UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re:	:	**Case No. 00-02951-CH**
STEVEN L. WILSON,	:	**Chapter 7**
Debtor.	:	
ROLFSTAD ENTERPRISES, LTD.,	:	**Adv. No. 00-20198**
Plaintiff,	:	
v.	:	
STEVEN L. WILSON,	:	
Defendant.	:	

ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On January 28-29, 2002, the court conducted a trial on Plaintiff's Complaint to Determine Dischargeability of Debt. August B. Landis represented Plaintiff Rolfstad Enterprises, Ltd., and Mark C. Feldmann represented Defendant Steven L. Wilson. At the conclusion of the hearing, the court took the matter under advisement. Upon stipulation by the parties, the court extended the deadlines for submission of post-trial briefs. Briefs have now been received, and the court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 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. Plaintiff Rolfstad Enterprises, Ltd., is a bank holding company wholly owned by Larry Rolfstad and his mother Doris Rolfstad. Rolfstad Enterprises, Ltd. (hereinafter Plaintiff or Rolfstad) is a successor in interest to VCR Bancorporation (hereinafter VCR).

2. Defendant Steven L Wilson (hereinafter Defendant or Wilson) filed a petition for chapter 7 protection on August 11, 2000. Wilson scheduled Rolfstad on Schedule F – Creditors Holding Unsecured Nonpriority Claims - as holding a claim valued at $1,300,000.00 based on a personal guarantee. He also indicated that a co-debtor was obligated on the debt.

3. On October 25, 2000, Rolfstad filed a proof of claim for $1,332,603.23 plus interest from January 1, 2000, accruing at a rate of $328.59 per day. Rolfstad also claimed attorney fees and court costs.

4. Prior to filing for bankruptcy protection Wilson worked for over twenty-five years in the banking industry. After receiving a bachelor's degree in business and teaching for two years, Wilson entered the field as an assistant cashier in Adel in 1974. From 1976 to 1979, he worked as a bank examiner for the state of Iowa. Wilson moved back into the private sector in 1979 as vice-president at the Van Horne Savings Bank, in Van Horne, Iowa. He moved to the Keystone Savings Bank in Keystone, Iowa in 1980, where he ultimately became the president and ultimately acquired an ownership interest in a holding company that owned the bank. In 1992, Wilson accepted a position with Firstar Bank in Cedar Rapids, Iowa. In 1996, he moved to the Hartford Carlisle Savings Bank (hereinafter HCSB) as president of the bank. Wilson was also an officer and shareholder of Wildcat, Inc., the holding company that purchased all the stock of HCSB.

5. During his employment at Firstar Bank, Wilson met Dirk Thierer. Theirer worked as a loan officer at Firstar. Theirer impressed Wilson as being successful and wealthy. When it became apparent to Wilson that Firstar was downsizing and reducing its number of managers, he and Theirer began contemplating the purchase of a bank.

6. Sometime in 1995, an employee of the accounting firm KPMG Peat Marwick, contacted Wilson at a Banker's conference concerning his interest in purchasing a bank. Wilson was told at this time that HCSB might be available.

7. VCR purchased a majority interest in HCSB in 1991, and by 1995 owned its outstanding shares of stock. Larry Rolfstad was a shareholder and one of the incorporators of VCR. When VCR took over HCSB, Larry became president of the bank. His wife Linda also worked at HCSB. There is no evidence in the record that the other shareholders of VCR were active in the operations of HCSB.

8. Larry Rolfstad is an experienced banker, having begun his career in 1963. He developed an expertise in returning distressed banks to sound financial positions. In 1991, HCSB was in a distressed condition and by 1995 Larry Rolfstad had returned it to soundness.

9. By 1995, Larry Rolfstad had begun to contemplate retirement. The stress related to his career began to cause him health problems. Consequently, he began to entertain offers for the purchase of HCSB. Larry testified that there was a great deal of interest in the bank, and he had numerous inquiries. However, he was concerned for the bank employees and the community. He wanted a buyer who would live in the community, and who had a rural background.

10. Larry Rolfstad testified that he felt that Wilson had the necessary qualities to run the bank. The two were acquainted professionally. They first met when Wilson was a member of the state team that examined the bank at Vinton, Iowa, where Larry worked. Later, Wilson became a competitor when he worked at Van Horne, Iowa. During that time, they occasionally met at community functions.

11. Larry and Linda Rolfstad met with Wilson, Thierer, and their spouses in the fall of 1995. The meeting was part social and part business. After the initial meeting, Wilson began contacting Larry by phone. They conducted additional meetings concerning the purchase of HCSB. Theirer attended some of these meetings.

