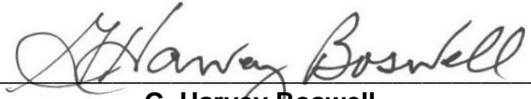




**Dated: December 13, 2004
The following is SO ORDERED.**


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

**Franky J. Delashmit,
Debtor.**

Case No. 02-10840

**Helena Chemical Company,
Plaintiff,**

Chapter 11

v.

Adv .Pro. No. 02-5136

**Franky J. Delashmit,
Defendant.**

**MEMORANDUM OPINION AND ORDER RE AMENDED COMPLAINT TO
DETERMINE NONDISCHARGEABILITY PURSUANT TO 11 U.S.C. § 523 AND,
IN THE ALTERNATIVE, OBJECTION TO DISCHARGE PURSUANT TO 11 U.S.C. § 727**

The Court conducted a hearing on the Plaintiff's "Amended Complaint to Determine Nondischargeability Pursuant to 11 U.S.C. § 523 and, in the Alternative, Objection to Discharge Pursuant to 11 U.S.C. § 727" on October 25, 2004. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. section 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

In February 2000, Big D Farms, Inc., (“Big D”), and Beaver Creek Partnership, (“Beaver Creek”), applied for and received credit from Helena Chemical Company, (“Helena”). Big D and Beaver Creek used the credit with Helena to purchase inputs for crops. At the time the credit applications were completed, the debtor in this case, Franky J. Delashmit, (“Delashmit” or “debtor”), was a shareholder and officer of Big D and a general partner in Beaver Creek. The debtor, in his capacity as partner and officer, signed the credit applications for Big D and Beaver Creek on February 21, 2000. The debtor also executed personal guarantees for the credit extensions on March 7, 2000. At the time of executing the credit applications and the personal guarantees, the debtor had been a farmer in West Tennessee for approximately thirty-six years.

The parties in this matter filed a “Stipulations of Fact” on October 20, 2004. At the trial in this matter, the parties presented an amended “Stipulations of Fact” to the Court. The amended stipulations set forth the following:

1. During all times relevant to this case and while the partnership was in existence, Franky J. Delashmit was a general partner in a partnership known as Beaver Creek Partners. The only other partner in that venture was his son Jon D. Delashmit.
2. Franky J. Delashmit participated in the management of the day to day business affairs of Beaver Creek Partners.
3. Beaver Creek is now defunct.
4. During all times relevant to this case and through today, Franky J. Delashmit was/is a shareholder and officer of a Tennessee Corporation known as Big D Farms, Inc.
5. Franky J. Delashmit has, since its inception, participated in the active management of the corporation.
6. On or about February 21, 2000, two (2) credit applications were filled out, one for Beaver Creek Partners and one for Big D Farms, Inc. and Frank Delashmit, individually, for commercial credit with Helena Chemical Company which used a Monsanto form for both applications. This credit application was accepted by Helena and credit was extended to both Beaver Creek and Big D Farms, Inc. which credit was personally guaranteed by Franky J. Delashmit.
7. The asset and liability information contained upon these applications were incorrect. They overstated assets and understated liabilities, which assets and liabilities are more accurately reflected by the bankruptcy schedules of the two entities and Mr. Delashmit’s individual petition, which are attached hereto, with the exception of: the crops which are listed upon the schedules (which did not exist at the time of the applications): the machinery/equipment (\$350,000) which Mr. Delashmit maintains was worth closer to that figure than the amount listed upon the schedules (\$100,000); and the Stewart Title debt was unsecured (as opposed to secured) at the time of the applications.

Nothing contained in this Stipulation of Facts shall imply any stipulation as to who filled out these applications or the state of Helena's knowledge regarding their accuracy at the time they were submitted, as these facts are disputed by the parties. Likewise, Helena makes no stipulation regarding whether Mr. Delashmit is correct regarding his assertion as to the machinery/equipment value.

