

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) In Chapter 7 proceedings
) Case No.: 2:10-bk-24419-CGC
GARY ROBERT BIALOWAS,)
))
Debtors.)
_____) **Adv. No.: 2:10-ap-01986-CGC**
C&C EQUIPMENT CO., d/b/a)
PROFESSIONAL LEASING SERVICES,)
INC.,) **UNDER ADVISEMENT DECISION RE:**
) **PLAINTIFF’S NON-**
Plaintiff.) **DISCHARGEABILITY COMPLAINT**
))
v.))
GARY ROBERT BIALOWAS,)
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Defendant.))
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I. Introduction

Plaintiff, C&C Equipment Co. (“C&C”), objects to the discharge of Debtor and Defendant Gary Robert Bialowas (“Bialowas”) on the grounds that: (1) the debt to C&C was incurred as a result of Bialowas’s misrepresentations, thus excepting the debt from discharge under section 523(a)(2)(A); (2) Bialowas concealed assets, thus preventing him from obtaining a discharge under section 727(a)(2); (3) Bialowas failed to maintain adequate records, thus preventing him from obtaining a discharge under section 727(a)(3); (4) Bialowas made false statements about his assets, thereby preventing him from obtaining a discharge under section 727(a)(4); and (5) that Bialowas did not satisfactorily explain the loss of his assets, thus preventing him from obtaining a discharge under section 727(a)(5).

II. Background & Facts

a. Bialowas’s assets

1 Bialowas owned an interest in a number of companies through the Bialowas
2 Family Trust (“Trust”), which was established in March 1998, in which he and his late
3 wife were the settlors, trustees, and beneficiaries. Bialowas formed Cactus Cartage, LLC
4 (“Cactus Cartage”) in July 1999, and the Trust has been a member of Cactus Cartage
5 since 2001. Bialowas formed Desert Transportation, LLC (“Desert Transportation”) in
6 August 1999, which is partially owned by Cactus Cartage. Bialowas formed AZIGB,
7 LLC (“AZIGB”), in which the Trust is a member, in January 2004. Bialowas formed and
8 was the general partner of Big A Holdings, LLLP (“Big A”) in October 1998. Big A is a
9 member of Specialty Fleet Services, LLC (“Specialty Fleet”), which Bialowas formed in
10 April 2002. Bialowas formed and was the general partner of Big A Holdings I, LLLP
11 (“Big I”) in October 1998. Big I is a member of Adam’s Terminal Services, LLC
12 (“Adam’s Terminal”), which was also formed by Bialowas. Bialowas and his business
13 partner, Clifford Rottman, formed Southwest Transfer and Storage, Inc. (“Southwest
14 Transfer”) in 1993. He was the president of Southwest Transfer from 1998 until March
15 2010. In March 1998, Bialowas and his late wife transferred their shares of Southwest
16 Transfer to the Bialowas Family Trust. In July 1998, the Bialowas Family Trust
17 transferred the shares of Southwest Transfer to Big I.

18 **b. Events leading up to the judgment against Bialowas**

19 This dispute arises from leases of certain tractors and trailers Bialowas used for
20 his transportation business. Bialowas, through Gary Michaels, Inc. and News
21 Transportation, Inc., both companies partly owned by him or by entities owned by him,
22 leased 15 tractors and 30 trailers from Kinnie Annex Cartage, Inc. (“Kinnie”), who was
23 in turn leasing those tractors from Drummy Leasing, Inc. (“Drummy”). C&C bought
24 Drummy’s assets in 2000, allegedly in reliance, at least in part, on certain representations
25 made by Bialowas to C&C’s principal. Bialowas defaulted on the Kinnie lease which
26 caused Kinnie to default on the Drummy lease. C&C successfully sued various parties to
27 the Drummy lease as a result of Kinnie’s default. Kinnie and other plaintiffs then sued
28 Bialowas in Michigan for defaulting on the Kinnie lease, and Bialowas to a state court
judgment in Michigan for \$1,000,000.00 (“Michigan Judgment”). C&C accepted an
assignment of the Michigan Judgment, which was domesticated in Arizona on August 22,
2006.

