

FILED & ENTERED

APR 09 2020

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY sumlin DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
David MacMillan and Cynthia Barrett Martin,
Debtor(s)

Case No.: 2:16-bk-21559-NB

Chapter: 7

Attitude Marketing, Inc.
Debtor(s)

Case No.: 2:19-bk-10552-NB

Chapter: 7
(Jointly Administered with 2:16-bk-21559-NB)

Wyndham Vacation Resorts, Inc.,
Plaintiff(s)

Adv. Pro. No.: 2:17-ap-01229-NB
(Jointly Administered with Adv. Pro. No. 2:17-ap-01551-NB)

v.
David MacMillan and Cynthia Barrett Martin,
Defendant(s)

**MEMORANDUM DECISION DENYING
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT UNDER 11 U.S.C.
§ 727(a)(4), (a)(5), AND (a)(6)**

Hearing:

Date: November 12, 2019

Time: 2:00 p.m.

Place: Courtroom 1545

255 E. Temple Street

Los Angeles, CA 90012

1 For the reasons set forth below, this Court will deny the remaining claims in the
2 pending motion for summary judgment, which seek to deny the chapter 7 discharge of
3 Debtors David MacMillan and Cynthia Martin, pursuant to §§ 727(a)(4), (5), and (6).
4 Definitions and the background of this matter are set forth in this Court's "Memorandum
5 Decision Re Motions For Partial Summary Judgment Filed By (1) Wyndham Vacation
6 Resorts, Inc. And (2) Chapter 7 Trustee" (the "Interim Memdispo," Wynd-Mac Adv. dkt.
7 144).

8 **1. PROCEDURAL BACKGROUND**

9 The Interim Memdispo denied motions for summary judgment with respect to
10 claims under §§ 727(a)(2) and (3). But, pursuant to the procedures contemplated in the
11 Interim Memdispo, Plaintiff Wyndham filed its second amended complaint ("SAC," adv.
12 dkt. 151) asserting its claims under §§ 727(a)(4), (5) and (6). The parties had already
13 briefed and argued the merits of those claims in connection with Wyndham's motion for
14 partial summary judgment regarding its first amended complaint (the "MSJ," adv.
15 dkt. 98) and, pursuant to the Interim Memdispo and the agreement of the parties at the
16 above-captioned hearing, that briefing and argument have been applied to the SAC,
17 along with additional briefs. See adv. dkt. 152, 157.

18 **2. DISCUSSION**

19 **a. Summary Judgment**

20 Each element of summary judgment is analyzed in the Interim Memdispo. Adv.
21 dkt. 144, pp. 4:9-5:10. That analysis is incorporated herein by this reference. As a
22 reminder, however, the rule states:

23 The court shall grant summary judgment if the movant shows that there is
24 no genuine dispute as to any material fact and the movant is entitled to
25 judgment as a matter of law. ... [Rule 56(a), Fed. R. Civ. P., incorporated
by Rule 7056, Fed. R. Bankr. P. (emphasis added).]

26 Summary judgment is properly granted when no genuine and disputed issues of
27 material fact remain, and, when viewing the evidence and inferences therefrom in the
28 light most favorable to the non-moving party, the movant is entitled to prevail as a

1 matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Elec.*
2 *Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

3 **b. § 727(a)(5)**

4 § 727(a)(5) provides:

5 (a) The court shall grant the debtor a discharge, unless –
* * *

6 (5) the debtor has failed to explain satisfactorily, before determination of
7 denial of discharge under this paragraph, any loss of assets or deficiency
8 of assets to meet the debtor's liabilities; ... [§ 727(a)(5) (emphasis added)]

9 Intent is not a required element under Section 727(a)(5). See 6 *Collier on*
10 *Bankruptcy* ¶727.08 (Richard Levin & Henry J. Sommer eds., 16th ed.).

11 Under Section 727(a)(5) an objecting party bears the initial burden of proof
12 and must demonstrate: (1) debtor at one time, not too remote from the
13 bankruptcy petition date, owned identifiable assets; (2) on the date the
14 bankruptcy petition was filed or order of relief granted, the debtor no
longer owned the assets; and (3) the bankruptcy pleadings or statement of
affairs do not reflect an adequate explanation for the disposition of the
assets. [*In re Retz*, 606 F.3d 1189, 1205 (9th Cir. 2010) (internal
quotation and citation omitted).]

