UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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May 28, 1997

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Counsel for Defendant-Debtor David C. Webb
714 West 41st Street
Sioux Falls, South Dakota 57105

Subject: ***Boilermaker-Blacksmith National Pension Funds v. David C. Webb (In re David C. and Janice L. Webb),***
Adversary No. 96-4050;
Chapter 7; Bankr. No. 96-40476

Dear Counsel:

The matter before the Court is Plaintiff's Motion for Summary Judgment and Defendant-Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that summary judgment shall be entered for Plaintiff and that Defendant-Debtor David C. Webb shall be denied a Chapter 7 discharge.

SUMMARY. David C. and Janice L. Webb filed a Chapter 7 petition in the District of South Dakota on June 20, 1996. They filed their schedules and statement of financial affairs on July 8, 1996. On their schedule of personal property, Debtors listed one 1992 Chevrolet half ton pickup valued at $10,000.00 but no other vehicles or trucks. In their schedule of creditors holding secured claims, Debtors stated the Thomas L. Webb Insurance Agency, Inc., had various security agreements covering all "assets, equipment & personal property of David C. Webb," among other items. Debtors stated they intended to reaffirm this debt. Debtors did not schedule any executory contracts or unexpired leases.

In their statement of financial affairs, Debtors stated that they had repaid "operating loans" of $10,000.00 to Webb Construction or a brother on December 23, 1995 and of $14,500.00 on March 19, 1996. The statement is unclear as to whether Webb Construction and a brother received one or the other payment or a share of each. Debtors further stated that these debts were

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repaid in full. Finally, Debtors stated in their statement of financial affairs that they held a 1990 GMC pickup for Webb Construction.

Debtor David C. Webb was deposed on October 29, 1996. He testified that the 1990 GMC pickup was purchased in 1991 by his brother Tim Webb because he, David Webb, could not get credit. Either David or Tim Webb made a down payment on the 1990 pickup and then David Webb made the payments thereafter. The pickup was titled in the name of Webb Construction, a business operated by Tim Webb.

In 1996, possibly March, Tim Webb again assisted David Webb in getting a new pickup because David could not get credit. David Webb gave Tim $15,000.00 for a downpayment on the 1996 GMC. Tim Webb obtained financing for the balance and the new pickup was titled in the name of Webb Construction. David Webb continues to give Tim Webb the monthly payments for the 1996 pickup. David Webb pays for the insurance on the 1996 GMC pickup.

David Webb also testified that Tim Webb took the 1990 GMC pickup after Debtors filed their petition and sold it for $4,000.00. Tim Webb has not given any of those proceeds to Debtors or the case trustee despite the fact that David Webb originally paid for most of the pickup.

Debtors did not schedule or otherwise disclose any legal or equitable interest they have in the 1996 pickup. Since the deposition in October 1996, Debtors have not amended their schedules to set forth any interest they have in the 1996 pickup.

On November 12, 1996, Boilermaker-Blacksmith National Pension Funds commenced a discharge complaint against Debtor David C. Webb on the grounds that David Webb had not correctly set forth his pre-petition residency, that he had failed to disclose his interest in the 1996 pickup, and that he had failed to disclose his interest in a checking account at a bank in Minnesota. Debtor David Webb answered on December 12, 1996 and denied the allegations. Regarding the 1996 pickup, Debtor David Webb acknowledged that he had not initially scheduled it but stated his failure was not an attempt to hide or secret assets from creditors. He further acknowledged that he gave his brother $14,500.00 for the downpayment.

On March 5, 1997, Plaintiff Boilermaker-Blacksmith National Pension Funds filed a motion for summary judgment based on the pleadings and depositions filed and the affidavit of David C. Hanson, Financial Director for Plaintiff. Plaintiff also filed a brief in support of its motion. Debtor David Webb responded to the

summary judgment motion on March 14, 1997 and, after receiving an extension of time, filed a brief and supporting affidavits by himself and his counsel, James A. Craig.

In his affidavit, David Hanson stated what judgments Plaintiff held against Debtor David Webb and the funds that had been collected to date against those debts. In its brief, Plaintiff focused on Debtor's statement regarding the 1990 and 1996 pickups and his interest in them.

In his affidavit, Debtor David Webb stated he considered the $14,500.00 he gave his brother for the 1996 pickup to be repayment for an operating loan. He further stated that since the pickup is not titled in his name, he did not consider himself the legal owner of it. He also stated that his statement of financial affairs contained a typographical error in that the pickup identified as being held for Webb Construction should have been the 1996 pickup instead of the 1990 pickup. In his affidavit, Attorney Craig stated that it is his and Debtors' intention to amend the schedules but that Debtor David Webb's out-of-town work schedule has made the amendments difficult to complete. To his affidavit, Attorney Craig attached correspondence reflecting Debtors' intentions to disclose requested information to the case trustee and counsel for Plaintiff.

A hearing on Plaintiff's summary judgment motion was held March 18, 1997. Using Debtors' schedules and Debtor David Webb's deposition, Plaintiff's counsel again focused on Debtor David Webb's lack of candor regarding the 1990 and 1996 pickups purchased through his brother. Debtor's counsel argued that fraudulent intent could not be inferred without Debtor David Webb's testimony. Counsel for Debtor, however, was unable to identify how Debtor David Webb's testimony at trial would vary from his October 1996 deposition. The Court took the matter under advisement.

DISCUSSION: SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). Although inferences may be drawn from the underlying facts, the matter must be viewed in the light most favorable to the party opposing the motion. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein

Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (cite therein).

The Court must consider the actual quantum and quality of proof necessary to support liability under the applicable law. *Hartnagel*, 953 F.2d at 396. Where motive and intent may be at issue, disposition of the matter by summary judgment may be more difficult. *Compare Amerinet*, 972 F.2d at 1490 (cite therein).

Here, Debtor David Webb has conceded that his schedules are inaccurate but he argues that summary judgment should not be entered against him because he should be given the opportunity to testify as to his motive. Debtor could not, however, point to any other evidence he could offer to support his claimed lack of fraudulent intent when preparing his schedules. Accordingly, this Court finds there is no genuine issue for trial. *Hartnagel*, 953 F.2d at 396. The record as a whole could not lead a rational trier of fact to conclude that Debtor lacked a fraudulent intent when he failed to accurately describe his interest in the 1990 GMC pickup and when he failed to disclose any interest he had in a 1996 GMC pickup. To the contrary, the record in this case evidences Debtor's intent to abuse the bankruptcy process, not use it for a fresh financial start. *United Mortgage Corp. v. Mathern (In re Mathern)*, 137 B.R. 311, 318-26 (Bankr. D. Minn. 1992), *aff'd*, 141 B.R. 667 (D. Minn. 1992).

Debtor's abuses in this case - - in addition to the inaccurate and incomplete schedules regarding the 1990 and 1996 GMC pickups -- include his failure to timely file amended schedules, his claim of his wife's home in Brandon, South Dakota as his residence when he does not live there and has not lived there for well over 180 days pre-petition, his efforts to funnel business income through his son, the titling of a scheduled 1992 Chevy half-ton pickup in his son's or a related business's name, his (Debtor's) failure to acknowledge any income on Schedule I and any executory contracts in

his statement of financial affairs although he worked steadily before and after the petition, his allowing his brother to retain the proceeds from the sale of the 1990 GMC pickup when it was bankruptcy estate property, and his willingness to reaffirm large business debts with family members while discharging the claims of others. The Court can find no honest intent when Debtor has done so much to the contrary. While all these actions were not relied upon by Plaintiff in its summary judgment motion, they do negate any reason for receiving evidence on whether Debtors' inaccurate and incomplete schedules were a product of Debtor David Webb's oversight or fraud. *Mathern*, 137 B.R. at 318-26; *see Nisselson v. Wolfson (In re Wolfson)*, 139 B.R. 279 (Bankr. S.D.N.Y. 1992), *aff'd*, 152 B.R. 830 (S.D.N.Y. 1993); *but see Elmira Savings Bank v. George (In re George)*, 179 B.R. 17, 24 (Bankr. S.D.N.Y. 1995).

DISCUSSION: DENIAL OF DISCHARGE. A Chapter 7 debtor is entitled to a discharge of debts unless, among other things, the debtor knowingly or fraudulently, in or in connection with the case, made a false oath or account. 11 U.S.C. § 727(a)(4)(A). The false oath or account must be material; that is, it must bear some relationship to the debtor's business transactions or the bankruptcy estate or it must concern the discovery of assets, business dealings, or the existence and disposition of the debtor's property. *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992)(citing *In re Olson*, 916 F.2d 481, 484 (8th Cir. 1990), and *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)). When it comes to the petition and the schedules and statement of financial affairs, these documents must be "accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts." *Mertz*, 955 F.2d at 598 (quoting *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974)).

Based on these standards, it is clear Debtor David Webb's misrepresentations on his schedules regarding the 1990 and 1996 GMC pickups constitute grounds for denying discharge. Since his misrepresentations were made on his schedules, they were made in connection with the case. Further, the misrepresentations were material because they concerned assets of the estate. Debtor's claim that the information about the pickups on his schedules was sufficient to "tip" the case trustee to investigate further is without value. As noted above, the schedules must be accurate and reliable on their face and they should not require additional examination to clarify. Finally, as discussed above, Debtor's

fraudulent intent is established by his course of conduct in this case. *Kirk v. Boughner (In re Boughner)*, 173 B.R. 406, 410 (Bankr. S.D. Iowa 1994)(citing *In re Devers*, 759 F.2d 751, 754 (9th Cir. 1985)), and *Mathern*, 137 B.R. at 318-26.

Summary judgment denying Debtor David Webb a discharge shall be entered.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: adversary file (docket original in adversary; serve copies on counsel)

UNITED STATES BANKRUPTCY COURT ★ SEAL

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

MAY 29 1997

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

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: _____
Date: _____

Case: 96-04050 Form id: 122 Ntc Date: 05/29/97 Off: 4 Page : 1
Total notices mailed: 2

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