1 **c. C&C's collection efforts**

2 C&C obtained a lien on Bialowas's earnings from Southwest Transfer, but it
3 never received non-exempt earnings statements or wage withholdings for the weeks of
4 December 8 through December 22, 2009. The non-exempt earning statements were not
5 accurate because Southwest Transfer issued nine paychecks to Bialowas for \$895.24,
6 while the non-exempt earning statements noted that Bialowas should only have received
7 \$498.28. Thus, the non-exempt earning statements understated Bialowas's take home
8 pay by \$396.96 per week. Additionally, C&C notes that between October 2009 and
9 August 2010, Bialowas signed for cash withdrawals from Southwest Transfer's account
10 totaling \$10,174.58.

11 On April 22, 2009 the state court entered a charging order against Bialowas's
12 interests in business entities Big A and Big I, requiring both entities to refrain from
13 paying Bialowas and to pay C&C. Plaintiff contends that neither Big A nor Big I
14 complied with the charging orders. On August 28, 2009, the state court determined that
15 the assets of the Bialowas Family Trust were Bialowas's property for purposes of
16 judgment enforcement. On November 11, 2008, C&C obtained a charging order against
17 Bialowas's interests in Adam's Terminal.

18 **d. Bialowas's bankruptcy**

19 Bialowas filed for bankruptcy on August 9, 2010. C&C initiated this adversary
20 proceeding on November 11, 2010 alleging that: (1) the debt owed to them is non-
21 dischargeable under section 523(a)(2)(A); and (2) Bialowas engaged in actions that
22 prevent him from obtaining a discharge pursuant to sections 727(a)(2)-(5). Specifically,
23 C&C contends that: (1) the debt to it was incurred a result false representations made by
24 Bialowas, which excepts the debt from discharge under section 523(a)(2)(A); (2)
25 Bialowas transferred and concealed assets, therefore preventing him from obtaining a
26 discharge under section 727(a)(2); (3) Bialowas failed to maintain adequate records,
27 therefore preventing him from obtaining a discharge under section 727(a)(3); (4)
28 Bialowas made false statements about his assets during the pendency of the bankruptcy,
therefore preventing him from obtaining a discharge under section 727(a)(4); and (5)
Bialowas never satisfactorily explained why the annual reports for AZ Crating list him as

1 a shareholder after he claims he sold his shares, therefore preventing him from obtaining
2 a discharge under section 727(a)(5).

3 **III. Analysis**

4 The party objecting to the debtor's discharge has the burden of proving, by a
5 preponderance of the evidence, that the debtor's discharge should be denied. See Retz v.
6 Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010); Khalil v. Developers Sur. and
7 Indem. Co. (In re Khalil), 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007). Objections to
8 discharge are construed liberally in favor of a debtor and strictly against those objecting
9 to a discharge. See First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342-43
10 (9th Cir. 1986).

11 **a. Section 523(a)(2)(A)**

12 Section 523(a)(2)(A) excepts a debt from discharge if it was for money, property,¹
13 services, or an extension, renewal, or refinancing of credit obtained by a false
14 representation, or actual fraud, other than a statement respecting the debtor's or an
15 insider's financial condition.² See 11 U.S.C. § 523(a)(2)(A). In order to except a debt
16 from discharge, a party must show that: (1) the debtor made representations; (2) that at
17 the time he knew were false; (3) that he made them with the intent and purpose of
18 deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the
19 creditor sustained the alleged loss and damage as a proximate result of the representations
20 being made. See Diamond v. Kolcum (In re Diamond), 285 F.3d 822 (9th Cir. 2002);
21 Am. Express Travel Related Svcs. Co., Inc. v. Hashemi (In re Hashemi), 104 F.3d 1122,
22 1125 (9th Cir. 1996); Cal State Emps.' Credit Union No. 6 v. Nelson (In re Nelson), 561
23 F.2d 1342, 1346 (9th Cir. 1977). The debtor must have either actual knowledge of a