15 The party objecting to discharge “bear[s] the burden of proving by a
16 preponderance of the evidence” that debtors’ discharge should be denied. *Id.* at 1196. It
17 is then up to the debtor to satisfactorily explain what happened to the assets. 6 *Collier*
18 *on Bankruptcy* ¶727.08 (Richard Levin & Henry J. Sommer eds., 16th ed.). “[V]ague,
19 indefinite, and uncorroborated explanations are unsatisfactory.” *In re Thompson*, 2009
20 WL 7751298 at *5 (9th Cir. BAP 2009) (internal quotation marks and citations omitted);
21 and see *In re Chalik*, 748 F.2d 616, 619 (11th Cir. 1984) (internal citations omitted).

22 The SAC’s allegations paint a picture that, at first, appears to satisfy the
23 foregoing standards. But the MSJ does not include uncontested facts that meet those
24 standards.

25
26 **c. The SAC’s allegations that appear to be most relevant to § 727(a)(5)**

27 The SAC alleges:
28

1 36. In his bankruptcy schedules, MacMillan disclosed current or former
2 ownership of the following entities and unincorporated businesses: ...
3 Timeshare Relief, Inc. [aka Aston Marketing Group, Inc.] ... Attitude Marketing,
4 Inc. ... (collectively, the "MacMillan Companies").
5 * * *

6 41. ... MacMillan, Martin and/or the MacMillan Companies acquired
7 commercial real estate, multiple vacation properties, at least one airplane,
8 luxury automobiles, race cars, business interests, and other property. The
9 MacMillan/Martin enterprise has generated hundreds of millions of dollars in
10 revenue.² MacMillan and Martin have failed to account for almost all of this
11 money in their substantively consolidated bankruptcy case. Moreover,
12 MacMillan and Martin have produced few documents reflecting what
13 happened to the hundreds of millions of dollars taken in by the MacMillan
14 Companies.

15 ² On his website, davidmacmillantimeshare.com, MacMillan represented in a
16 "Company Statement" - dated March 31, 2015 and posted on September 17, 2015 -
17 that "[s]ince 2004, we have successfully facilitated the transfer or return to the
18 Resorts of over 100,000 disgruntled timeshare owners who wanted out of their
19 timeshares." At \$3,000 per deed/interest transferred, the MacMillan enterprise would
20 have collected over \$300,000,000 in fees from victimized consumers from 2004
21 through 2015. Tax returns reflect that the gross revenue for Attitude Marketing was
22 more than \$54 million in 2012 and more than \$26 million in 2013.
23 * * *

24 79. Timeshare Relief, Inc. ("Timeshare Relief") is perhaps the most
25 notorious of the MacMillan Companies.

26 80. Timeshare Relief offered Timeshare Exit Services across the United
27 States.

28 81. At various times, MacMillan and Martin were shareholders, officers
and employees of Timeshare Relief.
* * *

92. On March 11, 2014, Timeshare Relief filed a Statement of
Information in the Office of the Secretary of State of California in which
MacMillan is listed as President, Chief Executive Officer and Chief Financial
Officer of Timeshare Relief. Martin is listed as Secretary of Timeshare Relief.
MacMillan and Martin represent that they are the sole Directors of Timeshare
Relief. ...
* * *

94. Despite demand by WVR in these bankruptcy cases and adversary
proceedings, MacMillan and Martin have produced nearly no corporate books
and records for Timeshare Relief.

95. Notwithstanding the fact that she was President and Secretary of
Timeshare Relief for years, Martin could not testify as to the occurrence of any
shareholder meetings, meetings of the board of directors, the existence of a
corporate book identifying issuance or transfer of shares in Timeshare Relief,
any corporate resolutions or provide any meaningful details concerning books
and records normally maintained by an entity which had the level of business
activity of Timeshare Relief. (According to its 2012 tax return, Timeshare
Relief generated gross revenue of \$54 million.)
* * *

1 156. The Timeshare Relief Owner Database, which was transferred to
2 Attitude Marketing, was subsequently transferred to Aston Business Solutions.