In addition to the facts, there were several documents attached to the October 25, 2004, stipulation. For ease, the Court will set forth these documents and the information contained therein in list format:

1. "Monsanto Corporation--Application for Extended Terms--Seed Only Financing" for Big D dated February 21, 2000. The application sets forth the name, address, and social security/taxpayer id number of Big D as well as the designation "Corporation." Directly underneath this information, there is a section titled "Current Financial Condition or Attach a Recent Financial Statement." The following information is set forth in this section:

ASSETS	VALUE	LIABILITIES	VALUE
Cash/checking & savings	\$5,000.00	Accounts Payable	\$0
Accounts receivables	\$30,000.00	Operating Loans	\$100,000.00
Inventory/Grain	--	CCC Loans	--
Prepaid Expenses	--	Taxes Due	--
Total Current Assets	\$35,000.00	Total Current Liabilities	\$100,000.00
Machinery and Equipment	\$350,000.00	Equipment Loans	\$100,000.00
Livestock/Feed	\$20,000.00	Notes Payable	--
Real Estate	\$300,000.00	Mortgage Loans	\$100,000.00
Total Assets	\$705,000.00	Total Liabilities	\$300,000.00
		Net Worth	\$405,000.00

The form was signed by Franky Delashmit as president of Big D on February 21, 2000.

2. “Monstanto Corporation–Application for Extended Terms–Seed Only Financing” for Beaver Creek dated February 21, 2000. The application set forth the name, address and social security/taxpayer id number for Beaver Creek as well as the designation “partnership.” Directly underneath this information, there is a section titled “Current Financial Condition or Attach a Recent Financial Statement.” The following information is set forth in this section:

ASSETS	VALUE	LIABILITIES	VALUE
Cash/check & savings	\$5,000.00	Accounts Payable	--
Accounts Receivables	\$15,000.00	Operating Loans	\$50,000.00
Inventory/Grain	--	CCC Loans	--
Prepaid Expenses	--	Taxes Due	--
Total Current Assets	\$20,000.00	Total Current Liabilities	\$50,000.00
Machinery & Equipment	\$250,000.00	Equipment Loans	--
Livestock/Feed	--	Notes Payable	--
Real Estate	--	Mortgage Loans	--
Total Assets	\$270,000.00	Total Liabilities	\$50,000.00
		Net Worth	\$220,000.00

This form was signed by Franky Delashmit on behalf of Beaver Creek on February 21, 2000.

3. “Summary of Schedules” for Beaver Creek in case no. 00-14476, filed on November 21, 2000. The summary shows no assets and no liabilities for Beaver Creek.

4. “Summary of Schedules” for Big D in case no. 00-13952, filed on October 23, 2000. The summary shows real property assets of \$350,000.00 and personal property assets of \$1,081,000.00. The summary also shows liabilities for (a) creditors holding secured claims in the amount of \$570,063.97, and (b) creditors holding unsecured nonpriority claims in the amount of \$273,947.51.00.

5. “Schedule A. Real Property” for Big D in case no. 00-13952. This schedule shows 300 acres of land valued at \$300,000.00 and 2.18 acres of land (shed) valued at \$50,000.00.

6. “Schedule B. Personal Property” for Big D in case no. 00-13952. This schedule shows a GMC Yukon valued at \$15,000.00; a 2000 GMC pick up truck valued at \$12,000.00; a 1999 GMC pick up valued at \$10,000.00; and a 1994 Peterbilt valued at \$40,000.00. The schedule also shows “2000 crops” valued at \$900,000.00. Finally, under the heading “farming equipment and implements,” the schedule lists a “disc” valued at \$4,000.00 and “JD 9610 Combine, 925 Platform, JD 8300 Tractor, JD 1780 Planter, JD 980 Field Cultivator, JD 8400 Tractor, JD 726 Mulch Finish Harrow (jointly valued)” valued at \$100,000.00.

7. “Schedule C. Property Claimed As Exempt” for Big D in case no. 00-13952. Big D did not list any exemptions on this schedule.

