

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: DAVID PETER BERGE,
Debtor.

MARKETGRAPHICS RESEARCH GROUP, INC.,
Plaintiff-Appellant,

v.

DAVID PETER BERGE,
Defendant-Appellee.

No. 18-6177

Appeal from the United States Bankruptcy Court for
the Middle District of Tennessee at Nashville.
Nos. 3:13-ap-90400; 3:13-bk-07626—Marian F.
Harrison, Judge.

Argued: June 19, 2019

Decided and Filed: March 27, 2020

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Rehearing Denied: May 6, 2020

Before MOORE, COOK, and READLER, Circuit
Judges.

OPINION

CHAD A. READLER, Circuit Judge.

For the Berge family, federal litigation unfortunately has become something of a family affair. David Berge and his parents, Don and Martha, were named as defendants in an unfair competition lawsuit brought by MarketGraphics Research Group, Inc., a company with which Don had previously been associated. Before MarketGraphics could proceed to judgment, Don and Martha filed for Chapter 7 bankruptcy. And when MarketGraphics ultimately obtained a judgment against David, he soon began pursuing Chapter 7 proceedings of his own.

David's Chapter 7 filing made MarketGraphics a judgment creditor in David's bankruptcy proceeding. MarketGraphics initiated adversary proceedings to assert that its claim should be exempted from discharge in accordance with 11 U.S.C. § 523(a)(6), which prevents a debtor from discharging claims for injuries he willfully and maliciously caused. According to MarketGraphics, the earlier judgment preclusively established such conduct on David's part. The bankruptcy court disagreed and denied

MarketGraphics's request to exempt its claim from discharge.

We agree with the bankruptcy court. Nothing in the record of these proceedings or the proceedings for the underlying judgment supports a finding that David acted with the requisite intent under § 523(a)(6) to harm MarketGraphics. Nor do we accept MarketGraphics's contention that we are precluded from reviewing that issue in the first instance. Accordingly, we **AFFIRM** the judgment of the bankruptcy court that David's debts are dischargeable.

I. BACKGROUND

A. David Works For His Father, An Independent Contractor For MarketGraphics.

MarketGraphics collects, analyzes, and distributes data related to residential housing markets. For the Memphis market, Don served for many years as MarketGraphics's licensee. Working as an independent contractor, Don collected data and maintained the company's local client relationships. To assist with data collection, MarketGraphics licensed its maps and other intellectual property to Don.

From the time he was in high school, David often assisted his father in the business. Don and David would "driv[e] the market" to determine growth and collect data to generate reports for MarketGraphics. These efforts continued until 2012, when Don terminated his relationship with MarketGraphics to venture out into the industry on his own. David, who by that time was a real estate agent living in

Nashville, agreed to help his father with his new endeavor.

Don established a new business under the name Realysis. Realysis consisted of three single-member LLCs. Don made himself the sole member of Realysis of Jackson, made his wife, Martha, a teacher, the sole member of Realysis, and made David the sole member of Realysis of Memphis.

MarketGraphics sent letters to its Memphis clients letting them know that Don retired and that the company would service their accounts directly. Despite non-compete and confidentiality provisions in Don's independent contractor agreement with MarketGraphics, Realysis also wanted to service those clients. So Realysis wrote to MarketGraphics's clients to "clear up the confusion" regarding the distinctions between MarketGraphics Research Group in Nashville and Realysis of Memphis, LLC as well as Don and David's roles in MarketGraphics and Realysis, respectively. The letter stated that Don and David gathered all of the information for MarketGraphics for fifteen years, that David was now the sole owner of Realysis of Memphis, LLC, and that Realysis would produce reports every quarter going forward. The letter was sent under David's name and from his Realysis email address. Realysis's letter generated yet one more letter, this time one from MarketGraphics to Realysis reminding Realysis that Don had signed a contract with non-compete and confidentiality provisions. But Realysis continued to compete against MarketGraphics—and effectively so. In under a year, MarketGraphics lost 75 percent of its Memphis-area customers to Realysis.

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