12. On March 15, Wildcat, Inc. (hereinafter Wildcat) filed articles of incorporation with the State of Iowa. It was formed as a bank holding company to purchase HCSB. Wilson and Thierer each invested $300,000.00 in Wildcat. Members of Thierer's immediate family invested $600,000.00, and his acquaintances invested another $800,000.00. Wilson was the president and a director of Wildcat, and Thierer was its secretary/treasurer and a director.

13. It was contemplated by Wilson and Thierer that VCR would finance a portion of the purchase price of HCSB. If VCR refused, they would have to seek out additional investors, or other financing.

14. Although the document is dated March 13, 1996, the parties stipulate that on March 16, 1996, Wildcat, Wilson, Thierer, VCR, Larry Rolfstad, Dora E. Rolfstad, the Marion Coons Trust and the Kenneth Coons Trust entered into a stock purchase agreement for the sale of all the issued and outstanding common stock of HCSB.

15. The stock purchase agreement provided that Wildcat, Wilson, and Theirer agreed to pay $2,000,000.00 in cash and to deliver an installment note for the balance of the purchase price.

16. On July 1, 1996, Wildcat, Wilson, and Thierer paid the $2,000,000.00 cash portion of the purchase price of HCSB.

17. Also on July 1, 1996, Wilson, individually and as an officer of Wildcat, and Thierer, individually and as an officer of Wildcat, executed a promissory note to VCR in the principal amount of $1,600,000.00.

18. The promissory note provided for 9% annual interest and quarterly payments of $52,500.00 principal and interest; the note was to be paid in full with all accrued interest on September 30, 2006; no prepayments were allowed in the first five years of the note without the consent of VCR; and the note was secured by the HCSB stock.

19. Larry Rolfstad testified that the payment schedule of the note along with the "no prepayment" provision was drafted to limit tax liability by spreading the payment over a number of years.

20. Upon delivery of the cash and promissory note, VCR conveyed all of its HCSB stock to Wildcat.

21. Along with the sale of the bank, HCSB entered into a number of agreements with Larry and Linda Rolfstad individually. HCSB agreed to an employment agreement with each for slightly more than one year at a specified salary along with benefits. Larry and Linda also entered into a non-competition agreement with Wildcat that was to pay them $750,000.00 and $250,000.00 respectively, in ten annual payments.

22. Upon taking control of HCSB, Wilson and Thierer aggressively promoted the growth of the bank. HCSB loaned over $65,000,000.00 in the following three years. Over this time, Wilson and Thierer infused funds into HCSB to continue its growth. In the summer of 1997, they borrowed $500,000.00 from Bankers Bank of Madison, Wisconsin. In the summer of 1998, they borrowed an additional $500,000.00 from Bankers Bank. Both loans were secured by Wilson and Theirer's Wildcat stock and their personal guarantees. In December 1998, the investors of Wildcat provided an additional $1,000,000.00. Wilson's pro rata share was $150,000.00, which he acquired by using his home to secure a loan.

23. Wilson's duties at HCSB included managing the daily operations of the bank, making loans to customers, approving loans made by loan officers that exceeded their lending limit, and assuring compliance with banking statutes and regulations.

24. Sometime after they took control of HCSB, Thierer informed Wilson about a technology company named Murdock Communications Corporation (hereinafter Murdock). Thierer was familiar with the company and its president Guy Murdock from his time at Firstar.

25. HCSB made a series of loans to Murdock and investors of Murdock resulting in an ultimate concentration of loans in one entity that exceeded statutory lending limits. Of those loans, only one promissory note bears Wilson's initials indicating that he was the officer who approved the loan. All of the other notes offered as evidence bear Thierer's initials.

26. During the period that the loans were approved, Murdock was in the process of launching a subsidiary corporation named Actel Integrated Communications, Inc. (hereinafter Actel). Guy Murdock was on Actel's board of directors. Thierer envisioned an initial public offering of Actel stock that would provide sufficient fund to pay off all of the Murdock loans.

27. In April or May 1998, Wilson identified a concentration of lending for Murdock that exceeded HCSB's single borrower limit. Wilson contacted James Wiewal, an acquaintance and president of Peoples State Bank, Manchester, Iowa. HCSB and Peoples State engaged in the participation of some of the Murdock loans, whereby People's State agreed to be a co-lender of a certain percentage of each loan.

28. HCSB was examined in the fall of 1996, summer of 1997, and December 1998. Each time, the examiners did not find any problems with the bank.

