydra-Cat."

> company, or business that is or was a client, customer, or prospective client of Ace Oilfield Rentals, LLC. Manufacturer will not engage in the Same or Similar Business as the Client. If client or customer wants to purchase a hydraulic catwalk rather than rent or lease from Ace Oilfield Rentals, LLC, Manufacturer will in advance, notify Client of situation so that Client can rectify situation with the customer. If situation cannot be rectified, Manufacturer will obtain a written statement from Client agreeing to the sale.
> . . . .
>
> **15. Right of First Refusal**
> Manufacturer agrees to give Client the right of first refusal for any orders of hydraulic catwalks to any other customers of Manufacturer. Client can refuse the production of one and still reserve the right to accept production of the next. In the event of multiple orders to Manufacturer, by customers other than Client, Manufacturer agrees to give Client the opportunity to purchase the next unit and all subsequent units. For example, if another customer wants to purchase two units, Manufacturer can only agree to build one unit for the other customer after Client has declined that unit in writing and the second unit requested cannot be built for the other customer unless Client declines that unit in writing as well.

Kerkvliet and Pankowski were both aware that under the Manufacturing Agreement Western was not authorized to manufacture and sell HydraCats on its own.

Over the next 18 months, Western manufactured ten HydraCats for Ace that Ace then leased, sold, or retained for later sale or leasing. Western added to its building in the second half of 2014 to foster production.

In late November 2014, while Western was manufacturing its eleventh HydraCat for Ace, Ace ordered two more HydraCats from Western. Three days later, Ace cancelled the order in light of waning drilling in nearby oil fields. Western returned

the $240,000.00 deposit Ace had made for the two new units. Both Western and Ace hoped the situation would improve sufficiently to warrant the manufacturing of additional HydraCats in the future, though at some point Kerkvliet and Pankowski began, on the advice of counsel, to consider the Manufacturing Agreement with Ace to have ended due to Ace's cancellation of its November 2014 order. Western finished the eleventh HydraCat that Ace had ordered earlier, and Ace completed payment and later took possession of that unit.[4]

Though it did not have an active order from Ace, Western manufactured two more HydraCats in late 2014 and the first half of 2015. Western sold both HydraCats, the first directly to Consolidated Wellsite Services, LLC ("Consolidated Wellsite") for $200,000.00 and the second directly to Continental Industries Field Services, LLC ("Continental Industries") for $162,500.00. Consolidated Wellsite had been in negotiations with Ace since late 2014 to acquire another HydraCat through Ace, but instead bought one directly from Western, making its final payment on February 13, 2015. Ace learned of Western's direct sale to Consolidated Wellsite in December 2014. Western did not give Ace the opportunity to purchase this HydraCat first, contrary to the terms of the Manufacturing Agreement. When Ace learned of the sale, one of Ace's principals contacted Kerkvliet by telephone, requesting Ace's lost profit from the sale and assurances a direct sale would not happen again. Ace did not receive either.

[4]How and when Ace obtained possession of the eleventh HydraCat appears to have been the subject of one count of Ace's Oklahoma lawsuit but was not part of its complaint in this adversary proceeding.

Regarding the HydraCat sold to Continental Industries, Western had been in negotiations with Continental Industries since about March 2015. Western sent an unsigned letter to Ace dated March 13, 2015 advising Ace it could purchase this unit for $203,000.00.[5] Ace did not respond directly, but forwarded the letter to its attorney. Continental Industries made a deposit in August 2015 for a unit and completed payment in September 2015. Though the record is unclear regarding when Ace first informed Kerkvliet and Pankowski that Ace would seek legal recourse regarding Western's direct sales of HydraCats to Consolidated Wellsite and Continental Industries, it appears a heated telephone call on this topic involving Kerkvliet, Pankowski, and a representative of Ace occurred in April 2015, after Ace received the March 13, 2015 letter from Western.

At some point, Western began advertising, through its website, the sale of HydraCats. Western's website did not, as of April 14, 2015, mention Western's affiliation with Ace, but instead stated: "Buy direct from the manufacturer and SAVE!" Its website as of April 14, 2015 also referred to the HydraCat as "our machine."

Ace commenced litigation against Western, Kerkvliet, and Pankowski before an Oklahoma state court on May 13, 2015. The state court action was removed to the United States District Court for the Western District of Oklahoma on June 19, 2015. Discovery continued over the next several months, with the federal district court

[5]In a June 6, 2017 deposition, Kerkvliet testified the correspondence to Ace was sent relative to Western's sale of a HydraCat to Consolidated Wellsite. The record otherwise indicates the correspondence related to Western's sale of a HydraCat to Continental Industries.

setting a discovery completion deadline of August 4, 2016.

Though when the idea was formulated is not known, Kerkvliet and Pankowski decided they would extinguish Western and Pankowski would continue the business as a different company. They also decided to file personal bankruptcy cases. According to Pankowski in his deposition testimony given June 6, 2017, Kerkvliet initially approached Dacotah Bank regarding financing for Pankowski to buy out Kerkvliet's interest in Western, and it was Kerkvliet who filled out the Personal Financial Statement Pankowski signed and later gave to First Interstate Bank, the eventual lender. On February 26, 2016, Kerkvliet provided First Interstate Bank some Profit & Loss statements for Western. These documents stated Western had net income of $201,780.62 in 2013, $463,495.62 in 2014, and $274,353.66 in 2015.

At Pankowski's request, an attorney with the Rapid City law firm of Gunderson, Palmer, Nelson & Ashmore, LLP did the legal work necessary to create a new limited liability company. By Articles of Organization signed and dated by the attorney on March 22, 2016 and filed with the South Dakota Secretary of State on March 24, 2016, WesDak Welding and Diesel, LLC ("WesDak") was formed. Gunderson, Palmer paid an extra fee to the South Dakota Secretary of State to expedite the processing. The Articles of Organization identified Pankowski as the initial manager. Pankowski testified at trial that Thomas Collings, Keith A. Geditz, and he were WesDak's members. Collings was an employee of Western at the time. Pankowski also testified he assumed a 75% interest in WesDak; the Court was unable to find in the record WesDak's membership agreement or other documentation regarding Collings's and

Geditz's split of the remaining 25% interest.

A representative of First Interstate Bank evaluated the business property on March 25, 2016. The resultant Commercial Real Estate Evaluation dated April 6, 2016, which was created for the bank's own consideration, listed WesDak as the real property owner and borrower. The evaluation also stated:

> One owner is purchasing the other 49% of the business from the other owner at the present time. They have agreed on a purchase price of $385,000 for the 49% ownership interest or approximately $770,000 for the entire company. They have not settled on the specific allocation of the purchase price, but it includes real estate, inventory, and equipment.

Thus, the evaluation incorrectly indicated a purchase of existing interests was taking place and erroneously indicated Pankowski was transferring his interest to Kerkvliet. Further, the evaluation did not recognize WesDak was a newly created entity, Kerkvliet held no formal interest in WesDak, or the real property and other business assets were still owned by Western as of March 25, 2016. For its in-house consideration of the proposed loan, First Interstate Bank determined the mortgaged real property was worth at least $500,000.00.[6] First Interstate Bank also determined, after reviewing the 2015 Profit & Loss statement provided by Kerkvliet, the business had sufficient cash flow to service a new loan.

By check dated March 31, 2016, and with the notation "Set up new bank account[,]" Western transferred $5,000.00 to First Interstate Bank, and First Interstate Bank used the funds to open a new account for WesDak. WesDak borrowed

[6]Based on definitions and statements in the evaluation, it appears the $500,000.00 was for the real property and building only. It does not appear the evaluator also included the value of the ongoing business.