8. "Schedule D. Creditors Holding Secured Claims" for Big D in case no. 00-13952. This schedule lists eight secured creditors with a total of \$570,063.97 in secured debt.
9. "Schedule E. Creditors Holding Unsecured Priority Claims" for Big D in case no. 00-13952. This schedule indicates that the debtor has no creditors holding unsecured priority claims.
10. "Schedule F. Creditors Holding Unsecured Nonpriority Claims" for Big D in case no. 00-13952. This schedule lists Helena as an unsecured creditor with a claim of \$95,140.41, Monsanto Ag Products with a claim of \$68,483.00 and AgriBank F.C.B. with a claim of \$110,324.10.
11. "Schedule G. Executory Contracts and Unexpired Leases" for Big D in case no. 00-13952. This schedule lists GMAC and John Deere Credit.
12. "Schedule H. Codebtors" for Big D in case no. 00-13952. This schedule does not list any co-debtors.
13. "Schedule I. Current Income of Individual Debtors" for Big D in case no. 00-13952. This schedule shows \$0 income.
14. "Schedule J. Current Expenditures of Individual Debtors" for Big D in case no. 00-13952. This schedule shows \$0 expenses.
15. "Declaration Concerning Debtor's Schedules" for Big D in case no. 00-13952. This declaration is undated, but signed by "Franky Delashmit PRES."
16. "Disclosure Statement" for Franky J. Delashmit in case no. 02-10840. This document lists real and personal property valued at \$102,300.00 for the debtor. It also lists secured liabilities in the amount of \$223,000.00 and unsecured liabilities in the amount of \$222,824.10. Helena is listed as having an unsecured claim in the amount of \$95,000.00 and an unsecured claim in the amount of "unknown."

In addition to the information stipulated to by the parties, the Court finds it important to set forth some of the facts that the parties testified to at the trial. At the time of applying for credit with Helena, Delashmit met with Russ McCallen, ("McCallen"), the sales depot manager for Helena, and Keith Thornell, ("Thornell"), a salesman for Helena. McCallen testified that at the time the credit applications were filled out, he had known Delashmit for at least twenty-five years. Thornell testified that he had known the debtor for at least fifteen years. Before going to work for Helena, McCallen worked for Terra Chemicals, ("Terra"). McCallen testified that he had done business with Delashmit when he worked at Terra. Thornell also testified that he had worked with Delashmit in the past.

The main point of contention between the parties is how the credit applications were filled out. Thornell and McCallen allege that Delashmit met with them and told them the financial information about Big D's and Beaver Creek's assets and liabilities. McCallen then allegedly filled in that information on the forms and Delashmit signed both applications. Both McCallen and Thornell testified

that the debtor never mentioned that the financial information on the applications was incorrect. Neither McCallen nor Thornell was aware at the time the applications were filled out that the assets and liabilities figures were incorrect. They both testified that they were not personally familiar with the financial conditions of Big D, Beaver Creek, the debtor or the debtor's family.

In contrast to the allegations made by McCallen and Thornell, Delashmit asserts that the credit applications were completely filled out when he arrived at the office and that he merely signed them. Delashmit testified that he did not talk about the financial information and figures with McCallen or Thornell nor did he review them. Delashmit further testified that had he reviewed the information on the applications, he would have noticed that the assets and liabilities listed were incorrect. Delashmit knew at the time the applications were signed that Beaver Creek did not own, nor had it ever owned, any assets, machines, land or equipment. Delashmit also testified that the \$350,000.00 value listed on the Big D application for assets was correct and that the \$100,000.00 value listed for the same assets on Big D's bankruptcy petitions eight months later was incorrect. Delashmit did not know why the assets were listed with a value of \$100,000.00 on Big D's schedules.

After the credit applications were filled out and signed, McCallen submitted them to Curtis Hopkins, ("Hopkins"), the credit manager for Helena, at Helena's Collierville, Tennessee office. Hopkins' job is to review the credit applications and credit information submitted by customers and then determine whether or not credit should be extended. When a customer applies for credit with Helena, the customer must first fill out an initial application which gives the customer's name, address and references. The initial application also gives Helena authority to run a credit report on the customer and contact suppliers to see how the customer pays their other bills. Delashmit submitted that application to Hopkins. Hopkins testified that nothing on Delashmit's credit report indicated that the figures listed on the credit application were incorrect.

