In the United States Bankruptcy Court

for the Northern District of Iowa

LOWELL BERNARD SCHLEISMAN and JOAN THERESA SCHLEISMAN	Bankruptcy No. 87-01663W
Debtor(s).	Chapter 7
LOWELL FORD LIMITED and LOWELL BARTEL	Adversary No. 87-0316W
Plaintiff(s)	
vs.	
LOWELL BERNARD SCHLEISMAN	
Defendant(s)	

MEMORANDUM OF DECISION AND ORDER RE: DISCHARGEABILITY COMPLAINT

The matter before the Court is a dischargeability complaint under 11 U.S.C. § 523(a) filed by Plaintiffs Lowell Ford Limited and Lowell Bartel against Defendant-Debtor Lowell Bernard Schleisman. A hearing was held March 14, 1988. Briefs and proposed findings of fact and conclusions of law were filed by each party on April 27, 1988. This ruling shall constitute findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(1).

I.

Plaintiff Lowell Ford Limited (Dealership) was incorporated by Plaintiff Lowell Bartel (Bartel) and Defendant-Debtor Lowell Schleisman (Debtor) in early 1984. For capital, Bartel contributed $40,000.00 in cash and Debtor contributed approximately $40,000.00 in assets of a business known as Bob's Tire. Schleisman Investment Co., a corporation held principally by Debtor and his wife and CoDebtor, Joan Theresa Schleisman, and Bartel each received 50% of the stock.[1] Bartel became president. Debtor became vice president. There were no other directors or stockholders.

1 By Pretrial Statement filed December 22, 1987, the parties stipulated that Defendant-Debtor was a 51% stockholder while Plaintiff Bartel held the remaining 49%. Testimony at trial as well as filings by both parties after the Pretrial Statement indicate equal ownership. Moreover, it appears that Schleisman Investments, Inc.'s stock is now held by Bank.

The Ford franchise was received in April, 1984 and Dealership began operations in June, 1984. Dealership operated out of a building rented for $1,000 a month from Schleisman Investment.

First State Bank of Conrad, Iowa (Bank) provided floor plan financing for the automobile inventory. Bank held a perfected first lien on all assets of Dealership. Debtor and Bartel gave personal guarantees on Dealership's debt to Bank.

Bartel assumed the full-time, day-to-day management responsibilities of Dealership. Debtor provided rust proofing and other services for Dealership's inventory at his service station. He also occasionally sold cars. Pursuant to an oral agreement, neither Bartel nor Debtor were compensated for their services even though compensation for corporate officers and directors was permitted by Dealership's by-laws.

An important duty Bartel performed as Dealership manager was to prepare the monthly financial statement sent to Ford Motor Company. Bartel was assisted in this and other bookkeeping duties by Dealership's bookkeeper, Jackie Stevens. Debtor, Bartel, and Stevens all attended a Ford Motor Company dealership school which included training in preparation of the required monthly financial reports.

Bartel managed Dealership until June, 1986 when he left to devote more time to his military reserve activities and his seed business. Debtor assumed the daily management responsibilities. Soon after Bartel left, Stevens, the bookkeeper, also left. Debtor began to take a salary of $5.50 per hour for a 40-hour week.

For the first few months after Debtor assumed the management role, his wife did the bookkeeping. She received minimal training from Stevens prior to Stevens' departure and did not attend any formal training sponsored by Ford Motor Company. Mrs. Schleisman did not work regular hours at Dealership; rather, she used evenings and weekends and other hours away from her regular job to do Dealership's bookkeeping. She was not paid for her services.

When Stevens left Dealership's employment, she and Mrs. Schleisman discussed an alternative bookkeeping method whereby the accounts payable ledger would no longer be used. Instead, the accounts payable ledger was phased out and new inventory would not be recognized in the inventory ledger and the corresponding cash ledger until payment was made. They arrived at this procedure to help Mrs. Schleisman keep Dealership's books in a shortcut fashion due to her time limitations. Debtor kept unpaid bills in a separate file as they came in.

Mrs. Schleisman soon realized she would be unable to keep up with Dealership's books. Another bookkeeper, Cheryl Schafer, was hired in the summer of 1986. She was not as well trained in bookkeeping methods as Stevens. Schafer did not attend the Ford Motor Company's training school.

