

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 04-40136
) Chapter 7
LOREN D. MILLER)
Soc. Sec. No. XXX-XX-5312)
and)
JEAN A. MILLER)
Soc. Sec. No. XXX-XX-5867)
Debtors.)

CORTRUST BANK, N.A.,) Adv. No. 04-4016
Plaintiff,)
)
-vs-) DECISION RE: PLAINTIFF'S
) COMPLAINT SEEKING DENIAL OF
LOREN D. MILLER) DISCHARGE OR A DETERMINATION
and JEAN A. MILLER,) THAT CLAIM IS NONDISCHARGEABLE
Defendants.)

The matter before the Court is Plaintiff CorTrust Bank, N.A.'s complaint against Defendants-Debtors Loren D. and Jean A. Miller seeking a denial of Debtors' discharge under 11 U.S.C. § 727(a) or a determination that the Bank's pre-petition claim against Debtor Loren Miller is nondischargeable under 11 U.S.C. §§ 523(a)(4) or (a)(6).¹ This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Debtor Loren Miller's general discharge of debts will be denied. No relief against Debtor Jean Miller was be ordered.

I.

On June 1, 2000, CorTrust Bank, N.A., ("Bank") made a business loan to Galaxy-MCS, Inc. ("Galaxy") for \$300,000.00. The funds

¹ The Bank did not seek a determination under §§ 523(a)(4) or (a)(6) that it held a nondischargeable pre-petition claim against Debtor Jean Miller.

were used by Galaxy to purchase a computer and printer repair and servicing business in the Sioux Falls and Sioux City areas from an entity with a similar name. The Small Business Administration ("SBA") provided a guarantee for the note.

The Bank obtained a blanket security interest in all of Galaxy's business property, including, but not limited to, its inventory, equipment, maintenance contracts for the computer work it performed, and accounts receivable. Itemized exhibits to the security agreement indicated Galaxy's personalty was worth \$79,845.00 (\$62,845.00 in inventory and \$17,000.00 in equipment) and that its maintenance contracts were worth \$24,257.70.

Loren D. Miller ("Miller") was the president and sole stockholder of Galaxy. He gave a personal guarantee to the Bank for Galaxy's note and agreed therein to preserve any collateral for the note.

In the latter half of 2003, Miller asked the Bank to refinance Galaxy's note. As part of the request, Miller gave the Bank a balance sheet for Galaxy dated September 29, 2003. This balance sheet indicated the corporation had tangible assets valued at \$48,119.08 (deposits, \$2,403.28; accounts receivable, \$984.39; "Stockholder loan receivable," \$19,814.87; inventory, \$20,000.00; petty cash, \$400.00; and depreciated equipment, \$4,516.54) and intangible assets ("Organization Costs," "Loan Costs," "Purchase of business," less "Accumulated Amortization") valued at \$186,961.90.

The Bank denied Galaxy's request to refinance.²

Galaxy ceased business at the end of 2003 and filed for Chapter 7 relief on February 4, 2004 (Bankr. No. 04-40135 in the District of South Dakota). According to Galaxy's bankruptcy schedules of assets and a February 6, 2004, letter from Galaxy's bankruptcy counsel to the Bank, the corporation did not own any assets.

At Galaxy's March 12, 2004, § 341 meeting of creditors, Loren Miller, as Galaxy's president, testified that he did not receive any compensation or "owner draws" from Galaxy during its final three months of business. He said the inventory was all used up by the time the business ceased operating and that the business's funds had been paid out to employees or vendors. He stated that the only assets Galaxy had on the petition date were two old computers and two desks of limited or no value located in Galaxy's Sioux City office.

In an effort to track down its collateral, the Bank reviewed Galaxy's corporate checking account maintained at the Bank. These records indicated that the corporation had paid the Millers a total of \$20,826.19 in the latter months of 2003 and early 2004. The

² The Bank made a personal loan to Miller and his wife Jean on October 6, 2003. The one-year loan was for \$112,367.98. As collateral, the Millers gave the Bank a mortgage on their home in Hartford, South Dakota. The Millers also had two earlier personal notes with the Bank that were secured by personal vehicles. These three personal notes are not the subject of this adversary proceeding.

checking account also indicated that Galaxy had paid \$2,186.28 to American Funds Group on October 15, 2003, and had paid two different entities in mid-October 2003 for storage unit rentals, all transfers which raised red flags for the Bank regarding the whereabouts of its collateral. Further, according to Galaxy's deposit records for its checking account at the Bank, deposits were \$29,929.99 in September 2003 and \$39,082.49 in October 2003, but fell to \$3,128.00 in November 2003.

The Bank hired a private investigator. The investigator, with Loren Miller's assistance, located one storage unit that contained mostly outdated computer equipment (described by the Bank's appraiser as cannibalized control units, replacement boards, a tape backup system, obsolete monitors, and twenty-year-old modems of no value, and some miscellaneous parts and tools worth \$200).

Post-petition, the Bank recovered on Galaxy's debt: \$50,000 from a personal guarantee given by Monte Kewley and \$150,860.90 on SBA's guarantee, leaving a balance of \$43,760.00. The collateral in the storage unit, which the Bank received, has not yet been liquidated.

Loren Miller and his wife, Jean A. Miller, (collectively "Debtors") filed for Chapter 7 relief on February 4, 2004, the same day Galaxy filed. Debtors' schedules indicated they had a home in which they held no equity and personal property valued at

\$16,685.00. They declared most³ of it exempt to the extent of any equity. Debtors' schedules did not indicate that they had any property stored in a rental facility, and they did not list any assets held by American Funds Group. They did not list any debt owed to the Bank based on Debtor Loren Miller's guarantee of Galaxy's note.

On April 27, 2004, the Bank commenced a denial of discharge and nondischargeability action against Debtors. It alleged that in Galaxy's final months, Debtor Loren Miller fraudulently took \$20,826.19 in Galaxy's assets rather than paying corporate creditors and that this sum should be declared nondischargeable under 11 U.S.C. § 523(a)(4). The Bank also alleged that Debtor Loren Miller had converted about \$40,000 worth of the Bank's business collateral and that this sum should be declared nondischargeable under § 523(a)(6). In seeking a denial of Debtors' discharge under 11 U.S.C. § 727(a), the Bank alleged that Debtors Loren and Jean Miller had concealed property of the estate within one year of their petition in an effort to defraud creditors, that Debtor Loren Miller had failed to preserve accurate financial and business records without reasonable justification, and that Debtor Loren Miller had failed to satisfactorily explain the loss or deficiency in Galaxy's assets.

³ Debtors listed "Karakoe Equipment" on their Schedule of Property Claimed Exempt but did not value that exemption. Thus, they did not exempt any of it. *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 72-75 (B.A.P. 8th Cir. 2001).

Debtors answered the complaint saying the funds transferred to them from Galaxy in Galaxy's final months reflected reimbursement for personal funds they used to purchase parts and supplies for the business. They said they did not use Galaxy's checking account because they were fearful the Bank would freeze it. Debtors also stated that in the final months they actually put more money into the corporation than they took out, leaving a balance due them of \$3,021.21. Debtors further stated they had turned over to the Bank all the property located in the storage facilities. They responded that the deposit with American Funds Group was for an "employees' simple saving fund" that did not belong to the corporation but to unnamed employees.

At trial, Richard J. Miller,⁴ a vice president for the Bank, testified regarding the June 1, 2000, loan that had been made to Galaxy and the security agreement the Bank had received. He reviewed the Bank's effort to find its collateral and to realize on the debt, which he stated was \$243,812.56 in principal on the petition date.⁵ He said that between August 31, 2003, and December 31, 2003, Galaxy's checking account records at the Bank indicated that Galaxy paid Loren or Jean Miller a total of \$20,826.19 (\$8,475 in September; \$8,721.94 in October; \$2,000 in

⁴ Richard Miller is not related to Loren and Jean Miller.

⁵ A computer print-out from the Bank also indicated Galaxy owed it \$243,812.56 on the petition date. Post-petition interest and attorney's fees do not accrue on the claim since the Bank is not fully secured. 11 U.S.C. § 506(b).

November; and \$1,629.25 in December). He acknowledged that he did not know whether Debtors had used these funds to pay Galaxy's expenses. He did note, however, that the dramatic drop in deposits into Galaxy's checking account in November 2003 corresponded with a \$17,011.22 deposit into Debtors' personal checking account at Wells Fargo on November 17, 2003. He also noted that during pre-trial discovery, Debtors did not produce their Wells Fargo checking account statement for December 17, 2003, to January 20, 2004, and that they did not provide expense reports or receipts regarding any expenses that Debtors claimed they paid personally for Galaxy during the final months of 2003.

Debtor Loren Miller testified that Galaxy first experienced financial troubles when some newer, computer-related ventures did not go as planned and when Galaxy began losing contracts with larger corporate customers after September 11, 2001. By the summer of 2003, he said he realized that Galaxy's revenues were insufficient for the business to continue. He acknowledged that he tried to restructure Galaxy's debt with the Bank and that this request was denied. He also acknowledged that Galaxy made its last loan payment to the Bank on October 9, 2003. He said he decided in October or November 2003, with his attorney's guidance, to close the business and file bankruptcy for it.

Both Debtor Loren Miller and Debtor Jean Miller testified that Galaxy billed a month in advance for its contracted services. They stated Galaxy's income decreased the last two months of 2003

because they did not bill for any future contract services once they decided to close Galaxy. According to Debtor Jean Miller, Galaxy sent out its last bills on October 1, 2003, for contract work to be performed in November. Galaxy's last work was performed in November 2003.

Debtor Loren Miller acknowledged at trial that Galaxy failed to schedule in its bankruptcy the old computer equipment located in the storage unit. He did not explain why that had happened, though he said the property had been in storage for quite some time, not just during the final months of the business, and that he did not feel it was worth much. Debtor Loren Miller also stated at trial that he had been confused during his testimony at the § 341 meeting regarding Galaxy's inventory and equipment and their respective values. In an attempt to clarify the matter, he stated that when he purchased the business, the value placed on the equipment was \$18,000.00. He testified that this equipment included the mainframes and other older computer-related equipment that Galaxy had turned over to the Bank post-petition from the storage unit. He said the Bank was aware of this value when it financed his purchase of Galaxy and that the Bank did not question the value. Bank officer Rick Miller did not dispute at trial that Galaxy's equipment was worth about \$20,000 when Galaxy obtained its loan from the Bank. In a balance sheet provided to the Bank dated September 29, 2003, Galaxy's equipment was valued at \$18,727.73 and the accumulated depreciation on equipment was stated to be

\$14,211.19, leaving a value of \$4,516.54.

Debtor Loren Miller said Galaxy's inventory was the parts, maintenance kits, circuit boards, and other computer components that the business used on a daily basis to repair and service computers and printers. He stated it was worth \$20,000 when he purchased the business. He further stated that the value of the inventory generally stayed around \$20,000 until he stopped replenishing it as the business drew to a close. He further explained that Galaxy's daily business expenses increased in the final months of operation since it had depleted its inventory and therefore needed to purchase parts and supplies on a daily basis.

Debtor Loren Miller acknowledged that Galaxy, through fifteen checks, paid him or his wife \$20,826.19 between August 31, 2003, and December 31, 2003. He said in the final months of business he processed some of Galaxy's expenses through his and his wife's personal checking account because he was afraid the Bank would freeze Galaxy's account, and because in the final few months of business, some of Galaxy's creditors would only accept payment by credit card or cash. Debtor Loren Miller testified that he could not provide the original receipts or expense reports corresponding to these expenditures from Debtors' personal account because the documents had been lost earlier by his attorney during some office moves or by Debtors when they changed homes. He testified that he also took some owner's draw during the final months of the business.

As an intended substitute for Galaxy's actual expense records for the latter months of operation, Debtor Loren Miller provided a self-prepared statement (Exhibit V) that he described as derived from Galaxy's "Quick Books" records. This statement covered September 30, 2003, to December 8, 2003. It indicated that Galaxy paid Loren Miller \$4,850.00 in "shareholder distributions," \$3,631.94 for "Exp. [expenses?] Sept. & O...", and \$1,629.25 for reimbursement of mileage for a total of \$10,111.19. Two of Debtors' other "Quick Book" summary records (Exhibits Z and AA) reflected an additional \$5,000 in shareholder distributions were made to Debtors during September 2003; these payments were not included on Exhibit V.

According to Exhibit V, Debtors wrote fourteen personal checks to cover Galaxy expenses, mostly to employees in November and early December 2003.⁶ Debtors' personal checking account does reflect the dates and amounts for these fourteen checks, but there is nothing other than their "Quick Book" summaries to corroborate to whom the checks were written or why.

The Quick Books summary exhibit V prepared by Debtors also showed that Debtor Loren Miller deposited with Galaxy \$3,500.00 on October 9, 2003, \$3,233.70 on November 14, 2003, \$2,249.96 on

⁶ Another entry says Debtors personally paid legal fees of \$1,500.00 to Tara Glasford, the bankruptcy attorney for both Debtors and Galaxy. Based on Attorney Glasford's Disclosures of Compensation, it appears \$750 was for their personal case and \$750 was for Galaxy's Chapter 7. Galaxy's and Debtors' respective Statement of Financial Affairs failed to disclose these payments.

November 26, 2003, and \$12,899.13 on December 8, 2003, for total of \$21,882.79. The exhibit described these deposits as "shareholder distributio[ns]." A \$3,500.00 deposit with Galaxy on October 9, 2003, is confirmed by Galaxy's checking account statement and deposit slips, although the deposit slip indicates the \$3,500.00 was actually a check from Rodney Woelfel to Loren Miller. According to Debtors' Exhibit V and Debtors' checking account statement, Woelfel was repaid \$3,500.00 in late November 2003, with a personal check from Debtors.⁷

The other "shareholder" deposits on Exhibit V (\$3,233.70 on November 14, 2003, \$2,249.96 on November 26, 2003, and \$12,899.13 on December 8, 2003) were not reflected on Galaxy's checking account. Three checks from Debtors' personal account on November 26, 2003, total \$2,249.96. That sum matches a deposit that Debtors describe on Exhibit V as having been made with Galaxy on November 26, 2003. Consequently, it appears the \$2,249.96 was not an actual deposit into Galaxy's account but rather was a credit on Debtors' behalf on Galaxy's Quick Books records. The shareholder deposits with Galaxy set forth on Exhibit V for November 14, 2003, and December 8, 2003, also coincide with checks written from Debtors' personal account, but the two deposits, which total \$16,122.83, exceed the corresponding checks, which total \$10,943.69, that Debtors personally wrote. It was not possible to

⁷ Debtors failed to list this debt repayment on question 3 of their Statement of Financial Affairs.

match the checks and the Exhibit V "deposits" as could be done with the November 26, 2003, transactions. Nonetheless, the claimed deposits on November 14, 2003, November 26, 2003, and December 8, 2003, were not reflected on Galaxy's checking account statement.

During adverse examination by the Bank's counsel, Loren Miller testified that in December 2003 he put \$11,800.00 into Galaxy so Galaxy could meet its obligations for payroll, insurance, and "the things that needed to be paid to close down properly." He said the \$11,800.00 were funds he retrieved from his personal simple IRA account. On direct examination, and this time relying on his Exhibit V, Debtor Loren Miller testified that he closed a personal retirement account and deposited around \$17,000.00 of these savings account funds into his and his wife's personal checking account on November 17, 2003. He said he then withdrew \$12,899.13 of those funds and deposited them into Galaxy's account with the Bank on December 8, 2003.

Debtors did not produce any documentation -- other than the self-prepared "Quick Books" summaries for Galaxy -- to support a large December 2003 deposit into Galaxy's account from Debtors' personal funds. Galaxy's checking account statement for that month did not reflect any deposits at all, and Debtors did not produce a deposit slip for the claimed transaction. When asked why Galaxy's December 2003 bank statement did not reflect the \$12,899.13 deposit, Debtor Loren Miller said the statement was inaccurate. Debtors' personal checking account statement for November 20, 2003,

through December 16, 2003, likewise does not reflect any withdrawals for \$12,899.13, and the balance on December 16, 2003, would not have been sufficient to cover a check for that amount absent additional deposits. Without explanation, Debtors did not produce during discovery or introduce at trial their personal checking account statement for December 17, 2003, to January 20, 2004, though Debtor Loren Miller testified that he had obtained a copy of it from the Bank and that his attorney now had it.

Debtors' personal checking account does confirm a deposit of \$17,011.22 on November 17, 2003, but no deposit slip was produced to show the source of that deposit. Debtor Loren Miller testified that \$16,332.00 of the \$17,011.22 were funds he withdrew from his simple IRA account from his employment at Galaxy. He said the other funds deposited into their personal account included \$4,000 to \$6,000 from his Karakoe business. He testified that he did not directly deposit any of Galaxy's accounts receivable into their personal account, but he confirmed that he did take funds from Galaxy's account for reimbursement of the Galaxy bills he had already paid. He acknowledged that his wife was not working at the time, so she was not generating any of the funds that were deposited into their personal checking account.

Debtor Loren Miller testified that he kept a separate checking account at Wells Fargo for a Karakoe business that he operated. Total deposits into that account for December 18, 2002, through December 17, 2003, were \$15,046.76, while total withdrawals were

\$12,015.79. Bank statements for 2003 for Debtors' personal checking account and the Karakoe checking account show Debtors transferred funds between the two accounts: a total of \$1,055.00 was transferred into the Karakoe account from their personal account and a total of \$5,495.00 was transferred into their personal account from the Karakoe account. Whether any of the Karakoe account's checks were written to or for the benefit of Debtors or Galaxy is unknown. The Karakoe account statement for December 18 to December 31, 2003, was never produced during discovery or placed in evidence. No large deposits, checks, or transfers were made in the first half of the month, however.

The Court requested Debtors' federal income tax return for 2003 to see whether it reflected a \$16,332.00 withdrawal from Debtor Loren Miller's simple IRA account. The tax return showed that Debtor Loren Miller closed four separate simple IRA accounts with American Funds. The four totaled only \$4,152.09. Debtors also reported "Wages, salaries, tips, etc." of \$5,536.00, but the source of that income is unknown, since no W-2 forms were attached and the first page for the attached Schedule E for Galaxy (a Sub S corporation) was missing.

Based on Galaxy's "Quick Books" summaries, Loren Miller took net officer's salary of \$4,609.52 from Galaxy between January 10, 2003, and March 14, 2003. There is no record on whether Galaxy made any other payments to Debtors between March 14, 2003, and

August 30, 2003.⁸ Total deposits into Debtors' personal checking account in 2003 were \$103,773.13. When the Karakoe account transfers of \$5,495.00, Debtor Loren Miller's officer's salary of \$4,609.52, the \$4,152.09 in deposits from the closing of Debtor Loren Miller's simple IRA accounts, and the \$20,826.19 in acknowledged transfers from Galaxy's account are subtracted from these total deposits, a balance of \$68,690.33 remains. The source of the remaining \$68,690.33 in 2003 deposits was not revealed at trial, and Debtors' Statement of Financial Affairs (questions 1 and 2) failed to list any gross income in 2003 for Debtors.

II.

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.* Only one subsection under § 727(a) needs to be satisfied for the discharge to be denied. *Id.* at 250. However, since the denial of a debtor's discharge is a harsh sanction, § 727(a) is strictly construed in

⁸ On question 1 of Debtors' Statement of Financial Affairs, Debtors failed to disclose any payments that Galaxy made to them during 2003 (gross amounts are to be disclosed). On question 23 of Galaxy's Statement of Financial Affairs, Galaxy failed to disclose any 2003 payments to insider Loren Miller.

the debtor's favor. *Floret, L.L.C. v. Sendecky (In re Sendecky)*, 283 B.R. 760, 763 (B.A.P. 8th Cir. 2002).

The Bank challenged Debtor Loren Miller's eligibility for a discharge on three grounds. In particular, the Bank alleged that he concealed or failed to preserve records regarding financial condition and business transactions, which is governed by § 727(a)(3). That subsection provides:

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

.....
(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3). This Code section is designed to insure that a discharge is given only upon a "true presentation" of a debtor's financial affairs and to insure that the creditors and trustee do not have to rely on a debtor's oral recollections about his financial transactions. *Klingler v. Hosler (In re Hosler)*, 309 B.R. 540, 549 (Bankr. C.D. Ill. 2004). Consequently, a debtor must produce

records which provide creditors with sufficient information to determine his or her financial condition and to trace his or her financial dealings with substantial accuracy and thoroughness for a reasonable period of time leading up to the bankruptcy filing.

Kaler v. Remily (In re Remily), 314 B.R. 790, 799 (Bankr. D.N.D.

2004) (citing *Grau Contractors, Inc. v. Pierce (In re Pierce)*, 287 B.R. 457, 461 (Bankr. E.D. Mo. 2002)).

There is no intent to deceive element to § 727(a)(3). *Sendecky*, 283 B.R. at 764. Instead, the debtor is held to a standard of reasonableness. *First State Bank of Newport v. Beshears (In re Beshears)*, 196 B.R. 468, 474 (Bankr. E.D. Ark. 1996). The debtor is required, in regards to his record keeping, to "take such steps as ordinary fair dealing and common caution dictate to enable creditors to learn what he did[.]" *Id.* (quoting *Koufman v. Sheinwald*, 83 F.2d 977, 980 (1st Cir. 1936) (cite therein)); *Hays v. Cummins (In re Cummins)*, 166 B.R. 338, 359 (Bankr. W.D. Ark. 1994). Whether a particular debtor's financial records are sufficiently complete and accurate is determined on a case by case basis. *Hosler*, 309 B.R. at 549. Factors to consider include the debtor's education and business experience, the size and complexity of his business, and any special circumstances. *Beshears*, 196 B.R. at 474 (quoting therein *Anderson v. Wiess (In re Wiess)*, 132 B.R. 588, 592 (Bankr. E.D. Ark. 1991)). Once the complainant makes a *prima facie* showing of inadequate records, the burden then shifts to the debtor to justify the absence of the record. *Davis v. Wolfe (In re Wolfe)*, 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999).

III.

The Bank has shown by a preponderance of the evidence that Debtor Loren Miller has failed to keep and produce material records

regarding Debtors' financial transactions leading up to their bankruptcy filing. The present record clearly shows four important records were missing. First, Debtor Loren Miller failed to provide a bank statement and copies of checks for Debtors' personal checking account from December 17, 2003, to January 20, 2004, when a large transfer from Debtors to Galaxy was in dispute. Second, Debtor Loren Miller failed to provide a bank statement and copies of checks for his Karakoe account from December 18, 2003, to mid-January 2004, one of the times when Debtors' income was at issue. Third, Debtor Loren Miller failed to provide a deposit slip regarding the \$17,011.22 that was placed into Debtors' personal checking account on November 17, 2003. There was no supporting evidence that most of it came from Debtor Loren Miller's simple IRA accounts as he had testified. In fact, his tax return for 2003 showed that four simple IRA accounts were closed, but they totaled only \$4,152.09. Fourth and finally, Debtor Loren Miller failed to produce any reliable records regarding the expenses that Debtors claimed they paid for Galaxy in the latter months of 2003. Without copies of bills, statements, cancelled checks, or other proof of what these expenses were, when they were paid, and by whom they were paid, creditors are left to wonder what happened to funds Galaxy and Debtors received in the final months of 2003. Debtors' Exhibit V, which Debtors offered as an alternative to the needed records, was self-prepared and not well-supported by any independent evidence.

The remaining question is whether Debtor Loren Miller's failure to keep and produce these records was justified. It was not. The bank account statements and copies of relevant checks and deposit slips should have been easily obtainable from Debtors' bank. There was no explanation why this was not timely done.

As to the missing records regarding the Galaxy expenses that Debtors claimed they paid, Debtor Loren Miller testified these records were lost. That explanation, however, falls short. When were they lost? By whom? Why was he unable to obtain duplicate bills or proof of payment from Galaxy's creditors? The present record left those obvious questions unanswered.

Debtor Loren Miller made some brief references to his grandson's illness and untimely passing in late 2003. While the Court extends its condolences to the family on such a difficult loss, the situation, according to the record, had no bearing on Debtors' record keeping or on Debtors' ability to furnish these necessary records some months later when this adversary proceeding arose.

In essence, the Court was left with Debtor Loren Miller's unsupported testimony, a whole month's gap in bank statements for Debtors' checking account and for Debtor Loren Miller's Karakoe account, no independent documentation regarding the claimed expenses paid for Galaxy, and poor and conflicting records regarding withdrawals from his simple IRA account and corresponding deposits into Debtors' personal checking account and then into

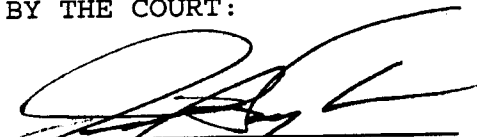
Galaxy's checking account. Without this information, the Court, creditors, and the case trustee were unable to accurately ascertain Debtors' financial condition or assess the nature of the claimed expense transactions on Galaxy's behalf. Accordingly, Debtor Loren Miller's discharge must be denied under § 727(a)(3).

The record does not support a denial of Debtor Jean Miller's discharge. Only one denial of discharge allegation against her was brought by the Bank's Complaint. The Bank alleged that she (and her husband) transferred or concealed property of the estate within one year of their petition, which is governed by § 727(a)(2)(A). However, the factual allegations in the Bank's complaint referenced only the missing assets of Galaxy's bankruptcy estate, not Debtors' estate. Since the separate corporate identity cannot be ignored, relief for the Bank against Debtor Jean Miller under § 727(a)(2)(A) is not appropriate. *Northeast Nebraska Economic Development District v. Wagner (In re Wagner)*, 305 B.R. 472, 475-76 (B.A.P. 8th Cir. 2004).

An appropriate order and judgment shall be entered.

Dated this 4th day of March, 2005.

BY THE COURT:



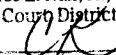
Irvin N. Hoyt
Bankruptcy Judge



Charles L. Nail, Jr., Clerk
Deputy Clerk
(SEAL)

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.

MAR 04 2005

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

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

MAR 04 2005

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

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