The second step in applying for credit with Helena is the credit application. According to Hopkins' testimony, the financial information supplied on this second form is used to determine whether or not the customer has the capability to get refinancing, whether or not the customer has developed a profitable history and whether or not his assets are liquid or fixed. Ultimately, the information is used, in conjunction with the customer's credit report, to determine whether or not credit should be extended. In the case at bar, Hopkins testified that the decision to extend credit to Big D and Beaver Creek was based on the financial information provided on the credit applications. Hopkins stated that the financial information on Big D's and Beaver Creek's applications was in line with what farmers similar to Delashmit would have. Hopkins further testified that had he known the financial information on the applications was incorrect, he would not have approved Big D's and Beaver Creek's credit applications.

Big D filed for chapter 11 relief on October 23, 2000. Beaver Creek filed chapter 11 on November 21, 2000. The Court issued the Final Decree in Beaver Creek's case on September 28, 2001, and in Big D's case on June 4, 2002. Delashmit filed an individual chapter 11 case on February 19, 2002. On April 23, 2002, Helena filed the instant adversary proceeding against the debtor. Helena amended their complaint for the first time on April 26, 2002, and for the second time on May 13, 2004. Pursuant to Delashmit's chapter 11 plan, the debtor proposes to pay Helena as an unsecured non-priority creditor with two claims: one for \$95,000.00 and one for an unknown amount. Delashmit's plan proposes to pay his unsecured non-priority creditors 1% without interest over ten years.

II. CONCLUSIONS OF LAW

Section 523(a)(2)(B) of the Bankruptcy Code provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

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

...
(B) use of a statement in writing -

(I) that is materially false;

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

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

(iv) that the debtor caused to be made or published with intent to deceive;

11 U.S.C. § 523(a)(2)(B). The creditor seeking an exception to discharge under this section must prove each of § 523(a)(2)(B)'s elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). "The failure of the plaintiff to prove any one of the above elements contained in section 523(a)(2)(B) will result in a dismissal of the dischargeability complaint." *Insouth Bank v. Michael (In re Michael)*, 265 B.R. 593, 597 (Bankr. W.D. Tenn. 2001) (citation omitted). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Gleason v. Thaw*, 236 U.S. 558, 35 S.Ct. 287, 59 L.Ed. 717 (1915); *Grogan*, 498 U.S. at 285.

In the case at bar, it is undisputed that the statements at issue were statements "in writing" under § 523(a)(2)(B); however, the parties dispute who filled out the financial information on the credit applications. Helena asserts that the debtor provided McCallen with the financial information and then McCallen wrote those figures on the application in the debtor's presence. Delashmit asserts that the information was already filled in on the applications and he simply signed them. Even if the Court were to find that Helena filled in the figures and the debtor merely signed the applications, the Court would

still conclude that the writing requirement has been met in this case. “As long as the written statement is written, signed, adopted or used by the debtor, the basic precondition concerning the writing requirement to the non-dischargeability complaint under section 523(a)(2)(B) is met.” *Michael*, 265 B.R. at 598. Delashmit admitted during his testimony at the trial that he signed the Monsanto applications for credit for Big D and Beaver Creek on February 21, 2000. Those applications contained a financial statement of the businesses on their faces. As a result, the statutory writing requirement is met.

The second element a creditor must prove under § 523(a)(2)(B) is that the financial statement at issue was materially false. “A statement is materially false if the information offers a substantially untruthful picture of the financial condition of the debtor that affects the creditor’s decision to extend credit.” *Michael*, 265 B.R. at 598. “Additionally, a debtor’s ‘failure to list, [or] concealment or understatement of assets or liabilities is ordinarily a misstatement considered “material.”” *Nat’l Bank v. Sansom (In re Sansom)*, 224 B.R. 49, 54 (Bankr. M.D. Tenn. 1998) (citations omitted).