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25 ¹The rights obtained by a debtor under a lease are property under section 523(a)(2)(A). See SP Invs. Ltd.
26 P'Ship v. O'Connor (In re O'Connor), 145 B.R. 883, 891 (Bankr. W.D. Mich. 1992); see also United States
27 v. Spicer (In re Spicer), 155 B.R. 795, 803 (Bankr. D.D.C. 1995). Therefore, Bialowas's rights under the
28 Kinnie lease are considered property.

²Statements respecting the debtor's financial condition are statements that purport to present a picture of the
debtor's overall financial health. See Barnes v. Belice (In re Belice), 461 B.R. 564, 577-78 (B.A.P. 9th Cir.
2011); Cadwell v. Joelson, 427 F.3d 700, 714 (10th Cir. 2005).

1 statement's falsity or a reckless disregard for its truth. See Runnion v. Pedrazzini (In re
2 Pedrazzini), 644 F.2d 756, 757-58 (9th Cir. 1981).

3 Intent to deceive may be inferred from the surrounding circumstances. See
4 Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997); Hashemi, 104
5 F.3d at 1125-26; Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199,
6 1206 (9th Cir. 2010). Factors that may be considered in determining a debtor's intent
7 include: (1) the length of time between the debt incurred and the bankruptcy filing; (2)
8 the financial condition of the debtor at the time the debt was incurred; (3) whether or not
9 the debtor was employed; and (4) the financial sophistication of the debtor. See
10 Hashemi, 104 F.3d at 1126; Citibank South Dakota v. Dougherty (In re Dougherty), 84
11 B.R. 653, 657 (B.A.P. 9th Cir. 1988).

12 C&C argues that Bialowas made the following representations:³ (1) he owned a
13 50% interest in Southwest Transfer; (2) Southwest Transfer had done \$4,000,000.00 in
14 business in 2000; (3) he owned Cactus Cartage and Desert Transportation; (4) had an
15 investment account with a low seven figure balance; and (5) was in possession of the
16 trailers that were subject to one of the leases purchased by C&C.

17 The testimony at trial established that Bialowas's statements were not completely
18 accurate. The Bialowas Family Trust, not Bialowas individually, owned Southwest
19 Transfer, Cactus Cartage, and an interest in Desert Transportation. Bialowas's investment
20 account had between \$250,000.00 and \$350,000.00 between 1999 and 2001, not a low
21 seven-figure amount. Additionally, On July 31, 2001, two months before C&C closed
22 the Drummy transaction, Bialowas notified Kinne that some of the trailers which were
23 specifically subject to the Kinnie/Drummy lease that C&C was to purchase were
24 missing.⁴

25 ³Bialowas argues that he did not talk to Mr. Kennedy, who was a member of C&C. Mr. Kennedy testified
26 that he spoke to Bialowas. See Hr'g Transcript 71: 18:23; Hr'g Transcript 78: 2-12; Hr'g Transcript 79-80.
27 While Mr. Bialowas's attorney tried to create doubt as to whether the man on the phone was actually
28 Bialowas, he was unsuccessful. Therefore, for purposes of this trial, it will be assumed that the
conversation between Mr. Bialowas and Mr. Kennedy occurred.

⁴Mr. Kennedy testified that it would have been good business practice for someone at Kinnie to contact him
about the missing trailers, and would have lead Mr. Kennedy to conduct more due diligence regarding the
Drummy transaction.

1 As mentioned above, intent to deceive can be inferred from the surrounding
2 circumstances. In this case, C&C has not met its burden of showing, by a preponderance
3 of the evidence, that Bialowas made these statements with the actual intent and purpose
4 of deceiving C&C. While Southwest Transfer, Cactus Cartage, and Desert
5 Transportation were not owned outright by Bialowas, they were owned by the Bialowas
6 Family Trust in which Bialowas was both a trustee and a beneficiary. Although these
7 statements may not have been 100% accurate, C&C has failed to show that Bialowas
8 purposefully intended that these statements deceive C&C into purchasing the Drummy
9 lease.

