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03/31/2006

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
JOHN CECIL DUNCAN,	§	**CASE NO. 02-46291**
	§	**(Chapter 7)**
Debtor.	§	
	§	
	§	
THE CADLE COMPANY,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**ADVERSARY NO. 03-4186**
	§	
JOHN CECIL DUNCAN,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION[1]

On October 18, 2004, the Court held a trial on this adversary proceeding to determine whether the debtor should be denied a discharge pursuant to sections 727(a)(2), (3) or (4) of the Bankruptcy Code based on the pre-petition transfer of certain assets, failure to keep records, and false oaths or non-disclosure of certain interests. At the conclusion of trial, the Court took the matter under advisement.

I. JURISDICTION

This Court has jurisdiction to consider this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334. This adversary proceeding involves objections to a debtor's discharge and, therefore, is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(J) upon which the Court may

[1] This Memorandum Opinion is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

enter appropriate judgments.

II. SUMMARY

At trial, Cadle asserted that the Debtor should be denied a discharge because he (i) transferred certain interests to his wife prior to filing for bankruptcy with the intent of hindering, delaying, or defrauding his creditors, (ii) failed to keep sufficient records from which his creditors could ascertain his financial situation prior to his bankruptcy, and (iii) made numerous false oaths or statements regarding the value or existence of his assets. The Debtor responded that he had no fraudulent intent, because the transfers involved either exempt or worthless assets and, in any event, were made prior to any knowledge of Cadle's existence. The Debtor also sought to establish that he had provided all of the documents in his possession or control with respect to his pre-petition financial condition. With respect to Cadle's remaining objection to discharge, the Debtor sought to establish that he had properly valued and disclosed all of his interests and assets in his bankruptcy schedules and that he did not make any false statements regarding these matters.

III. FINDINGS OF FACT

The Court, having considered the pleadings, evidence admitted at trial, stipulations, and arguments of counsel, makes the following findings of fact:

Historical and Procedural Background

1. John Cecil Duncan (the "Debtor" or "Defendant") is a general contractor who has built custom homes for approximately thirty (30) years through various corporate enterprises or ventures. The Debtor has been married to Barbara W. Duncan ("Ms. Duncan") for much, if not

all, of this time. Ms. Duncan is not a debtor in this or any other bankruptcy case. Ms. Duncan generally has been self-employed selling cosmetics and water filters, among other things.

2. The Federal Deposit Insurance Corp. (the "FDIC") obtained a final judgment against the Debtor on January 11, 1996 (the "FDIC Judgment"). The FDIC Judgment arose from loans to the Debtor's original building venture, John C. Duncan, Inc., which went out of business in 1987 during the savings' and loan crisis. During the period from January 1996 until August 2002, the FDIC Judgment was dormant. The Cadle Company ("Cadle" or the "Plaintiff") purchased the FDIC Judgment on or about July 26, 2001, and began collection efforts approximately one year later, in August of 2002. The Debtor first became aware of Cadle and its attempt to collect the FDIC Judgment when he received an envelope from Cadle in August of 2002, which included a request for production of documents in connection with Cadle's state court proceeding to enforce the FDIC Judgment.[2]

3. The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on December 4, 2002 (the "Petition Date"). On December 23, 2002, pursuant to Rule 1007 of the Federal Rules of Bankruptcy Procedure, the Debtor filed his Schedules A through J (the "Schedules") and a Statement of Financial Affairs (the "SOFA").

4. The meeting of creditors required by section 341 of the Bankruptcy Code (the "341 Meeting") commenced on January 16, 2003 and was concluded on May 23, 2003.

5. On April 18, 2003, Cadle filed its UNOPPOSED MOTION OF THE CADLE COMPANY FOR 2004 EXAMINATION OF DEBTOR requesting authority to examine the Debtor pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "2004 Motion"). The motion was granted by order entered April 30, 2003, and the examination was conducted on June 9, 2003

[2] There is no evidence reflecting service or return of service with respect to Cadle's First Request for Production in Cadle's proceeding to enforce the FDIC Judgment, which was filed in the Dallas County Court at Law No. 3, Case No. 02-09430-c. However, the Debtor testified that he received the discovery request on August 4, 2002.

(the "2004 Exam"). The scope of the examination was limited to the "acts, conduct, property, liabilities, and financial condition of the Debtor, as well as, any matter that may affect the administration of the Debtor's estate."

6. Cadle also requested authority to examine Ms. Duncan, which was granted by order dated April 30, 2003. The examination of Ms. Duncan was conducted prior to trial but the Court is unaware of the date of that examination.

7. Cadle also requested and received authority to examine H. Bank Texas, Household Finance Corporation, Texas Independent Bank GMAC, Homeside Lending Inc., Grand Bank, and First Savings Bank. There is no evidence as to whether Cadle actually conducted these examinations.[3]

8. Cadle initiated this proceeding on June 17, 2003, by filing its ORIGINAL COMPLAINT OBJECTING TO DISCHARGE (the "Complaint"). The parties' respective pre-trial motions for dismissal and summary judgment were denied by order of this Court entered on October 12, 2004.

9. On June 23, 2003, approximately one week after the commencement of this adversary proceeding, Cadle filed an objection to the exemptions claimed by the Debtor, including the Debtor's homestead exemption. The Debtor failed to respond to the objection, and an order granting Cadle's objection was entered by default on July 25, 2003. The Debtor requested reconsideration of the matter on August 6, 2003, which the Court granted by order

[3] *See* Docket No. 40, Order Granting Motion for 2004 Examination of Homeside Lending, Inc. entered May 16, 2003; Docket No. 45 Order Granting Motion for 2004 Examination of Household Finance Corporation; Docket No. 46, Order Granting Motion for 2004 Examination of GMAC; Docket No. 47, Order Granting Motion for 2004 Examination of Texas Independent Bank; Docket No. 48, Order Granting Motion for 2004 Examination of First Savings Bank; Docket No. 49, Order Granting Motion for 2004 Examination of Grand Bank; and Docket No. 50, Order Granting Motion for 2004 Examination of H Bank Texas. Docket No. 45 through 50 were entered on May 27, 2003.

entered January 13, 2004. After notice and a hearing on the merits, the Court entered an order on April 1, 2004, denying Cadle's objection to the exemptions claimed by the Debtor.