In paragraph 7 of the stipulations submitted to the Court at the trial in this matter, the debtor stipulated that:

The asset and liability information contained upon these applications were incorrect. They overstated assets and understated liabilities, which assets and liabilities are more accurately reflected by the bankruptcy schedules of the two entities and Mr. Delashmit’s individual petition, which are attached hereto, with the exception of: the crops which are listed upon the schedules (which did not exist at the time of the applications): the machinery/equipment (\$350,000) which Mr. Delashmit maintains was worth closer to that figure than the amount listed upon the schedules (\$100,000); and the Stewart Title debt was unsecured (as opposed to secured) at the time of the applications.

Beaver Creek’s “Summary of Schedules” show that Beaver Creek had no assets or liabilities when it filed for bankruptcy relief on November 21, 2000. Delashmit also testified at the trial that Beaver Creek never owned any assets, machines, land, or equipment. The financial statement on Beaver Creek’s application for credit shows assets of \$270,000.00 and liabilities of \$50,000.00. Clearly, a financial statement which shows assets of over a quarter million dollars for a partnership that never owned any assets is substantially untruthful.

The summary of schedules for Big D in case no. 00-13952, shows total assets of \$1,431,000.00 and total liabilities of \$844,011.48. Big D’s petition was filed on October 23, 2000. The financial statement on Big D’s application for credit with Helena shows total assets of \$705,000.00 and total liabilities of \$300,000.00. Even if the Court were to ignore the discrepancy between the \$350,000.00 value Delashmit placed on the machinery and equipment on the application and the \$100,000.00 value he placed on it on Big D’s bankruptcy schedules, the debtor still understated Big D’s liabilities by approximately \$500,000.00 on the Monsanto credit application. The Court finds this understatement

substantially untruthful. Given these facts, the Court concludes that the financial statements for Big D and Beaver Creek were materially false within the meaning of § 523(a)(2)(B).

The third element of § 523(a)(2)(B) requires that the statement in writing concern the “debtor’s or an insider’s financial condition.” Pursuant to 11 U.S.C. § 101(31), “insider” includes –

- (A) if the debtor is an individual –
 - (I) relative of the debtor or of a general partner of the debtor;
 - (ii) partnership in which the debtor is a general partner;
 - (iii) general partner of the debtor; or
 - (iv) corporation of which the debtor is a director, officer, or person in control;

11U.S.C. § 101(31)(A). Delashmit was the general partner in Beaver Creek and was an officer for Big D. Clearly, the third element of § 523(a)(2)(B) is satisfied in this case.

The fourth element of a § 523(a)(2)(B) inquiry requires the Court to find that the creditor “reasonably relied” on the financial statement. In the Sixth Circuit:

Whether a creditor's reliance was reasonable is a factual determination to be made in light of the totality of the circumstances. Among the circumstances that might affect the reasonableness of a creditor's reliance are: (1) whether the creditor had a close personal relationship or friendship with the debtor; (2) whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and (5) whether even minimal investigation would have revealed the inaccuracy of the debtor's representations.

In re Ledford, 970 F.2d 1556, 1560 (6th Cir. 1992) (citations omitted). The Sixth Circuit has further held that “once it has been established that a debtor has furnished a lender a materially false financial statement, the reasonableness requirement of § 523(a)(2)(B) ‘cannot be said to be a rigorous requirement, but rather is directed at creditors acting in bad faith.’” *Bank One Lexington, N.A. v. Woolum (In re Woolum)*, 979 F.2d 71, 76 (6th Cir. 1992) (quoting *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1166 (6th Cir. 1985)); *Ledford*, 970 F.2d at 1560; *Knoxville Teachers Credit Union v. Parkey*, 790 F.2d 490, 492 (6th Cir. 1986). Although the reasonableness requirement is not a rigorous requirement, Congress did intend for creditors to “use, when feasible, other sources of information, such as credit bureau reports, to verify the accuracy of the list of debts.” *Martin*, 761 F.2d at 1166.