10 Additionally, the factors indicative of fraudulent intent do not support a finding
11 that Bialowas had fraudulent intent in this case. Bialowas obtained property from C&C
12 in 2001, and he filed bankruptcy almost 10 years later, in August of 2010. Thus, there is
13 a significant span of time between obtaining the property and filing for bankruptcy. It is
14 important to remember that Bialowas was employed and had been running a successful
15 trucking operation for many years before C&C purchased Drummy's assets. Bialowas's
16 business took a turn for the worst partially due to the events of September 11 and to his
17 wife's declining health. These factors all indicate that Bialowas did not intend to deceive
18 C&C with his statements. For this reason, C&C's section 523(a)(2)(A) claim fails.

19 **b. Section 727(a)(2)(A)**

20 Section 727(a)(2)(A) denies a debtor a discharge if the debtor, with intent to
21 hinder, delay, or defraud a creditor transfers, removes, destroys, mutilates, or conceals his
22 property within one year before the date of the bankruptcy petition. See 11 U.S.C. §
23 727(a)(2)(A). In order to prevail under section 727(a)(2), a party must show that: (1) the
24 debtor's act occurred during the year preceding the date of the bankruptcy petition; (2)
25 the act was done with actual intent to hinder, delay, or defraud a creditor; and (3) the act
26 consisted of transferring, removing, mutilating, or concealing any of the debtor's
27 property. See Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997).
28 Concealment⁵ includes placing assets beyond the reach of creditors or withholding

⁵ The continuing concealment doctrine provides that an act that occurred more than a year before the
bankruptcy may still be considered an act of concealment if the debtor retains a secret benefit of ownership
in the transferred property within the year prior to the bankruptcy. See Adeeb, 787 F.2d 1343.

1 knowledge of the assets. See Collier on Bankruptcy § 727.02[6][b] (Alan N. Resnick and
2 Henry J. Sommer, eds., 4th ed. 2011). Actual intent can be established through
3 circumstantial evidence or by inferences drawn from the debtor's conduct. See Adeeb,
4 787 F.2d at 1342-43. Constructive fraud cannot be the basis for denial of discharge. See
5 id. at 1343. A creditor's lack of injury is irrelevant for the purposes of section
6 727(a)(2)(A). See Adeeb, 787 F.2d at 1343; See Duggins v. Heffron, 128 F.2d 546, 549
7 (9th Cir. 1942).

8 C&C argues that Bialowas's submission of inaccurate non-exempt earning
9 statements that concealed his true take-home pay and removal of money from Southwest
10 Transfer and Adam's Terminal shows that he intend to hinder, delay, or defraud C&C. It
11 is clear that Bialowas's non-exempt earning statements from Southwest Transfer were
12 inaccurate because it understated Bialowas's take home pay by approximately \$400 per
13 week. His testimony at trial, however, established that he completed the non-exempt
14 earning statements, but only to the extent of whitening out old payroll dates and filling in
15 new ones. Additionally, Bialowas testified that he was not, and had never been, in charge
16 of payroll at Southwest Transfer and had never been involved with preparing or
17 executing any garnishments served on any of Southwest Transfer's employees. C&C
18 contends that Bialowas testified that paying the withheld wages was not a priority for
19 him. However, even assuming this statement is true; it does not establish that Bialowas
20 intended to falsify the non-exempt earning statements in an attempt to conceal his true
21 wages and hinder, delay, or defraud C&C. It is also clear that Bialowas withdrew money
22 from Southwest Transfer and Adam's Terminal. Between October 2009 and August
23 2010, he withdrew \$10,174.58 from Southwest Transfer's account and in July and
24 October of 2009, Bialowas made cash withdrawals totaling \$5,836.18 from Adam's
25 Terminal's account.⁶ Bialowas's testimony at trial established that the withdrawals were
26 used to pay down his personal credit cards which were expended to fund business
27 interests, because there were no corporate sources of credit available to his various
28 entities, and not to hinder C&C.