3 157. Aston Business Solutions still uses the timeshare owner database
4 to generate money from companies that offer Timeshare Exit Services to
5 owners, including Wyndham owners.

6 158. Timeshare Relief developed and maintained a timeshare owner
7 database with information about more than eight (8) million owners of
8 timeshare interests (the "Owner Database").

9 * * *

10 161. Sometime before August of 2013, Attitude Marketing purportedly
11 "acquired" the Owner Database and, in August of 2013, Attitude Marketing
12 "transferred" the Owner Database to Aston Business Solutions.

13 162. After the transfer, the gross revenue of Attitude Marketing (owned
14 by MacMillan and Martin) plummeted,⁸ while the fortunes of Aston Business
15 Solutions (supposedly owned by Martin's daughter) skyrocketed.⁹

16 ⁸ In 2014 Attitude Marketing's gross revenue was \$2,196,546; in 2015 Attitude
17 Marketing's gross revenue was \$1,057,862; in 2016 Attitude Marketing's gross
18 revenue was \$1,165,698.

19 ⁹ Per its tax returns, Aston Business Solutions generated more than \$10.4 million in
20 2015, more than \$8 million in 2016, and more than \$3.5 million in 2017. A great deal
21 of the funds generated by Aston Business Solutions were funneled to MacMillan and
22 Martin through Attitude Marketing.

23 * * *

24 173. After entry of the Settlement Agreement [between MacMillan,
25 some of Debtors' businesses, and Wyndham], Aston Business Solutions was
26 a "client" of Attitude Marketing.

27 174. Aston Business Solutions provided nearly all of the income
28 received by Attitude Marketing since the Debtors filed bankruptcy.

* * *

181. After entry of the Settlement Agreement, Aston Business
Solutions' clients were referred to it by MacMillan. [SAC (adv. dkt. 151)
(emphasis added)]

d. The MSJ's argument regarding § 727(a)(5)

The MSJ's argument regarding § 727(a)(5) is brief. It asserts:

Pursuant to financial records that have been uncovered by [Wyndham]
through discovery, Debtors generated millions of dollars every year in revenue
through their myriad of businesses and DBAs, yet the Debtors have failed to
satisfactorily explain their loss and deficiency of assets to meet their liabilities.
In short, the Debtors' business have generated hundreds of millions of dollars
in revenue but MacMillan and Martin come to this Court supposedly penniless
and without explanation for what happened to their ill-gotten gains. ...

Evidence has shown that MacMillan and Martin's net worth was
substantial. However, the hundreds of millions generated by the MacMillan
Companies has somehow simply evaporated. [Adv. dkt. 98, pp. 16:16-17:5
(emphasis added)]

1 This argument is insufficient for two alternative reasons.

2 **(i) Wyndham’s assertion that Debtors failed to “explain” a loss or**
3 **deficiency of assets assumes, without evidence, that Debtors**
4 **were asked for an explanation**

5 There is insufficient evidence that Debtors were ever asked to explain their loss
6 or deficiency of these alleged assets. A declaration in support of the MSJ does include
7 some discovery requests (adv. dkt. 100, Ex. 10, at PDF pp. 25-40), but there is no copy
8 of any response to that request. More broadly, there is no evidence to support the
9 SAC’s assertion that Debtors have “produced nearly no” records in response to
10 discovery requests SAC (adv. dkt. 151, ¶ 94), and in any event that allegation in the
11 SAC is not included in the MSJ.

12 Nor does Wyndham point to any question on Debtors’ bankruptcy schedules or
13 Statement Of Financial Affairs (“SOFA”) that required Debtors to explain these alleged
14 losses. This Bankruptcy Court recognizes that the SOFA includes questions about past
15 income and loss of assets; but those questions have limitations, such as how far back
16 Debtors must answer, and to what extent Debtors must provide information about their
17 businesses, as distinguished from their own financial affairs. Without reference to
18 specific questions that Debtors should have answered differently, there is no basis for
19 summary judgment under § 727(a)(5).