10. On August 7, 2003, Cadle filed Proof of Claim No. 12 in the amount of $420,102.50. Proof of Claim No. 12 amended Proof of Claim No. 1 which was filed on February 27, 2003. On September 16, 2003, the Debtor filed his OBJECTION TO CLAIM NO. 12, AMENDED CLAIM OF THE CADLE COMPANY. On February 9, 2004, after notice and a hearing, the Court entered an order allowing the claim in the amount filed. On October 29, 2003, Cadle filed Proof of Claim No. 13, amending Proof of Claim No. 12 by adding additional supporting documentation. On January 7, 2004, Cadle filed Proof of Claim No. 14, amending Proof of Claim No. 13 by adding still more supporting documentation.

11. The Debtor and Mrs. Duncan testified at trial. Each appeared to be honest, and their testimony was credible. Their testimony was not contradicted by the witnesses offered at trial by Cadle, and, in most respects, the documentary evidence offered by the parties supported the testimony of the Debtor and Ms. Duncan.

Business Ventures and Interests

12. In his Schedules, the Debtor identified the following entities in which he had an ownership interest at the time of the bankruptcy filing:

a. Duncan & Sanders, Inc.: The Debtor holds a 50% stock ownership interest in this entity which is valued at $0.00. The Debtor's estimate of value is based on his analysis of the entity's significant outstanding debt. This entity was formed in 1992 with Linda Sanders ("Sanders"). The Schedules state that the only asset owned by this entity is a 1% general partnership interest in Duncan-Sanders Custom Builders, Ltd.

b. Duncan-Sanders Custom Builders, Ltd.: The Debtor holds a 49.5% limited partnership interest in this entity which is valued as "unknown." This entity was formed in 1992 with Sanders to build custom homes in the Southlake and Westlake areas of town and built 25-30 homes in the period between 1992 and 2001. The Schedules indicate that this entity might

have assets but all such assets are pledged to banks to secure interim financing on the homes built.[4] The Debtor has not been involved in the commercial enterprise of this entity since April of 2002, and Sanders has continued to run this business and make payments on its debts since the Debtor left.

c. Duncan & Sons, Inc.: The Debtor holds a 100% stock ownership interest in this entity which is valued at $0.00. This entity was formed in June or July of 2002 -- after the Debtor ceased doing business with Sanders. The Schedules indicate that the only asset owned by this entity is a 50% general partnership interest in JCD Associates, Ltd.

d. JCD Associates, Ltd.: Duncan & Sons, Inc. holds a 50% general partnership interest in this entity which is valued at $0.00, see above. This entity was formed in June or July of 2002, and the Debtor was employed by this entity at the time of the bankruptcy filing. The limited partner is not related to the Debtor and has provided all of the financing for this entity's purchase of property and construction projects. The Schedules indicate that this entity owned 4 unimproved lots and was in the process of building at least two homes as of December of 2002.

e. Heritage Custom Homes, Inc.: The Debtor identified this entity in his Schedules for disclosure purposes only. This entity ceased doing business in or around 1992.

13. At trial, the Debtor provided the following information regarding entities he had held interests prior to the bankruptcy filing:

a. John C. Duncan, Inc.: This was the original entity formed by the Debtor under which he built custom homes in the Carrollton area. The entity went out of business in 1987. The FDIC, as successor to the original lender, seized and liquidated all of the collateral securing its obligations to the lender to pay off the existing loans. In 1994 or 1995, the FDIC obtained the FDIC Judgment for the deficiency. This judgment was acquired by Cadle prior to the bankruptcy filing.

b. JCD Venture, Inc.: This entity was a joint venture with Metropolitan Savings and Loan which did business at the same time as John C. Duncan, Inc. This entity also went out of business. This entity had a bank account with Metropolitan but it was closed in 1995.

c. Heritage Contracting, Inc.: This entity ceased doing business in or around 1992.

[4] The Schedules indicate that Duncan-Sanders Custom Builders, Ltd. had constructed homes at 1612 Fair Oaks and 1812 Broken Bend and held at least 4 unimproved lots as of December of 2002.

14. At trial, the Debtor identified the following entities in which he acquired interests after the filing of the bankruptcy case:

a. DW Homes, Inc.: The Articles of Incorporation were filed with the Texas Secretary of State on November 25, 2002, but the share certificates were not issued until December 9, 2002. The Debtor testified that he understood that an entity was officially created when the stock was issued, accordingly, he did not think these entities were formed until after the bankruptcy was filed. This entity has no bank accounts or financial activity.

b. WD Childrens' Trust: The Trust Agreement creating this trust was executed on December 9, 2002, but this entity has no bank accounts or financial activity.

c. S&D Associates: This entity was formed in January of 2003 with DW Homes, Inc. as the general partner and WD Childrens' Trust as its limited partner.

15. The Debtor testified that Sanders, who was his business partner from 1992 through 2002, handled the financial matters related to their business enterprises, including obtaining all of the financing for their building projects. The Debtor did not participate in this aspect of the company's business other than to guarantee obligations if, and as, requested. The Debtor's contribution to their business was his expertise in constructing and building custom homes.

Financial Statements

16. The Debtor submitted a "Confidential Financial Statement" to Mercantile Bank of Fort Worth, a copy of which was introduced at trial as Exhibit PX-18 (the "Mercantile Financial Statement"). The Mercantile Financial Statement is not dated, but the statement purports to reflect the Debtor's financial condition as of October 28, 1999.

17. The Mercantile Financial Statement included the income, assets, and liabilities of Ms. Duncan because the bank requested that the statement reflect household assets and

obligations. The Mercantile Financial Statement also identified a life insurance policy with a cash value of $750,000.

18. The Debtor submitted a "Personal Financial Statement" dated May 1, 2002, to Horizon Bank, a copy of which was introduced at trial as Exhibit PX-17 (the "Horizon Financial Statement"). The Horizon Financial Statement was provided to the bank upon the request of Paula Turner, Vice-President of Horizon Bank, to update their files as to certain commercial loans made to Duncan-Sanders Custom Builders, Ltd. and the Debtor's guarantee of those obligations.

