

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

David William Russell,

CASE NO. 93-22321

Debtor.

Joel Conklin,

Plaintiff,

A.P. NO. 95-2392

vs.

David William Russell,

Defendant,

Austin S. Edgar, Inc.,

Plaintiff,

A.P. NO. 95-2393

vs.

David William Russell,

DECISION & ORDER

Defendant.

BACKGROUND

On October 21, 1993, the Debtor, David William Russell (the "Debtor"), who was in the wholesale and retail florist business, filed a petition initiating a Chapter 11 case. On his Schedules, filed as required by Section 521 and Rule 1007, the Debtor listed: (1) as his only assets, miscellaneous personal property valued at \$5,350.00, which did not include any checking, savings, brokerage or other financial accounts; (2) priority state and federal taxes due totaling \$77,333.58;

and (3) unsecured obligations due totaling \$195,562.67, including the amounts due on judgments obtained by Joel R. Conklin ("Conklin"), scheduled for \$39,264.02, and Austin Edgar, Inc. ("Edgar"), scheduled for \$19,661.86.

The minute report filed with the Court of a Section 341 meeting (the "Chapter 11 341 Meeting"), conducted on November 30, 1993 by a staff attorney in the Office of the United States Trustee (the "U.S. Trustee"), indicated that the Debtor had testified at the Meeting that he was not currently operating a business and might seek employment in Florida.

On January 6, 1994, the Debtor filed with the U.S. Trustee and the Court a required Cash-Flow Statement of Chapter 11 Debtor-in-Possession (the "Monthly Financial Report") covering the period from November 1, 1993 through December 31, 1993. The Monthly Financial Report indicated that the Debtor had no receipts or disbursements, although it indicated that the Debtor was liable for unpaid rent of \$700.00, unpaid utilities and telephone of \$240.00 and unknown and unpaid legal and accounting expenses. This Monthly Financial Statement was affirmed by the Debtor on January 3, 1994 as being true and correct.

On January 27, 1994, the U.S. Trustee filed a Motion to Convert or Dismiss the Debtor's Chapter 11 case (the "Conversion Motion"). On January 31, 1997, the Court received the original of a January 28, 1994 letter from the attorney for the Debtor which stated that:

"Please be advised that the undersigned, on behalf of David Russell, would advise the Court that in fact we do not oppose the motion to convert this matter to a Chapter 7. Given Debtor's present lack of income, it does not seem feasible that a reasonable plan could be circulated for confirmation."

On the February 24, 1994 return date of the Conversion Motion, the Court, pursuant to

Section 1112(b) and after considering the best interests of the creditors and the estate, granted the Conversion Motion, and on March 1, 1997 an Order of Conversion (the "Conversion Order") was signed. On March 15, 1994, a trustee (the "Chapter 7 Trustee") was appointed who later conducted a Section 341 meeting (the "Chapter 7 341 Meeting") on April 8, 1994.

On March 23, 1994, the Debtor filed a Final Report and Accounting in connection with his Chapter 11 case, which indicated only that: "Debtor has incurred no unpaid debts after the commencement of the Chapter 11 case, nor is there any need for a supplemental matrix."

On January 27, 1994, Conklin commenced an adversary proceeding (the "Adversary Proceeding") to have two prepetition New York State Supreme Court, Saratoga County, Final Judgments determined to be nondischargeable under Sections 523(a)(2)(A), (a)(4), (a)(6) and (a)(7). These Judgments were entered as the result of a New York State Supreme Court, Saratoga County, action commenced by Conklin against the Debtor (the "Conklin State Court Action"). The first judgment (the "Sanction Judgment") was based on the December 24, 1992 Order which awarded Conklin attorney's fees and costs based upon "defendant's frivolous litigation conduct" in connection with a discovery motion brought on behalf of Conklin. The second judgment entered June 2, 1993 (the "Dispositive Judgment") in the total amount of \$39,264.02 was for damages (principal, interest and punitive damages) on ten separate causes of action, together with costs and disbursements. The Complaint in the Adversary Proceeding alleged that the State Court Action was based on a number of separate causes of action to recover damages resulting from: (1) the Debtor's alleged fraud in connection with Conklin's purchase of 10,000 shares of common stock in the Village Green Bookstores, Inc. (the "Village Green"); (2) the Debtor's failure to perform his obligations under a

sub-lease of a 1988 Porsche (the "Porsche") leased by Conklin from Porsche Financial Services ("Porsche Financial"); and (3) the Debtor's failure to pay a number of parking tickets which he received while using the Porsche, which remained registered to Conklin, and which Conklin was required to pay in order to be able to renew his New York State driver's license.

