

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

<b>In Re:</b>	:	<b>Case No. 01-4713-rjh7</b>
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<b>RODNEY RAY SUHR,</b>	:	<b>Chapter 7</b>
	:	
<b>Debtor.</b>	:	
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<b>RED OAK LIVESTOCK MARKET, OMAHA LIVESTOCK MARKET, and DONALD WOLFE,</b>	:	<b>Adv. No. 01-20216-rjh</b>
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>RODNEY RAY SUHR,</b>	:	
	:	
<b>Defendant.</b>	:	
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**ORDER— COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**

This matter came on for trial on May 15, 2003. Leslie G. Peters represented plaintiffs Red Oak Livestock Market, Omaha Livestock Market, and Donald Wolfe. Elizabeth S. Hodson represented defendant Rodney R. Suhr. At the conclusion of the trial, the court took the matter under advisement. Post-trial briefs have 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.

## STATEMENT OF FACTS

1. The defendant in this proceeding is Rodney Ray Suhr (hereinafter Debtor). On September 10, 2001, Debtor filed a petition for chapter 7 relief with the United States Bankruptcy Court, Southern District of Iowa. On Schedule F – Creditors Holding Unsecured Nonpriority Claims, Debtor scheduled Omaha Market Center, Red Oak Livestock Account with a claim valued at \$45,000.00.

2. On December 21, 2001, Red Oak Livestock Market, Omaha Livestock Market, and Donald Wolfe (hereinafter Wolfe) commenced the above-captioned adversary proceeding seeking to except their claims from discharge. Their complaint alleges that Debtor wrote checks for the purchase of cattle to both markets, and those checks were not honored. The complaint also states that Wolfe is the owner of the both businesses and hence his joining in the complaint as a plaintiff.

3. The record is not entirely clear as to the relationships of the plaintiffs. The invoices give the same address, 1511 200th Street, Red Oak, Iowa, for both the Red Oak and Omaha markets. The Red Oak invoice states that it is Red Oak Livestock Market, Inc., and that “Don Wolfe & Patrick Wolfe” are the “Owners & Auctioneers.” Wolfe signed the verification page of the interrogatories sent to each of the named plaintiffs by Debtor. In answer to interrogatory #4, asking whether each plaintiff “sold cattle to Defendant” after January 27, 2001, Wolfe responds, “No, not as Donald Wolfe, Individually, but Red Oak Livestock, Inc. did sell cattle to the Defendant.” The Red Oak invoice also states, “We do not guarantee consignor’s statements or livestock against sickness or death. We act as agents only.”

4. Based on the record before it, the court concludes that Red Oak Livestock Market, Inc. is the real party in interest in this matter. Wolfe must be a shareholder and thus an owner of the corporation. He is quite probably an officer and director. The corporation is doing business as Red Oak Livestock Market and Omaha Livestock Market. Further, the corporation is in the business of providing a market for cattle buyers and sellers, and brokering the sales on a commission basis.

5. Prior to filing for bankruptcy protection, Debtor was involved in many facets of the cattle business. In addition to owning a cow-calf operation, he bought feeder calves, slaughter cows and bulls, and fat cattle. He would purchase livestock at various salebarns throughout the state of Iowa. Debtor would buy livestock for delivery to feedlot operations, and the slaughter animals would be sent to packing plants. Debtor would buy for himself and also buy on order for others.

6. Debtor sold some of the slaughter cattle “on the grid” as opposed to selling for live weight. A grid sale requires the animal to be slaughtered, and the carcass grade and yield determined. The seller then receives payment based on the quality and quantity of the carcass with bonuses or discounts based thereon. Such method of marketing is considered speculative, and causes delay in payment to the seller, in contrast to live weight selling where the seller receives payment upon delivery.

7. Debtor purchased cattle through Red Oak Livestock Market, Inc. Debtor’s family had known and done business with Wolfe for approximately twenty years. Debtor personally had been buying cattle through Wolfe’s salebarn for eight or nine years. Prior to the time in question, Debtor had always made good on his purchases.

8. Sometime in 2000, Wolfe became aware that Debtor was experiencing financial difficulties. In order to help him continue purchasing cattle, Wolfe allowed Debtor to pay for cattle purchase at the auction with multiple checks. Debtor would draw and deliver the checks at the time of the purchase. Wolfe would see that the checks were presented for payment at intervals over the next seven days. The purpose of this arrangement was to provide Debtor with the opportunity to receive payment from the slaughter animals and deposit those funds in his account before the checks were presented for payment. However, in the meantime, Red Oak Livestock Market, Inc., was drawing checks on its account to pay sellers for the livestock sold at the auction. In essence, the effect of this arrangement was that Red Oak Livestock Market, Inc., financed Debtor's purchase of livestock through its auction operations.