$385,943.56, plus $200.00 for fees, from First Interstate Bank on April 13, 2016. With the loan funds provided by First Interstate Bank, Western's loan balance of $383,297.56 with Dacotah Bank was paid in full.[7] Western provided $2,471.76 in cash to pay real estate taxes. First Interstate Bank took a mortgage from WesDak dated April 13, 2016, and Pankowski, Collings, and Geditz each gave First Interstate Bank a Commercial Guaranty regarding WesDak's new loan.[8]

On April 13, 2016, Kerkvliet signed, on Western's behalf, a Warranty Deed transferring the business real property to WesDak. Attorney Gerald M. Baldwin of Custer prepared the Warranty Deed. The Warranty Deed was notarized on April 13, 2016 and recorded on April 14, 2016.[9] First Interstate Bank filed its Financing Statement with the South Dakota Secretary of State on April 14, 2016.

Contrary to affirmative disclosure requirements in the Business Loan Agreement with First Interstate Bank, WesDak and its members did not disclose Ace had pending litigation against Pankowski or that Pankowski planned to soon file bankruptcy. According to Heidi McBride, a commercial loan officer with First Interstate Bank, she would liked to have known about both matters when the bank was deciding whether

[7]Settlement Statements included in a joint exhibit indicate that at closing two mortgages held by Dacotah Bank and real estate taxes owed to the Custer County Treasurer were paid. The statements also set forth closing costs of $2,846.00, which WesDak paid.

[8]Only Pankowski's signed guaranty was made a part of the record, but the Business Loan Agreement refers to guaranties by all three members of WesDak. Heidi McBride, a commercial loan officer with First Interstate Bank, also testified all three members of WesDak gave the bank a personal guaranty.

[9]The Warranty Deed at Joint Exhibit 6 does not contain the register of deeds's recording stamp; the Warranty Deed at Exhibit 19 of Kerkvliet's deposition does.

to make a loan to WesDak.

WesDak and Western executed a separate Asset Purchase Agreement wherein WesDak took Western's assets but not its liabilities. The Asset Purchase Agreement, which had been prepared for WesDak by an attorney with Gunderson, Palmer, was dated March 31, 2016 in its opening paragraph but was not signed by Kerkvliet, as Western's officer, and Pankowski, as WesDak's manager, until May 18, 2016. Only WesDak was represented by counsel regarding the agreement. In the Asset Purchase Agreement, Western did not disclose Ace's claim against it. Instead, the document included the following paragraphs:

> 7.5 **ABSENCE OF UNDISCLOSED CLAIMS OR LIABILITIES**. Except as disclosed on Exhibit 7.5, there are no material claims or liabilities of any nature, whether accrued, not accrued, absolute, contingent or otherwise, which exist presently or which may arise in the future as a result of activities of [Western] or the Business on or prior to the Closing Date which would impose any transferee liability on [WesDak].
>
> 7.6 **LITIGATION**. Except as disclosed on Exhibit 7.6, there is no governmental or private litigation, investigation, proceeding, claim, suit or audit of any kind whatsoever, pending against [Western] or the Business, including any mechanic's lien pending or which has been filed. Except as disclosed on Exhibit 7.6, there is no private person, other entity, or governmental agency that has any basis for any cause of action, whether or not known or asserted, which would cause [Western], the Business or [WesDak], as a transferee, to suffer any loss or liability not disclosed herein.

Neither an Exhibit 7.5 nor an Exhibit 7.6 was appended to the record copy of the Asset Purchase Agreement, and Kerkvliet was unable to affirm an Exhibit 7.6 ever

existed. The consideration stated in the Asset Purchase Agreement was $384,936.44–a sum close to the $383,297.56 WesDak borrowed and used to pay in full Western's loan from Dacotah Bank.

Kerkvliet also signed a Bill of Sale dated March 31, 2016 on Western's behalf. Therein, numerous items of personalty were listed that Western was transferring to WesDak. The Bill of Sale stated the consideration is "set forth in the attached Asset Purchase Agreement[.]" The Asset Purchase Agreement included various items of personalty as part of the "Purchased Assets" being sold for $384,936.44. Neither the Bill of Sale nor the Asset Purchase Agreement included Western's bank accounts, cash on hand, or accounts receivable as personalty being transferred to WesDak. What those amounts were on March 31, 2016 and what happened to those assets is not of record.

Western filed Articles of Termination with the South Dakota Secretary of State on May 5, 2016 using the secretary's form. According to the completed form, Western had been dissolved on April 1, 2016. Kerkvliet signed and dated the form on April 28, 2016.

The Court was unable to find anything in the record showing Collings or Geditz provided capital or other consideration for their interests in WesDak. The Court was also unable to find anything in the record showing Pankowski provided capital or other consideration for his interest in WesDak or find anything explaining how his 49% interest in Western morphed into his 75% interest in WesDak.

In mid-2016 in the Oklahoma litigation, Ace filed a summary judgment motion.

Ace was also scheduled to take Pankowski's deposition on July 27, 2016 and Kerkvliet's deposition on August 2, 2016.

On July 25, 2016, Kerkvliet and Pankowski each commenced a chapter 13 bankruptcy case in the District of South Dakota; their spouses did not file with them. Kerkvliet filed incomplete schedules and statements with his petition. However, he had reviewed and signed only his petition at that time, although his electronic signature appeared on all the documents. On his petition, Kerkvliet estimated his assets and liabilities were both less than $50,000.00.

Both Kerkvliet and Pankowski switched counsel of record in their bankruptcy cases on August 23, 2016. Kerkvliet converted his bankruptcy case to chapter 7 on August 31, 2016, and Pankowski converted his bankruptcy case to chapter 7 on September 1, 2016. The record indicates their first bankruptcy attorney, Brian L. Utzman, initiated the two bankruptcy cases at the request of Kerkvliet's and Pankowski's subsequent counsel of record, Stan H. Anker of Anker Law Group, P.C., because Attorney Anker was on vacation when Kerkvliet and Pankowski wanted to file their petitions.[10]

Kerkvliet filed several schedules and statements labeled "amended" on September 1, 2016.[11] In the attendant summary, Kerkvliet stated the value of his

---

[10]Anker Law Group, P.C. was advising Kerkvliet regarding the Oklahoma litigation; it is not clear whether the firm was also counseling Western and Pankowski on that matter. Since Anker Law Group, P.C. is not a single attorney firm and does a substantial amount of bankruptcy work, it is unclear why an attorney outside the firm was used to complete and file Kerkvliet's and Pankowski's chapter 13 petitions and then the bankruptcy cases were promptly turned over to Anker Law Group, P.C.

[11]Kerkvliet filed two motions seeking an extension of time to file all his required schedules and statements. Neither motion was contested. Since Kerkvliet had already

scheduled assets was $272,338.18, and his total scheduled liabilities were $320,546.00, including Ace's claim, both much larger than he had indicated on his petition.

Kerkvliet did not schedule an interest in any formal or informal business entity as an asset. The only business-related assets he scheduled were some farm equipment[12] and eight heifer calves. He did not schedule any business assets related to Ruby Creek Metal Arts, a business interest he listed on his amended statement of financial affairs, or Ruby Creek Industries, a business interest included in his and his spouse's 2014 federal income tax return. Kerkvliet testified Ruby Creek Metal Arts and Ruby Creek Industries were the same business. He further testified his spouse now owns Ruby Creek Metal Arts and a plasma cutter used in the business, stating, "Well, my wife and I started it together and then she kind of took it over." Kerkvliet also testified he had done "some small welding jobs out of my shop on my ranch" before later starting Western with Pankowski.