29. Right after the first of the year in 1999, Wilson and Thierer's business relationship became strained. They were beginning to have philosophical differences about the operation of HCSB. Wilson was concerned that Thierer was too aggressive in the promotion of the bank, and the concentration of loans was not in the best interest of the bank. He did not want to continue putting in cash to maintain his pro rata share in Wildcat and ultimately HCSB.

30. In April 1999, Wilson decided that either he needed to buy out Thierer or Theirer needed to buy him out. Wilson contacted Bankers Bank about financing the purchase.

31. Sometime in the spring of 1999, Wilson contacted Larry Rolfstad to see whether Rolfstad would consent to the pre-payment of the amount due on the promissory note, as consent was required to pre-pay in the first five years. Wilson engaged an accountant at KMPG Peat Marwick to calculate the amount necessary to satisfy the note along with a premium to account for any adverse tax liabilities to Rolfstad based on the lump sum payment. Rolfstad refused the pre-payment.

32. In May 1999, Wilson decided that he would leave HCSB. He and Thierer reached an agreement whereby Wilson received $1,000,000.00 for his Wildcat stock. Wilson also

received a one-year employment contract and an indemnity agreement covering any liability he might have related to the purchase and operation of HCSB.

33. At the time he decided to leave HCSB, Wilson believed that the bank was in good financial shape. He was concerned about its rapid expansion, but he did not believe that it was in danger of failing.

34. Wilson contacted Bankers Bank and negotiated the release of his personal guarantee of HCSB's loans there. He advised Bankers Bank of the proposed sale of his Wildcat stock to Thierer and indicated that its collateral position would be unchanged. Bankers Bank released Wilson from his personal guarantee.

35. On June 4, 1999, Wilson sold his interest in Wildcat to Dirk Thierer. Wilson resigned his positions at Wildcat and HCSB, and left the bank.

36. Wilson did not contact Rolfstad and inform him of his departure from the bank. The first time that Rolfstad learned of Wilson's departure was when Theirer contacted Larry on July 1, 1999, concerning the method of making the quarterly payment due on the promissory note.

37. In March and April of 1999, Wilson made transfers of valuable assets to his wife and did not receive any consideration in exchange. The assets included his interest in their homestead and stock in Keystone Community Bancorporation, a holding company that owned a controlling interest in the Keystone Community Bank. Wilson characterized the transfers as estate planning made on the advise of counsel.

38. Wilson used a portion of the proceeds from the sale of his Wildcat stock to pay off the debt encumbering his wife's homestead. He also invested a portion and paid other debts.

At trial he could not account for between $49,000.00 and $59,000.00 other than to say these amounts were spent on living expenses.

39. Wildcat made the quarterly payments on the promissory note to Rolfstad on October 1, 1999, and January 1, 2000.

40. On January 14, 2000, the Federal Deposit Insurance Corporation closed HCSB and placed it into receivership.

41. The April 1, 2000, payment was not made on the promissory note to Rolfstad.

42. On April 6, 2000, Rolfstad filed a petition, Law No. LA25738, in the Iowa District Court for Warren County naming Wildcat, Wilson, and Thierer as defendants, seeking judgment on the promissory note.

43. On July 24, 2000, the Warren County court entered an order for Default Judgment and/or Summary Judgment and Judgment Entry. The court entered judgment for breach of the stock purchase agreement. Judgment was in personam, jointly and severally, against Wildcat, Wilson, and Thierer in the amount of $1,332,603.23. The court also awarded accruing interest, costs, and attorney fees.

44. On August 2, 2000, the Peoples State Bank of Manchester, Iowa, and James Wiewel filed a petition, Law No. LA25896, in the Iowa District Court for Warren County naming Wilson, and Thierer as defendants. The petition makes allegations of fraud, breach of fiduciary duty, and negligence concerning the loan participation agreements.

45. Steven L. Wilson filed for protection under the Bankruptcy Code by filing a chapter 7 Petition on August 11, 2000.

46. On December 22, 2000, Rolfstad filed its complaint objecting to discharge and for a determination of dischargeability of a debt.

47. On April 13, 2001, Rolfstad filed a motion requesting that it be allowed to dismiss that portion of its complaint objecting to Wilson's discharge pursuant to 11 U.S.C. § 727. The motion stated that Rolfstad, Peoples State Bank, Wiewel, Wilson and the chapter 7 trustee had resolved certain disputes and objections to exemption in the main case. Pursuant to the settlement Rolfstad would dismiss its objection to discharge.