9. On January 27, 2001, Debtor purchased cattle at a cost of \$39,147.91 through the Red Oak Livestock Market. On January 29, 2001, he also purchased cattle at a cost of \$95,257.74 through the Omaha Livestock Market. Debtor issued multiple checks for the purchases as follows;

Check # 2691 to Red Oak Livestock for \$39,147.91  
Check # 2687 to Omaha Livestock for \$31,752.47  
Check # 2688 to Omaha Livestock for \$31,752.46  
Check # 2689 to Omaha Livestock for \$31,752.47

10. It came to Wolfe's attention that Debtor was having cash flow problems and the checks would not be honored. Wolfe never presented the checks for payment. He called Debtor who admitted that he was having problems, but assured that he would take care of it.

11. On February 5, 2001, Debtor wired \$50,00.00 in partial payment for the cattle purchase through the Omaha Livestock Market. On the same day, he signed a promissory note acknowledging that he owed \$39,147.91 and \$45,257.74 for the cattle that he purchased from the markets. He agreed to pay the amounts with nine percent interest.

12. Wolfe allowed Debtor to continue selling cattle through the markets. Wolfe then set off sale proceeds against the amount owed to Red Oak Livestock Market. Debtor paid the following amounts on his debt:

February 17, 2001	\$18,993.99
February 24, 2001	\$5,000.00
March 3, 2001	\$1,293.90
March 10, 2001	\$3,791.00
June 1, 2001	\$10,000.00

13. No further payments were made, leaving Debtor with a total balance from purchases through the two markets of \$45,326.76.

14. When Debtor filed for bankruptcy, he listed the following debts for cattle purchases.

Carol Suhr	\$72,000.00
Don Schomers	\$3,700.00
Guthrie livestock Auction	\$28,000.00
Madison County Auction	\$32,500.00
Marvin J Sorensen	\$38,261.19
Stuart Sales Co.	\$67,000.00

15. Debtor also scheduled interests in a number of cattle valued at \$390,332.00. These cattle were encumbered by security interests held by Citizens State Bank of Oakland, Iowa. Citizens State Bank requested and received relief from the

automatic stay and proceeded to liquidate its collateral. After sale of the cattle subject to its security, a deficiency of \$290,190.00 remained on the bank's claim.

16. On December 20, 2001, Citizens State Bank commenced an adversary proceeding seeking to deny Debtor a discharge, or alternatively, except its claim from discharge. Subsequently, the parties entered into a settlement agreement resolving all the issues of the adversary proceeding. Under the settlement, Citizens State Bank received a nondischargeable judgment for \$150,000.00.

### **DISCUSSION**

The Bankruptcy Code provides that discharge under section 727 does not discharge an individual from certain debts. 11 U.S.C. § 727. 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), other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(2)(A).

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.

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> 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.

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

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.

At the outset, the court notes that a check is not a factual assertion of anything, and therefore, cannot be said to be true or false. Williams v. United States, 458 U.S. 279, 284-85 (1982). Although the United States Supreme Court made this determination in the context of a criminal court case, the elements required to establish the crime in question were similar to the elements required by 11 U.S.C. § 523(a)(2)(A). Ray E. Friedman and Co., v. Jenkins (In re Jenkins), 61 B.R. 30, 38 (Bankr. D.N.D. 1986). Many bankruptcy courts apply this rule in fraud cases brought under this section. See Id.; Mega Marts, Inc., v. Trevisan (Trevisan), 300 B.R. 708, 716-17 (Bankr. E.D. Wis. 2003); Roebuck Auto Sales, Inc., v. Mahinske (In re Mahinske), 155 B.R. 547, 549-51, (Bankr. N.D. Ala. 1992) (setting forth the two lines of cases concerning whether the issuance of a check is a representation that the account on which it is drawn has sufficient funds); but see e.g. Check Control, Inc., v. Anderson (In re Anderson), 181 B.R. 943, 949 (Bankr. D. Minn. 1995) (stating that Williams is not binding in a § 523(a)(2)(A) proceeding). These courts hold that some additional proof in connection with the issuance of the check is necessary to show that a misrepresentation occurred. In re Jenkins, 61 B.R. at 40. This court agrees with that line of cases that require additional proof.

To except a debt from discharge for fraud, the Eighth Circuit requires a showing of “an intention and purpose of deceiving the creditor.” In re Van Horne, 823 F.2d at



1287. In the case of a bad check, the test requires a showing of the intent to defraud in connection with the issuance of the check. Such intent may be established by showing that the debtor did not intend to pay the creditor when the check was issued and knew that the check would not be honored. Groetken v. Davis (In re Davis), 246 B.R. 646, 653 (B.A.P. 10th Cir. 2000) aff'd in part, vacated in part by 35 Fed.Appx. 826, 2002 WL 1044832 (10th Cir. May 24, 2002).

Here, Plaintiff has failed to prove by a preponderance of the evidence that Debtor had an intent and purpose to deceive Plaintiff when he wrote the checks for the purchase of cattle. Debtor did not represent that he had enough funds available in the account to cover the checks when he wrote them. To the contrary, both he and Wolfe knew that he probably did not. Hence, their arrangement whereby he would draw multiple checks, and Wolfe would present them for payments at intervals. The whole purpose for this arrangement was to allow Debtor time to sell the cattle and deposit the proceeds into the account before the purchase checks reached his bank for payment. Wolfe also knew that by participating in this agreement with Debtor, he was loaning Debtor the purchase price of the cattle for the time that he held the checks. Having full knowledge of the transaction and actively participating in it prevents Wolfe and the corporation from claiming that Debtor represented that he had sufficient funds to cover the checks and had no intention of covering them.

Further weighing against a finding of deception is the fact that Debtor made significant payments on his debt. There is no doubt, that during this time period, Debtor's financial situation was unraveling. The record shows that Debtor owed numerous other parties significant amounts for cattle purchases. He also owed the

Citizens State Bank significant amounts of secured and unsecured debt related to his cattle business. On top of his other problems, his marriage unraveled and ultimately ended in divorce. However, based on his long relationship with Wolfe, Debtor attempted to pay off his debt. Quite possibly to the detriment of other creditors, Debtor made payments to Plaintiff in excess of \$89,000.00.

Plaintiff relies on Iowa Code § 714.8(14) defining as a fraudulent practice the payment to a market agency for livestock by check that is not honored by the financial institution because of insufficient funds. Along with that section, Plaintiff cites Iowa Code § 714.1 which provides that a court may infer that a drawer knew that a check would not be paid on presentment if the check was refused upon presentment for insufficient funds and within ten days of notice the drawer has not paid the holder the amount of the check.

In response to this argument, the court notes that the exception from discharge of a debt on the grounds of false pretenses, a false representation, or actual fraud is a matter of federal law. The creditor must show actual intent and purpose to deceive, not an intent implied by statute. See In re Van Horne, 823 F.2d at 1287.

Further, the court notes that Plaintiff never presented the checks for payment. Consequently, the checks were never dishonored for any reason, let alone insufficient funds. Therefore, Plaintiffs have not demonstrated the requirements of the cited statutes and have not offered direct proof that there were insufficient funds to cover the checks.

Finally, as an alternative theory, Plaintiffs argued that the debts should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(B). Section 523(a)(2)(B) provides for exception from discharge for debts incurred through the use of a false

statement in writing respecting the debtor's financial condition made with an intent to deceive. 11 U.S.C. § 523(a)(2)(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 or 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)").

Plaintiffs argued that the promissory note signed by Debtor constituted such a writing. At trial and upon motion by Debtor, the court made a finding that the promissory note was not a statement of Debtor's financial condition. Pursuant to Fed. R. Civ. P. 52(c) as incorporated by Fed. R. Bankr. P. 7052, the court determined that Debtor would have judgment as a matter of law against Plaintiffs dismissing the § 523(a)(2)(B) allegation, but reserved entry of the judgment until the entry judgment on the other count of the complaint.

For all the foregoing reasons, the court finds that Plaintiff has not carried its burden to show that its claim should be excepted from discharge. Accordingly, the court will order the complaint dismissed.

**ORDER**

IT IS THEREFORE ORDERED that defendant Rodney Ray Suhr shall have judgment against the plaintiffs Red Oak Livestock Market, Omaha Livestock Market, and Donald Wolfe, dismissing the complaint and holding that Rodney Ray Suhr's debt to said plaintiffs is discharged.

Dated \_\_\_\_\_

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