On his amended schedule D, Kerkvliet's only listed secured claim holder was a credit union with a security interest in a vehicle. On Kerkvliet's amended schedule E/F, his only listed unsecured claim holder was Ace, whose claim Kerkvliet described as unsecured, contingent, unliquidated, and disputed for $300,000.00. He scheduled

---

filed schedules and statements with his petition and since the record did not then reflect Kerkvliet had not signed the schedules and statements that were filed with his petition, the Court granted the first extension only for the filing of Kerkvliet's chapter 13 plan and granted the second extension only as to his chapter 13 plan and "any list, schedule, statement, or payment advices not previously filed[.]"

[12]Kerkvliet's amended schedule A/B contains, in the current value column, an error regarding the total value of his farm equipment and machinery.

Pankowski and Western as codebtors on Ace's claim. On his amended schedule I, Kerkvliet stated he was retired, with income of $1,689.00 per month from Social Security, veteran's disability, and an annuity. On his amended schedule A/B, however, Kerkvliet stated he did not have an interest in any annuity.

In his amended statement of financial affairs:

(a) Kerkvliet listed his 2016 year-to-date income from operating a business at $17,734.88, though he did not list any business income on his amended schedule I, and the $17,734.88 exceeded his scheduled income from Social Security, veteran's disability, and an annuity;

(b) Kerkvliet stated he did not make any payments or transfer any property on account of a debt that benefitted an insider;

(c) as a sale, trade, or other transfer of property other than in the ordinary course of business within two years of his petition, Kerkvliet stated he transferred a "business interest" to WesDak in April 2016 and that the consideration was the "[n]ew business assumed all debt at Dacotah Bank";

(d) Kerkvliet listed three business interests: Western, doing "Steel fabrication and commercial welding," with a starting date of January 2013 and an ending date of April 2016; Ruby Creek Ranch, doing "Ranching," with a beginning date of 2006; and Ruby Creek Metal Arts, doing "Metal art," with a beginning date of 2009; and

(f) Kerkvliet stated he had given Ace a financial statement about his business in 2015 "(Through Discovery in lawsuit)[,]" though it was not clear which documents he provided.

At question 28 of his amended statement of financial affairs, Kerkvliet did not disclose he had given First Interstate Bank the Profit & Loss statements for Western for 2013, 2014, and 2015 when WesDak and its principals were seeking financing in February 2016 to take over Western's debt at Dacotah Bank.

Kerkvliet filed another amended schedule A/B on October 24, 2016. Via this

amendment, he added a parcel of real property in Custer County, South Dakota, and valued his half interest at $1,000.00. Pankowski similarly amended his schedule A/B to add to his assets the other half interest in this same real property. Pankowski testified the land was adjacent to their business property but was not used by the business. Kerkvliet did not amend any other schedule or statement in the subsequent two years of his bankruptcy case.

In his June 6, 2017 deposition, Kerkvliet acknowledged that with the transfer of all Western's assets to WesDak, Western would no longer have assets from which Ace could be paid on any judgment Ace might obtain against Western in the Oklahoma action. He also stated the reason he filed bankruptcy was to stop the "frivolous lawsuit" in Oklahoma. During his deposition, Kerkvliet stated he wanted out of the business due to his health and so the business would no longer have to pay him as his work decreased. He also acknowledged Pankowski's new business wanted to do diesel work. At trial, Kerkvliet testified his intent in filing bankruptcy was "to stop a financial hemorrhage from $10,000 retainers left and right to an attorney in Oklahoma." He denied Ace's Oklahoma lawsuit was the impetus for extinguishing Western and for Pankowski's continuing the business as WesDak, but he again acknowledged that after the transfer of Western's assets to WesDak, Western would no longer have the ability to satisfy any judgment Ace obtained against Western.

Kerkvliet was a defendant in a Minnesota state court action in 2015 involving some real property in Yellow Medicine County, Minnesota. The plaintiff was 3DB Trust. Kerkvliet and his spouse were among the several defendants. The complaint

described the defendants as either former record owners of all or part of the subject real property, a claimant arising from a previous occupancy of the subject real property, or an heir of one of the defendants known to be deceased, though which defendant was deceased was not specifically stated. The complaint further indicated some of the defendants had previously transferred some real property to the trust and the legal description of the transferred property needed to be corrected. The complaint went on to state Kerkvliet and his spouse, two other couples, and one other person "are executing an unrecorded deed to 3DB trust as part of bringing this action," thus indicating these defendants were connected to the plaintiff-trust and the instigation of the complaint. At trial, Kerkvliet described the Minnesota state court action as one to correct a fence line regarding an earlier sale of real property by his father's estate. Kerkvliet said the plaintiff-trust was his father's and he–Kerkvliet–did not have an interest in it. Kerkvliet did not include in his amended schedules or his amended statement of financial affairs any information regarding the Minnesota state court action or the real property involved; he also did not disclose any earlier transfers of the real property referenced in the Minnesota state court action. The state court complaint did not identify the transferors, contain specific dates regarding when the original real estate transfers occurred, or what consideration was exchanged. The Court was unable to find that information in the record or otherwise identify the nature and scope of Kerkvliet's particular interest in the Minnesota property.

Sometime before April 14, 2015, Kerkvliet designed a hydraulic loading system for the back of a pickup. He calls the unit a HydraDeck. Kerkvliet formed Hydra

Master LLC with the South Dakota Secretary of State in 2014. At trial, Kerkvliet testified he created Hydra Master LLC to trademark a name should sales of HydraDecks ever take off. He further testified he had not kept the company active. WesDak's website as of June 3, 2017 indicated it manufactured HydraDecks. WesDak's website also indicated a patent on the HydraDeck was pending. Kerkvliet did not include the existence or the termination of Hydra Master LLC on either his amended schedule A/B or his amended statement of financial affairs, and Kerkvliet did not identify his HydraDeck invention–or any copyright or pending patent related thereto–as an asset of his bankruptcy estate.

Kerkvliet personally borrowed $13,000.00 from Dacotah Bank on June 23, 2014. A 2004 Keystone Challenger camper he was purchasing served as the collateral. As part of the loan process, Kerkvliet and his spouse completed a Credit Application for Dacotah Bank. The second page of the Credit Application, in a section titled Asset & Debt Information, contained a handwritten note stating "See Financials on File[.]" Dacotah Bank was in possession of a Personal Financial Statement from Kerkvliet and his spouse dated February 18, 2014. In the Personal Financial Statement, the couple stated they had cash in four Dacotah Bank accounts totaling $179,366.00, marketable securities valued at $375,000.00, livestock worth $12,000.00, other personal property valued at $230,000.00 (with $150,000.00 of it attributed to "Ranch Farm and Fabric[a]tion"), and real estate worth $2,349,000.00. The realty listed on the Personal Financial Statement included some in "YM County" that was described therein as being "Inherited" by Kerkvliet in 2012 and having a value of $1,600,000.00.

Kerkvliet acknowledged at trial this was the same Yellow Medicine County real property that was the subject of the 2015 state court matter in Minnesota. The other real property listed on the Personal Financial Statement was in Custer County, South Dakota, was valued at $749,000.00, and was stated to be owned by "Ruby Creek Ranch LLC[.]" The Personal Financial Statement did not identify any real property that Kerkvliet and his spouse owned together in South Dakota.

