

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

DEBRA M. WEST,
MATTHEW E. WEST,

Debtors.

Case No. 96-25374-MDM

Chapter 7

ALBY MATERIALS, INC.,
a Wisconsin corporation,

Plaintiff,

v.

Adversary No. 96-2633

MATTHEW E. WEST,

Defendant.

NIENOW ENGINEERING
ASSOCIATES, INC.,

Plaintiff,

v.

Adversary No. 96-2634

MATTHEW E. WEST,

Defendant.

MEMORANDUM DECISION

The plaintiffs brought these adversary proceedings against the chapter 7 debtor, Matthew West, under 11 U.S.C. § 523(a)(2), (4), and (6). The two proceedings were consolidated for trial, which was held over the course of four days in May and June 1997, after which the court took the matter under advisement. The parties also provided the court with post-trial briefs on damages.

The first adversary proceeding brought by plaintiff Alby Materials, Inc., ("Alby") involved the debtor's conduct in inducing Alby to purchase a controlling interest in Nienow Engineering

Associates, Inc. ("Nienow"). The second proceeding involved the debtor's conduct as president of the plaintiff Nienow after Alby's purchase. These proceedings will be addressed by the court in that order.

This court has jurisdiction to hear this adversary proceeding pursuant to 28 U.S.C. § 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This decision constitutes the court's findings of facts and conclusions of law under Fed. R. Bankr. P. 7052.

I. ALBY MATERIALS, INC. v. MATTHEW WEST

A. Facts

From 1990 through April 1996, the debtor, Matthew West, was the President and Treasurer of Nienow Engineering Associates, Inc., having purchased the company along with Daniel Spirewka from its founder, Wallace Nienow. Mr. West and Mr. Spirewka were equal stockholders and their debt to Mr. Nienow was secured by the assets of the corporation.

On June 17, 1993, Nienow filed a chapter 11 petition in this district. During late 1993, Alby began negotiating with Nienow regarding possible investment in the latter to exit the bankruptcy in a solvent condition. Mr. West met with representatives of Alby to discuss the terms of such an investment and provided Alby with written statements regarding Nienow's financial condition. Mr. West and the materials he provided were Alby's sole sources of information in determining whether to make the investment. The balance sheets indicated that Nienow's accounts receivable totaled approximately \$220,000.00 to \$230,000.00 between December 1993 and May 1994, receivables being the major corporate asset. Nienow's total assets during that same period ranged from \$255,000.00 to \$310,000.00. According to the trial

testimony of David Cole, Alby Materials' treasurer, Mr. West also told Alby Materials' advisory board prior to its investment that Nienow's accounts receivable were in good shape. Mr. West testified that he could not remember the substance of the accounts receivable discussions, but he believed at the time that all accounts owed Nienow were collectible. He thought he might have mentioned to someone at Alby that there might be a problem with some of the accounts.

Terry Alby, President of Alby Materials, Inc., testified that because of Mr. West's representations, Alby Materials decided to further investigate the company's investment potential, although it did not engage in a full scale due diligence investigation. Mr. Alby stated that at Mr. West's suggestion, Alby Materials did not contact anyone on the list of accounts receivable because the company did not want to alienate its customers any more than the chapter 11 already had. Furthermore, Mr. West seemed credible in his representations concerning the quality of the accounts, and Nienow Engineering's financial statements were prepared by an accounting firm and appeared in order.

Alby Materials hired Tom Landgraf, a certified public accountant and independent financial consultant, to look into the Nienow investment. Mr. Landgraf testified that prior to Alby Materials' investment, Nienow's books showed the company had nominal bad debt, which probably meant the company had a solid repeat customer base. Additionally, there were no reserves on the books for uncollectible accounts, and no recent write-offs. The personnel had remained with the company notwithstanding the bankruptcy.

Nienow and Alby reached an agreement on March 10, 1994. Pursuant to the Agreement, Alby Materials paid a total of approximately \$310,000.00 to Nienow, and on behalf of Nienow, to its creditors. Alby purchased 125 shares of unissued capital stock of Nienow, 51% of the

company's outstanding shares, for \$100,000.00. This amount was used to satisfy Nienow's unpaid payroll tax obligations to the Internal Revenue Service, the Wisconsin Department of Revenue and the Department of Industry, Labor and Human Relations. Alby Materials purchased the secured claim of Bank One and the unsecured claims of Joseph Lemel and Security Land Development. Alby Materials also loaned Nienow amounts sufficient to pay the balance due on the proof of tax claims, to bring current the debtor's leases on equipment it intended to retain, to pay the chapter 11 administrative costs and expenses and United States Trustee quarterly fees, and to provide working capital. Alby Materials also entered into an agreement with Wallace Nienow, the former owner of Nienow Engineering, to purchase his secured claim for \$86,000.00.

Prior to the agreement, Matthew West and Daniel Spirewka each owned 50% of Nienow's shares. Under the agreement between Nienow Engineering and Alby Materials, Matthew West retained 49% of Nienow's shares, and Daniel Spirewka surrendered his shares to Mr. West. Mr. West remained President and Treasurer of Nienow Engineering.

Dismissal of Nienow's bankruptcy case was a condition precedent to Alby Material's obligation to make said payments, and on March 28, 1994, Nienow filed a motion to voluntarily dismiss the case. At the April 21, 1994, hearing on Nienow's motion to dismiss, Mr. West testified that if Nienow were forced to liquidate, approximately three quarters of the money that was owed the company would be collectible. A greater amount could be collected if the company remained a going concern. Based primarily upon the agreement between Nienow and Alby Materials, the bankruptcy court dismissed the case on April 21, 1994, by order signed on May 2, 1994.

Both before and after Alby Materials purchased an interest in Nienow, Mr. West

controlled the company's customer billing. According to Mark Nesgood, Nienow's director of surveying, Mr. West decided the amounts to be billed to customers on about 90% of jobs done by Nienow and when they should be billed. Mr. West was also responsible for pursuing the collection of difficult accounts. Mr. West alone made decisions to write off bad accounts. Dan Spirewka likewise testified that prior to Alby Materials' purchase, when he was still a 50% shareholder of Nienow, only Mr. West dealt with client contact, billing and collection.

John Noggle, a Certified Public Accountant with R.J. Nolan & Associates, was Nienow's accountant from 1990 through 1996. Among other duties, Mr. Noggle compiled monthly financial statements which described Nienow's assets and liabilities. The monthly list of accounts receivable were prepared by various persons at Nienow. From approximately 1990 through early 1993, Mary Hockinson, Nienow's secretary, provided the accounts receivable to Nolan. After Ms. Hockinson left the company, Dan Spirewka prepared the list of accounts receivable until Rita Moglia was hired as Nienow's bookkeeper/secretary. Mr. Noggle compiled the company's financial statements from information supplied by the client. Mr. Noggle testified that he spoke with Mr. West about the build-up of accounts receivable prior to November 1993.

In 1994, \$90,435.00 of the accounts receivable that had been on Nienow's books at the time Alby Materials purchased an interest had to be written off as uncollectible. In 1995, an additional \$38,994.00 of the pre-Alby receivables had to be written off. Mr. Alby testified that if he had known that only 35% to 40% of Nienow's accounts receivable would actually have been collected, Alby Materials would not have invested in Nienow Engineering. Mr. Landgraf opined that Mr. West grossly misstated Nienow's accounts receivables. In his experience as an accountant and consultant, Mr. Landgraf had never seen a write-off of such magnitude due to a

mere mistake. Because of the write-offs, Nienow's true value at the time of Alby Materials' acquisition was \$25,000.00, in Mr. Landgraf's opinion.

Several witnesses testified as to how Mr. West handled his responsibilities with respect to receivables both before and after Alby Materials invested in Nienow. Art Bruemmer, a developer, worked with Nienow on a project in 1991. He was charged excessively for the work done by Nienow. At trial, Mr. Bruemmer stated that Mr. West promised to take care of the incorrect bills, but Mr. Bruemmer continued to receive additional bills. Nienow's lawsuit in state court against Mr. Bruemmer was dismissed with prejudice in 1996.

Simon Margolius, a builder and developer, worked with Nienow Engineering on a subdivision project in late 1994. Mr. Margolius testified that he had numerous difficulties with his bill from Nienow and he was consistently overbilled for the work performed by Nienow. At one point, Nienow's billing statement failed to credit him for payments made and showed that he owed \$15,000.00. Mr. Margolius and his attorney met with Mr. West and Mr. West stated that he would resolve the dispute. Mr. West did not resolve the matter. In late 1995, Terry Alby examined the company's records and determined that Mr. Margolius owed Nienow nothing.

David Andruczyk, Nienow's project engineer, testified that Mr. West stated in March of 1996, after the large write-offs when Alby began closely scrutinizing Nienow's operations, that February 1996 was a good month with a substantial number of billings. Nevertheless, Mr. Andruczyk contends that he and other employees were not busy that month. He also became aware at that time that one customer received a bill for the full amount of a contract even though work had only barely started.

Rita Moglia, Nienow's secretary and bookkeeper and Mr. West's sister-in-law, went to

work for the company after Alby invested. She testified that on more than one occasion, she brought discrepancies in the receivables records to Mr. West's attention. She said he refused to take an account off the receivable list even though he knew the account had been paid, and he instructed her to remove an account without payment or appropriate credit. Mr. West disputed these contentions.

B. Arguments

Alby Materials contends that its capital contribution of \$310,000.00, used to acquire a controlling interest in the company, should be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(2). Alby Materials claims that Mr. West made misrepresentations intentionally or with reckless disregard of Nienow's true financial condition. Mr. West intended to deceive Alby Materials when he made the misrepresentations about the collectibility of the company's accounts receivable, and Alby Materials justifiably relied on his representations to its detriment. Alby also reasonably relied on false written statements of Nienow's financial condition prepared with information supplied by Mr. West. Alby would not have invested \$310,000.00 to bring Nienow out of bankruptcy absent Mr. West's misrepresentations.

Mr. West argues that he made no misrepresentations regarding the financial condition of Nienow Engineering. If any misrepresentations were made, they were unintentional. According to Mr. West, he sincerely believed that most of Nienow's accounts receivable were collectible.

C. Analysis

A debt is nondischargeable under 11 U.S.C. § 523(a)(2) if it is

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by —

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing —

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. § 523(a)(2). A plaintiff must show that a debt is nondischargeable by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659-60 (1991); *Matter of Sheridan*, 57 F.3d 627, 633 (7th Cir. 1995). To further the policy of providing the debtor a fresh start in bankruptcy, exceptions to discharge are construed strictly against the creditor and liberally in favor of the debtor. *Meyer v. Rigdon*, 36 F.3d 1375, 1385 (7th Cir. 1994).

1. Section 523(a)(2)(A)

The Seventh Circuit has mandated the application of a single test to prove the three types of misconduct, even though intent is an integral part of "fraud" and not of "false pretenses" and "a false representation." See *Matter of Mayer*, 51 F.3d 670, 674-76 (7th Cir. 1995). Alby Materials alleges that Mr. West engaged in all three types of conduct, but its case primarily focused on allegedly false representations made by Mr. West.

In order to except a debt from discharge under § 523(a)(2)(A), Alby Materials must establish the following elements: (1) Mr. West obtained the funds at issue through false pretenses or representations he either knew to be false, or made with such reckless disregard for the truth as to constitute willful misrepresentations; (2) Mr. West actually intended to deceive Alby Materials;

(3) to its detriment, Alby Materials actually relied on the misrepresentations; and (4) Alby Materials' reliance was justifiable under the circumstances. See *Field v. Mans*, ___ U.S. ___, 116 S.Ct. 437 (1995); *Mayer*, 51 F.3d at 673-74.

First, Alby Materials must prove that Mr. West obtained funds invested in Nienow by reason of representations he "either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation." *Mayer*, 51 F.3d at 675.

The court notes that Alby Materials invested the funds in Nienow Engineering and paid debts of the bankrupt company; payment was not made to Mr. West *directly*. Thus, arguably, Mr. West never personally obtained the funds in question. Courts have taken one of three approaches to the issue of whether a debtor must personally receive money before the exception to discharge of § 523(a)(2)(A) can apply. The narrowest view requires that the debtor personally receive the "fruits of the fraud." See *In re Bilzerian*, 100 F.3d 886, 890 (11th Cir. 1996) (rejecting "fruits of fraud" view). The second view, termed the "receipt of the benefits" theory, requires that the debtor gain a benefit from the money that was obtained by fraudulent means. *Id.* The third view simply requires that a debtor obtain money by fraudulent means, and the debtor need not receive money personally or receive any benefit at all. *Id.* The majority of courts has preferred the middle view, the "receipts of the benefits" theory. See *id.*, *In re Ledford*, 970 F.2d 1556 (6th Cir. 1992); *Matter of Luce*, 960 F.2d 1277 (5th Cir. 1992); *In re Ashley*, 903 F.2d 599 (9th Cir. 1990). This court agrees with the majority view.

In *In re Ashley*, 903 F.2d 599, 604 (9th Cir. 1990), for instance, the debtor had induced creditors to loan money to a financially-troubled corporation in which he also had invested in order to keep the corporation viable. Although the debtor's link with the loan recipient was

"slightly attenuated," the court determined that he nonetheless obtained money under § 523(a)(2)(A) through his misrepresentations because he either was sufficiently related to the corporation to be considered a loan recipient himself, or, if not a recipient of the loan, profited because he had a financial interest in the corporation. *Id.* at 604.

In the instant case, Mr. West indirectly obtained both tangible and intangible financial benefit as a result of Alby Materials' investment. Mr. West, who was a shareholder, the treasurer and the president of the recipient of Alby Material's funds, profited even more directly than the debtor in *Ashley*. Because of Alby Materials' investment, Mr. West was relieved of any potential tax obligations, he retained his employment, and became a 49% shareholder of a solvent company. Consequently, Mr West "obtained" the invested funds of Alby Materials.

Whether Mr. West obtained these funds fraudulently is another issue. As noted above, Alby Materials must prove that Mr. West obtained the investment money through representations he either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation. An omission or failure to disclose can constitute a misrepresentation if the omission or failure to disclose creates a false impression that is known by the debtor. *In re Bozzano*, 173 B.R. 990, 993 (Bankr. M.D.N.C. 1994).

"False pretenses" in § 523(a)(2)(A) has been defined as "implied misrepresentation or conduct intended to create and foster a false impression." *In re Bryson*, 187 B.R. 939, 959 (Bankr. N.D. Ill. 1995). Another court further defined "false pretenses" as

a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in which a creditor is wrongfully induced by the debtor to transfer property or extend credit to the debtor . . .

A false pretense is usually, but not always, the product of multiple events, acts or representations undertaken by a debtor which purposely create a contrived and misleading understanding of a transaction that, in turn, wrongfully induces the creditor to extend credit to the debtor. A "false pretense" is established or fostered willfully, knowingly and by design; it is not the result of inadvertence.

In re Dunston, 117 B.R. 632, 641 (Bankr. D. Colo. 1990), *aff'd in part, rev'd in part*, 146 B.R. 269 (D. Colo. 1992). False pretenses do not necessarily require overt misrepresentations. Instead, omissions or a failure to disclose on the part of the debtor can constitute misrepresentations where the circumstances are such that omissions or failure to disclose create a false impression which is known by the debtor. *In re Bozzano*, 173 B.R. 990, 993 (Bankr. M.D.N.C. 1994).

Pursuant to the second element of § 523(a)(2)(A), Alby Materials must show that Mr. West intended to deceive it into investing in Nienow and paying off the company's debt. An intent to deceive may be inferred from a false representation which the debtor knows or should know will induce another to advance money to the debtor. *In re Kimzey*, 761 F.2d 421, 423-24 (7th Cir. 1985). Fraudulent intent can be established by circumstantial evidence. *In re Briese*, 196 B.R. 440, 451 (Bankr. W.D. Wis. 1996). The fraud must occur at or near the time the creditor advances the consideration given to the debtor. Subsequent acts of fraud or omissions do not establish that the debtor had the requisite intent at the time the representations were made. *See In re Ballantyne*, 166 B.R. 681, 685 (Bankr. E.D. Wis. 1994).

Third, Alby Materials must show that it actually relied on Mr. West's representations. Mr. Alby testified that the advisory board would not have invested in Nienow had Mr. West correctly portrayed the company's accounts receivable.

Finally, Alby Materials must show that its reliance on the representations was justifiable. *Field v. Mans*, 116 S.Ct. 437, 439 (1995). The difference between justifiable and reasonable

reliance is that the former is a subjective standard, whereas the latter is an objective standard of conduct. According to the Supreme Court:

“Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct to all cases.”

Id. at 444 (quoting Restatement (Second) of Torts § 545A, cmt. B (1976)). The court may not find justifiable reliance if the falsity of a misrepresentation would have been apparent had the creditor utilized an opportunity to make a cursory examination or investigation. *Id.* at 439.

Likewise, a creditor does not justifiably rely if the deceit should have been apparent to someone with the creditor's knowledge and intelligence from a cursory glance, or if the creditor discovered something that should have served as a warning and failed to further investigate. *Id.* The court must examine all of the facts available to Alby Materials and determine whether it should have realized that Nienow Engineering was not the viable company it was represented to be.

Nienow was not a capital intensive operation. Its value when Alby invested was in its receivables for past services. Going forward, its value was in its ability to provide future services to an established customer base and a reputation that could expand that base. A misrepresentation as to the value of its past services is likewise a misrepresentation as to its future potential and reputation. Mr. West testified at trial that he sincerely believed that all of Nienow's accounts were collectible. This court is satisfied that that cannot have been true. There was too much evidence of problems with dissatisfied customers, billings after payments, and billings before performance, all of which was within Mr. West's knowledge and control. The problems were of such magnitude, as shown by the huge write-offs in 1994 and 1995, that even the most naive person, which Mr. West is not, had to notice. To ignore these problems and improper practices

and to say the receivables were fine is reckless disregard of the truth; to recognize the problems and to tell Alby Materials the receivables were fine was fraud. Either interpretation of Mr. West's conduct establishes his wrongful misrepresentations and intent to deceive that runs afoul of 11 U.S.C. § 523(a)(2)(A).

The debtor argues that the court cannot find a debt nondischargeable on account of oral statements made about the company's financial condition because 11 U.S.C. § 523(a)(2)(A) addresses only "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . ." According to this argument, apparently the debtor could lie with impunity, as long as he was talking about financial matters in trying to get Alby to invest. Surely not. In any event, Mr. West's assurances about the quality of the receivables said more about the company than merely its financial condition. Such statements also contained logical implications about the quality of Nienow's work, the satisfaction of its customer base, and the likelihood the company would be able to get future referrals and repeat business. Accordingly, misrepresentations of the sort complained of in this action fall within the ambit of 11 U.S.C. § 523(a)(2)(A).

Without question, Alby actually relied on representations by Mr. West concerning the value of the accounts receivable, and it would not have made the investment had its board known that shortly after the investment it would have to write off 60% of the value of the major asset.

Moreover, the court is satisfied that Alby's reliance was justifiable under the circumstances. Mr. West testified before the bankruptcy court during Nienow's chapter 11 case that approximately three-fourths of the accounts were collectible. Before the deal was struck, he had told Alby's advisory board that the receivables were sound. The board of Alby Materials

believed Mr. West to be credible. After all, he had been in the position of billing and collecting; he should know. Mr. West's statements were consistent with those provided by the accountants. As is discussed in the next section, it reviewed internally information Mr. West provided and sought advice from outside advisors. Although Nienow was under bankruptcy protection, there were no other obvious risks. These acts are sufficient to make its reliance justifiable.

Alby's damages are what it invested, less what it received. True, Nienow is still in business. Alby may yet make money on it. However, what Alby got was substantially less than what it paid for, and damages are appropriately measured at the time of the fraud. If Alby is able by its own expertise to build additional value into the business, it is not for Mr. West's benefit. There was no evidence at trial that Mr. West's acts caused any decline in the value of the business once he was no longer at the helm. In its post-trial brief, Alby presented records showing Nienow's current value, evidence of which was not presented at trial. The court sustains the debtor's objection to that evidence and such evidence is not part of the court's consideration.

This court holds that Alby Materials' capital contribution of \$310,000.00, minus \$25,000.00 which Mr. Landgraf stated was the worth of Nienow after the investment, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) as to Matthew West.

2. Section 523(a)(2)(B)

In order to prevail on a claim under 11 U.S.C. § 523(a)(2)(B), a creditor must prove by a preponderance of the evidence that a debtor made, with an intent to deceive, a materially false written statement regarding his financial condition and that the creditor relied on that statement. See *Matter of Sheridan*, 57 F.3d 627, 633 (7th Cir. 1995); *Matter of Meyer*, 89 B.R. 25, 27

(Bankr. E.D. Wis. 1988).

First, there must be the existence of a statement in writing, and this statement must concern the debtor's financial condition. It is not disputed that this action involves a written statement which concerned the debtor's financial condition; namely, the financial statements prepared by Nienow's accountant using information supplied by Mr. West, showing the value of the receivables without write-offs or a bad debt reserve.

Second, the writing must be materially false. In *Matter of Mayer*, 51 F.3d 670, 675 (7th Cir. 1995), the Seventh Circuit indicated that subsection (B) applied to "a fib in a financial statement — the category carved out of § 523(a)(2)(A)." Clearly, the accounts receivable amounts were false; over 60 % were uncollectible. In evaluating whether a false statement is material, a germane inquiry is whether the creditor would have advanced the money to the debtor had it known the debtor's true financial condition. *Matter of Bogstad*, 779 F.2d 370, 375 (7th Cir. 1985). The accounts receivable were Nienow Engineering's greatest assets. Additionally, the accounts receivable were extremely important to the investor, Alby Materials. Mr. Alby testified that had Alby Materials had accurate financial information from Mr. West, it would not have invested in Nienow Engineering.

Third, Alby Materials must show that the statements were made with intent to deceive. It may show an intent to deceive by demonstrating that Mr. West had a reckless indifference to or reckless disregard for the accuracy of the information on the financial statement. *In re Grossman*, 174 B.R. 972, 984 (Bankr. N.D. Ill. 1994); see also *Matter of Garman*, 643 F.2d 1252, 1260-61 (7th Cir. 1980) ("[W]here . . . a person knowingly or recklessly makes a false representation which the person knows or should know will induce another to make a loan, intent to deceive may be

logically inferred.”). Alby Materials has satisfied its burden here. Such a reckless indifference and disregard is the most generous explanation of Mr. West’s failure to provide Nienow’s accountant with accurate information regarding its accounts receivable. Furthermore, fraudulent intent may be inferred from the totality of the circumstances. *Regency Nat’l Bank v. Blatz*, 67 B.R. 88, 91 (E.D. Wis. 1986). Rita Moglia testified that Mr. West instructed her to keep paid accounts on the books. David Andruczyk received a complaint that a bill had been sent before work was done. Granted, these examples occurred after the Alby investment, but this court is satisfied that Mr. West indeed had a propensity to play fast and loose with corporate records. Furthermore, Mr. West was aware of the benefits of Alby Materials’ investment. Mr. West was relieved of any potential tax liability, he became a 49% shareholder in a solvent company, and he retained his position as president and treasurer of Nienow. Both before and after Alby Materials invested in Nienow Engineering, Mr. West exercised almost exclusive control over the financial aspects of the business and provided the financial information to the accountants who prepared the erroneous financial statements.

Finally, the issue of whether Alby Materials reasonably relied on the representations of Mr. West regarding Nienow’s accounts receivable is straightforward. Alby Materials did not blindly rely upon the statements; it sought advice from an independent financial advisor, who considered Mr. West a credible source of information about the business. The financial statements had been prepared by a certified public accountant, which gave them an aura of reliability. Mr. West was questioned about the lack of a bad debt reserve, and his answers were credible and consistent with past financial history. Independent research, alone, may indicate reasonable reliance. *See Matter of Bogstad*, 779 F.2d 370, 372-73 n. 4 (7th Cir. 1985). Perhaps a complete audit would have

disclosed Nienow's problems, but a victim is not required to resort to such expensive lengths to avoid being deceived. Perhaps Alby should have demanded an aging report of the accounts, but they had otherwise made inquiry of the person they believed knew best. A creditor need not rely *exclusively* on a false financial statement before nondischargeability is allowed. *Matter of Garman*, 643 F.2d 1252, 1252 n.1 (7th Cir. 1980). The financial statements, along with Mr. West's oral representations and the opinion of an independent financial advisor, formed a reasonable basis for Alby Materials' assessment of Nienow's financial health.

Thus, Alby Materials' capital contribution of \$310,000.00, minus \$25,000.00 which Mr. Landgraf stated was the worth of Nienow after the investment, is likewise nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B).

II. NIENOW ENGINEERING ASSOCIATES, INC. v. MATTHEW WEST

A. Facts

After Alby Materials purchased a 51% interest in Nienow Engineering, Mr. West remained as President and Treasurer of the company. In his capacity as president, Mr. West was expected to obtain and retain a solid customer base. Mr. West was in charge of marketing, and Alby anticipated that he would incur certain business expenses as a result of his duties as president of Nienow.

On numerous occasions Mr. West withdrew funds from the company bank account. Between May 1994 and the time Mr. West was terminated from the company in 1996, he wrote over \$20,000.00 worth of checks payable to himself on Nienow's corporate account. Mr. West provided receipts substantiating such expenses for approximately \$4,000.00. Sometimes, Mr.

West would simply note on the memorandum portion of the checks what he purportedly used the money for. He also directed the bookkeeper to pay directly bills of an apparently personal nature. Robert Elkin, a civil engineer with Nienow since 1992 and the company's current president testified that Mr. West had no authority to give himself additional fringe benefits without approval by the board of directors, and Mr. West acknowledged as much.

In addition to extra nonpayroll checks written to himself or for his personal expenses, Mr. West would withdraw cash from petty cash without providing any withdrawal record or receipts to substantiate its use for business expenses. Rita Moglia, Nienow's secretary, testified that Mr. West did not return any change from money he withdrew from the corporate account or from petty cash. Only Mr. West and Ms. Moglia had access to the petty cash drawer.

According to Mr. West, he segregated cash for Nienow's business expenses from his own personal cash by keeping the money in separate pants pockets. However, this contention was disputed by David Andruczyk, a project engineer with Nienow who often had lunch with Mr. West. Furthermore, Mr. West did not retain an accurate or complete marketing and sales log, as instructed by Terry Alby. Although Mr. West was expected to take clients to lunch, he did not provide proper substantiation as was office policy.

B. Arguments

Nienow contends that Mr. West's indebtedness to the company for diverting corporate funds for his own personal use is nondischargeable under 11 U.S.C. § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. Nienow also claims that Mr. West embezzled corporate funds, and this debt is also nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Finally, Nienow alleges that Mr. West's action caused wilful and malicious injury to the company under 11 U.S.C. § 523(a)(6).

Mr. West denies that he engaged in any fraudulent conduct or embezzled any money from the company. During trial, Mr. West was able to substantiate a portion of the funds in question. He also said he considered some payments, such as a dental bill, "loans" which were undocumented and unreimbursed. After trial, however, Mr. West agreed that certain advances of funds from Nienow Engineering to him totalling \$9,128.57 were not authorized or business related and were therefore nondischargeable.

C. Analysis

Section 523(a)(4) provides in pertinent part that "[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Nienow Engineering has alleged that Mr. West's withdrawals of cash and use of corporate funds for personal purposes constituted fraud or defalcation while acting as a fiduciary and embezzlement.

As was stated in the previous section of this decision, the party seeking to establish an exception to the discharge of the debt, bears the burden of proof. *In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983). The burden of proof required to establish an exception to the discharge is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659-60 (1991). Exceptions to discharge are construed strictly against the creditor and liberally in favor of the debtor. *Meyer v. Rigdon*, 36 F.3d 1375, 1385 (7th Cir. 1994).

1. Section 523(a)(4) Fraud or defalcation while acting as a fiduciary and embezzlement.

To establish that the debt is nondischargeable for reasons of defalcation while acting in a fiduciary capacity, Nienow Engineering must show: (1) the existence of an express trust; (2) that the debt was caused by Mr. West's fraud or defalcation; and (3) Mr. West was acting as a fiduciary to Nienow at the time the debt was created. *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987). An objective standard is used to determine a defalcation, and intent or bad faith is not a requirement. *See In re Pawlinski*, 170 B.R. 380, 389 (Bankr. N.D. Ill. 1994). According to one court, defalcation "can be a mere deficit resulting from the debtor's misconduct, even though he derived no personal gain, and may be through negligence or ignorance rather than misconduct." *Pawlinski*, 170 B.R. at 389.

Generally, courts must look to federal law to determine whether a fiduciary relationship exists. *Johnson v. Woldman*, 158 B.R. 992, 995 (N.D. Ill. 1993), *aff'd*, 92 F.3d 546 (7th Cir. 1996). State law that clearly outlines fiduciary duties and trust property may, however, create a fiduciary relationship. *Id.*

A corporate officer or director is under a fiduciary duty of loyalty, good faith and fair dealing in the conduct of corporate business. *Modern Materials, Inc. v. Advanced Tooling Spec.*, 557 N.W.2d 835, 838, 206 Wis. 2d 434, 441 (Ct. App. 1996). An officer or director is precluded from exploiting his position for personal gain when the benefit or gain properly belongs to the corporation. *Id.* It is undisputed that Mr. West was president and treasurer of Nienow Engineering, and therefore owed a fiduciary duty to the company.

The term "embezzlement" under § 523(a)(4) is defined as "the fraudulent appropriation of property by a person to whom such property was entrusted or into whose hands it has lawfully

come." *Matter of Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S.Ct. 294, 295 (1895)). To prove embezzlement, Nienow Engineering must show by a preponderance of the evidence (1) that the debtor appropriated the subject funds for his own benefit and (2) that he did so with fraudulent intent or deceit. *In re Conder*, 196 B.R. 104, 110 (Bankr. W.D. Wis. 1995). A fiduciary or trust relationship need not be established in order to find a debt nondischargeable by an act of embezzlement. *Pawlinski*, 170 B.R. at 390; *Ballantyne*, 166 B.R. at 688.

First, Nienow must show that Mr. West appropriated monies from the company for his own use. Numerous times, Mr. West withdrew large sums from the corporate account to pay for his personal expenses. Without question, he derived considerable financial benefit by having access to corporate funds, well in excess of his \$40,000.00 salary. He did this with the knowledge that the account was funded exclusively with money designated for payment of business expenses. In his post-trial brief, Mr. West acknowledges that \$9, 128.57 of these withdrawals were improper and are nondischargeable. A list of these and other checks received by him or on his behalf, and whether such amounts received or allegedly received is dischargeable, is set forth later in this decision.

There was a considerable amount of evidence relating to Nienow's support of Mr. West's enthusiasm for the Green Bay Packers. Nienow Engineering reimbursed Mr. West for Packer season tickets, which supposedly were for the purpose of giving to clients or taking clients to games. (Corporate check number 1659, in the amount of \$435.00, and corporate check number 2507, in the amount of \$308.80,). Gary Foat, general manager of Nienow's Waterford office, stated that Mr. West had taken him and other employees or acquaintances, but no clients, to a few

Packer games. Mr. West claimed he took clients or potential clients to games but provided no examples. Mr. West would pay for the tickets and refreshments, and he was later reimbursed by Nienow. Mr. West even paid for tickets to a play-off game in Dallas, Texas, taking Mr. Foat. Mr. West testified that the Dallas game was a bonus to Mr. Foat for his good work with the company. Mr. Foat, however, had no knowledge of the bonus. In fact, according to Mr. Foat, Mr. West told him if anyone asked where the tickets came from, Mr. Foat was to say that he bought them, not Mr. West. Nienow Engineering, in fact, paid for or reimbursed Mr. West for the tickets. When asked how to code an \$850.00 check for this game (corporate check #3134), Mr. West told Ms. Moglia to document it as stamps and computer supplies, rather than the Dallas game. Ms. Moglia further stated that Nienow paid for a limousine to transport Mr. West and others to a football game in Chicago. Although in its brief, Nienow is willing to estimate that 20% of the cost of these games might have been for clients, the court finds no evidence to support this estimate and finds the entire amount nondischargeable.

Mr. West attended a seminar in Las Vegas, Nevada, and Nienow paid his expenses, as was appropriate. However, also at Nienow's expense, Mr. West's wife, two daughters and his eldest daughter's boyfriend accompanied him. Mr. West has agreed that four-fifths of the \$1,700.00 in expenses related to the Las Vegas trip are nondischargeable, as set forth in the detail of corporate checks and expenditures.

Ms. Moglia testified that at the time of the Las Vegas trip, Nienow Engineering had trouble making its payroll. This fact did not stop Mr. West from continuing to eat at the Silver Spring House approximately two or three times a week, at Nienow's expense. She testified that on one occasion she lied to Mr. West about the bank balance so he would not withdraw funds and

the company could make payroll.

Nienow claims that Mr. West personally accepted \$7,145.00, owed Nienow by Matthew Schulte for the Fairview Estates Project (Trial Exhibit 42). Doug Schacht, testified that he witnessed Mr. Schulte give Mr. West an envelope containing cash during a dinner at Chances Restaurant. Mr. West denied the incident occurred. Rita Moglia testified that Mr. West called her into his office and told her to take the Fairview project invoices off the books, without taking a credit. According to Ms. Moglia, Mr. West claimed he had an "agreement" with Mr. Schulte, the project developer. Because the court did not hear any testimony from Mr. Schulte, and there is insufficient proof of the amount supposedly received or its purpose, the plaintiff has failed to meet its burden of proof on this amount.

Mr. West testified that he took out various "loans" from Nienow between 1994 and 1996. Mr. West indicated on his bankruptcy schedules that Nienow was the holder of a \$1,750.00 unsecured nonpriority claim. According to Mr. West, Nienow loaned him the money for automobile repairs, dental fees, and a computer. Mr. West admits, however, that he neither spoke with anyone else from Nienow or Alby Materials regarding the loans, nor documented the terms of the loans. Mr. West also made the decision, without conferring with anyone else, that Nienow was to pay the deductibles on his health care insurance, as well as any uncovered health care treatments for his family. No other employees of Nienow were provided with this benefit and Mr. West did not report the payments as part of his compensation package to the Internal Revenue Service. Nienow also made payments, between September 1994 and April 1996, to its insurer for automobile insurance for cars owned by Mr. West's wife and daughter, totaling \$1,946.00. These checks are not in evidence, but Mr. West agrees they were paid. The \$1,946.00 is

nondischargeable.

Nienow Engineering presented evidence of various checks drawn from the corporate account which were purportedly (1) used by Mr. West for his or his family's own personal use; (2) made payable to Mr. West or to cash for which Mr. West cannot provide any documentation or substantiation that the funds were spent on legitimate business purposes; or (3) only partially substantiated or documented as legitimate business expenses or cash advances, with the remainder unaccounted for. Perhaps at least some of this unaccounted for cash was used for business purposes as Mr. West contends, although the court gives no credence to his "pants pocket" accounting system. The lack of documentation would not satisfy the IRS, although the bankruptcy court would not be bound by deductibility standards for nondischargeability purposes. However, given Mr. West's proven practice of using the business as another source from which he was free to pay his personal expenses without apparent constraints, the court is satisfied that he did so, and these amounts are nondischargeable.

Certain other checks not clearly drawn by Mr. West are nevertheless attributed to him by Ms. Moglia as cash withdrawals. She arrived at this conclusion by totalling petty cash receipts and subtracting this amount from amounts that went into petty cash as checks cashed by various individuals. She testified that since only Matthew West withdrew cash without prior or subsequent documentation, he must have received the unaccounted for balance. While the court accepts Ms. Moglia's attribution to Mr. West of checks payable to Mr. West or checks payable to "cash" endorsed by him, the court is unwilling to hold that checks payable to or endorsed by others, such as Ms. Moglia or Mr. Spirowka, meet the creditor's burden of proof that the debtor received the money so the debt is excepted from discharge. Since the company kept no record of

disbursements from petty cash, there could be other explanations for the discrepancies.

This is not to say that the court is giving Mr. West much benefit of the doubt in his use of petty cash. Mr. West exhibited questionable loyalty to Nienow by setting up a separate surveying business, West & Associates, in Waterford, where Nienow Engineering also established an office. He established this business while he was still employed by Nienow and was exploiting his control over Nienow funds. He stated that West & Associates took jobs that Nienow would not take, but the court was not convinced that jobs were not diverted from Nienow for Mr. West's personal gain.

The court will separately address each amount that Nienow alleges in its post-trial damages brief was improperly retained by Mr. West.¹ Checks that Nienow admitted were legitimate businesses expenditures are omitted.

- (1) Corporate check number 1242 made payable to "Matt West" and signed by Mr. West on 2/8/94, and endorsed by him, in the amount of \$258.50 for "truck repair." No receipts or cash returned. This is a duplicate reimbursement. Not discharged.
- (2) Corporate check number 1267 made payable to "Matt West" and signed by Mr. West on 2/24/94, and endorsed by him, in the amount of \$200.00. No receipts or cash returned. Not discharged.
- (3) Corporate check number 1283 made payable to "American X-Press" and signed by Mr. West on 3/7/94, in the amount of \$876.00 for "Acct # 3728-861288-21008." No receipts or explanations. This is Mrs. West's personal credit card as the business had no credit

¹On Exhibit 2, the chart of corporate checks for which the company is unable to substantiate as a proper business expenses, the plaintiff references corporate check number 1907 made payable to Daniel Spirewka for \$200.00, number 2434 made payable to Matt West for \$75.00, and number 3191 made payable to Matthew West for \$456.00. These checks are not included in the actual exhibit of checks, so the court is unable to determine whether they are nondischargeable; therefore, they are not listed and are discharged. On the other hand, checks for Packers tickets and car insurance premiums paid for Mr. West's wife and daughter were not placed in evidence by the plaintiff. Because the existence of those checks or payments was not disputed by Mr. West, the court has listed them, and they are not discharged.

cards. Not discharged.

- (4) Corporate check number 1284 made payable to "Daniel Spirewka" and signed by Daniel Spirewka on 3/8/94, in the amount of \$200.00 for "Seminar." Discharged.
- (5) Corporate check number 1303 made payable to "Matthew E. West" and signed by Mr. West on 3/23/94, and endorsed by him, in the amount of \$75.00. No receipts or cash returned. Not discharged.
- (6) Corporate check number 1355 made payable to "Matt West" and signed by Mr. West on 4/15/94, and endorsed by him, in the amount of \$40.00. No receipts or cash returned. Not discharged.
- (7) Corporate check number 1380 made payable to "Matt West" and signed by Mr. West on 4/25/94, and endorsed by him, in the amount of \$100.00 for "reimburse truck." No receipts or cash returned. Explanation is insufficient. Not discharged.
- (8) Corporate check number 1610 made payable to "Cash," signed by Mr. West on 5/9/94 and endorsed by Rita Moglia, in the amount of \$150.00. No receipts or cash returned. Discharged.
- (9) Corporate check number 1614 made payable to "Matthew West" and signed by Mr. West on 5/10/94, and endorsed by him, in the amount of \$68.00. No receipts or cash returned. Not discharged.
- (10) Corporate check number 1659 for \$435.00 for Packer tickets (copy not in evidence). Not discharged.
- (11) Corporate check number 1706 made payable to "Matthew West" and signed by Mr. West on 6/24/94, and endorsed by him, in the amount of \$400.00. No receipts or cash returned. Not discharged.
- (12) Corporate check number 1731 payable to "Matthew E. West" and signed by Mr. West on 7/12/94, in the amount of \$1,160.00 for "taxes paid." Mr. West testified at trial that the state had previously withheld his own personal tax refund to pay for Nienow Engineering's taxes, and the check to himself was reimbursement for that payment. Nienow Engineering, however, presented to the court a Wisconsin Department of Revenue Notice that stated that Mr. West's tax refund of \$1,160.00 "has been applied to a Tax Delinquency owed by you and/or your spouse." Nienow Engineering was not mentioned. (Trial Exhibit 69). Not discharged.
- (13) Corporate check number 1782 made payable to "Matthew West" and signed by Mr. West on 8/3/94, and endorsed by him, in the amount of \$100.00. No receipts or cash returned.

Not discharged.

- (14) Corporate check number 1812 made payable to "Matthew West" and signed by Mr. West on 8/12/94, in the amount of \$1,363.18 for "new truck/down payment." No receipts were provided for this amount. Mr. West testified that he purchased an extended warranty for the truck for \$745.00, which Nienow acknowledges. Nevertheless, Mr. West failed to account for the remaining \$618.18. \$618.18 is not discharged.
- (15) Corporate check number 1815 made payable to "Cash" and signed and endorsed by Rita Moglia on 8/17/94, in the amount of \$200.00 for "replenish petty cash." Partial receipts for \$77.45, no cash returned. Discharged.
- (16) Corporate check number 1845 made payable to "Cash" and signed by Mr. West on 8/11/94 and endorsed by Rita Moglia, in the amount of \$154.97 for "replenish petty cash." No receipts or cash returned. Discharged.
- (17) Corporate check number 1858 made payable to "Cash" and signed and endorsed by Rita Moglia on 9/2/94, in the amount of \$200.00 for "replenish petty cash." Partial receipts for \$59.50, no cash returned. Discharged.
- (18) Corporate check number 1891 made payable to "Burlington Clinic" and signed by Mr. West on 9/19/94, in the amount of \$291.60. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$291.60 is nondischargeable.
- (19) Corporate check number 1907 made payable to "Daniel Spirewka" and signed by Rita Moglia on 9/20/94, in the amount of \$200.00 for "replenish petty cash." Discharged.
- (20) Corporate check number 1915 made payable to "Cash" and signed by Mr. West on 9/26/94, and endorsed by him, in the amount of \$400.00. No receipts or cash returned. Not discharged.
- (21) Corporate check number 1934 made payable to "Matthew E. West" and signed by Mr. West on 9/30/94, and endorsed by him, in the amount of \$100.00. No receipts or cash returned. Not discharged.
- (22) Corporate check number 1952 made payable to "Matthew West" and signed by Rita Moglia on 10/11/94, in the amount of \$576.00 for "91 taxes." Ms. Moglia testified at trial that Mr. West told her that the check was for his personal taxes. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$576.00 is nondischargeable.
- (23) Corporate check number 1984 made payable to "West Allis Memorial Hospital" and signed by Mr. West on 10/17/94, in the amount of \$186.00 for "00263821-4137 [&]

00112984-4083." In his post-trial brief on damages, Mr. West has agreed that this amount is subject to repayment. Therefore, \$186.50 is nondischargeable.

- (24) Corporate check number 2003 made payable to "Matthew West" and signed by Mr. West on 10/31/94, and endorsed by him, in the amount of \$500.00. No receipts or cash returned. Not discharged.
- (25) Corporate check number 2056 made payable to "United Credit Service, Inc." and signed by Rita Moglia on 11/15/94, in the amount of \$30.00 for "ID#81480." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$30.00 is nondischargeable.
- (26) Corporate check number 2057 made payable to "John Hancock Mutual Life Insurance Co." and signed by Rita Moglia on 11/15/94, in the amount of \$827.60 for "67022798." Mr. West believed that this expense was business related since the insurance was initially for his original partner, Dan Spirewka. However, Mrs. West subsequently became the beneficiary of the insurance. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$827.60 is nondischargeable.
- (27) Corporate check number 2081 made payable to "Cash" and signed by Mr. West on 12/1/94, and endorsed by him, in the amount of \$200.00. Partial receipts for \$81.31, no cash returned. The balance of \$118.69 is not discharged.
- (28) Corporate check number 2082 made payable to "Cash" and signed by Mr. West on 12/1/94, and endorsed by him, in the amount of \$100.00. No receipts or cash returned. Not discharged.
- (29) Corporate check number 2101 made payable to "Cash" and signed by Mr. West on 12/8/94, in the amount of \$2,500.00 for "Christmas Party." The company's annual Christmas party was held at the Silver Spring House, with an open bar. Approximately 40 people attended the party. Nienow contends that a favorable estimate of the costs would be \$50.00 per person, or \$2,000.00 total. Consequently, according to Nienow, \$500.00 of the amount should be nondischargeable. Mr. West claims that the bill was so high because of the open bar, and any money left over would have been used for other business expenses. Since his assertion is unsubstantiated, and Nienow's estimate is reasonable, \$500.00 is nondischargeable.
- (30) Corporate check number 2159 made payable to "Elan Financial Services" and signed by Mr. West on 12/27/94, in the amount of \$1,367.00 for "acct 002-0238118." Ms. Moglia testified that the account referred to Mr. West's personal credit card, and she was never provided with a billing statement. Not discharged.
- (31) Corporate check number 2168 made payable to "Oral Surgery Associates of Southeastern

WI" and signed by Mr. West on 12/27/94, in the amount of \$190.00 for "Sara West." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$190.00 is nondischargeable.

- (32) Corporate check number 2185 made payable to "Cash" and signed by Mr. West on 1/6/95, and endorsed by him, in the amount of \$150.00. No receipts or cash returned. Not discharged.
- (33) Corporate check number 2191 made payable to "Cash" and signed by Mr. West on 1/9/95, and endorsed by Rita Moglia, in the amount of \$2,500.00. No receipts or cash returned. Nienow's post-trial brief notes this as "World of Concrete," apparently a New Orleans seminar. Discharged.
- (34) Corporate check number 2221 made payable to "Cash" and signed by Mr. West on 1/23/95, in the amount of \$700.00 for "95 Surveyors Institute Seminar." No receipts or cash returned, but the description is sufficient. Discharged.
- (35) Corporate check number 2255 made payable to "Rita L. Moglia" and signed by Rita Moglia on 2/7/95, in the amount of \$150.00 for "Nienow/City of Glendale Lunch Mtg." No receipts or cash returned. Discharged.
- (36) Corporate check number 2279 made payable to "Cash" and signed by Rita Moglia on 2/13/95, in the amount of \$400.00. No receipts or cash returned. Discharged.
- (37) Corporate check number 2289 made payable to "Radiology Consultants, S.C." and signed by Rita Moglia on 2/16/95, in the amount of \$243.00 for "Acct. #191807." In his post-trial brief on damages, Mr. West has agreed that this amount is subject to repayment. Therefore, \$243.00 is nondischargeable.
- (38) Corporate check number 2301 made payable to "Cash" and signed by Rita Moglia on 2/23/95, in the amount of \$2,000.00 for "GPS Seminar/Matt." Mr. West attended a three day seminar in Charlotte, North Carolina, alone. Ms. Moglia testified that Nienow paid for West's airfare directly, so Mr. West's expenses should not have been very high. Nienow estimates his reasonable expenses would have been \$1,050.00, and asserts that \$950.00 was improperly retained by Mr. West. Mr. West testified that he used the \$2,000.00 for lodging, food, and two workshops. Nienow's estimate is reasonable, and \$950.00 is not discharged.
- (39) Corporate check number 2325 made payable to "Radiologists Association, Ltd." and signed by Rita Moglia on 3/6/95, in the amount of \$74.00. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$74.00 is nondischargeable.

- (40) Corporate check number 2346 made payable to "Memorial Hospital of Burlington" and signed by Rita Moglia on 3/20/95, in the amount of \$81.84 for "407093 - D. West." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$81.84 is nondischargeable.
- (41) Corporate check number 2358 made payable to "Cash" and signed by Mr. West on 3/29/95, and endorsed by him, in the amount of \$300.00. No receipts or cash returned. Not discharged.
- (42) Corporate check number 2360 made payable to "Cash" and signed by Mr. West on 4/3/95, and endorsed by Rita Moglia, in the amount of \$250.00 for "replenish petty cash." No receipt or cash returned. Discharged.
- (43) Corporate check number 2366 made payable to "Cash" and signed by Mr. West on 3/7/95, and endorsed by him, in the amount of \$250.00. No receipt or cash returned. Not discharged.
- (44) Corporate check number 2383 made payable to "Richard Nerz, D.D.S., S.C." and signed by Rita Moglia on 4/10/95, in the amount of \$125.00. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$125.00 is nondischargeable.
- (45) Corporate check number 2403 made payable to "Cash" and signed by Mr. West on 4/12/95, in the amount of \$100.00 for "Nienow/Roger Newton." No receipts or cash returned. The explanation is insufficient. Not discharged.
- (46) Corporate check number 2419 made payable to "Cash" and signed by Rita Moglia on 4/25/95, in the amount of \$50.00 for "Replenish Petty Cash." No receipts or cash returned. Discharged.
- (47) Corporate check number 2420 made payable to "Cash" and signed by Rita Moglia on 4/25/95, in the amount of \$100.00 for "Waterford Petty Cash." No receipts or cash returned. Discharged.
- (48) Corporate check number 2450 made payable to "Memorial Hospital of Burlington" and signed by Rita Moglia on 5/4/95, in the amount of \$260.25 for "368715." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$260.25 is nondischargeable.
- (49) Corporate check number 2456 made payable to "Cash" and signed by Rita Molgia on 5/9/95, and endorsed by her, in the amount of \$100.00 for "Lunch with Tim Heller." No receipts or cash returned. Discharged.

- (50) Corporate check number 2479 made payable to "Richard Herz, D.D.S., S.C." and signed by Mr. West on 5/18/95, in the amount of \$125.00. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$125.00 is nondischargeable.
- (51) Corporate check number 2495 made payable to "Petty Cash" and signed by Mr. West on 5/25/95, and endorsed by Rita Moglia, in the amount of \$50.00 for "Meals and Entertainment." No receipts or cash returned. Discharged.
- (52) Corporate check number 2507 for \$386.00 for Green Bay Packer tickets (copy not in evidence). Not discharged.
- (53) Corporate check number 2514 made payable to "Matthew West" and signed by Mr. West on 6/8/95, in the amount of \$573.26 for "Waterford Office." Partial receipts for \$344.74, no cash returned. The balance of \$228.52 is not discharged.
- (54) Corporate check number 2518 made payable to "Petty Cash" and signed by Rita Molgia on 6/12/95, in the amount of \$100.00 for "Replenish Petty cash/Waterford." No receipts or cash returned. Discharged.
- (55) Corporate check number 2546 made payable to "Richard Herz, D.D.S., S.C." and signed by Rita Moglia on 6/20/95, in the amount of \$125.00. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$125.00 is nondischargeable.
- (56) Corporate check number 2585 made payable to "Matthew West" and signed by Mr. West on 6/30/95, and endorsed by him, in the amount of \$200.00. No receipts or cash returned. Not discharged.
- (57) Corporate check number 2590 made payable to "Matthew West" and signed by Mr. West on 7/6/95, and endorsed by him, in the amount of \$50.00 for "replenish petty cash." No receipts or cash returned. Not discharged.
- (58) Corporate check number 2650 made payable to "Matt West" and signed by Mr. West on 7/26/95, in the amount of \$1,600.00 for "repair — reimburse [illegible]." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$1,600.00 is nondischargeable.
- (59) Corporate check number 2659 made payable to "Petty Cash" and signed by Rita Moglia on 7/27/95, in the amount of \$100.00 for "replenish petty cash." No receipts or cash returned. Discharged.
- (60) Corporate check number 2661 made payable to "Douglas Schacht" and signed by Rita

Moglia on 8/1/95, in the amount of \$100.00 for "replenish petty cash." No receipts or cash returned. Discharged.

- (61) Corporate check number 2666 made payable to "Petty Cash" and signed by Rita Moglia on 8/3/95, in the amount of \$50.00 for "replenish petty cash." No receipts or cash returned. Discharged.
- (62) Corporate check number 2674 made payable to "Cash" and signed by Mr. West on 8/9/95, in the amount of \$1,400.00 for "GPS — Trip." Although the money had originally been intended as expenses for a seminar that Mr. West did not attend, he could not recall what the cash was used for. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$1,400.00 is nondischargeable.
- (63) Corporate check number 2735 made payable to "Matthew West" and signed by Mr. West on 8/25/95, in the amount of \$895.00 for "Drive for Computer." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$895.00 is nondischargeable.
- (64) Corporate check number 2747 made payable to "Rita Moglia" and signed by Rita Moglia on 8/31/95, in the amount of \$100.00 for "Lunch-River Hills." No receipts or cash returned. Discharged.
- (65) Corporate check number 2749 made payable to "Cash" and signed by Mr. West on 9/5/95, and endorsed by him, in the amount of \$100.00 for "petty cash." No receipts or cash returned. Not discharged.
- (66) Corporate check number 2793 made payable to "Petty Cash" and signed by Rita Moglia on 9/20/95, in the amount of \$100.00 for "Replenish." No receipt or cash returned; \$61.97 substantiated. Discharged.
- (67) Corporate check number 2804 made payable to "American Express" and signed by Mr. West on 9/27/95, in the amount of \$341.00 for "Acct. # 3728-861288-21008." Nienow's post-trial brief gives a breakdown of expenses for a Packer game and Las Vegas trip related to this check, which was not in evidence at trial, and the debtor objected. The court will not consider the breakdown, but the entire amount is nondischargeable.
- (68) Corporate check number 2884 made payable to "Matthew West" and signed by Mr. West on 10/24/95, and endorsed by him, in the amount of \$400.00 for "Schultz Mtg." No receipts or cash returned. The explanation is insufficient. Not discharged.
- (69) Corporate check number 2885 made payable to "Memorial Hospital of Burlington" and signed by Rita Moglia on 10/23/95, in the amount of \$233.63 for "Debbie West Acct #438214- 207.20 & #438497-26.43." In his post-trial brief on damages, Mr. West has

agreed that this debt is subject to repayment. Therefore, \$233.63 is nondischargeable.

- (70) Corporate check number 2896 made payable to "Matthew West" and signed by Mr. West on 10/30/95, and endorsed by him, in the amount of \$200.00 for "MBI Leadership." No receipts or cash returned. The explanation is insufficient. Not discharged.
- (71) Corporate check number 2897 made payable to "Petty Cash" and signed by Rita Moglia on 10/31/95, in the amount of \$100.00 for "replenish petty cash." No receipts or cash returned. Discharged.
- (72) Corporate check number 2916 made payable to "Matthew E. West" and signed by Mr. West on 11/7/95, and endorsed by him, in the amount of \$50.00 for "Expenses." No receipts or cash returned. The explanation is inadequate. Not discharged.
- (73) Corporate check number 2924 made payable to "Matthew E. West" and signed by Mr. West on 11/10/95, and endorsed by Matthew West and Debbie West, in the amount of \$100.00 for "Meals." No receipts or cash returned. Not discharged.
- (74) Corporate check number 2937 made payable to "Petty Cash" and signed by Rita Moglia on 11/15/95, in the amount of \$100.00 for "Replenish." No receipts or cash returned. Discharged.
- (75) Corporate check number 2941 made payable to "Matt West" and signed by Mr. West on 11/17/95, and endorsed by him, in the amount of \$150.00 for "partial reimburse." No receipts or cash returned. Not discharged.
- (76) Corporate check number 2988 made payable to "Cash" and signed by Mr. West on 11/27/95, and endorsed by him, in the amount of \$190.00 for "X-Mas Dec." Neither receipts nor extra cash were returned to the company. Corporate check number 3024 for \$1,900.00 was apparently for the same purpose. Nienow's estimate of the cost, which the court accepts as reasonable, is 80% of the total, so \$38.00 is nondischargeable.
- (77) Corporate check number 3005 made payable to "Petty Cash" and signed by Mr. West on 12/1/95, in the amount of \$100.00 for "Replenish." No receipts or cash returned. The endorsement does not appear to be that of Mr. West. Discharged.
- (78) Corporate check number 3010 made payable to "Mail & More" and signed by Rita Moglia on 12/4/95, in the amount of \$53.74. In his post-trial brief on damages, Mr. West has agreed that \$31.50 is subject to repayment. Therefore, \$31.50 is nondischargeable.
- (79) Corporate check number 3024 made payable to "Matthew West" and signed by Rita Moglia on 12/7/95, in the amount of \$1,900.00 for "Company X-Mas party." See explanation regarding check number 2988. The company's annual Christmas party was

held at the Silver Spring House. No receipt was provided for this expense, nor was cash returned. Nienow contends that 80% of the amount withdrawn is a reasonable estimate of the cost of the party, which the court accepts. Therefore, \$380.00 is nondischargeable.

- (80) Corporate check number 3036 made payable to "Richard Herz, D.D.S., S.C." and signed by Rita Moglia on 12/8/95, in the amount of \$125.00 for "Elizabeth West." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$125.00 is nondischargeable.
- (81) Corporate check number 3048 made payable to "Matt West" and signed by Mr. West on 12/13/95, and endorsed by him, in the amount of \$600.00 for "Chicago." No receipts or cash returned. Mr. West testified this was for a client or potential client, Joe Shipper, but the explanation is insufficient. Not discharged.
- (82) Corporate check number 3082 made payable to "Matthew West" and signed by Mr. West on 12/21/95, and endorsed by him, in the amount of \$200.00 for "replenish petty cash." No receipts or cash returned. Not discharged.
- (83) Corporate check number 3086 made payable to "John Hancock Mutual Life" and signed by Rita Moglia on 12/14/95, in the amount of \$909.36 for "life insurance/Matt." Mr. West believed that this expense was business related since the insurance was initially for his original partner, Dan Spirowka. However, Mrs. West subsequently became the beneficiary of the insurance. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$909.36 is nondischargeable.
- (84) Corporate check number 3134 made payable to "Matt West" and signed by Mr. West on 1/11/96, in the amount of \$850.00 for "Partial Expense." This was apparently used for the Packer game in Dallas attended by Matt and Debra West and Gary Foat and his wife. No cash or receipt returned. Rita Moglia testified that Mr. West told her to code it for computer supplies and postage. Not discharged.
- (85) Corporate check number 3191 made payable to "Matthew West" and signed by Mr. West on 1/26/96, in the amount of \$456.00. No receipts or cash returned. Not discharged.
- (86) Corporate check number 3222 made payable to "Richard Herz, D.D.S." and signed by Rita Moglia on 2/8/96, in the amount of \$125.00 for "Elizabeth West." In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$125.00 is nondischargeable.
- (87) Corporate check number 3241 made payable to "Traveltime" and signed by Mr. West on 2/9/96, in the amount of \$1,312.00. This refers to the Las Vegas trip which is 4/5 nondischargeable. Therefore, \$1,049.60 is nondischargeable.

- (88) Corporate check number 3248 made payable to "Mail N More" and signed by Rita Moglia on 2/2/96, in the amount of \$6.87. In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$6.87 is nondischargeable.
- (89) Corporate check number 3266 made payable to "American Express" and signed by Rita Moglia on 2/19/96, in the amount of \$997.00 for "#3728-861288-21008." This apparently relates to a Packer game. Not discharged.
- (90) Corporate check number 3304 made payable to "Matt West" and signed by Mr. West on 2/29/96, and endorsed by him, in the amount of \$600.00. No receipts or cash returned. Not discharged.
- (91) Corporate check number 3324 made payable to "Petty Cash" and signed by Rita Moglia on 3/7/96, in the amount of \$100.00 for "Replenish." No receipts or cash returned. Discharged.
- (92) Corporate check number 3335 made payable to "Cash" and signed by Mr. West on 3/15/96, and endorsed by him, in the amount of \$150.00. No receipts or cash returned. Not discharged.
- (93) Corporate check number 3341 made payable to "Matt West" and signed by Mr. West on 3/19/96, in the amount of \$1,700.00 for "Convention Expense." This amount was used for the Las Vegas convention in which Mr. West took 4 others — therefore, Nienow claims that 4/5 of the amount, or \$1,360.00, is improper. (At trial, Mr. West conceded that it was wrong for the company to pay for a family vacation) In his post-trial brief on damages, Mr. West has agreed that this debt is subject to repayment. Therefore, \$1,360.00 is nondischargeable.
- (94) Corporate check number 3349 made payable to "Daniel Spirewka" and signed by Rita Moglia on 3/21/96, in the amount of \$100.00 for "replenish petty cash." No receipt or cash returned. Discharged.
- (95) Corporate check number 3396 made payable to "American Express" and signed by Mr. West on 4/14/96, in the amount of \$1,217.00 for "Acct.# 3728-861288-21008 Expense (Con Ex-)." As this was for the Las Vegas trip, 4/5, or \$973.60 is nondischargeable.
- (96) Total payments of \$1,946.00 for car insurance for Mr. West's wife and daughter. The checks were not in evidence, but Mr. West admitted that such payments were made by Nienow. Not discharged.

The total nondischargeable debt to Nienow Engineering is \$28,434.24.

Mr. West, for many years, bled Nienow Engineering by taking excessive compensation via checks drawn to cash, without documentation, and personal expenses paid and camouflaged (not very well) as legitimate business expenses. He did so even after the company had been in chapter 11 and was clearly vulnerable to a shortage of funds. This was a clear and callous violation of his fiduciary duty to Nienow Engineering.

2. Section 523(a)(6) Willful and malicious injury to property of another.

As Mr. West's withdrawals from the company have been addressed in the prior section, and the court has found in the plaintiff's favor, it is not necessary to apply this subsection.

Separate orders consistent with this decision will be entered in each of the adversary proceedings.

Dated at Milwaukee, Wisconsin, October 17, 1997.

BY THE COURT


Margaret Dee McGarity
United States Bankruptcy Judge