Stevens assisted Schafer for a few hours upon Schafer's assumption of the bookkeeper role for Dealership. Mrs. Schleisman continued to work after hours on the Ford Financial Statements until September, 1986 and answered Schafer's questions by phone. Shafer began to prepare the monthly Ford financial statements herself beginning with September, 1986. The "short-cut" method of phasing out the accounts payable ledger was continued by her. Testimony by Schafer and Mrs. Schleisman indicated that after adoption of this bookkeeping method, the accounts payable figures on the Ford financial statements were less than the actual account payables. The lower accounts payable account then corresponded with an understated Dealership inventory, exclusive of automobiles.

During Schafer's tenure, the monthly Ford financial statement and other related bookkeeping duties were not timely performed due to Schafer's inexperience. Debtor was unable to provide substantive assistance to Schafer. Schafer was occasionally assisted by a CPA, especially in the preparation of the October, 1986 Ford financial statement.

Dealership never proved to be a successful business venture. A profit was realized in only a few months. Dealership was listed for sale with a broker on June 14, 1986. That listing expired December

9, 1986. Another listing agreement was made by Debtor for February 27, 1987 through January 1, 1988. No sale was ever made although one oral offer was received in the late winter or early spring of 1987.

Shane Tiernan, an officer of Bank, assumed oversight responsibility for Dealership's account in October of 1986. At that time, Bank was concerned about Dealership's financial well-being. Tiernan began to take a more active interest in Dealership's financial affairs.

On October 22, 1986, Tiernan, Bartel, Debtor, and Brian Mohr, another officer of Bank, met to discuss Dealership's financial situation. They discussed whether the business should be sold, whether Bartel should divest his interest, and alternatives which might make the business more profitable. Tiernan then had copies of the December, 1985 and April, 1986 Ford financial statements in his file. He asked that more recent statements be made available for his review.

Repeated requests for additional copies of Ford financial statements were made during the next few months of 1986. Schafer told Tiernan she was having difficulty in balancing the books and preparing the statements. Reports for September, October, and November of 1986 were eventually submitted in early 1987.

Bartel, Debtor, and officers of Bank met again in mid-January and in mid-February, 1987 to review Dealership's financial status. At the February, 1987 meeting, Tiernan determined Bartel needed to resume a more active role in Dealership in order to serve Dealership's best interests. Further, the parties discussed that a satisfactory net worth would need to be maintained in order to keep Dealership in operation. Additional meetings among Bartel, Debtor, and Bank's officers were held in late March and throughout April and May of 1987.

At various times, Tiernan used the Ford financial reports that were in his file as well as Bank's in-house information on its notes to compute Dealership's liquidity cushion/security margin. Dealership's liquidity cushion for the end of October, 1986, by Tiernan's calculations, was $22,000. His computations were based on the April, 1986 Ford financial statement as well as Bank's promissory notes. Tiernan's computed liquidity cushion on December 12, 1986 was $30,070.13. It was based on available Ford financial statements as well as Bank's promissory notes. Tiernan stated no consideration was given to accounts payable since Bank had a first lien on all of Dealership's assets. The liquidity cushion Tiernan computed in June, 1987 was a negative $30,309. It was based on Dealership's current financial statement and Bank's promissory notes.

Liquidation of Dealership began in May of 1987. Bank ultimately recognized a loss of $39,908.28. (fn.2) Personal guarantees given by Bartel and Debtor resulted in obligations of each to Bank.(fn.3)

2 This amount was computed as of the date of the hearing, March 14, 1988.

3 Bank has not sought to have Debtors' debt on the personal guaranty excepted from discharge.

Debtor and his wife filed a Chapter 7 petition in bankruptcy on July 30, 1987. Plaintiffs Lowell Ford Limited and Lowell Bartel now seek a determination that certain of Debtor's actions, while he managed Dealership, resulted in $19,602.514 in damages to Dealership and that the debt is a non-dischargeable liability. Plaintiffs seek recovery under 11 U.S.C. § § 523(a)(2)(A), (a)(2)(B), and (a)(4).

The acts of fraud or defalcation on which Plaintiffs presented some evidence are:

1. Unauthorized withdrawal of salary for June 13, 1986 through December 29, 1986.(fn.5)

4 Plaintiffs' Complaint does not explicitly set forth the basis for their $19,602.51 claim. Debtors did not move for a more definite statement. Plaintiffs argued for damages in excess of $54,000 in their post-trial brief.

5 Check no. 2600, June 13, 1986 for $203.54; check no. 2627, June 20, 1986 for $203.54; check no. 2646, June 27, 1986 for $203.54; check no. 2659, July 3, 1986 for $203.54; check no. 2667, July 11, 1986 for $203.54; check no. 2709, July 18, 1986 for $203.54; check no. 2722, July 25, 1986 for $203.54; check no. 2739, August 1, 1986 for $181.25; check no. 2751, August 8, 1986 for $181.25; check no. 2760, August 15, 1986 for $181.25; check no. 2780, August 22, 1986 for $181.25; check no. 2821, August 29, 1986 for $181.25; check no. 2842, September 5, 1986 for $181.25; check no. 2859, September 12, 1986 for $181.25; check no. 2872, September 19, 1986 for $181.25; check no. 2888, September 26, 1986 for $181.25; check no. 2918, October 2, 1986 for $181.25; check no. 2953, October 10, 1986 for $181.25; check no. 2966, October 17, 1986 for $181.25; check no. 2983, October 24, 1986 for $181.25; check no. 3001, October 31, 1986 for $181.25; check no. 3009, November 7, 1986 for $181.25; check no. 3026, November 14, 1986 for $181.25; check no. 3043, November 21, 1986 for $181.25; check no. 3069, December 1, 1986 for $181.25; check no. 3078, December 5, 1986 for $181.25; check no. 3093, December 12, 1986 for $181.25; check no. 3106, December 19, 1986 for $181.25; check no. 3115, December 24, 1986 for $181.25.

2. Submission and verification of Ford financial statements which listed false accounts payable and net worth figures and which failed to disclose payment of his salary;

3. Misappropriation of proceeds from the sales of a 1980 F-150 pickup and a 1986 Tempo car;

4. Unauthorized payments of loan obligation of Bob Schleisman and unauthorized deposits into retirement account for Bob Schleisman;

5. Failure to properly account for "Red Carpet Lease" program payment (check no. 2835 on September 3, 1986 for $200.00);

6. Failure to properly account for several cash transactions. These included:

a. check no. 3358 to cash for $1,300 on April 2, 1987;
b. check no. 2958 to Debtor for $20 on October 13, 1986;
c. check no. 2830 to Debtor for $1,150 on September 3, 1986; and
d. check no. 3121 to Debtor for $1,000 on December 29, 1986.

Debtor denies any wrongdoing. He asserts that he made no misrepresentations concerning Dealership's financial condition nor that he had any intent to mislead or deceive anyone.

Debtor responded to each of Plaintiff's allegations. Debtor stated he was entitled to salary as an employee of Dealership, not as a director or officer. Hence, he felt he had not violated his agreement with Bartel that they would not take compensation until Dealership became a more established business. Debtor did not specifically inform Bartel he was taking a salary but the payments were disclosed by Dealership's records. No Dealership salary was set forth on the Ford financial statements, however.

Debtor agreed with Bartel and Tiernan that the Ford financial statements, prepared for the months for which Debtor managed Dealership, had inaccurate statements of accounts payable. He was not directly involved in these statements' preparation. He knew that a "short-cut" bookkeeping method regarding accounts payable was adopted by Mrs. Schleisman and Schafer, but he did not fully grasp its effect on the books nor the Ford financial statements.

Debtor recalled formally discussing accounts payable with Tiernan only in October, 1986. Debtor said that on informal occasions when Tiernan asked about accounts payable, he provided a range of figures from his best recollection and stated that the accounts payable were, in most cases, not more than thirty days old. He admitted that by April, 1987 there was a possible discrepancy of $25,000 between actual accounts payable and the accounts payable stated on the Ford financial statements.

Debtor was unable to remember or determine from Dealership's books why proceeds of the 1980 F-150 pickup were not applied against Dealership's note on the pickup. However, he gave a personal note on the pickup to Bank which assumed Dealership's note.

Debtor could not explain why two notes were given on the 1986 Tempo. The first note for $8,718.92 was given May 8, 1986 with the funds advanced for "New Auto Inv[entory]." Payment was due in 184 days. This note was not paid. A second note for $4,000.00 was given on October 9, 1986 with the funds advanced for " Auto Inv[entory]." [The overstrikes were in the original]. Payment was due on November 9, 1986. The car was sold on October 7, 1986 for $9,650.00 (including a trade-in allowance of $3,100.00). Payment in full on the second note was made October 28, 1986. The May 8, 1986 note was not paid.

Debtor stated that Dealership's erroneous payments on his son's note to Bank and to his son's IRA account were compensated in part by Debtor's (or rather, Schleisman Investment's) capital contribution in excess of $40,000 and by Debtor's reimbursement of Dealership by personal check for $1,672.62 on February 10, 1985.

Debtor testified that he was personally entitled to the $200.00 "Red Carpet" lease program payment for which Dealership paid him by check number 2835.

Debtor also responded to the other checks questioned by Plaintiffs. He stated he had Schafer draw check number 3358 after he received Bank's March 31, 1987 letter which indicated Bank might soon seek liquidation of Dealership. Debtor wanted the cash available to pay salaries and building rent. He stated $1,000 of it was eventually used to pay rent and that the balance was redeposited in Dealership's account.

Debtor explained check number 2958 reimbursed Debtor for a business related meal of the Iowa Automobile Dealers Association. The check stub corroborated this statement.

Debtor and Mrs. Schleisman both testified that check number 2830 was issued to Debtor to reimburse them for the proceeds from the sale of their personal vehicle. It had been erroneously paid into Dealership's account by Schafer.

Check number 3121 for $1,000 Debtor stated, was for building rent. This is corroborated by the check stub and, circumstantially, by its amount.

Plaintiffs rely on three provisions of 11 U.S.C. § 523 in seeking a determination that certain debts of Debtor are nondischargeable. The elements of each of these provisions, § § 523(a)(2)(A), (a)(2)(B) and (a)(4), must be proven by clear and convincing evidence. In re Simpson, 29 B.R. 202, 209 (Bankr. N.D. Iowa 1983)(cited in Amana Employees Credit Union v. Sampson (In re Sampson), Bankr. No. 87-00521C, Adversary No. X87-0138C, slip op. at 10-11 (Bankr. N.D. Iowa, Jan. 25, 1988)).

Evidence must be viewed consistent with the congressional intent that exceptions to discharge are narrowly construed against the creditor and liberally on behalf of the debtor, thus "effectuating the

fresh start policy of the Code." Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987)(citing In re Jenkins, 61 B.R. 30, 39 (Bankr. D. N.D. 1986)). These considerations apply, however, only to honest debtors. Id. at 1287 (quoting In re Hunter, 771 F.2d 1126, 1130 (8th Cir. 1985)).

II.

Intent to deceive or defraud is one element of false pretenses, false representation, or actual fraud under § 523(a)(2)(A), see Van Horne, 823 F.2d at 1287, of fraud by a fiduciary or embezzlement or larceny under § 523(a)(4), Moore v. Holman (In re Holman), 42 B.R. 848, 851 (Bankr. E.D. Mo. 1984), and of use of a materially false financial statement under § 523(a)(2)(B)(iv). See Barclays American/Business Credit, Inc. v. Long (In re Long), 774 F.2d 875, 877 (8th Cir. 1985). "This intent must be shown to exist at the debt's inception." Strunk v. Wood (In re Wood), 75 B.R. 308, 313 (Bankr. N.D. N.Y. 1987)(citing Seepes v. Schwartz (In re Schwartz), 45 B.R. 354, 357 (S.D. N.Y. 1985)).

Direct proof of a debtor's state of mind is nearly impossible to obtain and so the creditor may present evidence of the surrounding circumstances from which intent may be inferred. Van Horne, 823 F.2d at 1287.(fn.6) When the creditor introduces circumstantial evidence proving a debtor's intent to deceive, the debtor "cannot overcome [that] inference with an unsupported assertion of honest intent." Id. (quoting Simpson, 29 B.R. at 211-12). The determination of intent must focus on whether the debtor's actions appear so inconsistent with his self-serving statement of intent that the proof leads the court to disbelieve the debtor. Id. at 1288 (quoting In re Hunt, 30 B.R. 425, 441 (M.D. Tenn. 1983)); see also Wood, 75 B.R. at 313.

6 As this Court recognized in Amana Employees Credit Union v. Sampson (In re Sampson), Bankr. No. 87-00521C, Advs. No. X87-0138C-, slip op. at 14 n.2 (Bankr. N.D. Iowa Jan. 25, 1988), the discussion in Van Horne, 823 F.2d at 1287, on the intent to deceive under § 523(a)(2)(A) is equally applicable to § 523(a)(2)(B).

Plaintiffs have failed to prove the element of intent to deceive or defraud required for recovery under §§ 523(a)(2)(A) or 523(a)(2)(B), or under the fraud by a fiduciary, embezzlement or larceny provisions of § 523(a)(4). While intent may be inferred ,from evidence of the surrounding circumstances, Plaintiffs have failed to introduce evidence that Debtor's complained-of acts were anything more than a product of inexperience and ill-placed reliance on the work product of subordinates. Debtor's actions are not so inconsistent with his declaration that he had no fraudulent intent that the Court disbelieves him. See Van Horne, 823 F.2d at 1288.

III.

Plaintiffs have also alleged that Debtors' acts while managing Dealership constituted defalcation by a fiduciary for which the resulting debt to Dealership is not dischargeable under § 523(a)(4). Plaintiffs must first establish that Debtor was acting in a fiduciary capacity. Second, Plaintiffs must show that defalcation occurred in the course of that fiduciary capacity. Kwiat v. Doucette, 81 B.R. 184, 188 (D. Mass. 1987).

The "fiduciary capacity" needed to render a debt nondischargeable under § 523(a)(4) must arise from an express or technical trust. Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934)(cited in Smith v. M& M Commodities, Inc. (In re Smith), 72 B.R. 61, 62 (N.D. Iowa 1987)). Courts must look to relevant nonbankruptcy law to determine whether or not the requisite trust exists. In re Dloogoff, 600 F.2d 166, 169 (8th Cir. 1979)(cited in Smith, 72 B.R. at 62).

Iowa courts recognize that corporate directors occupy a fiduciary relationship to the corporation and stockholders, Rowen v. LeMars Mutual Insurance Co., 282 N.W.2d 639 (Iowa 1979); Holden v. Construction Machinery Co., 202 N.W.2d 348, 356-57 (Iowa 1972) (citing inter alia Gord v. Iowana Farms Milk Co., 245 Iowa 1, 1617, 60 N.W.2d 820, 829 (1953); Des Moines Bank & Trust Co. v. Bechtel & Co., 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1951)), as well as among themselves. Kurtz v. Trepp, 375 N.W.2d 280, 283 (Iowa App. 1985)(citing Holi-Rest, Inc. v. Teloal, 217 N.W.2d 517, 525 (Iowa 1974)). Corporate fiduciaries must act at all times in utmost good faith and must "exercise powers held for the sole benefit of the corporation and its stockholders, never for their personal gain." Holden, 202 N.W.2d at 358. Those "inside" the business with more direct control of affairs have a heightened duty of loyalty and faithful service. Rowen, 282 N.W.2d at 649.

The Court concludes Debtor was acting in a fiduciary capacity while he managed Dealership. That Debtor also considered himself an employee does not supplant nor diminish his fiduciary capacity.

Defalcation under § 523(a)(4) does not have a precise definition. It is generally regarded as a failure to account for money or property that has been entrusted to a person. American Metals Corp. v. Cowley (In re Cowley), 35 B.R. 526, 529 (Bankr. D. Kan. 1983). However, no element of bad faith or intent need be shown. Smith, 72 B.R. at 63 (citing In re Martin, 35 B.R. 982, 989 (Bankr. E.D. Pa. 1984)).

> [Defalcation] is broader than embezzlement or misappropriation. It can be a mere deficit resulting from the debtor's misconduct, even though he derived no personal gain therefrom. [Cite omitted.] It is the slightest misconduct, and it may not involve misconduct at all.
>
> Negligence or ignorance may be defalcation[.] [Citations omitted.]

Smith, 72 B.R. at 63 (quoting Cowley, 35 B.R. at 529). An error of business judgment does not constitute defalcation. Wood, 75 B.R. at 314. "[A] court is not to second-guess the business judgment of an officer if he has acted in good faith on available information." Id.

While a plaintiff has the burden of establishing the nondischargeability of a debt under § 523(a)(4), the defendant-fiduciary must establish he properly discharged his obligation. Rowen, 282 N.W.2d at 647. Common law requires a "corporation-controlling director, challenged in a self-dealing situation, to carry the burden to establish his good faith, honesty and fairness." HoliRest, Inc. v. Treloar, 217 N.W.2d 517, 525 (Iowa 1974)(citing inter alia Pepper v. Litton, 308 U.S. 295, 306 (1939); Holden, 202 N.W.2d at 354-55).

Upon review of the evidence presented, the Court concludes Plaintiffs have established certain acts of defalcation under § 523(a)(4). First, it is clear Debtor was not authorized to receive a salary for his services. While Debtor's compensation cannot in any fashion be considered unreasonable or excessive, it was contrary to the directors' understanding and Dealership's bylaws. Those sums advanced for $5,412.28 constitute a debt which is rendered nondischargeable by § 523(a)(4). See supra page 7, n.5.

Second, Debtors' negligence or ignorance regarding supervision of Dealership's books and preparation of accurate Ford financial statements constitutes defalcation while acting as Dealership's fiduciary. That these tasks were assigned to and performed by others does not eliminate Debtor's obligations since it was a responsibility he had assumed. Moreover, his dereliction is not simply an error of business judgment; it was a failure to perform by ignorance or negligence an important business duty.

The Court, however, concludes Plaintiffs have not established any deficit or debt which arises from this act of defalcation. While Bank may have liquidated Dealership earlier in 1987 if a more accurate financial picture been available, there was no evidence presented that an earlier or more speedy liquidation would have reduced Dealership's debt to Bank. To the contrary, Bartel testified he did not know whether a long or short period of liquidation was better, but that the "quiet" liquidation adopted was to everyone's advantage. Tiernan's computed decrease in Dealership's liquidity cushion from late 1986 to June of 1987 is much too tenuous and unsupported by other evidence to serve as an accurate measure of the corporate debt resulting from Debtor's lack of proper attention to financial records and statements prepared for Dealership.[7]

7 The question of the impact of Bartel's sudden departure from his managerial role and his virtual inattention to Dealership's affairs thereafter is not before this Court.

Plaintiffs have not established that Debtor's failure to pay the May 8, 1986 note on the 1986 Tempo car after its sale constitutes defalcation. Plaintiffs identified the two notes given on the Tempo and produced records of sale and of payment of the October 9, 1986 note. However, Plaintiffs did not show that the cash proceeds were improperly applied to the second note or that the vehicle traded in did not become part of Dealership's inventory. Moreover, while Bartel testified his review of cash transactions between October, 1986 (the month the Tempo was sold) and June, 1987 disclosed $1,270 in cash had been received but not deposited, Plaintiffs provided no evidence on how this discrepancy was discovered or to what transaction it was related. Most specifically, Plaintiffs did not produce any evidence that any undeposited cash was due to an act by Debtor which was not a product of his business judgment or which was contrary to his fiduciary duties. See Wachovia Bank & Trust Co. v. Banister (In re Banister), 737 F.2d 225 (2nd Cir. 1984)(corporate officer who failed to remit inventory sale proceeds to secured creditor did not incur nondischargeable debt in personal bankruptcy of officer since no conversion under applicable state's laws occurred where proceeds were applied to corporation's general business purposes).

The Court reaches a similar conclusion regarding the 1980 F-150 pickup. There was no evidence that the sale proceeds were not deposited in Dealership's account. Moreover, a debt, if any, arising from Debtor's decision to deposit the pickup's sale proceeds in Dealership's account rather than apply it to Dealership's note on the pickup has been erased by Debtor's personal note to cover Dealership's note.

Evidence at trial also established that Dealership was reimbursed for any loss it suffered by erroneous payments on behalf of Bob Schleisman. While Bartel apparently(fn. 8) disputed Debtor's calculations in arriving at the appropriate sum for which Dealership should be reimbursed, Plaintiffs did not establish that Debtor's personal check of February 10, 1985 for $1,672.62 was not accepted by Dealership in satisfaction.

8 Mrs. Schleisman testified the undated, handwritten notes on Exhibit S were Bartel's. This was not disputed.

The other cash transactions of which Plaintiffs complain are not found to be acts of defalcation. Checks numbered 2835 and 2830 appear to be products of Debtor's business judgment into which this Court will not inquire further.

Finally, the Court concludes recovery is limited to Plaintiff Dealership. While Iowa law clearly recognizes Debtor had a fiduciary relationship with Bartel as a fellow director and shareholder, the acts of which Plaintiffs complained created a nondischargeable debt only to Dealership. Bartel has not established that his personal losses, if any, which arose from Debtor's actions were outside the debt he incurred as a guarantor of Dealership's liabilities. Moreover, the facts presented here do not establish

that rare instance in which direct recovery by a shareholder should be permitted. Holi-Rest, Inc., 217 N.W.2d at 527.

ORDER

IT IS HEREBY ORDERED that Debtor-Defendant Lowell Bernard Schleisman is indebted to Plaintiff Lowell Ford Limited in the amount of $5,412.28;

IT IS FURTHER ORDERED that the debt of $5,412.28 from Debtor-Defendant Lowell Bernard Schleisman to Plaintiff Lowell Ford Limited is excepted from discharge pursuant to 11 U.S.C. § 523 (a)(4).

Judgment shall enter accordingly.

SO ORDERED THIS 27th DAY OF JULY, 1988.

William L. Edmonds
Chief Bankruptcy Judge