In contrast to the Personal Financial Statement, Kerkvliet's last-filed amended schedule A/B valued the Custer County property at $261,312.00 and indicated it was owned by Kerkvliet and his spouse, not a separate legal entity. He scheduled cash or deposit account funds of $5,239.77, an investment account valued at $68,221.36, retirement funds of $33,111.05, livestock worth $700.00, and vehicles, farm equipment, and other personalty valued at $34,410.00–all at values notably less than he had listed on the Personal Financial Statement.

In his amended schedule A/B, Kerkvliet listed two checking accounts at Dacotah Bank with account numbers ending in 0312 and 0304 and a savings account at Highmark Federal Credit Union with an account number ending in 0-000. He did not schedule a money market account at Dacotah Bank, though he and his spouse then had one, with an account number ending in 4618. The money market account contained $20,367.85 on February 18, 2016. Kerkvliet acknowledged at trial he did not schedule the money market account on his amended schedule A/B or disclose in his amended statement of financial affairs that he had closed any bank accounts. Kerkvliet also acknowledged he removed $10,500.00 in cash from the money market account in late

February 2016, but he could not remember what he did with the funds other than pay bills. Kerkvliet further acknowledged that although the unscheduled money market account had been brought to his attention during his June 6, 2017 deposition, he had not amended his schedules to include that account.

At trial, Kerkvliet acknowledged he had sold the 2004 Keystone camper on March 2, 2015 and that he had not disclosed the sale in his amended statement of financial affairs. As to the Yellow Medicine County real property, Kerkvliet testified at trial he had erroneously stated in the Personal Financial Statement that he had already inherited the property in 2012. He went on to testify:

> I never had it. That was a guess at what the inherited value would be. And after that was [sic] thing was made out, the farmland dropped by probably half, and my dad went through nursing homes and hospitals and stuff, and that ate up a good share of it.

At his June 6, 2017 deposition, however, Kerkvliet testified: "There was a few acres [in Minnesota] split up between my brother and my two sisters and I after my dad died." When Kerkvliet's father actually passed away and what Kerkvliet actually inherited was not found in the record. In his last-filed amended schedule A/B, Kerkvliet stated he was not currently entitled to receive property because someone had died.

On his and his spouse's 2014 federal income tax return, Kerkvliet stated they had net income from Ruby Creek Industries of $1,450.00, schedule K-1 income from Western of $235,602.00, and, after deducting expenses and taking $53,488.00 in depreciation, went in the red $92,445.00 farming. They also reported total wage and salary income of $58,877.00. Kerkvliet and his spouse's tax returns for 2015 and 2016 were not part of the record.

Upon the chapter 7 trustee's request, creditors were given notice to file proofs of claim. Three claims were timely filed. A credit union filed two proofs for its claim fully secured by a 2014 Ford pickup (it appears the second claim may be amending the first). The third was a proof of claim filed by Ace for $1,762,233.20, unsecured.

As of January 9, 2017, WesDak's website[13] reflected Pankowski, Collings, and Geditz as the co-owners and Kerkvliet's spouse as the office manager. The website still listed Kerkvliet as a contact person for buyers interested in a HydraCat. A picture of the shop building on the website showed the building had "Western Dakota Welding" for outside signage. As of that date, WesDak's website address remained *WesternDakotaWelding.com*, and WesDak still used Western's Facebook page.

On March 28, 2017, the chapter 7 trustee filed a motion seeking a turnover from Kerkvliet of numerous items of personalty, including vehicles, farm equipment, cash, nonexempt funds in some accounts, Kerkvliet's home so the nonexempt equity therein could be liquidated, and the non homestead real property. Following a hearing, the Court directed Kerkvliet to turn over the nonexempt property that was still within Kerkvliet's control.

As of June 3, 2017, WesDak's website remained similar: the website address was still *WesternDakotaWelding.com*; WesDak still used Western's Facebook page; Kerkvliet and Pankowski were still listed as WesDak's primary contact persons for inquiries regarding a HydraCat; and a picture on the website indicated the business's

[13]At trial, Ace's counsel referred to Plaintiff's Exhibit 9 as pages from WesDak's website as of January 9, 2017, but the Court was unable to locate that date on the exhibit itself. Arthur Lee Puckett, III, a representative of Ace, testified he had taken the screenshots of the website on that date.

building still had "Western Dakota Welding" on it. Pankowski, in his deposition testimony, stated the picture was still accurate as of June 6, 2017.

In a June 28, 2017 year-to-date profit and loss statement WesDak gave First Interstate Bank, WesDak showed net income of $144,949.74. An attendant June 28, 2017 balance sheet for WesDak attributed $26,652.26 to the Land and Building and $313.37 to Shop Equipment. The balance sheet labeled the remaining Fixed Assets as Purchased Goodwill valued at $327,754.72 and indicated the business was depreciating "Purchased Goodwill for WDWD[.]"

As of September 5, 2017, WesDak was offering its real property and its 12,000 square foot building for sale for $649,000.00. The real property and building were no longer listed for sale as of August 30, 2018, but Pankowski testified at trial that day he would accept an offer for $649,000.00 because he believed that price would generate sufficient profit to allow him to build another shop. The unpaid balances as of January 9, 2018 on WesDak's two loans from First Interstate Bank (WesDak had obtained a second loan in 2016) were, respectively, $367,688.67 and $15,075.77.

After Kerkvliet's and Pankowski's personal bankruptcy cases were filed, Ace's lawsuit in Oklahoma continued only against Western. Kerkvliet, Pankowski, and Western did not timely disclose to the court in Oklahoma or to Ace that Western had been extinguished or that Western had transferred its assets to WesDak. By order dated September 1, 2017, the United States District Court for the Western District of Oklahoma awarded Ace $454,554.90 in actual damages, $1.00 in nominal damages, $89,952.80 in punitive damages, and $108,390.25 for attorney fees, for a total of

$652,898.95. The court also enjoined Western "and all persons or entities acting in concert with it" from manufacturing and selling HydraCats and disseminating any of Ace's "confidential proprietary information and trade secrets." No appeal was taken. Ace has been unable to recover anything on its judgment against Western.

Before this Court, Ace timely commenced separate adversary proceedings against Kerkvliet and Pankowski seeking a denial of their respective discharge of debts under 11 U.S.C. § 727(a)(2) or (4) and seeking, alternatively, to have its claim against each debtor excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). In this adversary proceeding, Kerkvliet counterclaimed, objecting to Ace's claim on the grounds Western is solely liable for any claim Ace may have. He also challenged the amount of Ace's claim. Subsequent to Kerkvliet's answer, Ace amended its proof of claim to seek the sum awarded by the federal district court in Oklahoma in favor of Ace and against Western.[14]

A joint trial on Ace's adversary proceeding complaints against Kerkvliet and Pankowski was held August 30, 2018.[15] The matters were taken under advisement after receipt of the trial transcript[16] and the parties' respective written closing

[14]Ace's proof of claim is for $652,898.55; the Oklahoma court actually awarded Ace $652,898.95.

[15]In addition to the exhibits admitted at trial (doc. 88), the Court, without objection by the parties, included as part of the record the entire case file for Bankr. Nos. 16-50206 and 16-50207, including proofs of claim and depositions, and the case file for this adversary proceeding and Adv. No. 16-5008, including the depositions.

[16]The transcriptionist erroneously captioned the transcript only for Ace's adversary proceeding against Pankowski, Adv. No. 16-5008, and the transcript is filed only in that adversary proceeding. *See supra* note 15.

arguments.[17]

II.

A chapter 7 debtor may be denied a general discharge of debts for one of several reasons set forth in 11 U.S.C. § 727(a). The party seeking a denial of a debtor's discharge must prove each element of a particular subsection by a preponderance of the evidence. Fed.R.Bankr.P. 4005; *Kaler v. Charles* (*In re Charles*), 474 B.R. 680, 683-84 (B.A.P. 8th Cir. 2012); *Cadlerock Joint Venture II, L.P. v. Sandiford* (*In re Sandiford*), 394 B.R. 487, 490 (B.A.P. 8th Cir. 2008). Once that party has made a *prima facie* case, the debtor must come forward with evidence to rebut or meet the presumption. The party seeking a denial of the debtor's discharge, however, bears the ultimate burden of persuasion. *Sandiford,* 394 B.R. at 490 (quoting Fed.R.Evid. 301). Section 727(a) is designed to prevent a debtor's abuse of the bankruptcy code, but because a denial of a discharge is a harsh remedy, the provisions of § 727(a) are strictly construed in favor of the debtor. *Snyder v. Dykes* (*In re Dykes*), 590 B.R. 904, 909 (B.A.P. 8th Cir. 2018) (quoting therein *Korte v. Internal Revenue Service* (*In re Korte*), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001)). This harsh remedy must be imposed on Kerkvliet in this case, pursuant to both 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(4)(A).

Under § 727(a)(2)(A), a debtor may be denied a general discharge of debts if

[17]At the conclusion of the trial, the Court asked the parties, in their written closing arguments, to "discuss each count of the complaint and each element regarding the code sections under which [Ace] seeks relief." In large part, however, each party's primary focus was not on § 727(a)(2)(A) or (a)(4)(A).

> 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 . . . property of the debtor, within one year before the date of the filing of the petition[.]

The elements under § 727(a)(2)(A) are: (1) the subject action took place within twelve months prior to the bankruptcy petition date; (2) the debtor took the subject action; (3) the debtor did so with the intent to hinder, delay, or defraud creditors; and (4) the subject action consisted of transferring, removing, destroying, or concealing property of the debtor. *City Nat. Bank of Fort Smith, Arkansas v. Bateman* (*In re Bateman*), 646 F.2d 1220, 1222 (8th Cir. 1981); *Georgen-Running v. Grimlie* (*In re Grimlie*), 439 B.R. 710, 716 (B.A.P. 8th Cir. 2010).

When considering whether the debtor had the requisite fraudulent intent, the Court may consider any factors bearing upon the issue, including the oft-utilized "badges of fraud," with a confluence of several badges being sufficient for a presumption of fraudulent intent to arise. *Ritchie Capital Management, LLC v. Stoebner*, 779 F.3d 857, 864 (8th Cir. 2015); *Doeling v. O'Neill* (*In re O'Neill*), 550 B.R. 482, 499 (Bankr. D.N.D. 2016). As may be relevant here, these badges of fraud include, but are not limited to: (1) the lack or an inadequacy of consideration for the subject transfer or transfers; (2) a family, friendship, or other close relationship between the debtor and the transferee; (3) the debtor's retention of the possession, benefit, or use of the property in question; (4) the financial condition of the debtor before and after the transfer; (5) a transfer of all or substantially all the debtor's property; (6) the secrecy of the transfer; (7) the existence or the cumulative effect of

a pattern or series of transactions or a course of conduct after the pendency or threat of legal action; and (8) the general chronology of events and transactions under inquiry. *See, e.g.*, *Sears v. Sears*, 863 F.3d 980, 985 (8th Cir. 2017); *Stoebner*, 779 F.3d at 861-65; *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *O'Neill*, 550 B.R. at 499; *Nielsen v. Logs Unlimited, Inc.*, 839 N.W.2d 378, 381-82 (S.D. 2013) (citing S.D.C.L. § 54-8A-4(b)). Once the party seeking a denial of the debtor's discharge has identified several badges of fraud and established a presumption of fraudulent intent, the debtor must go forward and establish a "legitimate supervening purpose" for the transfer. *Stoebner*, 779 F.3d at 862.

A presumption of fraudulent intent also arises when a debtor has transferred valuable property without payment. *Bateman*, 646 F.2d at 1222 (quotations therein omitted). If the party seeking a denial of the debtor's discharge establishes a gratuitous transfer occurred, the burden of production then shifts to the debtor to prove his or her intent in making the transfer was not to hinder, delay, or defraud creditors. *Id*. at 1222-23; *Grimlie*, 439 B.R. at 716.

Here, the record shows, without dispute, Kerkvliet's interest in Western was extinguished, Kerkvliet and Pankowski jointly took the steps necessary to extinguish their interests in Western, and they took this action in the spring of 2016, only a few months before filing bankruptcy. Thus, the first, second, and fourth elements of § 727(a)(2)(A) are satisfied.

The third element–whether Kerkvliet extinguished his interest in Western with the intent to hinder, delay, or defraud his creditors–is also satisfied. The confluence

of relevant circumstances is overwhelming, with most wearing a badge of fraud.

WesDak did not purchase Western's business as a whole–WesDak just took ownership of Western's assets and took over the business's mortgage debt through a new lender. WesDak did not assume Western's other liabilities.

A new legal entity did not need to be created for Kerkvliet's interest in Western to be bought out, contrary to one of Kerkvliet's and Pankowski's claimed reasons for extinguishing Western. Instead, Western's Operating Agreement provided for that contingency. A new legal entity also did not need to be created for the business name to be changed to include "Diesel."

Though Western was extinguished, the business continued under the new limited liability company's name without interruption. Kerkvliet and his spouse continued to work there.

There is nothing in the record showing WesDak or its principals–Pankowski, Collings, and Geditz–provided any consideration to Western or its principals–Kerkvliet and Pankowski–for the equity in the assets WesDak received when Kerkvliet and Pankowski extinguished Western. There is nothing in the record to show Pankowski, Collings, or Geditz even provided any capital for their interests in WesDak.

Kerkvliet and Pankowski's actions regarding Western and Western's assets produced several benefits for themselves, each an insider of the other. Kerkvliet benefitted from the extinguishment of Western and WesDak's assumption of Western's mortgage debt by having his personal guaranty of Western's debt extinguished. Kerkvliet and Pankowski benefitted by having a key asset each held–his respective

interest in Western–extinguished should Ace be successful in its Oklahoma lawsuit. Pankowski benefitted from Western's extinguishment by acquiring, without any demonstrated consideration, a larger interest in the same business operation under a different company name. Most important, Western's creditors received no benefit from Western's extinguishment since the equity in Western's assets was apparently transferred to WesDak for no consideration.

Kerkvliet's interest in Western constituted a significant asset; thus, Kerkvliet's extinguishment of that interest impacted his financial condition. The action also muddied Western's financial affairs. In fact, the entire record indicates muddling theirs and Western's financial affairs may have been Kerkvliet and Pankowski's principal reason for extinguishing Western and then filing personal bankruptcy cases, all while in the midst of Ace's lawsuit against Western and themselves individually. Both Kerkvliet and Pankowski admitted Western's extinguishment would thwart the collection of any judgment Ace obtained against Western.