In the case at bar, Delashmit asserts that Helena did not rely on the financial statements at issue because they had been doing business with him for years. Delashmit alleges that Helena relied on that business relationship rather than the financial information on the applications in making the decision to extend credit to Big D and Beaver Creek. The proof before the Court, however, demonstrates that

Helena did rely on the financial information on the applications. Hopkins testified that he reviewed the information on the applications and that had he known that the information was false, he would not have approved the applications. While it is true that Helena had worked with Delashmit in the past and that the prior business relationship gave rise to a level of trust between the parties, that trust only reinforced Hopkins' reliance on the financial information. Because Delashmit had been honest in past dealings, Hopkins and Helena had a basis for believing that the information was correct.

In addition to the actual reliance testified to by Hopkins, the Court also finds that Helena's reliance on the financial information was reasonable. Prior to receiving the credit applications, Hopkins ran credit reports on Delashmit and found nothing that indicated the figures listed on the applications were incorrect. Hopkins also testified that the financial information on the applications was in line with what similar farmers in the area would have. There were no red flags raised by Delashmit's financial information that would have alerted Helena that the information was inaccurate. There was also no proof presented that Helena, Hopkins, McCallen or Thornell had any knowledge that the information listed on the financial section of the applications was incorrect. In light of the long business relationship between the parties and the fact that Hopkins did some investigation into Delashmit's credit, together with the absence of any red flags, the Court finds that Helena reasonably relied on the financial information.

The fifth, and final element of a § 523(a)(2)(B) inquiry is whether or not the debtor intended to use the false statement in order to deceive the creditor. The debtor alleges that he had no intent to deceive the creditor in this case because he did not prepare the financial information on the applications. "The standard, however, is that if the debtor either intended to deceive the [creditor] or acted with gross recklessness, full discharge will be denied." *Martin*, 761 F.2d at 1167; *Knoxville Teachers Credit Union*, 790 F.2d at 491. In an unpublished decision, the Sixth Circuit recognized that "[g]ross recklessness occurs when a financial statement is prepared by a third party and the statement is signed without the debtor reading it." *Brock v. Glen Eagle Marketing, Inc.*, 1994 WL 601025, *2 (6th Cir. 1994) (citation omitted); *see also, In re Copeland*, 291 B.R. 740, 787 (Bankr. E.D. Tenn. 2003) ("[o]ne having the ability and opportunity to inform [herself] of the contents of a writing before [she] executes it will not be allowed to avoid the effect of it by showing that [she] was ignorant of its content or that [she] failed to read it." (citing *Evans v. Tillet*, 545 S.W.2d 8, 11 (Tenn. Ct. App. 1976))). In the case at bar, the debtor admitted that he signed the credit applications without reviewing the financial information listed therein. As a result, the Court finds that the debtor acted with gross recklessness when he signed the credit applications without reviewing the financial information and, thereby, possessed the requisite intent to deceive the creditor.

Helena has satisfied their burden of proof with respect to each of the five elements of 11 U.S.C. § 523(a)(2)(B). The Court will grant Helena a non-dischargeable judgment against the debtor in the amount of \$172,334.34 plus interest at the statutory rate. The Court will also grant Helena an award for reasonable attorneys fees. Helena will be ordered to file an application for fees which the Court will set for a hearing. The Court will review the application to ensure the fees Helena is seeking are reasonable. In light of the non-dischargeable judgment in favor of Helena, the Court will not address Helena's § 727 claim.

III. ORDER

It is therefore **ORDERED** that the debt owing to Helena Chemical Company by the Debtor is hereby declared **NON-DISCHARGEABLE** pursuant to 11 U.S.C. § 523(a)(2)(B) in the amount of \$172,300.34 plus interest at the statutory rate.

It is **FURTHER ORDERED** that Helena shall file an application for attorney's fees which the Court will set for a hearing to review the reasonableness.

Mailing Information

Debtor

Attorney for Debtor, Timothy Latimer

Attorneys for Helena Chemical Company, James Pentecost and Donald D. Glenn

United States Trustee