29 Additionally, C&C has not established that Bialowas made those transfers with an
30 intent to hinder, delay, or defraud C&C. C&C argues that because Bialowas admitted to

⁶ Adam's Terminal also made a number of payments for the lease on Bialowas father's car.

1 making withdrawals of cash to avoid IRS liens⁷ on Southwest Transfer's and Adam's
2 Terminal's checking accounts, there is no need for the court to rely on inferences of
3 intent. They rely on Bialowas's testimony that on occasion he would do business in cash
4 because if the liens the IRS had. However, Bialowas testified that it was mainly
5 Southwest Transfer that was doing business in cash, and very rarely was Adam's
6 Terminal doing business in cash. Furthermore, Bialowas testified that Southwest
7 Transfer occasionally had to do business in cash because the government, which was a
8 client, would pay funds to Southwest Transfer which really belonged to another account.

9 Bialowas did testify that on occasion, when money was deposited into Southwest
10 Transfer's accounts, the money would be withdrawn with cashier's checks to pay bills so
11 that Southwest Transfer would be able to pay its bills before the IRS got a hold of the
12 money. Contrary to C&C's assertions, the Court does not find that Bialowas was
13 delaying his personal creditors by taking money out of the Southwest Transfer and
14 Adam's Terminal accounts to pay the bills for those companies. Bialowas may have
15 been delaying Southwest Transfer's and Adam's Terminal's creditors occasionally
16 dealing in cash to avoid IRS levying those bank accounts, but Southwest Transfer's and
17 Adam's Terminal's creditors are not Bialowas's creditors. Because C&C has not
18 established that Bialowas intended to hinder, delay, or defraud his creditors, their section
19 727(a)(2) claim fails.

20 **c. Section 727(a)(3)**

21 Section 727(a)(3) denies a debtor a discharge if he has concealed, destroyed,
22 mutilated, falsified, or failed to preserve any recorded information, including books,
23 documents, records, and papers, from which the debtor's financial condition might be
24 ascertained, unless such act or failure to act was justified under all of the circumstances
25 of the case. See 11 U.S.C. § 727(a)(3). In order to prevail under section 727(a)(3), a
26 party must show: (1) that the debtor failed to maintain adequate records or concealed,
27 destroyed, mutilated, or falsified recorded information; and (2) that such inadequate
28 records make it impossible to ascertain the debtor's financial condition and material

⁷ The tax liens discussed are the following: (1) 2007/2008 IRS 940/941 federal taxes for Bialowas; (2) 2009/2010 IRS 941 federal taxes for Adam's Terminal; (3) 2008/2009 IRS 941 federal taxes for Southwest Transfer; and (4) 2006-2009 Arizona state taxes for Southwest Transfer. See Def.'s Exs. K-N.

1 business transactions. See Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir.
2 1994). A debtor's intent to conceal his financial condition is irrelevant. See id. at 1297.

3 When determining the adequacy of records, courts consider the following factors:
4 (1) whether a debtor was engaged in business and, if so, the complexity and volume of
5 the business; (2) the amount of the debtor's obligations; (3) whether the debtor's failure to
6 keep or preserve books and records was due to the debtor's fault; (4) the debtor's
7 education, business experience and sophistication; (5) the customary business practices
8 for record keeping in the debtor's type of business; (6) the degree of accuracy disclosed
9 by the debtor's existing books and records; (7) the extent of any egregious conduct on the
10 part of the debtor; and (8) the debtor's courtroom demeanor. See 4 William J. Norton,
11 Bankruptcy Law and Practice § 86.9 (3d ed. 2012); see also Riley v. Riley (In re Riley),
12 305 B.R. 873, 883 (Bankr. W.D. Mo. 2004); Barristers Abstract Corp. v. Caulfield (In re
13 Caulfield), 192 B.R. 808, 823 (Bankr. E.D.N.Y. 1996); Vandenbogart v. Minesal (In re
14 Minesal), 81 B.R. 477, 481 (Bankr. E.D. Wis. 1988).