20 **(ii) Alternatively, the MSJ does not sufficiently identify exactly what**
21 **“loss” or “deficiency” of assets Debtors are accused of not**
22 **explaining**

23 The MSJ, as quoted above, alleges that Debtors’ businesses and DBAs
24 generated millions of dollars in income and that the proceeds “somehow simply
25 evaporated.” MSJ (adv. dkt. 98), pp. 16:16-17:5. But there is insufficient evidence of
26 the specific proceeds at issue.

27 Debtors do not dispute that they and their companies used to earn substantial
28 revenues. But they explain that a prepetition settlement with Wyndham forced them

1 and “various entities” to stop providing services to their traditional customer base –
2 timeshare owners – while allegedly permitting them to engage in marketing services to
3 third parties under certain conditions. MacMillan Decl. (adv. dkt. 112), p. 3:12-16. This
4 caused “financial distress” and by the time Debtors were in bankruptcy the businesses
5 “were not fully staffed.” *Id.* at p. 5:5-6.

6 True, Debtors’ explanation is vague, and they offer no documentary support for
7 that defense, but that is putting the cart before the horse. First Wyndham’s MSJ has to
8 produce evidence that Debtors had specific assets such as revenues from specific
9 businesses prepetition, and that there is an unexplained loss or deficiency of those
10 assets. Wyndham does not do so.

11 Wyndham’s statement of undisputed facts (“Statement”) does not address most
12 of the alleged “myriad of businesses and DBAs” referenced in the MSJ. For example,
13 although the SAC devotes substantial attention to Timeshare Relief, Aston Business
14 Solutions, and what happened to the Owner Database, Wyndham’s evidence in support
15 of the MSJ does not address any of these things. Instead it includes a single reference
16 to a single business, Attitude Marketing:

17 20. Tax returns reflect that the gross revenue for Attitude Marketing was
18 more than \$54 million in 2012 and more than \$26 million in 2013. Decl. D.
19 Eliades, Exh. 3; Attitude Marketing Tax Returns for the years 2012 and 2013.
[Statement (adv. dkt. 99), p. 5:16-19 (emphasis added)]

20 But the declaration of Mr. Eliades in support of the MSJ (adv. dkt. 100) does not
21 include any of the referenced tax returns. In actuality, although the Statement itself
22 does not explain that it is referring to a different declaration of Mr. Eliades, the MSJ
23 (adv. dkt. 98, p. 2:5-6) defines the “Eliades Declaration” as a declaration filed in the
24 main bankruptcy case – not in this adversary proceeding. That different declaration and
25 exhibits start on page 73 of Wyndham’s response to Debtors’ objection to Wyndham’s
26 claim (the “Claim Objection Opposition,” MacMillan Bankruptcy, dkt. 326).

27 Debtors apparently were confused by this indirect reference to a different
28 declaration than the one accompanying the MSJ. On several factual issues they object,

1 “the cited evidence does not exist as cited.” Evid. Obj. (adv. dkt. 113) p. 2, at lines 8,
2 13, 18, 22.

3 But even assuming, for the sake of discussion, that Debtors should have realized
4 which declaration was being referenced, the 2012 and 2013 tax returns of Attitude
5 Marketing are not enough. That evidence of past income of a single business does
6 nothing to undercut Debtors’ explanation that Wyndham itself caused the loss of their
7 business’ income, through the prepetition settlement that restricted what Debtors and
8 their businesses could do.

9 For each of the foregoing reasons, this Court cannot grant summary judgment
10 under § 727(a)(5).

11 **e. § 727(a)(4)**

12 § 727(a)(4) provides:

13 (a) The court shall grant the debtor a discharge, unless—

14 * * *

15 (4) the debtor knowingly and fraudulently, in or in connection with the
16 case—

17 (A) made a false oath or account;

18 (B) presented or used a false claim;

19 (C) gave, offered, received, or attempted to obtain money, property,
20 or advantage, or a promise of money, property, or advantage, for
21 acting or forbearing to act; or

22 (D) withheld from an officer of the estate entitled to possession
23 under this title, any recorded information, including books,
24 documents, records, and papers, relating to the debtor’s property or
25 financial affairs [§ 727(a)(4) (emphasis added)]

26 Wyndham’s MSJ focuses on the emphasized language above. The MSJ
27 identifies several separate allegedly false oaths or accounts.

28 **(i) Equity interests in Attitude Marketing**

The MSJ states:

Martin represented in her bankruptcy schedules that she had an ownership interest in Attitude Marketing. Post-petition, however, Martin unequivocally testified under oath that she did not have an ownership interest in Attitude Marketing at the time of her bankruptcy filing. [MSJ (adv. dkt. 98), p. 6:19-22.]

1 But Martin explains that a “memo on [a \$10,615.57] check was erroneous” in
2 stating that it was issued on account of an equity interest (Martin Decl., adv. dkt. 112,
3 p. 2:8-14), and the reasonable inference is that Martin was confused, but attempting to
4 be fully candid, when she checked the box on her bankruptcy schedules indicating that
5 that she had an interest in an “undetermined” amount in Attitude Marketing. MSJ (adv.
6 dkt. 98) p. 6, n. 5, at lines 24-26. Martin now declares: “I was not, nor have I ever been
7 an owner, or an owner of equity in Attitude Marketing, Inc.” Martin Decl. (adv. dkt. 112),
8 p. 2:13-14.

9 In a summary judgment context, this Court cannot assess credibility. In any
10 event there is no evidence from which to question Martin’s explanation.

11 **(ii) Nevada litigation**

12 Wyndham accuses Debtors of knowingly and fraudulently failing to disclose
13 some litigation (the “Nevada National” litigation). MSJ (adv. dkt. 98), pp. 12:21-14:3.

14 But MacMillan declares:

15 With regard to the Nevada National litigation, this matter was a frivolous
16 lawsuit filed against Attitude Marketing, Aston Business Solutions, Cynthia
17 Martin and myself. The case was quickly settled in mediation, before the
18 bankruptcy, neither Cyndy Martin or myself or Attitude Marketing received
anything out of it. I[t] was simply an oversight not to list it. [MacMillan
Decl. (adv. dkt. 112), p. 6:14-17]

19 Again, on summary judgment this Court cannot assess credibility. In addition,
20 given the dozens of businesses and DBAs of Debtors, and the number of disputes and
21 lawsuits they appear to have had, there is no evidence from which to question Debtors’
22 explanation that omitting this one piece of minor litigation was simply an oversight.

23 **(iii) Whether clients of Debtors’ businesses must be treated as**
24 **Debtors’ own creditors**

25 Wyndham accuses Debtors of knowingly and fraudulently failing to list on their
26 creditor matrix and bankruptcy schedules “thousands of creditors” – namely, timeshare
27 owners who allegedly are “actual or potential creditors” of Debtors. MSJ (adv. dkt. 98),
28 p. 14:4-17 *et seq.* Wyndham notes in particular certain of its own timeshare owners

1 who had involvement with Debtors or their businesses. But Debtors have argued that
2 the timeshare owners were clients of Debtors' businesses, not Debtors themselves. As
3 MacMillan explains:

4 15. I listed all consumers that I knew who were making claims
5 against me on my bankruptcy schedules. I believe it was in my best
6 interest to list all potential claimants. In addition, I had no way of knowing
7 who made the complaints [to governmental entities about Debtors'
8 businesses]. The complaints that were known about were listed on the
9 schedules.

10 16. With regard to the timeshare owners who remitted payments
11 directly to Wyndham, such as money orders or personal checks made
12 payable to Wyndham in 2016 and 2017 to have their timeshares
13 transferred, I did not list those owners as creditors on my bankruptcy
14 schedules as they were not creditors. They were Wyndham clients and
15 we were in the process of actively working with Wyndham to return these
16 timeshares pursuant to the settlement agreement. As such at that time, I
17 did not deem them to be creditors because I was simply facilitating the
18 transfer of the timeshares back to the developer and was trying to
19 complete a job. Our company in conjunction with Wyndham contacted the
20 owners to let them know that Wyndham would be taking the
21 properties/timeshares back. Included as part of the settlement agreement
22 with Wyndham was a letter from Wyndham (see settlement agreement ¶15)
23 that was sent to all Wyndham owners of the master list that read
24 "Wyndham will accept a return of your Wyndham timeshare interest if you
25 execute the enclosed documents".

26 * * *

27 18. I highly dispute the statement that "9000 consumers paid the
28 MacMillan entities to transfer the time shares and those interests were not
transferred". The vast majority of timeshares were transferred. Every
effort was made to complete every transfer that the company had
knowledge of. The 9,000 number is hearsay and highly inflated.
[MacMillan Decl. (adv. dkt. 112), pp. 6:18-7:18]

In other words, Debtors did not list their business's customers as their own. That
appears to be a reasonable explanation.

True, the SAC summarizes assertions in some prior litigation that Debtors are
alter egos of their businesses. But Debtors claim they attempted to list anyone who was
actually asserting liability against them and, as Debtors point out, it would be in their
own interests to do so, in order to discharge those debts.

Wyndham cites no authority that Debtors had a duty to treat allegations of alter
ego liability in other matters as if they transformed every claim against Debtors'

1 businesses into claims against Debtors themselves. On the record presented, this
2 Court cannot conclude that Debtors' "knowingly and fraudulently" failed to list creditors.

3 For all of the foregoing reasons, this Court cannot grant summary judgment
4 under § 727(a)(4).

5 **f. § 727(a)(6)**

6 § 727(a)(6) provides:

7 (a) The court shall grant the debtor a discharge, unless—
* * *

8 (6) the debtor has refused, in the case—

9 (A) to obey any lawful order of the court, other than an order to
respond to a material question or to testify;

10 (B) on the ground of privilege against self-incrimination, to respond
11 to a material question approved by the court or to testify, after the
debtor has been granted immunity with respect to the matter
concerning which such privilege was invoked; or

12 (C) on a ground other than the properly invoked privilege against
13 self-incrimination, to respond to a material question approved by
the court or to testify [§ 727(a)(6) (emphasis added)]

14 The MSJ asserts that Debtor MacMillan refused to obey this Court's order, in the
15 form of a subpoena to produce certain records of Timeshare, and instead destroying
16 those documents "less than three weeks" after those documents were required to be
17 produced. MSJ (adv. dkt. 98), p. 9:15-28. But, as explained in the Interim Memdispo:

18 Debtor MacMillan declares that the documents were destroyed
19 because "[w]e had occupied the building since 2005," they had an
"accumulation of paperwork in the ordinary business," and they had to
20 vacate the premises at the end of 2016 due to a foreclosure. MacMillan
Decl. (Wynd-Mac-Adv.dkt. 112), p. 5:17-26. He adds that he "believed the
21 best course of action at the time was to properly dispose of redundant and
irrelevant paperwork" and that none of these actions "affected any of the
22 financial disclosures." *Id.* [Interim Memdispo (adv. dkt. 144, p. 7:1-8)]

23 As noted in the Interim Memdispo, "the parties' allegations raise credibility
24 issues, that cannot be decided on summary judgment. Wyndham has not established
25 the lack of a genuine dispute as to these factual allegations." Interim Memdispo (adv.
26 dkt. 144, p. 7:8-10.

27 For the foregoing reasons, this Court cannot grant summary judgment under
28 § 727(a)(6).

1 **3. CONCLUSION**

2 For the foregoing reasons, the MSJ's claims for relief under § 727(a)(4), (5) and
3 (6) must be denied. Together with the Interim Memdispo, this resolves all claims in the
4 MSJ.

5 Debtors are directed to lodge a proposed order denying these remaining claims
6 in the MSJ within seven days after entry of this Memorandum Decision on the docket.

7 ###

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

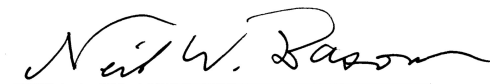
Date: April 9, 2020

25

26

27

28



Neil W. Bason
United States Bankruptcy Judge