48. On May 14, 2001, the court entered an order granting Rolfstad's motion to dismiss its objections to discharge.

DISCUSSION

Rolfstad originally objected to Wilson's discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(2)(B), (a)(3) & (a)(5), and objected to the dischargeability of its debt pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). After resolving certain disputes and objections to exemptions in the main case with Peoples State Bank, Wiewel, Wilson, and chapter 7 trustee Thomas Flynn, Rolfstad filed a motion with the court to dismiss is action objecting to discharge. The court subsequently granted the motion. Rolfstad also abandoned its action under 11 U.S.C. § 523(a)(2)(B). The §§ 523(a)(2)(A), (a)(4), and (a)(6) allegations remain before the court.

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;
>
> * * *
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 523(a)(2)(A), (4), & (6).

Statutory exceptions to discharge are strictly construed against the party seeking the exception. Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848, 853 (8th Cir. 1997) (en banc), affirmed, 523 U.S. 57 (1998); Werner v. Hofman, 5 F.3d 1170, 1172 (8th Cir. 1993). 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.

Dischargeability Under 11 U.S.C. § 523(a)(2)(A)

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).[1] The plaintiff must prove each element of his § 523 (a)(2)(A) claim or the debt is not excepted from discharge.

"The first, second, and third elements can be considered together by asking whether the debtor made false representations knowingly and with the intent to deceive the creditor." AT&T Universal Card Services v. Broerman (In re Broerman), No. 97-2569-CH, Adv. No. 97-97203 slip. op. at 5 (Bankr. S.D. Iowa Jan. 19, 1999) (Judge Hill decision book # 313). Intent to deceive may be proven by circumstantial evidence. In re Van Horne, 823 F.2d at 1287.

A debtor has a duty to inform a creditor of all material facts surrounding a transaction, and silence concerning a material fact can constitute a false representation. In re Van Horne, 823 F.2d at 1288. A debtor need not "bare his soul" to a creditor, but "the creditor has the right to know those facts touching upon the essence of the transaction." Id.

The Seventh Circuit has recently held that misrepresentation and reliance are not necessary to establish actual fraud under §523. McClellan v. Cantrell, 217 F.3d. 890, 894 (7th Cir. 2000). It determined that fraud is a broader concept encompassing " 'any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.'" Id. quoting 4 Collier on Bankruptcy ¶ 523.08[1][e], p. 523-45 (15th ed., Lawrence P.

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

King ed., 2000). In such a case, a plaintiff must show that a fraud occurred, the debtor was guilty of intent to defraud; and the fraud created the debt that is the subject of the discharge dispute. Bletnitsky v. Jairath (In re Jairath), 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001). The plaintiff must also plead the facts of the fraud with particularity. Id. citing Fed. R. Bankr. P. 7009.

The court notes that in his concurrence in McClellan, Circuit Judge Ripple, while conceding that the majority has made a plausible yet "strained" reading of § 523(a)(2)(A), explains that § 523(a)(6) provided a "more direct avenue" for dealing with the factual situation presented to the court. McClellan, 217 F.3d. at 896. Moreover, as of this writing, the Eighth Circuit has not yet considered a proceeding under § 523(a)(2)(A) in the context of McClellan. Accordingly, this court is reluctant to embrace what appears to be a significant departure from this circuit's established precedent absent direction from the Eight Circuit Court of Appeals. However, the court notes that any analysis under § 523(a)(2)(A) requires an intent to deceive on the part of the debtor be shown in order for the debt to be excepted from discharge.

In this case, Rolfstad argues that it has carried it burden under § 523(a)(2)(A). It claims that Wilson had an affirmative duty as an officer, director, and member of HCSB's credit committee to inform Rolfstad of the loans made by HCSB that were ultimately invested in Murdock Communications. Rolfstad labels these loans as "nominee" or "conduit" loans that, when added together, constitute a violation of banking regulations by exceeding the single borrower limit. Rolfstad claims that Wilson knew or should have known of the loans and their illegality, and also that the loans were compromising the bank's stability. He also knew of his

duty to inform Rolfstad of the transactions. Consequently, he was jeopardizing Rolfstad's security interest in the HCSB stock and ultimately its claim, and intended to do so.

Rolfstad labels as the "critical circumstantial evidence" of Wilson's intent to deceive Rolfstad the "confluence of (a) the stalled Actel IPO, (b) the maturing of the Murdock Loans, (c) Wilson's gratuitous transfers to his wife, (d) his decision to exit from Wildcat and HCSB prior to the next expected examination, (e) his secrecy in exiting from HCSB and Wildcat, and (f) the manner in which Wilson handled the proceeds from the sale of Wildcat stock to Thierer. The court is not persuaded that Rolfstad has proven that Wilson intended to deceive it.

The court begins by noting that it finds both Larry Rolfstad and Steven Wilson to be credible witnesses. That their views on key facts involving the purchase and operation of HCSB differ is not surprising considering that the stakes of this proceeding exceed $1,000,000.00. The court also acknowledges that the timing and sequence of events especially concerning Wilson's "estate planning," without supporting documents could easily cast a pallor over his testimony. Nonetheless, the court finds his statements concerning his part in the acquisition and operation of HCSB to be credible.

Turning to the evidence presented at trial, the court determines that Rolfstad has not carried its burden to show any deception on the part of Wilson in obtaining the funds to purchase the HCSB stock. The record is clear that the parties to the transaction were knowledgeable and experienced businessmen. Both Larry Rolfstad and Steven Wilson had extensive banking backgrounds. Counsel represented the parties in drafting the agreements, and the parties had access to qualified professionals in determining the value of HCSB. The stock purchase agreement and the payment schedule of the promissory note were negotiated as arm's length

transactions. Wilson testified that VCR's agreement to take back a promissory note was only one method of financing that Wildcat considered; alternatively, it would have sought out further investors or other financing to provide the additional funds for the stock purchase.

Further, Larry Rolfstad conceded that the documents offered into evidence concerning the stock purchase, the indemnity agreement, the employment agreements, and the noncompetition agreements contained all the provisions concerning the transfer of HCSB to Wildcat. Absent from the agreement is any provision for Wilson to remain involved in either Wildcat or HCSB for any length of time. Nor does the agreement provide for notification to Rolfstad, VCR, or Larry Rolfstad of Wilson's intent to leave Wildcat or HCSB. Accordingly, the court does not find that Wilson had a duty to inform Rolfstad that he was leaving HCSB.

None of the documents concerning the sale of HCSB, other than his one-year employment contract, provides for any continuing involvement by Larry Rolfstad in the operation of HCSB. Consequently, the court does not find that Wilson had a duty to inform Rolfstad of the lending operations of HCSB, based on their business relationship.

The fact that Wilson decided to leave HCSB and sell out his interest in Wildcat to Thierer is not indicia of fraud. The court finds credible Wilson's statement that he and Thierer began to have philosophical differences. Wilson was a minority shareholder of Wildcat, and the other shareholders were friends and relatives of Thierer. Wilson could not control Wildcat, and Thierer could. Thierer could determine that additional cash needed to be infused into HCSB, and Wilson would either have to generate the cash or see his pro rata interest in the corporation decline. Further, both Thierer and Wilson had the authority to make loans to the maximum single borrower rate for the bank. The evidence reveals that Wilson generally made smaller

loans to local individuals and businesses, while Theirer made more and larger loans to entities in a variety of locations. In fact, based on the volume and amount of the loans, Thierer did the majority of the lending for HCSB. The court concludes that the evidence supports Wilson's claim that Thierer wanted to develop HSCB more rapidly and in a manner at odds with Wilson's desires.

Rolfstad points to the number of loans and amount of money that it claims went to Murdock as evidence of Wilson's intent to defraud Rolfstad. It claims that as an officer and a member of HCSB's lending committee, Wilson knew or should have known that the concentration of loans exceeded the amount permitted by banking regulations and threatened the financial stability of the bank. However, Wilson testified that he did not have knowledge of the majority of the loans identified by Rolfstad, and he could not tell from the documents whether all the loans had been funded. The court notes that all but one of the loans were made by Thierer. Wilson testified that to a great extent he relied on Thierer's experience and judgment in making loans. When he noticed what he perceived to be a violation of the lending limit, he contacted Peoples State Bank, which agreed to participate in certain loans. Wilson believed that by soliciting another bank to participate in HCSB's loan activity that he rectified the situation concerning the lending limit problem with Murdock. Both parties agree that participating out loans is an acceptable banking practice when used for legitimate purposes.

Further, the court notes that Rolfstad's argument attempts to impose a negligence standard of "known or should have known" where the Bankruptcy Code requires proof of intentional wrongdoing. While it may well be that Wilson was not as diligent in his positions at

HCSB as Rolfstad would have liked, the court does not find that he intended to defraud Rolfstad through participation, approval, or acquiescence involving the Murdock loans.

Rolfstad also identifies Wilson's disposition of the funds that he received from the sale of his interest in Wildcat as indicia of fraud. In particular, Rolfstad takes exception to Wilson's payment of the debt encumbering the homestead that he transferred to his wife for no consideration. Rolfstad discounts Wilson's statement that estate planning was his motivation for the transfer.

However, Wilson had a legal right to convey his exempt property regardless of his motivation, Benson v. Richardson, 537 N.W.2d 748, 757 (Iowa 1995), and to date no one has contested the homestead transfer as fraudulent and avoidable. Wilson remained liable on the homestead debt after he transferred the real property, and it is the well-settled rule in Iowa that a debtor may prefer one creditor even if the payment disadvantages another. Carlisle v. Milliman, 203 N.W. 268, 270 (Iowa 1925); see also Production Credit Ass'n of Midlands v. Shirley, 485 N.W.2d 469, 472 (Iowa 1993) (same); Textron Financial Corp. v. Kruger, 545 N.W.2d 880, 883 (Iowa App. 1996) (same and the natural consequence of the transfer is that other creditors may be delayed or prevented from obtaining payment).

In the settlement to the objections to exemption, Rolfstad agreed not to pursue collection against the homestead if his claim was excepted from discharge. All facts considered, the court infers that there is no question that Wilson had an exempt interest in the homestead, and none of the parties were confident that fraudulently acquired funds could be traced into the homestead. Accordingly, the court does not find that the mere fact that he paid off the debts encumbering the homestead supports an inference of fraudulent intent by Wilson.

Further, the court finds that Wilson's offer to pay off the promissory note with interest and a premium for additional tax liability belies any assertion of fraudulent intent. Wilson approached KMPG Peat Marwick and requested a calculation of the amount necessary to pay off the promissory note and make Rolfstad whole for any additional taxes incurred. That Rolfstad determined that it was not in its best interest to accept the offer does not diminish probative value of the offer. Rolfstad argues that had it known then what it knows now, it might have viewed the offer differently. Undoubtedly, the statement is correct, but it is irrelevant as it pertains to Wilson's intent. Had he been attempting to defraud Rolfstad of the amount owed under the promissory note, it is difficult to fathom how Wilson could do so by attempting to pay the obligation in full.

The court also declines to infer fraudulent intent from Wilson's failure to offer Rolfstad any of his Wildcat proceeds. As Wilson testified, he already offered to pay Rolfstad earlier and the offer was rejected based on tax and retirement consequences. Further, Wilson did not believe that HCSB was on the verge of collapse. He viewed it as a going concern that could pay its own debts, including his one-year salary.

Finally, the court notes that Rolfstad did not complain that Wilson conspired with Thierer to commit fraud, and thereby impute Thierer's intentions to Wilson. See In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig., Temporomandibular Joint (TMJ) Implant Recipients v. Dow Chemical Co., 113 F.3d 1484, 1498 (8th Cir. 1997) (setting forth the elements of civil conspiracy). Nor did Rolfstad complain that Wilson aided and abetted Thierer in committing fraud. See Id. at 1495 (setting forth the elements of aiding and abetting in civil matters).

At trial, Rolstad called Thierer to provide testimony concerning the operations at HCSB. After giving his name, address, and stating that he did not know Rolfstad's counsel, Thierer invoked his Fifth Amendment right against self-incrimination to all the subsequent questions asked of him.

When considering if any inference may be drawn from a witness invoking the Fifth Amendment, federal courts make a distinction between criminal and civil cases. Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 521 (8th Cir. 1984). The prevailing rule in federal courts is that the Fifth Amendment's privilege against self-incrimination asserted in a civil action does not prohibit the finder of fact from drawing an adverse inference from parties' refusal to testify in response to evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); Rosebud Sioux Tribe, 733 F.2d at 521. Further, the adverse inference may be drawn from non-party witnesses invoking the Fifth Amendment. Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983); but see id. at 715 (Winter, J. dissenting). Accordingly, under the appropriate circumstances, bankruptcy courts may draw an adverse inference from a witness's claim of Fifth Amendment privilege. See e.g. In re Hanson, 225 B.R. 366, 372 (Bkrtcy. W.D. Mich. 1998); General Motors Acceptance Corporation v. Bartlett, 154 B.R. 827 (Bankr. D.N.H. 1993); and In re Metzgar, 127 B.R. 708 (Bankr. M.D. Fla. 1991).

Before such an inference may be made, the party requesting the inference must establish its prima facie case by providing evidence that tends to prove each element of its case. Trustmark Nat'l Bank v. Curtis (In re Curtis), 177 B.R. 717, 720 (Bankr. S.D. Ala. 1995). Without other probative evidence, the invocation of the Fifth Amendment is insufficient to prove

a case. Id. After other proof of each element is offered, the trier of fact may add to the weight of evidence the inference. Id.

Because the court has already determined that Rolfstad has not proven each of the required elements of § 523(a)(2)(A) or § 523(a)(6), the court does not draw any inference from Thierer's failure to testify. Consequently, Thierer's failure to respond does not add to the weight of the evidence.

For all the foregoing reasons, the court finds that Rolfstad did not carry its burden to prove that Wilson obtained property from it with an intent to deceive it. Accordingly, Plaintiff has failed to show that the debt is not dischargeable pursuant to § 523(a)(2)(A).

Dischargeability Under 11 U.S.C. § 523(a)(6)

Section 523(a)(6) also requires intentional or willful conduct along with an element of malice. However, the elements of willfulness and malice must be analyzed separately. Barclays American/Business Credit v. Long (In re Long), 774 F.2d 875, 880 (8th Cir. 1985). "Willful" means intentional or deliberate. Id. "Malice" must apply to a heightened level of culpability that goes beyond recklessness if it is to have a meaning independent of willful. Johnson v. Miera (In re Miera), 926 F.2d 741, 743 (8th Cir. 1991). The Eighth Circuit Court defines willful as "headstrong and knowing" conduct and "malicious" as conduct "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause …harm." Id. at 743-44. The act must be done with the actual intent to cause injury to the creditor. Kawaauhau v. Geiger, 523 U.S. 57, 61-64 (1998). Unless the debtor takes action with malice, fully intending or expecting to injure the economic interests of the creditor, the debt is not excepted from discharge. Id.

Rolfstad argues that Wilson's failure to prevent Thierer from making the Murdock loans and protect HCSB's financial stability constitutes willful and malicious injury to it under § 523(a)(6). For essentially the same reasons as above, the court is not persuaded.

The court does not believe that Wilson intended to violate the banking regulations by allowing Thierer to exceed the single borrower limit to Murdock. Thierer made all of the Murdock loans except for one that Wilson made. He trusted Thierer, and relied on Thierer's experience and judgment. When Wilson perceived that there was a problem, he took steps to correct it by participating out some of the loans in manner customary within the industry. Wilson may not have been as diligent as he should have been, but his actions or inactions do not rise to the level of willful intent to injure Rolfstad. At worst, Rolfstad has shown that Wilson was negligent in carrying out his responsibilities at HCSB.

Further, Rolfstad has not shown that Wilson specifically intended to harm Rolfstad. At most, it could be said that Wilson's alleged derelictions were directed at HCSB. The bank bore the brunt of damage, as its customers' deposits were insured by the F.D.I.C. After the F.D.I.C. took control of the bank its stock lost its value. Certainly Wildcat, and consequently its shareholders, were damaged because they held the stock. However, although the value of its collateral diminished in value, Rolfstad retained its claim against Wildcat, Thierer, and Wilson. HCSB's receivership did not affect the claim. To suggest that Wilson intentionally intended to harm Rolfstad through his failure to monitor Thierer's lending practices is a tenuous claim at the very best.

Moreover, Wilson's offer to pay off the promissory note in full with a premium to compensate for adverse tax consequences proves the contrary. If he intended to injure Rolfstad,

he would have no incentive to offer pay the promissory note. Wilson also believed that HCSB was financially sound when he left in June 1999, and regardless he believed that Thierer had sufficient resource to assure payment of the promissory note. Accordingly, the court finds that Wilson did not intend to financially injure Rolfstad.

Dischargeability Under 11 U.S.C.§ 523(a)(4)

In order to prevail under § 523(a)(4), a plaintiff must establish two elements. First, the plaintiff must prove the existence of a fiduciary relationship, and second, that Defendant committed fraud or defalcation in the course of the fiduciary relationship. Jafarpour v. Shahrokhi (In re Shahrokhi), 266 B.R. 702, 707 (B.A.P. 8th Cir. 2001). Whether a "fiduciary relationship" exists is determined by federal law. Tudor Oaks Limited Partnership v. Cochrane (In re Cochrane), 124 F.3d 978, 984 (8th Cir. 1997). Federal law limits fiduciary relationships to express trusts or technical trusts that are imposed by statute. Id. The fiduciary relationship must have existed before and apart from the incident that created the debt. Id. Mere contractual relationships are insufficient to establish a fiduciary relationship. In re Shahrokhi, 266 B.R. at 708. Courts may look to nonbankruptcy law to determine whether an express or technical trust exists. Dutton v. Kondora (In re Kondora), 194 B.R. 202, 208 (Bankr. N.D. Iowa 1996).

The Eighth Circuit defines "defalcation" as

> the "misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds." Under section 523(a)(4), defalcation "includes the innocent default of a fiduciary who fails to account fully for money received." …An individual may be liable for defalcation without having the intent to defraud.

In re Cochrane, 124 F.3d at 984 quoting Lewis v. Scott, 97 F.3d 1182, 1186 (9th Cir. 1996). Defalcation is evaluated objectively and "does not necessarily involve misconduct." In re

Kondora, 194 B.R. at 208. "An individual may be liable for defalcation without having the intent to defraud." In re Cochrane, 124 F.3d at 984.

Rolfstad claims that Wilson occupied a fiduciary relationship with it based on his positions as an officer and director of HCSB and its security interest in the HCSB stock. Additionally, Roflstad claims that fiduciary is a broad term, and the court should look to the facts of relationship between Wilson and Larry Rolstad and determine, that based on his superior knowledge and position, Wilson stood in a fiduciary capacity to Larry Rolfstad. The court disagrees.

Rolfstad misconstrues the term "fiduciary" as it is used in the Bankruptcy Code. As used in § 523(a)(4), fiduciary is a very limited term. Barclays American/Business Credit v. Long (In re Long), 44 B.R. 300, 305-06 (Bankr. D. Minn. 1983) aff'd 774 F.2d 875. As stated above, it is limited to express or technical trusts that existed before and apart from the debt that was created. Under this narrow interpretation, corporate officials may be held to fiduciary duties to shareholders if statute or state law rule provides for such, and draining corporate assets for their personal benefit may create a bar to the discharge of debt. In re Long, 775 F.2d at 878-79 and n.3. However, they are not found to be fiduciaries to third-party creditors. Id. Further, the court notes that in Iowa, "a debtor-credit relationship between a borrower and his lender does not ordinarily also create a fiduciary duty." Kolb v. Naylor, 658 F. Supp. 520, 526 (N.D. Iowa 1987).

In this case, the parties were engaged in an arm's length transaction for the purchase of HCSB stock. Rolfstad provided financing to Wildcat for a portion of the sale price. Wilson provided a personal guarantee for the loan. The court does not find any exceptional circumstances to transform this from the commercial transaction that it appears to be. The court

concludes that the parties involved occupied a debtor/creditor relationship, and not one of fiduciary/beneficiary. Accordingly, Rolfstad's claim is not excepted from discharge under § 523(a)(4).

Rolfstad relies in large part on Kansas Bankers Surety Co. v. Eggleston (In re Eggleston), 243 B.R. 365 (Bankr. W.D. Mo. 2000) in pursuing its action against Wilson. However, that case is factually dissimilar from the matter before this court. In that case, the bankruptcy court found that the surety was a subrogee of the bank, and thereby had standing to raise the bank's claims in bankruptcy court. The debtor was an officer at the covered bank. The court found that the debtor engaged in a fraudulent nominee loan scheme whereby he induced personal friends to apply for loans and turn over the proceeds to him. He told the friends that there was no problem with him getting money from the bank; they were just helping him cut through red tape. He also told the friends that they would not be obligated on the loans, and he would pay them off. The debtor made some interest payments, but ultimately defaulted. The court excepted the surety's claim under § 523(a)(2)(A), (a)(4), & (6).

Unlike the surety, Rolfstad does not have standing to bring claims that HCSB might have against Wilson. More importantly, Wilson did not engage in the type of nominee loan scheme outlined in Eggleston. Wilson did not induce any of the loan applicants to request loans. There is no evidence that he received any of the loan proceeds.

Further, there is no evidence that Wilson represented to any of the loan recipients that they would not be obligated to repay the loans, or that they believed that they were not obligated. To the contrary, the only evidence that the court has concerning actual loan recipients comes from Wiewal's deposition where he states that Chaplin has been extremely cooperative and

provided additional collateral. He also states that Guy Murdock has provided additional collateral in response to Peoples State Bank's suit against him. The testimony supports the inference that the borrowers knew that they were obligated on the loans.

For all the foregoing reasons, the court determines that Rolfstad has not carried its burden in this proceeding. Accordingly, its claim against Wilson will not be excepted from discharge.

ORDER

IT IS THEREFORE ORDERED that Plaintiff Rolfstad Enterprises LTd.'s complaint is dismissed, and its claim is not excepted from discharge. Defendant Steven L. Wilson is discharged from Plaintiff's claim.

FURTHER, Defendant Steven L. Wilson may have judgment against Rolfstad Enterprises, Ltd., dismissing the complaint with costs to Rolfstad Enterprises, Ltd.

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