Another badge of fraud is Kerkvliet and Pankowski's extinguishment of their interests in Western, their transfer of Western's assets to WesDak, and Pankowski's creation of WesDak before he and Kerkvliet each filed bankruptcy were not done openly: The existence of Ace's lawsuit was not disclosed to the lender that provided takeout financing for WesDak; Pankowski was unable to affirm the attorney who prepared the Asset Purchase Agreement for WesDak knew Ace had brought suit against Western; and Western, Kerkvliet, and Pankowski failed to disclose the extinguishment of Western to the court in Oklahoma. In addition, four different law

firms were involved in the creation of WesDak, the termination of Western, the transfer of Western's assets to WesDak, and Kerkvliet's and Pankowski's bankruptcies. Further, Kerkvliet and Pankowski, as Western's members, did not ensure Western was dissolved in an orderly manner following the precepts of S.D.C.L. ch. 47-34A, art. 8. In particular, the record does not show Western's assets were applied against Western's obligations to its creditors, as required by § 47-34A-806, or that notice of Western's termination was given to claimants under either § 47-34A-807 or § 47-34A-808. Instead, formalities were minimized or bypassed in Kerkvliet and Pankowski's haste to extinguish Western, transfer Western's assets to WesDak, and then file their personal bankruptcies.

A final notable badge of fraud is Kerkvliet and Pankowski's extinguishment of Western, Pankowski's creation of WesDak, Kerkvliet and Pankowski's transfer of Western's assets to WesDak, and Kerkvliet's and Pankowski's bankruptcy petitions all occurred as Ace's legal action in Oklahoma was nearing a dispositional stage. Ace's summary judgment motion was pending, and depositions of Kerkvliet and Pankowski were scheduled to be taken within a matter of days.

Kerkvliet did not establish on the record a legitimate supervening purpose for extinguishing his interest in Western. *See Allred v. Nickeson* (*In re Nickeson*), Bankr. No. 13-10137, Adv. No. 14-1004, 2015 WL 9957348, at *9-10 (Bankr. D.S.D. May 28, 2015) (though "[t]here is no bright line test for what constitutes a legitimate supervening purpose[,]" the defendant in a trustee's fraudulent transfer action failed to adequately rebut the presumption of fraud). *Cf. Luker v. Eubanks* (*In re Eubanks*),

444 B.R. 415, 424-25 (Bankr. E.D. Ark. 2010) (the debtor's testimony established a legitimate supervening purpose for the transaction at issue where the court found the debtor had a "strong personal character and a commitment to full disclosure" and where the debtor abstained from shading or reframing "the circumstances that were to be construed against him"). Kerkvliet's and Pankowski's testimony that Western was extinguished and WesDak was created because Kerkvliet wanted out of the business due to a lack of work for Kerkvliet and Kerkvliet's eye health issues and because Pankowski wanted to add "Diesel" to the business name was not credible. Kerkvliet and his spouse remained active in the business long after Kerkvliet and Pankowski extinguished Western and had all of Western's assets transferred to WesDak. As noted above, Western's Operating Agreement provided the means for a transfer of interests without the dissolution of Western, and a name change for Western could have incorporated "Diesel." Moreover, the addition of "Diesel" to the business name was not shown to be vital to the business since a year after WesDak was created the business's building still had Western's name on it and the business's Facebook page and website address had not been changed to include "Diesel." Finally, if Kerkvliet and Pankowski actually needed to terminate Western for these claimed reasons, they could have done so while still complying with S.D.C.L. ch. 47-34A, art. 8.

In addition to the extinguishment of Western, Kerkvliet also runs afoul of § 727(a)(2)(A) because he removed $10,500.00 in cash from an unscheduled money market account pre-petition. Kerkvliet held an interest in the funds. He removed the

funds from the money market account less than a year before his bankruptcy petition was filed. He removed the funds himself. Several badges of fraud establish he removed the funds to hinder his creditors,[18] including Kerkvliet had a lawsuit pending against him at the time of the removal, what he did with the funds remains unexplained, the amount of the funds transferred was sufficiently significant to impact Kerkvliet's financial status, and Kerkvliet failed to schedule in his bankruptcy the account from which he took the funds. He even failed to schedule the account after its omission was brought to his attention. Kerkvliet offered only a curt, self-serving statement that he used the withdrawn funds to pay bills–wholly insufficient to establish a legitimate supervening purpose for removing the funds.

III.

The Court will also deny Kerkvliet's general discharge of debts under 11 U.S.C. § 727(a)(4)(A), which provides a debtor may be denied a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account[.]" The elements of this subsection are: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with a fraudulent intent; and (5) the statement related materially to the debtor's bankruptcy case. *Lincoln Sav. Bank v. Freese* (*In re Freese*), 460 B.R. 733, 738 (B.A.P. 8th Cir. 2011), *cited in Charles*, 474 B.R. at 684. A debtor's disclosures in the schedules, statements, and other documents the debtor is required to file, as well as the debtor's testimony at the meeting of creditors,

[18] *See* cases cited *supra* pp. 23-24.

constitute oaths for the purposes of § 727(a)(4)(A). *Charles*, 474 B.R. at 684. The debtor's fraudulent intent under § 727(a)(4)(A) may be established by circumstantial evidence. *Home Service Oil Co. v. Cecil* (*In re Cecil*), 542 B.R. 447, 451 (B.A.P. 8th Cir. 2015); *Dantzler v. Zulpo* (*In re Zulpo*), 592 B.R. 231, 255 (Bankr. E.D. Ark. 2018) (badges of fraud may establish fraudulent intent to conceal) (cites therein omitted). Multiple inaccuracies may rise to the level of a reckless indifference to the truth, and may be regarded as intentionally false. *Cecil,* 542 B.R. at 451; *McDermott v. Petersen* (*In re Petersen*), 564 B.R. 636, 650-51 (Bankr. D. Minn. 2017). Finally, the threshold to establish a particular statement was material to the case is "fairly low." *Charles*, 474 B.R. at 686 (quotations therein omitted). "The subject matter of a false oath is material, and thus sufficient to bar discharge, 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 his property." *Cepelak v. Sears* (*In re Sears*), 246 B.R. 341, 347 (B.A.P. 8th Cir. 2000) (quotation therein and additional citations omitted), *cited in Charles*, 474 B.R. at 686. Even the omission of a "relatively modest asset" may result in the denial of a debtor's discharge if made "with knowledge and fraudulent intent." *Charles*, 474 B.R. at 686 (quoting *Sears*, 246 B.R. at 347).

Once the party seeking the denial of a discharge under § 727(a)(4)(A) has established the debtor made a false oath, the debtor must then go forward and show he lacked the requisite fraudulent intent or that the omissions were inadvertent. *In re Loganbill*, 554 B.R. 871, 877 (Bankr. W.D. Mo. 2016); *Watson v. Andrews* (*In re Andrews*), 428 B.R. 855, 861 (Bankr. E.D. Ark. 2010). The debtor's showing must be

made with credible evidence, *Velde v. Omang* (*In re Omang*), 403 B.R. 647, 652 (Bankr. D. Minn. 2009); mere unsupported assertions of honest intent are insufficient. *Conine v. Foster* (*In re Foster*), Bankr. No. 2:08-bk-75126, Adv. No. 2:09-ap-07076, 2012 WL 1441418, at *3 (Bankr. W.D. Ark. Apr. 25, 2012).

The Court does not find any fraud arising from Kerkvliet's filing of his initial, incomplete schedules and statement of financial affairs. It is undisputed Kerkvliet had not signed these documents before his attorney filed them with Kerkvliet's petition. Their premature filing was Kerkvliet's first bankruptcy attorney's transgression, not Kerkvliet's.

Kerkvliet's amended schedules and amended statement of financial affairs, however, contain several omissions and other errors that are material and warrant a denial of his discharge. First, Kerkvliet failed to schedule a money market account he and his spouse still maintained as late as February 2016. He did not deny he had the account and there is no record, including his amended statement of financial affairs, that he closed any account between February 2016 and his July 25, 2016 petition date.

Kerkvliet's disclosures in his amended schedule A/B and his amended statement of financial affairs regarding his interest in a business at his home are also problematic. Kerkvliet's 2014 federal income tax return identified the business as Ruby Creek Industries, with both Kerkvliet and his spouse as proprietors; on the tax return the business was also described as a welding shop. Kerkvliet did not list any business names he used or any sole proprietorships he operated on his bankruptcy petition. In

his last-filed amended schedule A/B, Kerkvliet did not list any interest in a limited liability company, partnership, or joint venture, and he did not schedule an interest in any nonfarm business-related property. At question 27 of his amended statement of financial affairs, Kerkvliet listed Ruby Creek Metal Arts as a business he owned or had a connection to, and he checked the box indicating it was a limited liability company or limited liability partnership. He also indicated it was an active business that had existed since 2009 and that it did "Metal art." Thus, his bankruptcy documents were inconsistent, if not conflicting, regarding his interest in this home-based business, and together his bankruptcy documents failed to paint a coherent picture of this business interest.

At trial, Kerkvliet initially testified the home-based business was now his spouse's and that she owned the plasma cutter used in the business. Then he testified they had started the business together and she had "kind of took it over." All his statements at trial were less than convincing, none was corroborated by any other testimony or documentary evidence, and some of his testimony was contradicted by his own amended statement of financial affairs, in which he stated he held an interest in Ruby Creek Metal Arts. Thus, the record still does not show what the business did, who owned it, what income it generated, who owned the plasma cutter used in the business, or the business's value. Even what the business's name was on the petition date remains unknown. All this could and should have been avoided if Kerkvliet had filed a complete and accurate schedule A/B and a complete and accurate statement of financial affairs regarding his business interests and the assets used in any sole

proprietorships. He did not.

Kerkvliet did not disclose an interest in Hydra Master LLC in his amended schedule A/B or his amended statement of financial affairs. Question 27 of the statement of financial affairs has a four-year lookback period. Kerkvliet acknowledged he created this company in 2014, so even if this formal business entity had been dissolved before his bankruptcy petition date, as Kerkvliet testified, Kerkvliet should have included the appropriate information about it on his amended statement of financial affairs. Similarly, nowhere in his amended schedules or amended statement of financial affairs did Kerkvliet disclose the HydraDeck he designed. He also did not disclose as an asset the apparent then-pending patent application regarding his HydraDeck.

Kerkvliet's disclosures in his amended statement of financial affairs regarding Western were inaccurate. He stated at question 18 that he had transferred a "business interest" to WesDak in April 2016. The business interest transferred was not identified therein, though Kerkvliet's answer to question 27 indicates he transferred his interest in Western to WesDak. However, the several documents in evidence all show Kerkvliet did not transfer anything to WesDak. Instead, he and Pankowski extinguished Western and had Western transfer its assets directly to WesDak. At question 18, Kerkvliet also failed to state the value of the business interest he describes as having been transferred to WesDak. Since Western held equity in its assets[19] and since Kerkvliet was the

[19]First Interstate Bank, around the time Kerkvliet and Pankowski extinguished Western, valued the business real property and building at $500,000.00 and Kerkvliet and Pankowski told the bank's evaluator they thought the business was worth $770,000.00 as a going concern. The debt against the property was about

majority owner of Western, Kerkvliet's omission of the value of the transfer is significant and indicates Kerkvliet completed his amended statement of financial affairs not just with a reckless indifference to the truth, but with a deliberate avoidance of the truth.

Kerkvliet's last-filed amended schedule A/B was markedly different than his February 2014 Personal Financial Statement. The stated owner of the real property where his house is located was not the same on his amended schedule A/B as it was on the Personal Financial Statement, and the values of his farm and ranch property, his bank accounts, and his financial assets, including retirement funds, were notably less on his amended schedule A/B than what he had listed on his Personal Financial Statement. The nature or description of some of his financial assets also varied between his amended schedule A/B and his Personal Financial Statement. In his amended statement of financial affairs, Kerkvliet did not disclose any substantial transfers of assets–other than his interest in Western and a very large gift to his son–and at trial he offered no explanation for the notable decline in his assets between the Personal Financial Statement's February 18, 2014 date and his bankruptcy filed on July 25, 2016.

Kerkvliet did not disclose in his amended statement of financial affairs the sale of the camper for $15,000.00 in 2015. Kerkvliet also did not disclose any assets or transfers related to his father's estate. What his interest was in the Yellow Medicine

---

$384,000.00, thus leaving equity of at least $116,000.00 and as much as $386,000.00, based on these valuations. Pankowski, in his bankruptcy case, scheduled the equity in the business real estate and shop at $42,283.06.

County real property in Minnesota remains a mystery, and whether he transferred any interest in that property pre-petition remains unknown. His testimony that he had inherited little from his father lacked credibility, and he provided no other evidence to support his statement. Regardless of what he may have inherited from his father and when he may have inherited it, Kerkvliet nonetheless should have disclosed the Minnesota state court action in his amended statement of financial affairs at question 9 and any transfers of an interest in the Minnesota real property within the two-year lookback period at question 18.

Kerkvliet's income that he disclosed on his amended schedule I did not match what he disclosed in his amended statement of financial affairs. What his actual income was on the petition date and its sources remain unclear. As with both his amended schedule A/B and his amended statement of financial affairs, this inconsistency further highlights Kerkvliet's lack of regard for the accuracy of his bankruptcy documents.

Kerkvliet's disclosures regarding the value of the real property he and Pankowski own jointly that is adjacent to the business property is also problematic. When he amended his schedule A/B on October 24, 2016 to add this property, he valued his interest at only $1,000.00. As discussed in the Court's decision entered simultaneously in *Ace Oilfield Rentals, LLC v. Pankowski* (*In re Pankowski*), Bankr. No. 16-50206, Adv. No. 16-5008 (Bankr. D.S.D. Feb. 7, 2019), the record indicates this jointly-owned property may have been worth $128,000.00.

Under the circumstances presented and after considering Kerkvliet's credibility

and demeanor at trial, the Court finds Kerkvliet's incongruous and incomplete disclosures regarding his business and real property interests and his personal property and their values in his amended schedule A/B and his amended statement of financial affairs evidence a reckless disregard for the truth, if not an outright intent to mislead the case trustee, his creditors, and the Court. *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 252 (4th Cir. 1987) (because it is difficult to rely only on a debtor's testimony regarding his state of mind, a court may infer fraudulent intent under § 727(a)(4)(A) from all the facts and circumstances in the case), *cited in Robinson v. Rothwell* (*In re Robinson*), 342 Fed. Appx. 235, 236 (8th Cir. 2009), and *Sears*, 246 B.R. at 349-50. The effect of his actions was to shield or hide assets. Kerkvliet did not timely correct identified errors. *See Mertz v. Rott*, 955 F.2d 596, 598-99 (8th Cir. 1992) (a debtor's failure to take advantage of opportunities to correct an error in the record is indicia of a fraudulent intent under § 727(a)(4)(A)). Kerkvliet, at trial, offered no plausible explanation regarding why the value of his business interests and his real property interests declined in a few years' time. Further, at trial he displayed a blatant lack of concern regarding the accuracy of his amended schedules and amended statement of financial affairs.

In sum,

> [f]ull disclosure is required, not only to ensure that creditors receive everything they are entitled to receive under the Bankruptcy Code, but also to give the bankruptcy system credibility and make it function properly and smoothly:
>
> > Bankruptcy provides debtors with a great benefit: the discharge of debts. The price a debtor must pay for that benefit is honesty and

> candor. If a debtor does not provide an honest and accurate accounting of assets to the court and creditors, the debtor should not receive a discharge.

Cecil, 542 B.R. at 454 (B.A.P. 8th Cir. 2015) (quoting therein *Ellsworth v. Bauder* (*In re Bauder*), 333 B.R. 828, 834 (B.A.P. 8th Cir. 2005) (Schermer, J., dissenting)). Here, the record clearly shows Kerkvliet should not receive a discharge of debts as a benefit when he did not pay for that discharge with honesty and candor regarding his required bankruptcy documents.

IV.

Though Kerkvliet has requested it via his counterclaim, the Court will not determine in this adversary proceeding whether Ace has a personal claim against Kerkvliet and, if so, in what amount. Thus, the Court will not decide whether holders of claims against Western or WesDak should be permitted to seek recourse against the limited liability companies' principals or members or whether holders of claims against Kerkvliet should be able to levy on assets of the two limited liability companies. *See Kelley v. Opportunity Finance, LLC* (*In re Petters Co.*), 561 B.R. 738, 749-50 (Bankr. D. Minn. 2016) (defining the variants of veil piercing)*; Larson Manu. Co. of South Dakota, Inc. v. American Modular Housing Group, LLC,* 4:16-CV-04118-VLD, 2018 WL 626263, at *6 (D.S.D. Jan. 30, 2018) (discussing when a corporate veil may be pierced under South Dakota law); *Kozlowski v. Palmquist*, 4:12-CV-04174-KES, 2016 WL 1255711, at *12-13 (D.S.D. Mar. 29, 2016) (discussing when a corporate veil may be pierced under South Dakota law); *Osloond v. Osloond*, 609 N.W.2d 118 (S.D. 2000) (discussing when a corporate veil may be pierced under South Dakota law);

Kansas Gas & Elec. Co. v. Ross, 521 N.W.2d 107 (S.D. 1994); and *Baatz v. Arrow Bar*, 452 N.W.2d 138 (S.D. 1990). Any such action would need to involve the entities themselves and their members or principals, some of whom are not parties to this adversary proceeding. Whether and how the entities' veils should be lifted may also be more appropriately determined by the Oklahoma federal district court in light of its familiarity with the facts and to preclude any inconsistent findings by this Court. Further, the trustee for Kerkvliet's and Pankowski's chapter 7 bankruptcy cases, wearing the shoes and utilizing the provisions of 11 U.S.C. ch. 5 and S.D.C.L. ch. 47-34A, art. 8, may need to be involved in any action seeking to make Kerkvliet or Pankowski personally liable for claims against either limited liability company or to make either limited liability company's assets available to Kerkvliet's and Pankowski's creditors. *See, e.g., Mohsen v. Wu* (*In re Mohsen*), Bankr. No. 05-50662, Adv. No. 06-05183, 2010 WL 6259979, at *4 (B.A.P. 9th Cir. Dec. 21, 2010) (the debtor-member's interest in a limited liability company became property of the bankruptcy estate); *In re Hickory Ridge, LLC*, Bankr. No. 07-1251, 2010 WL 1727968, at *5-6 (Bankr. N.D. W.Va. Apr. 27, 2010) (when a member of a limited liability company files bankruptcy, his interest in the entity becomes an asset of the estate pursuant to 11 U.S.C. § 541).[20]

The Court is not concerned Ace is being given standing to object to Kerkvliet's

[20]The United States District Court for the District of South Dakota has recently certified related issues to the South Dakota Supreme Court for determination. *See* Order Certifying Questions to South Dakota Supreme Court, *SDIF Limited Partnership 2 v. Tentexkota, LLC*, et al., 1:17-CV-01002-CBK (doc. 207) (D.S.D. Dec. 10, 2018), and Order Accepting Certification, *SDIF Limited Partnership 2 v. Tentexkota, LLC*, #28825 (S.D. Jan. 3, 2019).

discharge when whether Ace is a claim holder remains unresolved. This is a single creditor case, Ace is that single creditor, and at present it holds an allowable claim. 11 U.S.C. § 101(5)(A); *Korte v. Internal Revenue Service* (*In re Korte*), 262 B.R. 464, 470-71 (B.A.P. 8th Cir. 2001); *Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein* (*In re Holstein*), 299 B.R. 211, 223-25 (Bankr. N.D. Ill. 2003), *cited in Sears*, 863 F.3d at 984. If it is determined Ace does not hold a personal claim against Kerkvliet, then no claim exists for which Kerkvliet will be denied a discharge. If it is determined Ace does hold a pre-petition claim against Kerkvliet, regardless of amount, Ace's claim will not be discharged. As discussed in *Holstein,* judicial economy plays an important role in allowing a creditor holding a disputed claim to bring a denial of discharge action.

> Any other result, finally, would threaten judicial economy. Under Holstein's view, a debtor in bankruptcy can always assert as a defense to a creditor's discharge objection that the creditor's claim was legally or factually unsupportable. If that were true, every decision on an objection to discharge would inevitably entail a decision on the merits of the objecting creditor's claim. Bankruptcy courts would end up deciding multitudes of substantive claims ordinarily the province of state courts and federal district courts. In defining a "creditor" to include those holding "disputed" as well as "undisputed" claims, Congress evidently had something else in mind.

Holstein, 299 B.R. at 225.

An order and judgment will be entered denying Kerkvliet's general discharge of debts pursuant to § 727(a)(2)(A) and § 727(a)(4)(A). The order will also dismiss Kerkvliet's counterclaim without prejudice.

Dated: February 7, 2019.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 16-50207
	)	Chapter 7
DOUGLAS JOHN KERKVLIET	)	
SSN/ITIN xxx-xx-1121	)	
	)	
Debtor.	)	
	)	
ACE OILFIELD RENTALS, LLC	)	Adv. No. 16-5009
	)	
Plaintiff	)	ORDER DIRECTING ENTRY
-vs-	)	OF JUDGMENT DENYING
	)	DISCHARGE AND DISMISSING
DOUGLAS JOHN KERKVLIET	)	COUNTERCLAIM WITHOUT PREJUDICE
	)	
Defendant.	)	

In recognition of and compliance with the decision entered this date; and for cause shown; now, therefore,

IT IS HEREBY ORDERED a judgment shall be entered denying Debtor-Defendant Douglas John Kerkvliet a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(4)(A).

IT IS FURTHER ORDERED Debtor-Defendant's Counterclaim (doc. 20) is dismissed without prejudice.

So ordered: February 7, 2019.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 16-50207
	)	Chapter 7
DOUGLAS JOHN KERKVLIET	)	
SSN/ITIN xxx-xx-1121	)	
	)	
Debtor.	)	
	)	
ACE OILFIELD RENTALS, LLC	)	Adv. No. 16-5009
	)	
Plaintiff	)	
-vs-	)	
	)	JUDGMENT DENYING DISCHARGE
DOUGLAS JOHN KERKVLIET	)	
	)	
Defendant.	)	

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED Debtor-Defendant Douglas John Kerkvliet is denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(4)(A).

So ordered: February 7, 2019.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

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

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota