

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

<b>In re</b>	:	<b>Case No. 98-5353-CH</b>
<b>JEFFREY W. VOORHEES,</b>	:	
	:	<b>Chapter 7</b>
<b>Debtor.</b>	:	
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<b>JOHN R. CAMPBELL,</b>	:	<b>Adv. No. 99-99036</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>JEFFREY W. VOORHEES,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	

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**ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**

On April 11, 2000, trial was held on Plaintiff's Complaint to Determine Dischargeability of Debt. Plaintiff, John R. Campbell, was represented by his attorney Philip Watson, and Defendant, Jeffrey W. Voorhees was represented by his attorney Mark C. Feldman. At the conclusion of the trial, the court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed, and the court now considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

**FINDINGS OF FACT**

1. On December 11, 1998, Jeffrey W. Voorhees (hereinafter Voorhees) filed a petition for relief under Chapter 7 of Title 11, the Bankruptcy Code.

2. Voorhees is fifty-six years old. He received a degree in architecture in 1970 from Iowa State University. After working for another company for approximately four years, he began his own architecture firm in 1974. He expanded into real estate development in the 1980s particularly in the area of low cost or affordable housing. The 1986 tax reform act created a stimulus to the industry by providing low income tax credits.

3. Voorhees incorporated Voorhees Development Group, Inc. (hereinafter VDG) to pursue real estate development activities. He was the sole shareholder of VDG at the time of the bankruptcy. The stock was scheduled in the petition.

4. The plaintiff in this adversary proceeding is John R. Campbell, Jr. (hereinafter Campbell). Campbell is 46-year-old trial attorney who practices in Kansas City, Missouri. Campbell received a bachelor's degree from the University of Missouri in 1975 and a law degree from the University of Missouri, Kansas City in 1978. His law practice is primarily in the areas of personal injury and medical malpractice.

5. Campbell has experience in real estate development. He provided legal assistance to clients, and he personally engaged in real estate development projects. Campbell participated in the development and construction of residential four-plexes in Jackson County, Missouri. He owned part of the development corporation. He did the paperwork and arranged financing to buy the ground and for the construction of the

structures. Campbell contacted the banks and sometimes executed personal guarantees for the financing. He has also invested in rental housing, commercial property, and limited partnerships that owned office buildings.

6. William F. “Jay” McCroy (hereinafter McCroy) introduced Voorhees and Campbell.

7. Although they attended the same high school, Campbell and McCroy did not become acquainted until 1992. McCroy was referred to Campbell by a mutual acquaintance. Campbell purchased a limited partnership in an office building from McCroy.

8. While between jobs, McCroy worked out of Campbell’s office for a period of time in 1994. His job was to generate business. He did corporate and transactional work and drafted articles of incorporation. McCroy performed work for some of Campbell’s clients. He and Campbell became friends. Campbell represented McCroy in some legal matters.

9. Sometime in 1989, Voorhees became acquainted with McCroy through a friend.

10. Voorhees maintained contact with McCroy, and in December of 1995, McCroy returned to Iowa and began working with Voorhees. Voorhees testified that McCroy was not his employee, but was an independent contractor. McCroy assisted Voorhees by putting together real estate transactions. Most of his time was spent on “market rate transactions.” His role included identifying and acquiring capital for the development projects. McCroy told Voorhees that he knew Campbell. He identified

Campbell as a person with contacts and experience in the Kansas City area.

11. In May of 1996, Voorhees and McCroy traveled to Kansas City, Missouri,

and met with Campbell at his office.

12. On May 24, 1996, Campbell received a facsimile copy of Voorhees' personal financial statement. Voorhees began using this financial statement format, based on a spreadsheet, in 1988 or 1989. The master copy was kept in a file at his office, and updated quarterly and annually. The file was available to his employees who provided this statement to various entities. The statement was a constant working document and was furnished to creditors on multiple occasions. Voorhees testified that he considered personal guarantees of corporate debt to be a contingent liability in that he would not be obligated to satisfy the debt unless the corporation defaulted. Voorhees did not include this information in his personal financial statement.

13. On May 24, 1996, Campbell received a facsimile copy of VDG's financial statement. This document was maintained in the office by the bookkeeper. There was no regular schedule for updating the statement, but Voorhees testified that it was kept current to within six months. The VDG financial statement was kept in a long format and a short format. Campbell received the short format. Voorhees testified that he thought that Campbell would request a longer statement, but he never received such a request.

14. Campbell met McCroy in Des Moines, Iowa, on May 31, 1996. The next day, McCroy picked up Campbell at his hotel, and they traveled to Voorhees' office for a

meeting.

15. On June 3, 1996, Campbell received a facsimile letter from Voorhees.

This letter recounted the discussions from the June 1st meeting and outlined the proposed business relationship. It stated that in order to support the long-term goal of a fully integrated, self-supporting real estate acquisition, development and management firm, they would need to centralize the income and expense of the group in a single location.

The proposed location would be Prairie Development Group, Inc. renamed as Voorhees Capital Group, Inc. (hereinafter VCG). This document further provided:

To summarize your interest and desired inputs in our proposed joint effort you would:

- 1- Transfer title in and to certain developable real property located in Blue Springs, Mo. to the Corporation[VCG](transaction to be structured so as to be a “tax free exchange”);
- 2- provide support of the over-all development activities of the Corporation and the Development Group by making your financial statement available, through guarantees, to support required borrowings;
- 3- Secure for the Corporation, within 7 to 10 days of the date of this correspondence, a loan in the amount of \$100,000;
- 4- Secure for the corporation, within 30 days of the date of this correspondence, a total borrowing or Letter of Credit in the amount of \$500,000; and
- 5- Provide support and assistance for establishment and maintenance of development activities in the Kansas City metropolitan area.

In return for your inputs Voorhees Development Group, Inc. would provide the following:

- 1- Transfer of 15% of the Common Stock of the Corporation to you;
- 2- Restructuring and reorganization of the Voorhees Development Group and the Corporation such that the values reflected on the attached Schedule of Assets are property of the Corporation;
- 3- Restructuring and reorganization of the Voorhees Development Group such that the greatest possible amount of the future net income and operational expense of the Group, exclusive of

- Development Fees arising from Low Income Housing Tax Credit development outside the Kansas City area, is concentrated in the Corporation; and
- 4- Execution of Employment Agreements for each of us to provide for salaries and bonuses to fairly reflect the true value of the time and asset inputs which will combine to create the over-all net income.

16. A document captioned Schedule of Assets – Voorhees Capital Group, accompanied the June 3, 1996, letter. The schedule included Sun Prairie at Fox Valley, Aurora, Illinois; Autumn Chase Apartments, Phoenix, Arizona; and Foxwood, Flagstaff, Arizona. The schedule placed the value of the investments in VCG at \$2,350,000 or 83.93% from VDG and \$450,000 or 16.07% from Campbell. Voorhees would have 84% and Campbell would have 16% of the common stock of VCG.

17. On June 4, 1996, Voorhees, Campbell, and McCroy met with James P. Goetz, senior vice-president of Missouri Bank and Trust in Campbell's office. The purpose of the meeting was to discuss financing for real estate development in the metropolitan Kansas City area. The first transaction was to obtain a letter of credit for an existing project of Voorhees. The letter of credit was to be substituted for a deposit held by another creditor.

18. On June 11, 1996, Campbell met with McCroy in Kansas City to work out an agreement.

19. On June 12, 1996, Campbell received a facsimile copy of an Agreement of Commitment. The Agreement of Commitment incorporated many of the provisions recited in the June 3, facsimile letter. Additionally, it stated that Voorhees was the sole shareholder of VDG, and Prairie Development Group, Inc. (hereinafter PDG) was a wholly owned subsidiary of VDG. Under the terms of the agreement, PDG would be

renamed Voorhees Capital Group, Campbell would transfer his Blue Springs Property to PDG, Campbell would become a 20% shareholder of PDG, Campbell would have the opportunity to purchase additional stock of PDG up to a one third interest, PDG would issue employment agreements providing Campbell a salary of \$50,000 per year and Voorhees \$175,000 per year, and the parties would execute a Buy-Sell agreement restricting the transfer of PDG common stock after Campbell received stock as provided by the agreement. All of these provisions, except the company name change, would be conditioned on Campbell successfully obtaining \$100,000 short-term debt within ten days of the execution of the agreement and \$500,000 intermediate-term debt or a one-year \$500,000 unconditional irrevocable letter of credit within thirty days of the execution of the agreement. PDG would use the intermediate-term debt proceeds to pay the short-term debt. Finally, if Campbell could secure the short-term but not the intermediate-term debt, the agreement would be of no further effect and Campbell would receive \$10,000 for his efforts.

20. Campbell refused to sign the Commitment of Agreement. He testified that he was awaiting a more formal document, but stated that the terms of this facsimile were correct.

21. On July 2, 1996, Voorhees Missouri Real Estate Group, Inc. (hereinafter VMREG) articles of incorporation were filed, and its certificate of incorporation issued. Campbell drafted the articles and signed as incorporator. Campbell transferred his real estate in Blue Springs, Missouri, to VMREG.

22. On July 2, 1996, Voorhees and Campbell closed on a \$100,000 loan at Missouri Bank And Trust. The Blue Springs, Missouri real estate secured the loan. Both

Campbell and Voorhees guaranteed the loan. At this time, Missouri Bank and Trust was in possession of the VDG financial statement in the long format.

23. Campbell and Voorhees also reached an agreement with Missouri Bank and Trust for a \$496,887 irrevocable letter of credit. An internal bank memorandum from Goetz to the loan committee states that the letter of credit was to replace a cash deposit held by a mortgagor for a project in the Chicago area. However, the real estate alone was insufficient security. The letter of credit was substituted to PFC Corporation who sent approximately \$498,000 to Missouri Bank and Trust. Of this amount, \$250,000 was placed in a certificate of deposit at Missouri Bank and Trust, the \$100,000 loan was repaid, and the balance was placed in VCG's checking account. Consequently, Campbell procured a net amount of \$250,000.

24. At the time of the July 2, 1996 closing, the parties had not reduced their agreement to a final writing. Campbell testified that he believed that the terms included in the Commitment to Agreement formed their agreement. He did not believe that his failure to secure the \$100,000 loan within ten days of his receipt of the document invalidated the agreement, nor did he believe that necessity of the \$250,000 certificate of deposit altered the agreement.

25. Voorhees testified that because Campbell did not sign the Commitment to Agreement, did not secure the \$500,000 loan without Voorhees' \$250,000 certificate of deposit, and did not procure the \$100,000 loan in a timely fashion, the Commitment of Agreement was not in effect. Rather, the parties had an agreement to agree, and McCroy would work out the details with Campbell. Voorhees testified that an important part of Campbell's contribution to the development group would be to assist in raising capital for



the development projects.

26. Some time after the July 2, 1996 closing, McCroy contacted Campbell about contacting other sources of investment capital. Campbell refused to solicit finances from family members or acquaintances. McCroy contacted Voorhees and communicated Campbell's refusal. Voorhees directed McCroy to work it out.

27. Voorhees testified that he never intended to commit all of his time and energy to the Kansas City venture, as he had numerous other projects in the works. He stated that McCroy was to be working with Campbell.

28. Voorhees had no contact with Campbell from July 2, 1996, until January 2, 1997. Campbell sent Voorhees two letters dated December 17, and December 30, 1996. These two letters expressed Campbell's frustration with the course of their business relationship. In the December 17 letter, Campbell included an agreement for Voorhees to sign which dissolved the business relationship.

29. Voorhees faxed Campbell a response on January 2, 1997. The tone of the response was apologetic, and Voorhees suggested that they meet to discuss matters.

30. In a letter dated January 3, 1997, Campbell indicated his willingness to meet with Voorhees. He also stated that perhaps he should have been communicating directly with Voorhees rather than McCroy.

31. On July 10, 1997, the parties entered into a Settlement Agreement and Mutual Release. The agreement provided that Voorhees, McCroy, VDG, and VCG would pay \$30,000 to Campbell for services performed and transfer 100% ownership of VMREG to him. Voorhees, McCroy, VDG, and VCG would also take all necessary action to release Campbell from his obligation as guarantor at Missouri Bank and Trust

and release the security interest in Blue Springs real estate. If the releases were not secured by August 10, 1997, Campbell would be paid \$100 per day in addition to his other remedies until the releases were procured. Campbell would be indemnified and held harmless from debts arising from VDG, VCG, or the letter of credit and any debt arising from the operation of VMREG prior to the date of the settlement agreement. The agreement provided a mutual release from any and all claims, demands, damages, actions or causes of action arising out of or relating to their business relationship. The performance by the other parties of their obligations under the agreement was a condition of the release by Campbell.

32. Campbell received \$30,000 pursuant to the settlement agreement. However, Voorhees did not procure release of Campbell's personal guarantee or of the Blue Springs real estate.

32 On July 10, 1998, Campbell filed petition in the District Court for Johnson County, Kansas, for Specific Performance of Contract and Breach of Contract. The suit was based on the "Settlement Agreement and Mutual Release" of July 10, 1997, and named Voorhees, McCroy, VDG, and VCG as defendants. The complaint contained no allegations of fraud.

33. On September 24, 1998, Campbell received a judgment against Voorhees. On motion for summary judgment, the Johnson County Kansas District Court awarded Campbell \$408,788.75 for breach of the settlement agreement. Voorhees did not resist the summary judgment motion.

34. Sometime in June of 1996, Voorhees received notice from a general contractor on two projects that the contractor was insolvent and going out of business. At

that time the projects were only half complete. Voorhees notified the bonding companies of the contractor's failure to perform. After thirty days passed, the bonding company responded that it had no record of the bonds being issued, and the bonds provided to Voorhees were forged. Voorhees contacted attorneys to pursue performance on the bonds, and subsequently, the bonding company failed.

35. Over the ensuing months, Voorhees worked to complete the projects. Voorhees testified that the failed general contractor had not paid subcontractors for work they had completed. Also, the general contractor did not subcontract all the work, so certain construction items were not completed. In contracting for completion of the projects, Voorhees determined that the general contractor might have initially underbid the projects as bids he received to complete the projects escalated by a considerable amount. Finally, Voorhees incurred expenses for management fees and penalties for late work as the nine-month project extended to two years.

36. In addition to the problems with the Iowa projects, Voorhees testified that later an Aurora, Illinois project faltered and \$1.5 million in equity was lost. Voorhees was unable to supply the \$300,000 to \$400,000 needed to sustain the townhomes in Burnsville, Minnesota, and the contractor took over the project. The equity in this project was forfeited.

37. By the end of 1998, it was apparent to Voorhees that he would not be able to save his real estate business.

## **DISCUSSION**

Campbell argues that Voorhees should not be able to discharge the debt owed to him evidenced by the Johnson County, Kansas judgment and based on the settlement agreement. He contends that the underlying events that lead up to the judgment are fraught with fraud and misrepresentations. Campbell claims that he relied on various false oral and written representations about a business relationship and also on a false statement of Voorhees' financial condition. Campbell argues that his claim should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) & (B). For the following reasons, the court disagrees.

The Bankruptcy Code provides that discharge under section 727 does not discharge an individual from certain debts. 11 U.S.C. § 523. Section 523(a)(2) provides in relevant part that a debtor is not discharged from any debt:

- (2) for money, property, services, or an extension, renewal, or other 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 the intent to deceive...

11 U.S.C. § 523(a)(2)(A) & (B).

“Since [§523(a)(2)(B)] covers only statements ‘respecting a debtor’s ... financial condition’ and subsection (A) excludes such statements, the subdivisions ‘are ... expressly mutually exclusive.’” First National Bank of Olathe, Kansas v. Pontow, 111 F.3d 604, 608 (8th Cir. 1997)(citing Long, 774 F.2d 875, 877, n. 1 (8th Cir. 1985)).

Unwritten misrepresentations of financial condition do not provide a basis for

nondischargeability under §523(a)(2)(A). Alden State Bank v. Anderson (In re Anderson), 29 B.R. 184, 189 (Bankr. N.D. Iowa 1983) (“False statements concerning the debtor’s or an insider’s financial condition will be analyzed under 11 U.S.C. §523(a)(2)(B); representations which do not deal with the debtor’s or an insider’s financial condition will be analyzed under 11 U.S.C. §523(a)(2)(A)”).

The standard of proof under § 523 is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). It “is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate.” Smith v. United States, 557 F.Supp. 42, 51 (W.D. Ark. 1982) aff’d, 726 F.2d 428 (8th Cir.1984). The party with the burden of proof must provide evidence to prove his or her position is reasonably probable, not merely possible. Sherman v. Lawless, 298 F.2d 899, 902 (8th Cir. 1962). If the proven facts equally support each party's position, "the judgment must go against the party upon whom rests the burden of proof." Id.

The Eighth Circuit has adopted a five-part test to determine whether a debt will be excepted from discharge under § 523(a)(2)(A). The court asks whether: (1) the debtor made false representations; (2) the debtor knew these representations were false at the time they were made; (3) the debtor made these representations with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations; and, (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987) as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995).<sup>1</sup>

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<sup>1</sup> In Van Horne, the Eighth Circuit originally held that the plaintiff must prove that his or her reliance was reasonable, however, the United States Supreme Court in Fields determined that the proper standard under 11 USC § 523(a)(2)(A) is "justifiable reliance." Additionally, Van Horne held that the plaintiff had the burden of proving the debtor's deceit by clear and convincing evidence. In Grogan, the United States

The plaintiff must prove each element of his § 523 (a)(2)(A) claim or the debt is not excepted from discharge. Id. Likewise, the plaintiff must prove each element of § 523(a)(2)(B) to prevail. Valley National Bank v. Bush (In re Bush), 696 F.2d 640, 644 n. 4 (8th Cir. 1983).

Both Code sections require the plaintiff to prove that the debtor made a false representation with the intent to deceive. Because direct proof of debtor's state of mind is "nearly impossible to obtain," the requisite intent may be inferred from circumstantial evidence. In re Van Horne, 823 F.2d at 1287.

In this case, the court concludes that the evidence presented will not support a finding that Voorhees intended to deceive Campbell at the time of the July 2, 1996, transaction. Consequently, the debt owed to Campbell is not excepted from discharge under either § 523(a)(2)(A) or § 523 (a)(2)(B).

In making its determination, the court finds both Voorhees and Campbell to be credible witnesses. That their versions of circumstances surrounding their ill-fated business relationship and their interpretations of events after the closing at Missouri Bank and Trust are markedly different is unsurprising.

The court finds the following facts to be persuasive. In December 1995, McCroy returned to Iowa and began working with Voorhees. His duties included identifying and acquiring sources of capital. McCroy was originally from the Kansas City area and had previously worked out of Campbell's office. He was friends with Campbell and knew of his real estate experience. McCroy identified Campbell as a person with the contacts and resources with whom VDG could pursue development in the Kansas City area.

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Supreme Court held the proper standard to be by the preponderance of the evidence. The balance of Van Horne remains good law.

In 1996, Voorhees was sole shareholder of VDG. Through the company he had extensive development projects in various states throughout the country. Many of these projects were organized as partnerships with VDG as the general partner. In the spring of 1996, he decided to move into the Kansas City metropolitan market. In May, he and McCroy traveled to Kansas City to meet with Campbell to discuss a business relationship. As a result of those discussions, Voorhees had his personal financial statement and VDG's financial statement transmitted to Campbell.

The personal financial statement Voorhees sent to Campbell was based on a spreadsheet. Voorhees began using this format in 1988 or 1989. This statement was updated quarterly and annually. It was furnished to creditors on numerous occasions. If a creditor requested additional information, Voorhees supplied the information. Voorhees considered his personal guarantee of corporate debt to be a contingent liability, one that would not arise unless the corporation defaulted. Consequently, this information was not included on his personal financial statement. The court finds that Voorhees did not intentionally fail to disclose information of his personal liability for the purpose of misleading Campbell.

Voorhees set forth an offer of a business relationship in the Agreement to Commitment. Campbell refused to sign the agreement. Nonetheless, he argued that its terms embodied their agreement. However, he dismisses the fact that he did not perform his obligations fully or in a timely fashion. The agreement requires him to secure a short-term loan of \$100,000 within 10 days of its execution. Campbell received the agreement on June 12, 1996, however he did not secure the loan until July 2. More importantly, the agreement required Campbell to secure a \$500,000 intermediate-term loan or irrevocable

letter of credit within thirty days. Campbell was only able to secure the letter of credit after Voorhees provided \$250,000 for a certificate of deposit. When the letter of credit was drawn down and Voorhees defaulted, the Missouri Bank and Trust cashed in the certificate of deposit and applied it to the debt. The parties were left personally liable on approximately a \$250,000 debt secured by the Blue Springs real estate.

Both Campbell and Goetz knew that the purpose of the letter of credit was to free up \$500,000 that Voorhees had with PFC. Campbell knew this money was not destined for the Kansas City venture, but for other projects Voorhees was developing.

At the time that Voorhees initiated business negotiations with Campbell, he did not know that he had a problem with a general contractor on two projects. Even after he found out that the contractor was insolvent and unable to complete the projects, he believed the surety bond would cover the cost of completion. It was not until after the closing on the letter of credit that Voorhees became aware of the forgery and the financial obstacles that he faced. Even then he did not believe the problems to be insurmountable.

Although Campbell makes much of the fact that he had no personal contact with Voorhees for five months, the circumstances surrounding the business venture indicates that Campbell was to be working primarily with McCroy. McCroy initiated the business relationship between Campbell and Voorhees. He remained Campbell's contact in the business. Voorhees believed that McCroy was drafting corporation documents and completing the necessary paperwork for VCG. Voorhees had numerous developments in progress and never intended to commit all of his time and expertise to the Kansas City project.



Finally, Voorhees entered into a settlement with Campbell and paid him \$30,000. As part of the agreement, Voorhees transferred any interest he had in VMREG to Campbell. This returned the Blue Springs real estate valued at approximately \$350,000 to Campbell. The court finds these actions weigh against a finding that Voorhees intended to deceive and defraud Campbell.

The court finds that Campbell has not proven by a preponderance of the evidence that Voorhees intended to deceive him either with the financial statement or with representations about the business agreement. Rather than a case of fraud, the court believes this to be a case of breach of the settlement contract just as Campbell presented in his Johnson County petition. Because Campbell has not proven the element of deceit the court concludes that the debt is not excepted from discharge. The court need not address the other arguments raised.

**ORDER**

IT IS THEREFORE ORDERED that the debt owed plaintiff John R. Campbell is not excepted from discharge and the defendant Jeffrey W. Voorhees shall have judgment against the plaintiff dismissing the complaint.

Dated this \_\_\_\_\_ day of December, 2000.

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RUSSELL J. HILL, CHIEF JUDGE  
U.S. BANKRUPTCY COURT