19. The Horizon Financial Statement included the income, assets, and liabilities of Ms. Duncan because the bank requested that the statement reflect household assets and obligations. The corporate interests identified in the Horizon Financial Statement were valued based on the anticipated retail value of the homes which had been completed, inclusive of a 40% profit margin.

20. Question 19(d) of the SOFA instructs debtors to "[l]ist all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case." The Debtor did not disclose the Horizon Financial Statement in response to Question 19(d). At trial, the Debtor testified that he had forgotten that the Horizon Financial Statement had been issued, but he did not think that he needed to disclose it since Cadle had obtained a copy of the document in the state court collection action.

The Briargrove Transfer

21. Within one year of bankruptcy, on or about June or July of 2002, the Debtor transferred or attempted to transfer his community property interest in certain property known as

4832 Briargrove Lane, Dallas, Texas, 75287, to Ms. Duncan (the "Briargrove Transfer"). The Briargrove Transfer is disclosed on Schedule A in the Debtor's description of his remaining interest in the property as "a homestead interest only, having conveyed his previous community interest in the property to his wife, Barbara, as her separate property, in settlement of loans made by her separate estate to the community." The transfer was made to satisfy certain outstanding obligations incurred by the Debtor and his business ventures to Ms. Duncan's separate property.

22. At trial, the Debtor explained that Ms. Duncan had substantial assets prior to their marriage and that she had inherited a significant amount of money prior to or shortly after they married. For these reasons, they had never maintained joint bank accounts, nor had they commingled their finances.

23. During the course of their marriage, Ms. Duncan borrowed money against certain of her investments that she held as separate property in order to assist the Debtor in funding his building ventures. By 1996, these borrowings had accrued to approximately $188,000. At the 341 Meeting, the Debtor stated that he had documentation to evidence these obligations. At trial, Ms. Duncan testified that she had recently come across some notes evidencing the loans in her files, but the documents had not yet been produced to Cadle.

24. In 1996, Ms. Duncan, following the advice of her accountant, paid off the indebtedness created by these borrowings by cashing out the investments and applying the proceeds to the loans against them. A promissory note dated May 13, 1996 in the amount of $188,709.39 was executed to evidence the Debtor's obligation to Ms. Duncan, a copy of which was introduced at trial as Exhibit PX-22 (the "1996 Note").[5] The 1996 Note was payable in monthly installments of $999.97. The Debtor made payments on the 1996 Note until 2002, but he did not keep a ledger to reflect the payments made or the remaining balance on the 1996 Note.

[5] The 1996 Note is dated May 13, 1996, but was not executed by the Debtor until November 14, 1996.

25. In 2002, Ms. Duncan and her accountant, in an effort to update her estate plan, determined that the Debtor could pay off the 1996 Note by transferring his interest in the Briargrove property to Ms. Duncan. The Debtor believed the transfer was accomplished by a written partition agreement which was produced to Cadle. At trial, Cadle denied that it had received any such document.

26. After the commencement of the case, Ms. Duncan conveyed the Debtor's interest in the Briargrove property back to him. Ms. Duncan returned the property because she did not want it to appear that she had received payment ahead of other creditors. On September 28, 2004, Schedule A was amended to reflect the reconveyance and to include the Debtor's interest in the Briargrove property.

27. The Debtor continues to reside at the Briargrove property and contribute to household expenses, including mortgage payments. In his Schedule J, the Debtor included amounts attributable to a house payment and insurance among his expenses. The Debtor has always paid his portion of the household expenses and mortgage.

The Stock Transfer

28. Within one year of bankruptcy, on or about July 17, 2002, the Debtor and Ms. Duncan executed an Assignment of Interest whereby the Debtor purported to assign his interest in Duncan & Sons, Inc., to his wife (the "Stock Transfer"). This transfer was made to satisfy certain obligations incurred by the Debtor to Ms. Duncan.

29. In particular, in 2001, Ms. Duncan loaned the Debtor $23,000 from her separate property so that he could pay certain income tax obligations (the "2001 Note"). A promissory note was executed to evidence this obligation, and the Stock Transfer was intended to provide collateral for the 2001 Note.

30. The Debtor never physically tendered the stock certificates to Ms. Duncan, because he was unable to locate them.

The Debtor's Schedules and Statement of Financial Affairs

31. In response to Questions 2 and 3 of the SOFA, the Debtor reported that his income was $25,988 from employment and $109,172 from Ms. Duncan's separate property in 2001. The Debtor and Ms. Duncan's 2001 joint tax return reflected income as follows: (i) wages in the amount of $25,988, (ii) taxable interest in the amount of $14,008, (iii) ordinary dividends in the amount of $15,604, and (iv) rental real estate in the amount of $79,560.

32. The Schedules reflected total assets of $440,979 and liabilities of $592,367.27. The Horizon Financial Statement, which was submitted six months prior to the bankruptcy filing, reflected total household assets of $2,828,820 and liabilities of $1,609,000. The Mercantile Financial Statement, which was submitted three years prior to the bankruptcy filing, reflected total household assets of $2,981,336 and liabilities of $1,942,500. The financial statements included household income and assets, not just the Debtor's income and assets. The financial statements also included the value of homes built at their anticipated retail value inclusive of profit rather than at true market value.

33. Schedule B identified a term life insurance policy issued by Transamerica Life with a death benefit of $250,000 but no cash value. The Horizon Financial Statement identified life insurance in the face amount of $250,000 with no cash surrender value. The Mercantile Financial Statement identified a life insurance policy in the amount of $750,000. This policy had two parts: a $500,000 component, and a $250,000 component. The premiums for the $500,000 portion became increasingly too expensive and, at some time prior to May 2002, the Debtor allowed this portion of the policy to lapse.

34. On Schedule B, the Debtor identified a checking account at Compass Bank in the name of Heritage Custom Homes, Inc. with a balance of $109. The Debtor also noted on Schedule B that he is a signatory on this account and that the corporation has been defunct for all purposes for many years. However, the Debtor kept the account open and used it as his personal bank account.

35. On Schedule E, the Debtor identified several credit cards with debts, as of the Petition Date, in the aggregate amount of approximately $16,500. No credit card statements have been produced.

36. Item 4 of Schedule B states that "a considerable amount of the furniture and furnishings in Debtor's home are his wife's separate property. The items listed above are the ones in which he believes he may have an community property interest and that he knows his wife did not inherit."

37. Ms. Duncan holds oil and gas interests as well as rental real property as her separate property. Ms. Duncan also owns a boat and other vehicles which are not community property. A large portion of the personal items located in their home belong to Ms. Duncan as her separate property. No evidence was introduced at trial to support Cadle's allegation that the Debtor has any ownership interest in and/or right to such property.

38. In response to Question 10 of the SOFA, which asks whether the Debtor made any transfers to insiders within one year of bankruptcy, the Debtor answered "None." In response to Question 7 of the SOFA, the Debtor stated that he made no gifts within the year preceding the bankruptcy.

39. The Debtor testified that he did not consult with his accountant in preparing his Schedules and SOFA. The Debtor only consulted with his bankruptcy attorney, Ms. Harriet

Langston, regarding his Schedules and SOFA. Ms. Langston has been practicing law for over 18 years and has been board certified in consumer bankruptcy since 1998.

40. Ms. Langston testified at trial, credibly, that she personally prepared the Debtor's Schedules and SOFA rather than delegating that task to her administrative staff (as is customary), because she was familiar with Cadle's practice of aggressively pursuing the collection of debts. Ms. Langston prepared the Schedules from documents received from the Debtor as well as from extensive interviews and discussions with the Debtor.

41. Ms. Langston listed the stock of Duncan & Sons, Inc. as being owned by the Debtor, because there was no evidence that the stock had ever been transferred. Additionally, Ms. Langston deliberately included detailed descriptions and notes in the Schedules in order to provide as much information as possible and to be as accurate as possible with respect to the Debtor's assets and liabilities. The preparation of the Schedules and SOFA as well as the particular placement of information involved legal decisions made by Ms. Langston, in her capacity as the Debtor's lawyer.

Documentation and Records Produced

42. The Debtor produced bank account statements for the period of January 1999 through August 2002 with respect to his personal checking account, which was held in the name of Heritage Custom Homes, Inc. The bank statements identified the date and amount of deposits or withdrawals, but the statements did not identify the payee with respect to withdrawals or payor information with respect to deposits.

43. The Debtor also produced bank statements for an account in the name of John C. Duncan for the period from January 2000 through October 2002. This was a money market account which permitted only a few checks a month to be written. The Debtor transferred funds

from this account to his checking account and used his checking account to pay his regular monthly bills and expenses.

44. The Debtor's bank no longer provides the Debtor with copies of cancelled checks on these accounts. If the Debtor received copies of cancelled checks in the past, he does not have them or cannot find them in his records. The Debtor inquired about obtaining copies of all checks and deposits. He was informed that the bank would provide copies at a cost of $3 per check and $25 per hour, for an estimated $2,000 to $3,000.

45. At trial, Ted Lance, an account officer at Cadle, testified that there were no substantial amounts going into or out of these accounts.

46. After receiving the Debtor's responses to Cadle's requests for production, Cadle never requested additional information or any explanation with respect to a particular deposit or withdrawal identified in the bank statements, and Cadle never asked the Debtor to obtain copies of any specific documents relating to any deposit or withdrawal.

47. The Debtor produced the following tax returns: (i) 1997, 1998, 2000, and 2001 personal tax returns; (ii) 2000, 2001, and 2002 partnership returns of Duncan-Sanders Custom Builders Ltd; and (iii) 2000, 2001, and 2002 corporate returns of Duncan & Sanders, Inc.

48. The Debtor did not produce any credit card statements. Upon receipt, reconciliation, and payment, the Debtor discards his monthly credit card statements.

49. The Debtor produced all of the personal and business financial documentation in his possession or control. Additionally, Cadle obtained a substantial number of documents regarding the Debtor's finances by subpoena from third parties prior to the 2004 Exam.

IV. DISCUSSION AND CONCLUSIONS OF LAW

Section 727 of the Bankruptcy Code provides that the Court must grant a discharge to a chapter 7 debtor unless one or more of the specific grounds for denial of a discharge listed in subparagraphs (1) through (10) are proven to exist. The provisions governing denial of a debtor's discharge are construed liberally in favor of the debtor and strictly against the party challenging the debtor's right to a discharge. *Friendly Finance Discount Corp. v. Jones (In re Jones)*, 490 F.2d. 452 (5th Cir. 1974). Furthermore, under Rule 4005 of the Federal Rules of Bankruptcy Procedure, the burden of proof with respect to all elements is on the party objecting to discharge.

In this case, Cadle objects to the Debtor's discharge under sections 727(a)(2), (3), and (5) of the Bankruptcy Code, raising three of the most common objections to discharge: (i) fraudulent transfer of assets; (ii) failure to keep adequate books and records; and (iii) making false statements in connection with the bankruptcy case. The Court will address each of these objections in turn.

A. Section 727(a)(2): Transfer or concealment of assets

Section 727(a)(2) is intended to prevent the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. This provision states in pertinent part as follows:

> [t]he court shall grant the debtor a discharge, unless . . . the debtor, with intent to hinder, delay or defraud a creditor . . . has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed (A) property of the debtor within one year before the date of the filing of the petition; or (B) property of the estate, after the filing of the petition.

11 U.S.C. §727(a)(2). Thus, to establish that the Debtor's discharge should be denied under section 727(a)(2)(A), Cadle must prove by a preponderance of the evidence: (i) the existence of a transfer of property, (ii) belonging to the debtor, (iii) within one year of the filing of the petition, (iv) with intent to hinder, delay, or defraud a creditor of the estate. *See Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 90 (5th Cir. 1989).

Intent to defraud must be actual, not constructive. *Id.* at 91. Actual intent can be established by circumstantial evidence or by inferences which can be drawn from a course of conduct. *Hibernia Nat'l Bank v. Perez (In re Perez)*, 954 F.2d 1026, 1029 (5th Cir. 1992); *Chastant*, 873 F.2d at 91; *Morton v. Dreyer (In re Dreyer)*, 127 B.R. 587, 593 (Bankr. N.D.Tex. 1991); *Cullen Center Bank & Trust v. Lightfoot (In re Lightfoot)*, 152 B.R. 141, 147 (Bankr. S.D.Tex. 1993). The Fifth Circuit has identified the following factors which may provide evidence of actual intent to defraud: (i) a lack or inadequacy of consideration, (ii) a familial or close relationship between the parties, (iii) retention of possession, benefit, or use of the property in question, (iv) the financial condition of the party sought to be charged both before and after the transaction in question, (v) the existence or cumulative effect of a pattern or course of conduct after the incurring of a debt, onset of financial difficulties or threat of suits by creditors, and (vi) the general chronology of the events and transactions at issue. *Chastant*, 873 F.2d at 91; *Hubbell Steel Corp. v. Cook (In re Cook)*, 126 B.R. 261, 268 (Bankr. E.D.Tex. 1991).

These factors are essentially restatements of the "badges of fraud" incorporated in the Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COM. CODE §24.005. In examining the badges of fraud in the context of section 727, some courts have noted that the badges break down into three categories: (i) those that are inherently indicative of fraudulent intent; (ii) those that suggest a motive other than economic rationality, and (iii) those that are only relevant because of

their timing. *See Martin Marietta Materials, Southwest, Inc. v. Lee (In re Lee)*, 309 B.R. 468, 486 n. 30 (Bankr. W.D.Tex. 2004) (citing *Murphy v. Crater (In re Crater)*, 286 B.R. 756, 764-65 (Bankr. D.Ariz. 2002)). Those badges that are inherently indicative of fraudulent intent include actual retention of the property, concealment of the transfer, and removal or concealment of assets. *See Lee*, 309 B.R. at 486 n.30.[6]

The Fifth Circuit has held that a presumption of actual fraudulent intent arises when a debtor transfers property to a relative. *Chastant*, 873 F.2d at 91 (citation omitted). However, evidence that the transfer to a relative was for fair value or consideration rebuts the presumption of fraudulent intent. The burden of proof then shifts back to the creditor to prove actual fraudulent intent. *See In re Valley-Vulcan Mold Co.*, 237 B.R. 322, 331 (B.A.P. 6th Cir. 1999) (stating that "even if the traditional badges of fraud give rise to an inference or presumption of fraudulent intent, the transferee can still rebut this presumption by showing the transaction was in fact made for fair consideration").

In this case, the transfers of the stock and residence undoubtedly occurred within one year of the Petition Date, involved a party of close relationship -- the Debtor's wife -- and related to assets in which the Debtor continued to retain possession or the benefit of use. The transfers, however, were not gratuitous. Both transfers were made for value, namely, the forgiveness of a substantial amount of debt.

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[6] The first two factors identified by the Fifth Circuit in *Chastant* -- lack of consideration and a close relationship -- indicate the possibility that the transaction was not economically rational. The last three factors -- the financial condition of the parties, a pattern of suspicious conduct, and the chronology of events preceding the transfer or bankruptcy filing -- are only relevant because of their timing. While a lack of economic motivation and timing considerations, when considered together, may be persuasive of a debtor's actual intent to hinder, delay or defraud his creditors, alone they do not mandate such a finding. *See, e.g., Roland v. U.S.*, 838 F.2d 1400, 1403 (5th Cir. 1988) (when several badges of fraud are found, they may, when considered together, "be a proper basis for an inference of fraud"); *Diamant v. Sheldon L. Pollack Corp.*, 216 B.R. 589, 591 (Bankr. S.D.Tex. 1995) ("While one badge of fraud standing alone may amount to little more than a suspicious circumstance, insufficient in itself to constitute a fraud per se, several of them when considered together may afford a basis from which its existence is properly inferable.").

The Debtor also claimed that the value of his interest in Duncan & Sons, Inc. is negligible and his interest in the homestead is exempt. The Debtor argued at trial that transfers of worthless or exempt assets cannot form the basis of denial of discharge under section 727(a)(2)(A). While these facts constitute evidence of a lack of actual intent to hinder, delay or defraud, they are not dispositive of that issue. *See, e.g., Tavenner v. Smoot (In re Smoot)*, 265 B.R. 128, 143 (Bankr. E.D.Va. 1999), *aff'd,* 257 F.3d 401 (4th Cir. 2001) (exempt property that is subsequently transferred may be the subject of a section 727 action if the requisite intent to hinder, delay or defraud creditors can be shown).

The transfers of the residence and the stock both occurred in June or July of 2002. The Debtor did not know Cadle had acquired the FDIC judgment until August of 2002. The FDIC had never made any effort to collect the FDIC Judgment, and he had no reason to know or believe that anyone would attempt to collect the FDIC Judgment until he received a request for production from Cadle in August 2002. In addition, when the Debtor received the discovery requests from Cadle, he interpreted them as being addressed to John C. Duncan, Inc. rather to him personally. He did not understand that Cadle was attempting to collect a debt against his personal assets until later. Cadle has provided no evidence which contradicts the Debtor's testimony or implies that the Debtor was contemplating or intending to file for bankruptcy at the time the Debtor transferred the stock and his interest in the residence to his wife.

It also is significant that the transfers were disclosed in the Debtor's Schedules. There was no attempt to hide or conceal the transfers from the Court, the trustee or the Debtor's creditors. The Debtor and Ms. Duncan both testified, credibly, that the purpose of the transfers was to satisfy and collateralize the obligations encumbering Ms. Duncan's separate property as part of a process of updating her estate plan. With regard to the Briargrove Transfer, Cadle

argued that the Debtor's retention of possession of the property evidenced a fraudulent intent to conceal his ownership of the property. However, in this case, continued use and possession of the Briargrove property does not evidence fraudulent intent or concealed ownership because the Debtor may claim occupancy of this property through his status as a spouse (rather than as an owner). *See In re Peterson*, 312 B.R. 385, 392 (Bankr. N.D. Iowa 2004).

In determining whether the Debtor's intent was fraudulent, the Court looks to the surrounding facts and circumstances, the credibility of the Debtor's testimony, and the general chronology of events. Although there are some badges of fraud present in this case, such as the fact that the Debtor made the Stock Transfer and the Briargrove Transfer to his wife, these are merely factors for consideration and are not conclusive. Based on the record before it, the Court finds, by a preponderance of the evidence, that the Debtor did not have any actual hinder, delay or defraud his creditors. Cadle has failed to sustain its burden and has not established that the Debtor's discharge should be denied under section 727(a)(2)(A).

B. Section 727(a)(3): Failure to Keep or Preserve Adequate Records

Section 727(a)(3) requires debtors to maintain records in order to obtain a discharge in bankruptcy. *See, e.g., In re Esposito*, 44 B.R. 817 (Bankr. S.D.N.Y. 1984). Section 727(a)(3) specifically provides as follows:

> The court shall grant the debtor a discharge, unless . . . 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 the circumstances of the case.

11 U.S.C. §727(a)(3).[7] Thus, in this case, Cadle must establish by a preponderance of the evidence *either* that the Debtor failed to keep or preserve recorded information, including books, documents, records and papers, *or* that the Debtor engaged in an act of destruction, mutilation, falsification or concealment of such recorded information. If Cadle's burden is satisfied, the burden of proof shifts to the Debtor to prove that the inadequacy in keeping or maintaining records is justified under the circumstances of this case. *See Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 703 (5th Cir. 2003) (the debtor's explanation for inadequate books and records must be satisfactory).

Cadle did not complain that records were destroyed, mutilated, falsified or concealed. Rather, Cadle sought to establish at trial that, because the Debtor failed to keep adequate books and records, it is impossible for creditors to ascertain the financial condition and material business transactions of the Debtor for the period preceding the bankruptcy filing. *See In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996). The completeness and accuracy of a debtor's records is determined on a case-by-case basis, taking into account the debtor's occupation, financial structure, education, experience and sophistication, among other things. *In re Womble,* 289 B.R. 836 (Bankr. N.D.Tex. 2003); *In re Juzwiak*, 89 F.3d at 428-29 (where debtor ran a business enterprise engaged in a steady stream of large scale transactions, the chaotic checking account records produced by debtor were insufficient).

The Court agrees that, although Federal Rule of Bankruptcy Procedure 4005 places the burden of proof on the party objecting to discharge, this rule does not alter a debtor's initial obligation to produce records from which his or her financial condition can be ascertained. *See*

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[7] Section 727(a)(3), unlike the other subsections of section 727, does not require a showing of intent or that the complained of act or acts were knowing and fraudulent. *See, e.g., In re Potter*, 88 B.R. 843, 848 (Bankr. N.D.Ill. 1988) ("The question is not why doesn't the debtor have adequate books and records but rather simply does the debtor have adequate books and records").

In re Greene, 81 B.R. 829, 833 (Bankr. S.D.N.Y. 1988). As another bankruptcy court has explained, the chapter 7 trustee and other creditors "are entitled to honest and accurate signposts on the trail showing what property passed through the debtor's hands during the period prior to his bankruptcy." *In re Dreyer*, 127 B.R. 587, 594 (Bankr. N.D.Tex. 1991). An individual debtor, however, "is not required to keep an immaculate set of books and records of his personal financial transactions." *Id.* The true inquiry for the Court is whether the level of recordkeeping employed by a particular debtor is appropriate given the nature of his or her particular circumstances.[8]

Here, despite the fact that the Debtor was involved with several business entities, the Debtor's bankruptcy case was an ordinary consumer case involving uncomplicated personal finances. The Debtor made approximately $8,000 per month for some periods prior to the bankruptcy and $4,000 per month in the period immediately preceding the bankruptcy filing. He gave approximately $2,000 to $4,000 to Ms. Duncan per month for household expenses, and he deposited the remaining amounts into his checking account or money market account. The Debtor had only a few monthly obligations and paid only a few personal expenses. Most of these monthly expenditures fell under the categories of insurance, gas, food, and clothing. He generally charged these expenses to his credit cards and paid off his credit card balance each month.

At trial, Cadle sought to portray the Debtor as a sophisticated businessman based on the fact that the Debtor operates a construction business which builds homes valued in excess of $1

[8] In *In the Matter of Bartolotta*, 485 F.2d 227 (5th Cir. 1973), the Fifth Circuit Court held that a referee erred in denying a debtor's discharge based upon a failure to keep books and records in the seasonal Christmas tree vending business, because the lower court should have heard evidence of any special circumstances relevant to that particular debtor and his case. In *Texas National Bank of Beaumont v. Edson*, 100 F.2d 789 (5th Cir. 1939), the appellee debtor testified that at no time did he ever undertake to keep a set of books on his business operations. *Id.* at 790. The Fifth Circuit ruled that the grant of the discharge was dependant upon a finding that failure to keep books and records was justified under all of the circumstances of the case.

million. There was no evidence, however, of the Debtor's education or knowledge of financial matters. Rather, the evidence supported the Debtor's testimony that his partner handled all of the financial aspects of their businesses and that his expertise was in building homes. While the Debtor may be an excellent builder of expensive custom homes, building homes does not require financial sophistication, and, with all due respect to the Debtor, the Court finds that he is not a financially sophisticated businessman. The Debtor's testimony reflected that he has only a rudimentary understanding of the corporate structure of the entities in which he held or holds interests, the offices he held or holds in those entities, if any, and/or the nature of the assets held by such entities.

Cadle also described the Debtor as operating through a complex nexus of nine business entities. However, only two or three of the Debtor's business entities operated at any given time,[9] and the operating structure of these businesses was not complex or sophisticated. Further, the testimony supports that the Debtor was not necessarily in control of these entities at any particular time (other than those which he formed in 2002). The Debtor and Ms. Duncan testified, credibly, that the Debtor had been building homes for 30 years, but that he had, unfortunately, not been financially successful.

The Debtor, as an individual, is not under a duty to keep more detailed records than any other individual taxpayer. *See In re Rowe*, 81 B.R. 653, 657 (Bankr. M.D.Fla. 1987) (holding that debtor's checking account statements were sufficient for ascertainment of his financial

[9] The Debtor did business through John C. Duncan, Inc. and JCD Venture, Inc. until 1987. For some time after those entities ceased doing business until 1992, the Debtor conducted business through Heritage Custom Homes, Inc. In 1992 the Debtor went into business with Sanders and stopped using any of the previous entities for business activities. From 1992 through 2002, the Debtor and Sanders created Duncan & Sanders, Inc. and Duncan-Sanders Custom Builder, Ltd. for the purpose of building custom homes. In 2002, the Debtor stopped doing business with Sanders and began doing business without any partners through Duncan & Sons, Inc. and JCD Associates, Ltd. After the bankruptcy filing, the Debtor and one of his friends formed DW Homes, Inc. and S&D Associates for the purpose of building custom homes, but, as of the trial, these post-petition entities were not yet conducting any business activities.

condition). The Debtor produced three years of bank statements to Cadle, which Cadle admitted showed no substantial deposits or withdrawals. Cadle nonetheless argued that the Debtor's discharge should be denied, because the Debtor did not also produce cancelled checks or credit card statements.

While credit card statements are the type of documents consumers generally retain, such retention is becoming less common as online banking and bill paying technology gain in popularity. The retention of cancelled checks is also becoming less common as many banks no longer provide cancelled checks to their customers without a special request or payment of a fee. The Court, therefore, finds that the failure of the Debtor to maintain cancelled checks and individual credit card receipts for consumer purchases does not, standing alone, warrant denial of discharge. *In re Peterson*, 296 B.R. 766, 789 (Bankr. C.D.Ill. 2003) (office manager's failure to maintain credit card receipts for consumer purchases did not bar discharge); *Ledbetter v. Zaidan (In re Zaidan)*, 86 B.R. 296 (Bankr. S.D.Fla. 1988) (an individual debtor who customarily disposed of cancelled checks and similar documents but maintained bank statements and recent tax returns should not be denied a discharge); *In re Irey*, 172 B.R. 23 (Bankr. N.D. Ohio 1994) (maintenance of bank statements without check stubs or cancelled checks is sufficient record-keeping for an individual, non-business debtor).

The Debtor provided his bank statements for the period preceding the bankruptcy filing, his personal and corporate tax returns, his will, his life insurance policy, the formation documents relating to the entities under which he is currently doing business, documentation regarding the transfers and other obligations incurred, as well as many other documents. Cadle failed to establish that it was necessary for the Debtor to maintain books and records of a different type and quality in order for creditors to ascertain his financial condition. *See Matter of*

Oesterle, 651 F.2d 401 (5th Cir. 1981) (failure of tax consultant to maintain records was justified where business was not of the size and complexity that keeping of books and records was necessary); *In re Wang*, 247 B.R. 211, 217 (Bankr. E.D.Tex. 2000). On the contrary, it was apparent from the testimony of Cadle's representative and the arguments presented at trial that the documentation provided to Cadle was sufficient for Cadle to clearly understand the Debtor's financial condition in the years leading up to the bankruptcy filing.

The Bankruptcy Code requires a debtor to retain sufficient records for creditors to be able to ascertain his or her financial situation prior to filing. The Debtor's recordkeeping satisfies this requirement.[10] The Court finds that Cadle has failed to establish a *prima facie* case under section 727(a)(3). To the extent that Cadle could be determined to have made a *prima facie* case under section 727(a)(3), the Court finds that the Debtor has shown that any failure to keep books and records was justified under the circumstances of this case.

C. Section 727(a)(4): False Oaths

Finally, section 727(a)(4) provides that the Court must deny the debtor a discharge if the debtor, knowingly and fraudulently, in or in connection with the case, made a false oath or account. The purpose of this section is to encourage debtors to deal honestly with their creditors by making full and complete disclosure. "The debtor must be scrupulous in giving notice of all assets to which others may make a legitimate claim." *In re Sullivan*, 204 B.R. 919, 942 (Bankr. N.D.Tex. 1997) (citing *Banc One, Texas, N.A. v. Braymer (In re Braymer),* 126 B.R. 499, 502 (Bankr. N.D.Tex. 1991)).

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[10] Cadle also argued that many of the documents they received were obtained by subpoena from third parties, not from the Debtor. The Debtor testified that he directed Cadle where to go to obtain documents responsive to Cadle's initial discovery request to the extent he did not have the documents in his possession or control. The bulk of the information requested by Cadle in its discovery requests related to the entities through which the Debtor and Sanders did business -- not to the Debtor's personal finances. Having determined that the Debtor produced sufficient documentation for creditors to ascertain his personal financial condition for the period preceding the bankruptcy filing, it is unnecessary for the Court to address Cadle's argument regarding the production of additional documents.

Cadle asserts that the Debtor's Schedules and SOFA contain many false statements which generally can be categorized as (i) failure to list certain assets and ownership interests which the Debtor claims are Ms. Duncan's separate property, (ii) incorrect valuation of the Debtor's business ventures or identify assets owned by such entities, (iii) failure to list the Stock Transfer or Briargrove Transfer in the SOFA and other related omissions arising out of these transfers,[11] (iv) failure to report or identify income, and (v) failure to disclose that the Horizon Financial Statement had been issued.

In order prevail on its section 727(a)(4) objection to discharge, Cadle bears must prove, by a preponderance of the evidence, that (i) these statements were made under oath, (ii) these statements were false, (iii) the Debtor knew these statements were false when made, (iv) the Debtor made these statements with fraudulent intent, and (v) these statements relate materially to the bankruptcy case. *Sholdra v. Chilmark Fin. LLP (In re Sholdra)*, 249 F.3d 380, 382 (5th Cir. 2001); *Beauboef v. Beaubouef (In re Beaubouf)*, 966 F.2d 174, 178 (5th Cir. 1992).

With regard to whether the Debtor made a statement under oath by alleging failing to disclose certain assets in his Schedules and SOFA,[12] omissions and incorrect valuations may qualify as false statements. *See In re Beaubouef*, 966 F.2d at 178. However, such omissions "must rise to the level of an intentional and willful defrauding of the creditors." *Interfirst Bank Greenville, N.A. v. Morris (In re Morris)*, 58 B.R. 422, 428 (Bankr. N.D.Tex. 1986).

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[11] Cadle asserted that the Debtor failed to identify, in response to Question 18 of Schedule B, the life estate he claimed to retain in the Briargrove property, and should not have listed his ownership interest in Duncan & Sons, Inc. in light of the Stock Transfer or any housing expenses in Schedule J.

[12] Cadle also complained that the Debtor made false statements in connection with his testimony at the 341 Meeting and 2004 Exam, which the Debtor denies. The transcripts of these proceedings are not before the Court and Cadle did not present any evidence to refute the Debtor's testimony. The Court has insufficient evidence to find that such statements are false. Accordingly, Cadle has not met its burden with respect to such statements under section 727(a)(4).

With respect to whether the statements in the Debtor's Schedules and SOFA were false, the Court concludes that only the Debtor's response to Question 19(d) of the SOFA -- relating to the issuance of financial statements in the two-year period prior to filing for bankruptcy -- was a false statement. The Debtor testified that he had simply forgotten that the financial statement had been issued to the bank. He also testified that, since Cadle already had knowledge and possession of the document, he did not feel that he needed to disclose it again in the SOFA. The Court finds the Debtor's testimony to be credible in that the omission was an inadvertent or honest mistake. However, the statement in the SOFA, as a matter of fact, was false.

Cadle has failed to substantiate its assertion that any of the other statements or omissions are, or were, false. The majority of the statements or omissions complained of by Cadle relate to property owned by Ms. Duncan as her separate property. The Debtor and Ms. Duncan consistently maintained that these items were not listed in the Schedules or SOFA because Ms. Duncan owned them prior to their marriage or they were purchased during their marriage with her separate funds. The record at trial contains no credible evidence which contradicts or disputes the Debtor or Ms. Duncan's testimony on this issue. With respect to the Debtor's valuation of his business interests, Cadle has provided no independent or credible evidence which refutes the Debtor's scheduled value of these assets. With regard to the Debtor's income, the evidence at trial supported that the amounts listed in the SOFA were correct.

Cadle also complained that the Debtor failed to identify the pre-petition property transfers to Ms. Duncan in response to various questions regarding gifts and transfers of property out of the ordinary course of business in the SOFA. However, these transfers were for consideration and were not gifts. The Court also finds that the Debtor's disclosures were appropriate and that statements in the Schedules and SOFA are correct. Although the intent of the Stock Transfer

was to effectuate a transfer of the Debtor's interest in Duncan & Sons, Inc. to Ms. Duncan, the certificates were never actually tendered, and no transfer occurred.[13] With respect to the transfer of the Debtor's interest in the Briargrove property, the Debtor disclosed on Schedule A that he had transferred his community property interest in this property to Ms. Duncan, retaining only his homestead interest. While the Debtor could have listed the transfer of the Briargrove property in response to multiple questions on the SOFA, the fact that the transfer was disclosed on the first page of the Schedules was sufficient to provide creditors with the disclosure encouraged by section 727(a)(4)(A).

It is not enough for Cadle to point to inaccuracies and inconsistencies in the Debtor's schedules. To deny the Debtor a discharge under section 727(a)(4)(A), the Court must find that the Debtor intended to defraud and mislead the other parties in the case. Cadle argued that the sheer volume of the false statements evidences fraudulent intent, but the only statement actually proven to be inaccurate or misleading is the statement in the Debtor's SOFA regarding the issuance of any financial statements in the period preceding the bankruptcy. Cadle has not established, by a preponderance of the evidence, an actual intent to deceive or a reckless indifference for the truth. *In re Sholdra*, 249 F.3d at 382. The Debtor was not trying to conceal any assets or interests from his creditors or the bankruptcy trustee. The Debtor's and his attorney, Ms. Langston, attempted to disclose every possible fact or interest relevant to the case in an attempt to avoid the very claims made by Cadle in this adversary proceeding. Based on the evidence presented at trial, the Court finds that the Debtor did not possess any fraudulent intent with respect to his Schedules and SOFA.

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[13] The parties do not dispute that the transfer was not effectuated and the evidence and testimony at trial supports the finding that the Stock Transfer did not operate to divest the Debtor of his ownership interest of Duncan & Sons, Inc.

Furthermore, false statements sufficient to deny a debtor's discharge must not only be made with fraudulent intent; they must also be material. A statement is "material" if it bears a relationship to the debtor's business transactions or bankruptcy estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. *See e.g., Beaubouef*, 966 F.2d at 174. The only false statement identified herein, whether or not the Debtor issued a financial statement prior to the bankruptcy filing, is not material. The Horizon Financial Statement reflects household assets, income and liabilities -- not the Debtor's independent financial situation. The existence or non-existence of this financial statement has no material or adverse effect on the Debtor's creditors or the bankruptcy estate particularly where its existence was disclosed to the largest and most active creditor in the case.

The Debtor has dealt honestly with his creditors and has made a full and complete disclosure of all of his assets and liabilities. The Debtor turned over the Horizon Financial Statement to Cadle in connection with Cadle's pre-petition collection activities. The Debtor attended his 341 Meeting and cooperated with Cadle in identifying its attempt to identify additional information. The Debtor and Ms. Duncan submitted to examinations under Rule 2004 of the Federal Rules of Bankruptcy Procedure so that Cadle could inquire further about the Debtor's assets or interests. Cadle has failed to show by a preponderance of the evidence that the Debtor has not fulfilled his duty under this section of giving notice to his creditors of all of his assets and liabilities. The Court finds that the Debtor's failure to identify the Horizon Financial Statement in his SOFA was an inadvertent mistake, was not material, and does not justify the denial of the Debtor's discharge under section 727(a)(4).

V. CONCLUSION

For the foregoing reasons, the Court concludes that Cadle has failed to establish that (i) the Briargrove Transfer or the Stock Transfer were made with intent to hinder, delay or defraud, (ii) there has been a failure of record keeping which would justify the denial of a discharge; or (iii) the Debtor made any knowing and fraudulent statements with respect to any material matter herein. Accordingly, Cadle's the relief requested is denied and judgment shall be granted in favor of the Debtor. This opinion shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable herein by Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure, and disposes of all issues pending before the Court. To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party. An appropriate judgment will be entered which is consistent with this opinion.

Signed on March 31, 2006

Brenda T. Rhoades

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE