

## Appeal History:

aff'd, No. [C92-3016](#) (N. D. Iowa Feb. 18, 1994) (O'Brien, J.)

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# In the United States Bankruptcy Court

## for the Northern District of Iowa

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EDWARD J. COURRIER  
and SHIRLEY A. COURRIER

Bankruptcy No. X88-01891M

*Debtor(s).*

Chapter 7

JACK L. HULBERT and  
ANNA HULBERT

Adversary No. X89-0043M

*Plaintiff(s)*

vs.

EDWARD J. COURRIER and  
SHIRLEY A. COURRIER

*Defendant(s)*

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### MEMORANDUM OF DECISION AND ORDER

#### Re: Objections to Discharges

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Jack and Anna Hulbert (HULBERTS) object to the discharges of the debtors. Trial was held in Mason City on March 12, 1991. At the close of plaintiffs' case, Courriers' counsel moved to dismiss pursuant to Fed. R.Civ. P. 41(b) as incorporated by Fed. R.Bankr. P. 7041. Courriers contended that plaintiffs had failed to show any right to relief. The court declined to render judgment, reserving ruling until the close of all the evidence. The Courriers then offered evidence. The court, having considered all of the evidence, now issues its memorandum of decision and order which includes findings of fact and conclusions of law.

#### I.

Vending Services of Northern Iowa Corp. (VENDING SERVICES), located in Clear Lake, was in the business of selling food, tobacco and beverages through vending machines located at businesses in north central Iowa. Vending Services filed a voluntary chapter 11 petition on December 22, 1986. At the time of its bankruptcy, the corporation had approximately 25 customers, the largest of which was Winnebago Industries. In the year prior to its filing, it had gross receipts of approximately \$800,000.00, with all of its income coming to it in coins and small denomination paper currency. Vending Services was operated by Edward and Shirley Courier, a married couple from Clear Lake. Shirley was an officer and director of the corporation and was in charge of operating the office. Edward Courrier was an officer, director and the company's sole shareholder. The couple's son Dirk was

employed by the company as a "route man." Edward Courier had purchased the stock of the corporation from Jack Hulbert in 1984. Prior to the purchase, the Courriers had been employed by Hulbert to operate Vending Services. Before moving to Clear Lake, Courriers had worked for Hulbert in Mankato, Minnesota.

Jack Hulbert, while a principal shareholder of Vending Services, became personally liable for indebtedness of the corporation to Norwest Bank of Mason city, N.A. After Edward Courier purchased his stock, Hulbert remained personally liable to Norwest. Vending Services was in default on its debt payments to Norwest prior to and during the chapter 11. As a result, Norwest sought to collect from Jack Hulbert. The Hulberts are creditors of Courriers, holding a substantial unsecured claim, perhaps to the extent of \$900,000.00.

Vending Services was operated under chapter 11 for nearly 16 months. On April 19, 1988, on the motion of the U. S. Trustee, the chapter 11 case was converted to a case under chapter 7. While the company was in operation, it generated large amounts of cash, amounts estimated at \$20,000.00 per week. Although much of the money was deposited in bank accounts, approximately \$15,000.00 remained in machines located at customer locations. Money was also kept in an office petty cash fund and in a revolving office account.

Vending Services employed route men to fill the vending machines with products and to collect the money from them. Route men were assigned to service specific machines through the use of "route slips." These slips enabled the company to keep track of machine inventory and money collections. Most machine locations were serviced daily. The route men returned their route slips to the office where the collections were counted by office personnel using a coin-counting machine. The machine produced a tape indicating the amount of value counted. The business location of the machine was noted on the tape. The cash tapes were used to verify the cash collection information on the route slips.

Beginning in 1984, information as to inventory placed in the machines and as to cash taken out was entered into the computer from the route slips. Data entry was performed by Shirley Courier and by sometime-employee, Laurie Jones. Each day after entering the route slip information on the computer, office personnel would bundle the route slips and cash tapes, place them in file folders according to account, and keep them until month-end computer reports had been generated. At that time, they would be thrown away.

This disposition of the money counting tapes and the route slips was in accordance with advice from Patrick Rogers, the company's certified public accountant. Rogers was aware of the company's use of "account slips" (route slips), but he considered that there was no need to retain the slips or the money counting tapes. Rogers had advised Courriers that after the monthly computer reconciliation of accounts, there was no need for the company to keep them. Rogers discussed this matter with Courriers prior to filing a chapter 11; it was not discussed again after the filing.

The business computer reports included a summary of accounts; this was also referred to as a sales report. The summary could be and was generated weekly, monthly and yearly. The company's fiscal year ended April 30. When each monthly summary was created, the prior month's information was deleted as separate data in the computer's memory and it became part of the year-to-date information. The account summary showed, among other things, current monthly sales per machine per location; it also included year-to-date information. Once monthly data had become part of the year-to-date information in the computer, the record of figures for a particular month (other than the current month) was provided by hard copy printouts, and until year's end, this monthly information would also be available on the computer's backup disks. Once a year-end report was run, the only information which

would be available for the year would be the monthly report printouts, the year-end report printout and the permanent year-end report maintained on a backup disk. The year-end report maintained on a backup disk would be the only information on the computer for the prior year.

The businesses where machines were located were paid a percentage commission of the gross business done by Vending Services. The percentage was subject to contract, and it might differ among the customers depending on the location of the business and the product contained in the machine.

One of the company's larger accounts was Beatrice Dairy. Vending Services was aided in servicing this account through the use of a hostess who was employed by Beatrice Dairy. Although the hostess' salary was paid by Beatrice Dairy, it was reimbursed for a portion of it by Vending Services. The hostess would remove money from the machines more than once per week. However, the money would only be picked up and brought to Vending Services by a route man once per week. Despite the once-per-week pickup, it was necessary to enter inventory and collection information in the computer on a per-collection basis in chronological order. Because of concern over whether entries were made properly, Shirley Courier entered the Beatrice Dairy information herself rather than permitting Laurie Jones to do it. Exhibits 1 and 2 are the commission statements run for the Beatrice Dairy account for the months of January and February, 1988. Although the sales, tax and commission figures were placed on the report by hand, they were run by the computer. Normally, the information was recorded by computer on the form. Although the court did not fully understand Shirley Courier's reason for this two-month aberration in methodology, the essence of the explanation was that it was a mistake caused by time pressure.

During the course of the chapter 11, Vending Services of Rochester (Minnesota), which was owned by Jack Hulbert, sold two used vending machines in a transaction with Edward Courier. The total sale price was \$1,000.00, and it was paid in cash by Ed Courier at the Vending Services' office in Rochester. According to Courier, he made the purchase on behalf of SED Corporation, an Iowa company incorporated by his son Dirk for the purpose of purchasing the assets of Vending Services from the chapter 11 estate. A motion for the approval of such a sale was denied by the court on April 6, 1988. SED Corporation leased the two machines to Vending Services until the conversion to chapter 7. At that time, they were returned to SED. According to Edward and Shirley Courier, the money for the purchase was loaned to Dirk Courier by a member or members of Shirley's family.

On the morning of April 19, 1988, the Courriers were aware that the U. S. Trustee's motion to convert the case to chapter 7 would be heard in bankruptcy court in the early afternoon. They had discussed the possible conversion with Rogers, the accountant. Shirley Courier said she was told by him that she was responsible for any of the records of the corporation, and that if she was going to lose possession of the building, she should take the records with her when she left. Rogers advised Shirley Courier to make sure all taxes were current at the close of business. This included sales tax and employee trust fund taxes. On the morning of April 19, 1988, Shirley Courier arrived at work, told Laurie Jones she could go home, and then began working at the computer in order to run certain final reports. Shirley put the previous day's sales into the computer and ran the month-end processing in order to generate the hard copy monthly report. She treated April as a "short month" running from April 1 to April 19, 1988. She said she could have, but did not generate a hard copy year-end report. I believe Shirley Courier's testimony on this point was contradictory and that she did generate a final year-end report which had the effect of erasing from the computer all individual statistics for the month of April. The year-end report included information for the period of January 1 through April 19, 1988.

According to Shirley Courier, as of April 20, the computer memory included a list of each vending machine with its location, year-to-date sales, and inventory. It also included a warehouse inventory.

She also completed the final payroll. For the purpose of paying employees final payroll checks, the Courriers purchased cashiers' checks at a bank. They also made a deposit to cover state and federal withholding taxes. A "hard copy" final payroll report was produced which provided year-to-date grosses and withholding information. Once this was done, she deleted from the memory of the computer all employee information. This was not normal. She did it, she said, because the business was closing. At the time, this same information would have been available from the hard copy year-end payroll report and from the individual employee file folders. The year-end report and files would have contained employee names, addresses, social security numbers, wage rates and wages paid year-to-date and withholding figures. From this information, Shirley Courier could have prepared W-2 forms.

At the hearing in the early afternoon, the court converted the case to one under chapter 7. The U.S. Trustee was prepared at that time to appoint an interim trustee and did so, appointing Michael C. Dunbar, who was present at the hearing. After the hearing, Dunbar went to the Vending Services business location and toured the building with the Courriers. Edward Courier surrendered the keys to the building. Shirley Courier showed Dunbar the dollar bill changers and the money inside them along with the revolving fund and the day's receipts. Dunbar asked Shirley Courier to produce from the computer a list of the business' asset inventory which she did and gave to him.

That afternoon, Dunbar negotiated with Jack Hulbert for the sale of the estate's assets. Shirley and Edward Courier were aware of these negotiations. Dunbar was trying to negotiate an immediate sale of the estate's assets because of his concern as to their perishability, and because he did not want to operate the business. The trustee reached a sales agreement with Hulbert that afternoon. According to Dunbar's testimony, the price was based on the parties' understanding of the existing assets and on discussions with Courriers and Hulberts as to their value.

When Dunbar arrived at the business premises on the afternoon of the 19th, there were no written business records located there. Dunbar looked around but the office area was clean and the desks had been cleared out. Hulbert and his wife Anna accompanied Dunbar to the business location on the 19th. Anna Hulbert was knowledgeable on the company's computer program and had trained Shirley Courier in its use. Anna Hulbert testified that the office area was empty of all filing records and that the only computer disks located there were two packs in the computer--a program pack and a daily data pack. Missing were a source pack and two backup disks. The source pack is important to aid outside computer technicians to restore service if the computer "goes down." It also was used to make changes in the program. The back-up disks were used to store computer entries for individual months until the year-end reports were generated. These individual months would then be available only on printouts. At least one of the backup disks would have or should have contained information for the month of April. As a result of the missing backup disks, Anna Hulbert could not generate a computer sales report for April, 1988.

The written business records had been removed prior to the hearing on conversion. Most records had been removed on the morning of the 19th with perhaps some being removed on the evening of the 18th. Courriers packed up the business records into more than ten boxes. Edward Courier remembers going through the office and removing almost all of the printed data located there. He had helped clean out the file cabinets. Neither Edward nor Shirley Courier had any recollection of removing any computer disks from the business premises. The more than ten boxes of business records were stacked in the garage at Courriers' home. Early on the morning of April 20, Courier went to the garage and noticed that a box or two had tipped over. It had been raining, and Courier noticed also that the garage floor was wet. For these reasons, he decided to move some of the boxes to an enclosed porch on another side of the house. He did not advise his wife of the move prior to his leaving for Des Moines

that morning. There is disagreement and confusion as to what day Dunbar came to the Courier home to obtain the boxes and as to when he successfully obtained some of them. Dunbar says he went to Courriers on April 20th with Vending Services' attorney Robert Swanson. There he said he met Mr. Courier and told him he had come to get the records. Dunbar says he was told that the records were not available, that they were in a motor vehicle, and that the motor vehicle was not on the premises. Dunbar testified that he sensed when he went there that he would not obtain the records that day. He says he later made arrangements with attorney Swanson to pick up records and that he drove to Swanson's office in Mason City to get them. There he took about a dozen boxes from the Courriers' station wagon and placed them in his Volkswagen Rabbit automobile. He took the records to his home in Cedar Falls.

Edward Courier remembers events differently. He says he was not home when Dunbar came on the 20th as he had already left for Des Moines. He recalls taking boxes to Swanson's office on the 21st of April and turning them over to Dunbar. Shirley Courier said Dunbar came to the house on the 20th and took some but not all of the boxes. The Courriers agree, and I find, that records were provided to Dunbar on more than one occasion. They first turned over the records concerning the chapter 11 operation of the company. These were taken to Swanson's office. Sometime later, although there is no agreement as to when, Dunbar requested a turnover of records for the period prior to the filing of the chapter 11. These were also taken to Swanson's law office, but they were picked up at that time by attorney Larry Eide who represented the Hulberts.

When packing the boxes of written materials, neither Shirley nor Edward Courier inventoried them, but they testified that all written materials were turned over to Dunbar. Dunbar in turn went through the records only in cursory fashion and recalls there being only written documents and no computer disks or other computer software. He did, however, see computer printouts and recalled that route slips and counting machine tapes for April were in the boxes. He said that commission records were also in the files. Dunbar did not inventory the records. He agrees that he did turn over a portion of the records to Larry Eide. He got no receipt from Eide and has no idea what Eide did with these records. Dunbar says he was no longer concerned with the records because he had already sold most estate assets to Hulbert.<sup>(1)</sup> Dunbar sold the debtors' motor vehicles to Hulbert for \$6,500.00 and the merchandise inventory for \$23,629.23.

The computer disks owned or leased by Vending Services included a leased source pack, a program disk, two backup disks, and one daily data disk. The backup disks were large, similar in size to 33-rpm long playing phonograph records. When not in the computer, the computer disks were kept in two locations at the office--in the money room and in a metal cabinet in the office. As previously stated, when the trustee arrived at the company premises on the afternoon of the 19th, only two disks were located there. The source disk and the backup disks were missing. Ed Courier testifies he has no knowledge of their whereabouts. Both Shirley and Edward Courier deny removing any computer disks from the premises. The last disk Shirley saw were the program and data disks. From the two disks on the premises, Anna Hulbert was able to print the January 1 through April 19 year-to-date information but was not able to obtain April-only information. She was also able to call up on the computer employee information from a source other than that which had been erased by Shirley Courier.

Anna Hulbert went through four boxes of written materials provided to attorney Larry Eide. She said she found no account summaries, no daily tapes, and no daily route slips. She says that the records which she examined included cancelled checks, deposit books and paid invoices for the period during the chapter 11.

C.P.A. Rogers had told Courriers at the time he began working with Vending Services, that they should retain payroll records for a period of five years and invoices, cancelled checks and bank statements for a period of three years. That is the C.P.A.'s standard advice to his small business clients. Rogers also told Shirley Courier that the hard copy record is the permanent record regarding employee data. According to Shirley Courier, Rogers told her that it was up to her whether she erased employee information from the computer once the hard copy was printed. Rogers was asked during his deposition examination whether there would be any valid accounting reason to erase any computer records. He answered "no", however, he was not asked whether there would be any valid reason not to. But it was his opinion that once the monthly hard copy payroll report had been generated that there was no need to retain the information on the computer.

Rogers testified that he never advised Shirley Courier to erase any computer records, and she never inquired about it. He also testified that during the month prior to the conversion to chapter 7, Shirley did not ask him whether there were any company records she could dispose of. Specifically, as to the events of April 19, Rogers recalled no discussions with Shirley Courier as to what records should be retained on the computer and what should be printed.

During the chapter 11, Shirley Courier forwarded to Rogers several computer reports. These included a profit and loss statement, statement of changes in financial position, working capital statement, copies of journal entries and copies of listings of amount of cash in various vending machines and in the cash room.

In Rogers' opinion, Courriers were not stealing from the business. He bases his opinion on his seeing a decline in both their personal and the corporate incomes and his understanding that the income from Vending Services was in line with industry figures as told to him by Courriers. Edward Courier denies stealing or "skimming" from the business income.

Michael Wilson is a friend of Courriers who works for Hulbert as vice president and general manager of Vending Services of Rochester (Minnesota). He has known the Courriers since 1981 and considers himself a close "business friend" of theirs. On the day the case was converted, Wilson came to Vending Services at Hulbert's request in order to help get the business stabilized as Hulbert had hoped to purchase from the trustee a "going concern." His interest was not only in purchasing the assets but also in keeping the customers served without interruption. During the course of the afternoon, Wilson was having coffee with Ed and Shirley at the plant. He told them, "I'm not looking forward to this" (taking over their old business). He told Courriers, "I don't expect you to give me any information." He testified that Shirley responded, "If we would have had more time, there would be less information available here for you to operate the business on." Shirley testified that she did not recall making such a statement.

Wilson testified that over the course of their operation of Vending Services, Courriers' animosity toward Jack Hulbert grew because they felt that they had made a bad deal with him in purchasing the business. Although Wilson was told nothing by the Courriers to directly indicate that they were skimming money from the business, Wilson got that impression. Wilson said that on one occasion, Ed Courier told him that a juice machine at a school was their vacation money. There was no indication of when that conversation or statement took place. Wilson testified that on a second occasion when Wilson and Ed Courier were commiserating over the travails of working for Hulbert, Courier told him that he, Courier, had to "take care of himself." Ed Courier denies this and said that he told Wilson that Wilson should take care of himself because Wilson had complained that he was being pushed around by Hulbert. Wilson said Edward Courier once had told him that it is easy not to report all the cash from this type of business. Wilson testified that nothing else was said. From the evidence,

the court is unable to determine whether this was merely an observation about a cash business or an indication that Ed Courier was stealing money from the corporation.

## II.

Hulberts' amended complaint asks that Courriers be denied discharges pursuant to 11 U.S.C. § 727(a)(7) and any of the following subsections of § 727: (a)(2), (a)(3), (a)(4), and (a)(5). Hulberts also sought a determination that Courriers' debts to them not be discharged pursuant to various subsections of 11 U.S.C. § 523(a). By their counsel's opening statement at trial, Hulberts limited their objections to §§ 727(a)(7), 727(a)(2)(B) and 727(a)(3). In their post-trial brief, Hulberts argued that Courriers should be denied discharge also pursuant to § 727(a)(4).

A debtor may be denied discharge under § 727(a)(2)(B) if he or she "has transferred, removed, destroyed, mutilated, or concealed . . . property of the estate, after the date of the filing of the petition with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property."

Section 727(a)(3) bars discharge if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case."

Debtor may be barred from receiving a discharge pursuant to § 727(a)(4)(B) if he or she has "knowingly and fraudulently, in or in connection with the case-- . . . withheld from an officer of the estate entitled to possession . . . any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs."

Sections 727(a)(2) and (a)(3) are not mutually exclusive. A plaintiff may seek to bar the discharge of a debtor under either section even though the "property of the debtor" or the "property of the estate" consists of recorded information. Such information is still property of the estate under the broad definition of property in § 541 of the Code.

The records under consideration in this case were records of a corporation and not the individual debtors. However, the debtors were insiders of Vending Services. Section 727(a)(7) permits the court to deny debtors a discharge if they are found to have committed any of the acts described in § 727(a) during and in connection with another bankruptcy case involving an "insider." An "insider" includes a "corporation of which the debtor is a director, officer, or person in control. . . ." 11 U.S.C. § 101(31)(A)(iv).

## III.

The parties disagree over the standard of proof which plaintiffs must meet in proving that discharge should be denied. The burden is on the plaintiffs prove that discharge should be denied, but Fed. R. Bankr. P. 4005 does not indicate whether plaintiffs must meet their burden by "a preponderance of the evidence" or "by clear and convincing evidence." The United States Supreme Court in Grogan v. Garner, \_\_\_ U.S. \_\_\_, 111 S.Ct. 654 (1991) has determined that the "preponderance of the evidence" standard is applicable in proceedings to determine exceptions to discharge under 11 U.S.C. § 523(a), including those exceptions to discharge involving fraud. The court pointed out in dicta that Congress had also chosen the preponderance standard for determinations under 11 U.S.C. § 727(a)(4). No mention was made by the court as to standard of proof applicable as to other subsections of § 727. Since the Grogan decision, courts have continued to disagree over the appropriate standard in § 727 cases. The court in In re Sanders, 128 B.R. 963, 967 (Bankr. W.D. La. 1991) applied a clear and

convincing standard to § 727 objections other than those raised under § 727(a)(4). The Tenth Circuit has concluded from Groqan that the appropriate standard as to all sections of § 727 is "preponderance of the evidence." First National Bank of Gordon v. Serafini (In re Serafini), 938 F.2d 1156 (10th Cir. 1991). The preponderance standard has been applied in § 727 cases in In re Cook, 126 B.R. 261, 265 (Bankr. E.D. Texas 1991) and In re Hall, 126 B.R. 117 (Bankr. N.D. Fla. 1991).

Having considered the reasoning of Groqan v. Garner, I conclude that the appropriate standard of proof for determining objections to discharge under § 727 is "preponderance of the evidence." Debtors in this case argue that a heightened standard is necessary because the "entire discharge" is involved rather than just the discharge of an individual debt. But, as we are instructed by the Supreme Court, "a debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy." Discharge is for the honest debtor. Groqan v. Garner, 111 S.Ct. at 654. If a debtor may be denied a discharge of a particular debt using the preponderance of the evidence standard, I am not persuaded that a different standard should apply in proceedings where a debtor is alleged to have acted to the detriment of all of his creditors or the estate. Debtors argue that the allegations of fraud should require a heightened standard. Yet the Code does not make a distinction for fraud cases. Under § 727(a)(4), an objecting party may prove by a preponderance that a debtor engaged in fraudulent activity. For example, if a creditor can show, by a preponderance of evidence, that a debtor knowingly and fraudulently withheld recorded information from an officer of the estate, discharge may be denied. 11 U.S.C. § 727(a) (4) (D). It would be odd if the same creditor must prove by clear and convincing evidence that a debtor fraudulently destroyed or concealed the same property. 11 U.S.C. § 727(a)(2). I conclude that the standard of proof to be met under the subsections of § 727 is "preponderance of the evidence."

#### IV.

Hulberts contend that Courriers should be denied discharge under § 727(a)(2)(B) because with intent to hinder, delay or defraud either Hulberts or the trustee, the Courriers removed, destroyed or concealed property of the estate after the filing of the chapter 11 case. They point to the disappearance of written records, three computer disks, and the "skimming" or "factoring" of money. As to § 727(a)(3), Hulberts argue that debtors concealed or destroyed or failed to keep or preserve the corporation's recorded information including written records and the computer disks. Last, Hulberts seek a denial of Courriers' discharges under § 727(a)(4)(B) on the grounds that Courriers knowingly and fraudulently withheld from the trustee the same corporate information.

#### V.

I conclude that Courriers should be denied discharge because with intent to hinder and delay the Hulberts, they removed and concealed business records of Vending Services. Courriers were aware of the impending conversion of their case to chapter 7. They were facing the loss of their business, and they were aware of the potential purchase of the business assets by Jack Hulbert. Courriers harbored animosity toward Jack Hulbert. Confronted with the loss of their business and the possibility that it would be taken over by Hulbert, they removed nearly all of the business records from the company premises. When Hulberts, the trustee, and Michael Wilson went with the Courriers to the company offices after the conversion hearing, they found that all financial records had been removed except for two computer disks. I find credible Wilson's testimony that Shirley Courier told him, in the presence of Edward Courier, that "[i]f we would have had more time, there would be less information available here for you to operate the business on." These events took place at the time when Dunbar was expeditiously trying to sell the business assets to Jack Hulbert. The business involved perishable goods about which the trustee was concerned. Dunbar did not want to operate the business, and Hulbert wanted to take it over as a "going concern." The removal of the records could have made it more difficult for the trustee and Hulbert to negotiate a sale. Even if it did not, the court infers the Courriers



had the intent to prevent Hulbert from easily taking over the business or the trustee from operating it or selling it. The court gives great weight in its decision to Shirley Courrier's incriminating statement as quoted by Wilson. Her response to such evidence at trial was only that she did not recall making the statement. There is no evidence that Edward repudiated the statement when it was made. In his testimony, he did not deny it or explain it.

I do not find credible Shirley Courrier's explanation for the removal of the records--that the accountant had advised her to remove any records from the business because the Courriers' would be responsible for them. Nowhere in Rogers' testimony was he asked to corroborate that explanation. Given the incriminating statement as quoted by Wilson, the court doubts the explanation and considers that it could have been given merely as a self-serving explanation at trial.

Additional evidence supporting the court's decision is Dunbar's testimony that he had difficulty obtaining the corporate records from the Courriers. I believe that when he went to the Courriers' house in Clear Lake, he was told by Edward Courrier that the written records were not available--that they were in a car and that the car was not on the premises. I do not find credible Edward Courrier's testimony that this encounter with Dunbar did not take place. On critical points, in order to find for the Courriers, I would have to find not credible the testimony of Dunbar and Wilson and instead believe the testimony of Courriers. I decline to do so. Also, although Shirley Courrier's erasure of employee information from the computer could have been for the benign reason that she was closing the business, still the erasure of the employee information is consistent with an intent to make sure the employees got paid but that Hulbert got no records.

For the foregoing reasons, I find that the Courriers removed the business records of Vending Services from the business premises not with the intent to preserve them but with the intent to hinder or delay the trustee's sale of business assets to Hulbert. Courriers should be denied discharges also under 11 U.S.C. § 727(a)(3) because they concealed recorded information of Vending Services from which the company's financial condition or business transactions might be ascertained and because they were not justified in doing so. That the Courriers eventually turned over a substantial portion of the business records to the trustee does not exculpate them. The trustee was able to obtain all of the records only after repeated requests. Had the Courriers not removed the business records from the premises, all would have been available to trustee on the day of conversion and during the sale negotiations. Even though the dozen or so boxes of business records were returned, at least three computer disks were and are still missing. Courriers were responsible for those disks. They were last in Courriers' possession, and they cannot explain their disappearance. Although none of the witnesses spent a great deal of time inventorying or studying the written records in the boxes, the evidence supports the conclusion that the disks were not among the written records. There is no evidence that the disks were removed from the business premises by anyone other than Courriers. The Courriers cleared out the office but cannot account for the three disks.

I do not reach the issue of whether debtors should be denied discharge under 11 U.S.C. § 727(a)(4)(D). I do not do so because I am denying the debtors' discharges on other grounds and because plaintiffs' objections under that section were waived in their counsel's opening statement. To permit its resurrection now without a motion to amend would be unfair surprise.

Plaintiffs also contend that Courriers "skimmed" or "factored" money from the business. This is slang or business jargon to indicate that Courriers personally took and benefitted from money earned by the debtor corporation during the chapter 11 case. Plaintiffs contend that there is strong circumstantial evidence of this misdeed: Shirley Courrier entered the Beatrice Dairy information herself, not permitting Laurie Jones, the data entry employee, to enter it; Shirley Courrier recorded Beatrice

commission information manually for January and February, 1988; the only reason to maintain manual records on the Beatrice Dairy account would be to hide the skimming of money from the account; it would have been faster and more accurate to do the work on the computer; the trustee testified that Courriers were not totally cooperative in turning over corporate records; Michael Wilson testified that Courriers resented Jack Hulbert; Ed Courier told Michael Wilson that he "had to take care of himself"; Courier purchased two machines from Vending Services of Rochester for \$1,000.00 in cash; Michael Wilson got the impression that Courriers were skimming funds from the business; and that after the filing of the adversary proceeding, Shirley Courier made no effort to find the missing records. The foregoing do not add up to proof by a preponderance of evidence that the Courriers were stealing money from the corporation.

The court accepts the explanation that Shirley Courier handled the Beatrice Dairy account herself because of the perceived inability of Laurie Jones to do the work adequately. The court accepts the explanation of Shirley Courier as to the reason for the two months of written Beatrice Dairy commission statements. In light of the court's accepting her explanation of error, it would make no difference whether or not the computer might have done the imprinting of the information more quickly. That the Courriers were not fully cooperative in turning over records or that they resented Jack Hulbert or that Shirley did not go through the boxes of records after the adversary was filed do not prove that they stole cash from the corporation. The purchase of the equipment for cash was credibly explained. Finally, Hulberts have not proved any money was stolen. Hulberts have failed to meet their burden of proof as to the theft or embezzlement of cash from Vending Services.

### CONCLUSIONS OF LAW

Edward J. and Shirley Courier should be denied discharges under 11 U.S.C. § § 727(a)(2)(B), (a)(3), and (a)(7).

### ORDER

Edward J. and Shirley Courier are denied discharges. Judgment shall enter accordingly.

SO ORDERED ON THIS 18th DAY OF November, 1991.

William L. Edmonds  
Chief Bankruptcy Judge

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## In The United States District Court

### For the Northern District of Iowa

#### Central Division

IN RE: EDWARD J. COURRIER  
and SHIRLEY A. COURRIER,

Debtors,

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JACK L. HULBERT and  
ANNA  
HULBERT,  
C92-3016

No.

Plaintiffs/Appellees,

vs.  
ORDER

EDWARD J. COURRIER  
and  
[01891M](#)  
SHIRLEY A. COURRIER,

Bankruptcy No. [X88-](#)

Defendants/Appellants.

The matter before the court is Debtor/Defendants' appeal from the Bankruptcy Court's ruling on their bankruptcy. After careful consideration of the facts involved in this case, it is the ruling of this court that the Defendants' appeal is denied.

#### I. FACTS

The facts recited here are largely those facts found by Judge Edmonds, with which both sides agree. This case arises out of two bankruptcy proceedings--the corporate bankruptcy of Vending Services of Northern Iowa Corporation (hereinafter Vending Services) and the individual bankruptcies (joined in one proceeding) of its principal officers and directors, Edward and Shirley Courier (hereinafter the Courriers).

Under the Courriers' control, Vending Services was a closely-held corporation which sold food, tobacco and soft drinks through vending machines located in businesses throughout north central Iowa. The Courriers purchased Vending Services from Jack Hulbert in 1984. After the purchase, Hulbert remained personally liable for the debt of Vending Services to Norwest Bank of Mason City. When Vending Services defaulted on its debt payments to Norwest, Norwest sought collection from Hulbert. Hulbert is a creditor of the Courriers, holding a substantial unsecured claim.

On December 22, 1986, Vending Services filed a voluntary Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Iowa. Vending Services continued to operate under Chapter 11 for approximately 16 months. During those 16 months, Vending Services complied with the requirements and responsibilities placed upon it by the Bankruptcy Court, including filing monthly reports with the Bankruptcy Court and the United States Trustee.

Beginning in 1984, inventory and cash records regarding the vending machines were entered into a computer. Data entry was performed by Shirley Courier and part-time employee Lori Jones. After the input information (route slips) was entered into the computer, the records were to be filed/stored until the end of the month, at which time they would be thrown away. The business computer reports included a summary of accounts (sales report), which was generated weekly, monthly and yearly. The company's fiscal year ended on April 30 of each year. When each monthly summary was created, the prior month's information was deleted as separate data in the computer's memory and it became part of the year-to-date summary. Once monthly data had become part of the year-to-date summary, the only record of figures for any particular month other than the current month was the data stored either on

hard copy print-outs, or back-up disks. Once a year-end report was generated, the only information available for the year would be in the form of monthly report print-outs, the year-end report print out, and the permanent year-end report, which was stored on a back-up disk.

In the afternoon of April 19, 1988, the Bankruptcy Court was to consider the U.S. Trustee's Motion to convert Vending Services' Chapter 11 Bankruptcy into a Chapter 7 Bankruptcy. The Courriers were aware of this. That morning, Shirley Courier arrived at work and told Lori Jones to go home. After Ms. Jones left work, Mrs. Courier began working on the computer. Mrs. Courier put the previous day's sales records into the computer and ran the month-end processing in order to generate a monthly report. In so-doing, she treated April as a short month. Mrs. Courier said that she could have, but did not, generate a yearend report. The Bankruptcy Court found that Mrs. Courier had, in fact, generated a year-end report, which had the effect of erasing from the computer all individual statistics for the month of April. The year-end report included cumulative information for the period of January 1, 1988 through April 19, 1988. Mrs. Courier also completed the final payroll and produced a hard copy final payroll report, which provided the year-to-date gross salaries and withholding information. Once this was done, Mrs. Courier deleted all employee information from the memory of the computer. This was not a normal practice. In fact, Patrick Rogers, the Courriers' certified public accountant, had specifically told them not to so-delete their records. Rogers had informed the Courriers during their Chapter 11 Bankruptcy that they should retain payroll records for a five year period, along with invoices, cancelled checks and bank statements to be preserved for a period of three years.

On April 19, 1988, the Chapter 11 Bankruptcy was converted into a Chapter 7 case pursuant to the U.S. Trustee's motion, and Michael Dunbar was appointed as the Bankruptcy Trustee. After the hearing on the Bankruptcy conversion, Mr. Dunbar accompanied the Courriers to the physical plant of Vending Services, where the Courriers surrendered the keys to the building, as well as all of the assets of the company -- which included thousands of dollars worth of currency. Trustee Dunbar asked the Courriers to produce and turn over an inventory of the business assets from the business computer, and the Courriers did so.

At this time, there were no other written business records located at the plant. The office area was clean and the desks had been cleared out. There were no filing records and the only computer disks on the premises were two packs in the computer, a program pack and a "daily data pack." The source of the pack was missing, along with two back-up disks. The so-called "source pack" was an important piece of equipment because it aided outside computer technicians in restoring service to the computer if it were to "go down," or if program changes were to be made. The back-up disks would contain the monthly data for April, 1988, and without those disks an April sales report could not be generated. All of the written business records had been removed by the Courriers and stored at their home.

That afternoon, Trustee Dunbar negotiated a sale of the Vending Services assets with Jack Hulbert. The price was based on the buyer's and seller's understanding of the existing assets, as well as discussions between the Courriers and the Hulberts as to the value of those assets. Trustee Dunbar and Mr. Hulbert entered into a sales agreement on April 19 which included \$6,500 for vehicles and \$23,629.23 for merchandise inventory. No objections were filed regarding the sale.

Trustee Dunbar went to the Courriers' home on April 20, 1988 with Robert Swanson, Vending Services' attorney, to retrieve all of the business records. Trustee Dunbar was told by Mr. Courtier that these records were not available because they were inside a motor vehicle which was not at the Courier home. Trustee Dunbar later made arrangements with Swanson to pick up the records in Mason City. Swanson did so. After a cursory examination of the records, Trustee Dunbar observed that the materials contained only written records. No computer disks or other computer software was turned

over to him. The Courriers have since explained that they turned over their entire set of written materials to Dunbar, despite the fact that no inventory of these materials exists.

On December 9, 1988, the Courriers filed their own voluntary Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Iowa. Approximately 90 days later, the Hulberts filed a complaint, alleging six counts against the Courriers. A trial was held on the matter in Mason City, Iowa on March 12, 1991. On November 18, 1991, Judge Edmonds filed a Memorandum of Decision and Order regarding the Objections to Discharge. He denied the Courriers a discharge under 11 U.S.C. Sections 727(a)(2)(B) (concealment of property), 727(a)(3) (concealment of recorded information), and 727(a)(7) (concealment in connection with another case). This matter comes before this court as an appeal from Judge Edmonds' November 18, 1991 Order.

## II. DISCUSSION

Bankruptcy Rule 8013 speaks to the disposition of appeals and the weight to be given a Bankruptcy Judge's factual findings. Rule 8013 provides:

On an appeal, the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.

A district court must affirm the fact findings of the bankruptcy court unless the bankruptcy court's findings are "clearly erroneous." Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 55-56, n. 5 (1981). A finding is "clearly erroneous" if, on the entire record, the district court is left with a definite and firm conviction that a mistake has been made. In re Perimeter Park Inv. Assoc., 616 F.2d 150, 151 (5th Cir. 1980) (a bankruptcy case relying on United States v. United States Gypsum Co., 333 U.S. 364 (1948)). Of course, conclusions of law are subject to de novo review. In re Comer, 723 F.2d 737, 739 (9th Cir. 1984). This appeal appears to raise four issues:

1. Has there been a removal or concealment of property?
2. Was the property claimed to be concealed or removed property of the Bankruptcy Estate?
3. Was the removal or concealment done with the intent to hinder, delay or defraud a creditor of the estate?
4. Was there concealment of recorded information that prohibited a determination of the debtors' financial condition, or business transactions?

This court will consider each issue individually.

1. Whether there was a removal or concealment of property? The United States Code section referring to Debtors' duties in bankruptcy is 11 U.S.C. Section 521 which states, in pertinent part, the following:

The debtor shall--

- (1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs. .

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title. . .

The section dealing with debt discharge is 11 U.S.C. Section 727(a)(2)(B), which provides:

The Court shall grant the debtor a discharge unless --

(2) the debtor, with intent to hinder, delay or defraud a creditor or officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --

(B) property of the estate after the date of the filing of the petition.

The Courriers (the appellants here) correctly note that this Code section requires a finding that property was concealed and that the property was property of the estate, and that the concealment was done with the intent to hinder, delay or defraud.

According to the Courriers, the type of case which is envisioned by Section 727(a)(2)(B) is one where the debtor attempts to conceal assets for his or her own use and benefit, to the exclusion of the Trustee and/or the Creditors. Matter of Reed, 700 F.2d 986 (5th Cir. 1983); In re Tarle, 87 B.R. 376 (Bkrptcy. W.D. Pa. 1988). The Courriers assert that this was not and is not the situation that occurred in their bankruptcy. They contend that no asset has been concealed or destroyed, and that the fact that three computer disks have disappeared is not relevant. They contend, instead, that these computer disks have no value, other than replacement cost, since the information which was on those disks is available on paper. Accordingly, the Courriers contend that Section 727(a)(2)(B) is not invoked, since the estate suffered no loss.

In response, the Plaintiffs argue that the Courriers have incorrectly stated the law. Plaintiffs contend that the Bankruptcy Court correctly found concealment based on the fact that the record contains factual evidence that business records had been removed (Designated Record 115); that Mrs. Courier erased computer records (D.R. 103-04, 164-65); and that Mrs. Courier stated to Michael Wilson that if she had had more time to work on the computer, less information would have been available (D.R. 162). All of this evidence, Plaintiffs contend, shows that the Bankruptcy Court's ruling denying a discharge was supported by logical inferences drawn from the evidence and not clearly erroneous. In re Vecchione, 407 F. Supp. 609 (E.D.N.Y. 1976); In re Steinberg, 4 B.R. 593 (Bankr. D. Mass. 1980).

This Court notes, initially, that the Reed case cited by the Courtiers is not dispositive here. First, Reed is a case about pre-bankruptcy fraudulent conversion. The case at bar involves alleged fraudulent concealment. Second, the Reed court never stated that Section 727(a)(2)(B) only applies to cases involving concealment for the debtors' own use and benefit. The issue to be resolved by this court is whether the bankruptcy court's finding of an actual intent to defraud was clearly erroneous. Even in Reed, cited by the appellants, the court cited Farmers Co-op Ass'n v. Strung, 671 F.2d 391, 395 (10th Cir. 1982) for the proposition that "(f)raudulent intent of course may be established by circumstantial evidence, or by inferences drawn from a course of conduct." Reed, 700 F.2d, at 991. This court is persuaded that the circumstantial evidence involved in this case -- the Courriers' removal of the business records, the fact that Mrs. Courier erased computer records against the advice of her CPA and in contravention of normal company practice, and Mrs. Courier's statement to Michael Wilson

that she would have removed more information from the company's computer if she had more time -- leads to an inference that the records were fraudulently concealed in this case. Therefore, this court is not persuaded that because the bankruptcy court applied Section 727(a)(2)(B) to the facts in this case, the court's actions were in any way clearly erroneous.

2. Whether the property allegedly removed was property of the estate?

The Courriers also contend that the computer disks at issue were not property of the estate, but were, in fact, owned by the Plaintiff, Mr. Hulbert, or one of his corporations (D.R. 109, 187). Further, the Courriers argue that the Bankruptcy Court did not, and could not, properly make a finding that what was removed was property of the estate. Therefore, the Courriers conclude that they have not committed an act barred by Section 727(a)(2)(B). They believe that any finding to the contrary is a factual error which can be corrected, and which ruling is entitled to no deference because it is based on a misunderstanding of the governing law. In re Martin, 761 F.2d 472, 474-75 (8th Cir. 1985); In re Ahlers, 794 F.2d 388, 394 (8th Cir. 1986), rev'd on other grounds, 485 U.S. 197 (1988).

In response, the Plaintiffs argue that this assertion is not accurate. They point to the testimony of Shirley Courier which suggests that Vending Services was using the computer software as a licensee (D.R. 187). According to Plaintiffs, this constitutes property of the estate under 11 U.S.C. Section 541(a)(1), which is construed broadly. S. Rep. No. 989, 95th Cong. 2d Sess. 82-3. The Plaintiffs assert that the effect of the removal of disks (a loss of their replacement cost) is not relevant. Instead, Plaintiffs assert that the act of removing them is what is important. Duggins v. Heffron, 128 F.2d 546 (9th Cir. 1942); In re Strotz, 61 F. Supp. 565 (S.D. Cal. 1944), aff'd, 150 F.2d 859 (9th Cir. 1945).

This court is persuaded that the Courriers have misconstrued the facts in this case and, in fact, the assets they "owned" or used as licensees was part of the bankruptcy estate as contemplated by 11 U.S.C. Section 541(a)(1). This section is broadly construed "to include all property interests, whether reachable by state-law creditors or not, and whether vested or contingent. This definition draws into the estate all of the Debtor's property interests as of the filing date. . . ." U.S. v. Cardall, 885 F.2d 656, 678 (10th Cir. 1989) (quoting In re DeWeese, 47 B.R. 251, 254 (W.D.N.C. Bankr. 1985)). Because this court believes that the property interest that the Defendants had as licensees was property of the bankruptcy estate under 11 U.S.C. Section 541(a)(1), it finds the bankruptcy court's finding that the Courriers violated Section 727(a)(2)(B) was not clearly erroneous.

3. Whether the alleged removal or concealment was done with an intent to hinder, delay or defraud a creditor?

Without conceding that they ever concealed property of the estate, the Courriers contend that there is no evidence in the record showing that they intended to hinder, delay or defraud anyone. Indeed, the Courriers assert that the fact that they produced a print-out of inventory information which was available on the very afternoon of the conversion hearing, coupled with the fact that no one has ever complained that the inventory was defective, proves that they lacked the requisite intent to defraud (D.R. 114-15). The Courriers maintain that the missing records really did not matter in the sale of the assets to the Plaintiffs. The Courriers believe that because the sale was a sale of assets alone, as opposed to a sale of the business as a going concern (D.R. 28-29), they were under no obligation to produce the records for the Plaintiffs at all, and also under no obligation to give the records to the Trustee on the very day of the Bankruptcy Conversion.

In response, Plaintiffs first object to the Courriers claim that the business was not a going concern (D.R. 124). Plaintiffs also argue that there was plenty of circumstantial evidence from which the Court

could infer intent. In re Devers, 759 F.2d 751 (9th Cir. 1985) (circumstantial evidence may prove intent). In terms of circumstantial evidence, Plaintiffs first point to the evidence of hard feelings which existed between them and the Courriers (D.R. 140). Next, they point to the fact that the three computer disks were the most important pieces of information needed to assess the financial condition of the company, and that they were missing, and were last in the Courriers' possession. Finally, Plaintiffs point to the fact that Shirley Courier systematically erased computer records with full knowledge of the pending Bankruptcy Conversion (D.R. 107-08).

Because this court believes the bankruptcy court could have concluded that there was an intention on the part of the Courriers to defraud creditors, it finds that Defendants' Claim to the contrary are untenable.

4. Whether the concealment prohibited a determination of the debtors' financial condition, or business transactions?

Finally, the Courriers do not believe that there is any evidence that they concealed any recorded information that prevented anyone from determining their financial condition or business transactions. The Courriers argue that they turned over every box of records, and that there is no evidence to show that their financial condition could not be determined from the information contained in those boxes. This, they contend, again shows that the Bankruptcy Court misapplied governing law.

In response, Plaintiffs assert that the computer disks in question contained information that never has been recovered, notwithstanding the delivery of several boxes of paper documents. According to Plaintiffs, this means that they were not able to fully determine the Defendants' financial condition and business transactions.

Because this court is persuaded that no one will ever know whether the information contained on the computer was relevant to determining the financial condition of the Defendants, and because this court is persuaded that the evidence as determined by the bankruptcy court supported a finding of fraudulent intent, it is persuaded that the bankruptcy court did not misapply the law.

IT IS THEREFORE ORDERED that the Bankruptcy Court's finding of fraudulent intent on the part of Defendants in concealing information recorded on their computer is not clearly erroneous.

IT IS FURTHER ORDERED that the Defendants' appeal from the Bankruptcy court's ruling be denied.

William L. Edmonds

Chief Bankruptcy Judge

1. Although Dunbar and Hulbert reached agreement on a sale on April 19, 1988, notice of sale was not provided to creditors and parties-in-interest until January, 1989. No objections to the sale were filed.

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