15 A debtor must produce records that are customarily kept by a person doing the
16 same kind of business, or satisfy the bankruptcy court with adequate reasons why he was
17 not under a duty to do so. See Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3rd Cir.
18 1992). A debtor who is substantially involved as a principal in a business operation is not
19 justified in relying on a business partner to maintain adequate records, especially when
20 the debtor has business experience. See United States v. Schreiter (In re Schreiter), No.
21 05-27479, 2007 WL 1772176 at * 4 (Bankr. D. Ariz. June 19, 2007). When a debtor
22 owns and controls numerous business entities and engages in substantial financial
23 transactions, a complete absence of recorded information related to those entities and
24 transactions establishes a prima facie violation of section 727(a)(3). See Caneva v. Sun
25 Communities Ltd. P'ship (In re Caneva), 550 F.3d 755, 762 (9th Cir. 2008).

26 The bankruptcy code does not require a debtor to keep an impeccable system of
27 bookkeeping; the records must simply sufficiently identify the transaction so that
28 intelligent inquiry can be made of them. See Meridian Bank, 958 F.3d at 1231. When a
debtor owns and controls numerous business entities and engages in substantial financial
transactions, a complete absence of recorded information related to those entities and

1 transactions establishes a prima facie violation of section 727(a)(3). See Caneva, 550
2 F.3d at 762.

3 In this case, the evidence shows that Bialowas's records, while not impeccable,
4 were adequate under the circumstances and that Bialowas has provided a sufficient
5 explanation about the lack of some records. C&C argues that Bialowas should be denied
6 a discharge because of his failure to produce adequate records for the Bialowas Family
7 Trust, Big A, and Big I (both entities owned by the Bialowas Family Trust) and also
8 provided false earning statements that made it impossible to ascertain his financial
9 condition. There are a number of factors courts can use to determine the adequacy of
10 records submitted by the debtor. Here, the factors tilt in favor of Bialowas.

11 Bialowas was engaged in the trucking business and had numerous entities, which,
12 in turn, had numerous obligations. However, some of his entities were merely flow
13 through entities. Bialowas has provided tax records for both flow-through entities.
14 Bialowas testified that Big A and Big I were flow-through entities that never received any
15 money, but merely provided a vehicle for money to flow through to other entities. See
16 Hr'g Transcript 02/08/12 34:1-16. Bialowas had produced K-1 statements for both Big A
17 and Big I. See id. at 34:21-36-14; Pl.'s Ex. 71. Bialowas testified that he did not keep
18 any records for Big A and Big I other than the ones the accountants kept. See Hr'g
19 Transcript 02/08/12 95:1-5.

20 Since Big A and Big I were flow through entities, Bialowas testified that the
21 records relating to the financials of Big A and Big I would be from the entities they own.
22 See id. at 145:23-146:3. Southwest Transfer, an entity owned by Big I, which itself is
23 owned by the Bialowas Family Trust, is one of the entities for which complete records
24 are not available. However, the lack of completeness is not Bialowas's fault, but a result
25 of Southwest Transfer's deteriorating business. Since Big A and Big I were flow through
26 entities, Bialowas testified that the records relating to the financials of Big A and Big I
27 would be from the entities they own. See id. at 145:23-146:3. Southwest Transfer, an
28 entity owned by Big I, which itself is owned by the Bialowas Family Trust, is one of the
entities for which complete records are not available. However, the lack of completeness
is not Bialowas's fault, but a result of Southwest Transfer's deteriorating business.

1 It was customary for Southwest Transfer to keep records. Southwest Transfer's
2 records would have furnished information for Big I, which should have furnished
3 information for the Bialowas Family Trust. However, as described above, the seizure of
4 Southwest Transfer's servers prevented Bialowas from being able to provide records to
5 fully account for all expenses. Bialowas did not have any control or say in how the
6 seized serves were disposed. See Hr'g Transcript 02/08/12 44:7-11. Because the Court
7 finds that Bialowas maintained adequate business records under the circumstances,
8 C&C's section 727(a)(3) claim fails.

9 **d. Section 727(a)(4)(A)**

10 Section 727(a)(4) denies a debtor a discharge if he knowingly and fraudulently, in
11 connection with the bankruptcy case made a false oath or account. See 11 U.S.C. §
12 727(a)(4)(A). In order to prevail under section 727(a)(4)(A), a party must show that: (1)
13 the debtor made a false statement or omission; (2) regarding a material fact; and (3) did
14 so knowingly and fraudulently. See Khalil, 379 B.R. at 172. Whether a false statement
15 injured the creditor is irrelevant. See Duggins, 128 F.2d at 548. A fact is material if it
16 bears a relationship to the debtor's business transactions or concerns the discovery of
17 assets. See id. at 173. Non-dischargeability under section 727(a)(4)(A) can be based on
18 the debtor's knowingly and fraudulently omitting information from his schedules. See
19 Duggins, 128 F.2d at 548.

20 C&C argues that Bialowas knowingly and fraudulently omitted an entity named
21 AZIGB from his bankruptcy schedules, thereby preventing him from obtaining a
22 discharge per section 727(a)(4)(A). Bialowas testified that AZIGB was formed as a
23 company that was strictly a bill paying entity that did not conduct any business. See Hr'g
24 Transcript 01/23/12 186:11-16; Hr'g Transcript 02/08/12 80:3-19. Additionally,
25 Bialowas testified that the only reason significant money was flowing into and out of
26 AZIGB was because he was depositing his paycheck and any loan funds into AZIGB in
27 order to pay the necessary bills. See Hr'g Transcript 02/08/12 80:20-25. Bialowas
28 stopped using AZIGB to pay bills by early 2009, because there was no longer any need
for it. See id. at 82:21-25. He testified that he did not list AZIGB in his schedules
because since there was no money in AZIGB, it was not an asset. See id. at 83:14-18.
While C&C has established that AZIGB was omitted from Bialowas's bankruptcy

1 schedules, it has failed to establish, by a preponderance of the evidence that the omission
2 was made knowingly and fraudulently.

3 C&C also argues that Bialowas should be denied a discharge because he
4 knowingly made false statements concerning the operations of both Specialty Fleet and
5 AZIGB. At his 341 meeting, Bialowas testified that AZIGB ceased operations in 2004 or
6 2005. See Hr'g Transcript 02/08/12 85:8-11. During the trial, he testified that the 341
7 hearing, he had no clear-cut-date of when AZIGB ceased operations, but that it was
8 between the years 2004-2006. See id. at 85:14-16. It was established during trial that
9 AZIGB actually ceased operations in 2009. See id. at 85:20-25. Bialowas also testified
10 at his 341 hearing that Specialty Fleet, another entity which he owned, ceased operations
11 in 2007, which was an incorrect statement. See id. at 89:3-7. While the record
12 establishes that Bialowas was mistaken about the dates that AZIGB and Specialty Fleet
13 ceased operating, C&C has failed to establish, buy a preponderance of the evidence that
14 the omission was made knowingly and fraudulently. Because C&C failed to prove that
15 Bialowas knowingly and fraudulently omitted AZIGB from his bankruptcy schedules,
16 their section 727(a)(4) claim fails.

17 **e. Section 727(a)(5)**

18 Section 727(a)(5) denies a debtor a discharge if he has failed to explain
19 satisfactorily any loss of assets of deficiency of assets to meet the debtor's liabilities. See
20 11 U.S.C. § 727(a)(5). Whether a debtor has satisfactorily explained the loss of assets
21 rests in the bankruptcy court's discretion. See Bernau v. Oliver (In re Oliver), 314 B.R.
22 732, 742 (Bankr. N.D.Ill. 2004). A debtor need not justify the wisdom of his disposition;
23 debtor must merely explain in good faith what happened. See id. What is relevant is the
24 completeness and truth of the debtor's explanation. See id.

25 C&C argues that Bialowas did not satisfactorily explain his interests in an entity
26 called Arizona Crating, which precludes him from receiving a discharge per section
27 727(a)(5). Arizona Crating was formed by Bialowas and his business partner, Clifford
28 Rottman, in 1995. See Hr'g Transcript 02/08/12 68:17. On July 1, 1995, Bialowas
transferred his interest in Arizona Crating to his son, as is evidenced by a Bill of Sale,
after which he had no control over Arizona Crating. See id. at 70:8-71:12; Pl.'s Ex. 49.
Bialowas testified that from 1995-2010, he was not employed by Arizona Crating and

1 never received any income or distributions from Arizona Crating. See Hr'g Transcript
2 02/08/12 72:20-25. Although Bialowas was listed as an owner on Arizona Crating's
3 2000-2008 Arizona Corporate Commission Reports, he testified that the documents were
4 incorrect, and that upon learning of the mistake, he contacted Mr. Rottman to correct the
5 corporate reports. See id. at 73:20-79:20. In this case, Bialowas has presented a
6 satisfactory explanation as to what happened to the Arizona Crating asset: he sold his
7 shares. As for the corporate reports, they were a mistake, which Bialowas took steps to
8 correct upon finding out about the mistake. Therefore, there is no basis to deny Bialowas
9 a discharge under section 727(a)(5).

9 **IV. Conclusion**

10 While C&C has established that Bialowas made certain representations that may
11 have not been 100% accurate, it has failed to establish, by a preponderance of the
12 evidence that those misrepresentations were made with fraudulent intent. C&C did not
13 establish, by a preponderance of the evidence that Bialowas made those representations
14 with actual intent to hinder, delay, or defraud C&C. Additionally, while C&C
15 established that Bialowas was making withdrawals out of Southwest Transfer's and
16 Adam's Terminal's accounts, it failed to establish, by a preponderance of the evidence,
17 that Bialowas made those withdrawals with the actual intent to hinder, delay, or defraud
18 his creditors.

19 Bialowas has produced certain records relating to the multiple entities he owns.
20 While the records may not be complete, they are adequate under the circumstances.
21 Southwest Transfer, which was one of Bialowas's major entities, had its servers, which
22 housed its business records, repossessed. Therefore, some of Southwest Transfer's
23 records could not be located. Since Big I owned Southwest Transfer, this resulted in Big
24 I missing some records. Since the Bialowas Family Trust owned Big I, this resulted in
25 the Bialowas Family trust missing some records as well.


26 While C&C has sufficiently shown that Bialowas omitted AZIGB from his
27 bankruptcy schedules and provided the wrong date that AZIGB and Specialty Fleet
28 ceased operating in his 341 meeting, C&C has failed to establish, buy a preponderance of
the evidence, that the omission and mistake were made knowingly and fraudulently.

1 Finally, Bialowas has satisfactorily explained that he sold his shares in Arizona
2 Crafting. He has also satisfactorily explained that his name was mistakenly included as
3 an owner in Arizona Crafting's corporate reports, which he took steps to correct.

4 Therefore, judgment on all causes of action will be given to the defendant.
5 Counsel for defendant is to submit a form of judgment.

6
7 **So ordered.**

8 Dated: September 26, 2012.

9
10 
11 CHARLES G. CASE II
12 UNITED STATES BANKRUPTCY JUDGE
13

14
15 COPY of the foregoing mailed by the BNC and/or
16 sent by auto-generated mail to:

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19 all interested creditors and parties.
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