On June 8, 1994, an Order was entered discharging the Debtor from all of his debts with the exception of those covered by the then pending Adversary Proceeding.

On March 8, 1995, after a trial in the Adversary Proceeding, the Court: (1) determined the Sanction Judgment to be nondischargeable under Section 523(a)(6); (2) found that portion of the Dispositive Judgment which represented damages for the amounts paid by Conklin for parking tickets received by the Debtor and not paid for to be nondischargeable under Section 523(a)(6); determined that that portion of the Dispositive Judgment which represented damages in the nature of principal, interest and pro rata costs and disbursements for the \$3,550.00 paid by Conklin to the Debtor for the purchase of Village Green common stock was determined to be nondischargeable under Section 523(a)(2)(A).

On June 2, 1995, Conklin filed an Adversary Proceeding (the "Conklin Adversary Proceeding") which sought to have the Debtor's discharge revoked pursuant to Sections 727(d)(1) and (d)(2).¹

¹ Section 727 provides in pertinent part:

- (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

The Complaint in the Conklin Adversary Proceeding alleged that: (1) the Debtor had for a number of years hidden assets in his wife, Susan C. Russell's ("Susan Russell") name and used bank accounts in her name to run his businesses; (2) in his bankruptcy, the Debtor had failed to disclose a number of assets, including: (a) a brokerage account with Charles Schwab, Inc., maintained in joint names with his wife, opened in 1986 and closed in June, 1994; (b) interests in Daniel's Restaurant of Newark, New York, Inc., Pro-May Corporation, Flowers by Fidele and World Class Cleaners; (c) a Dean Witter brokerage account (the "Dean Witter Account") maintained in the Debtor's name, opened in June, 1993; and (d) a brokerage account maintained in Susan Russell's name, which was funded in whole or in part with funds from the Debtor's businesses; (3) prior to and while his Chapter 7 case was pending, the Debtor negotiated checks in the names of various corporations in which he had an interest, and ran them through bank accounts maintained in Susan Russell's name; (4) before the filing of his Chapter 11 petition, while operating as a debtor-in-possession, and after the conversion of his case to a Chapter 7 case, all without disclosure to the Bankruptcy Court, the

-
- (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge; [or]
 - (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee.

U.S. Trustee, his Chapter 7 Trustee or his creditors, the Debtor continued to use Susan Russell's bank accounts to hide his business income; (5) the Debtor's use of his wife's bank accounts and placing of assets in her name, both prior to his petition, during his Chapter 11 case, and after the conversion of his case to a Chapter 7 case, demonstrated a comprehensive and persistent pattern of fraud on creditors and the Bankruptcy Court; (6) in March, 1994, after the conversion to a Chapter 7 case, the Debtor purchased several drycleaning businesses, Williamson Laundromat and World Class Cleaners which he had interests in prior to both the filing of his Chapter 11 petition and the conversion to Chapter 7, and he failed to disclose those interests; (7) in February, 1994, Susan Russell received a check in the amount of \$30,000.00 from a business associate of the Debtor's, which was alleged to be the repayment of a loan, and the Debtor had an interest in those funds prior to and during his Chapter 11 case; and (8) Conklin learned of the foregoing only after June 8, 1994, when the Debtor's discharge was entered, as the result of discovery in the Adversary Proceeding.

On July 7, 1995, the Debtor filed an Answer to the Conklin Adversary Proceeding which denied its substantive allegations and alleged that the Debtor had no ownership interests in Pro-May Corporation or Daniel's Restaurant of Newark, New York, Inc., both of which were defunct corporations, and that World Class Cleaners had been acquired by the Debtor and another individual post-petition with no money down, and the seller had subsequently repossessed the business.

On January 6, 1996, Edgar, which held a January 4, 1990 judgment against the Debtor (the "Edgar Judgment"), filed an Adversary Proceeding against the Debtor (the "Edgar Adversary Proceeding") which also sought to have the Debtor's discharge revoked pursuant to Section 727(d)(1) and (d)(2). The Complaint in the Edgar Adversary Proceeding set forth essentially the

same allegations as contained in the Complaint in the Conklin Adversary Proceeding.

On December 18, 1995, the attorney for Edgar delivered to the Court various bank account records, which had been turned over to the attorneys for Conklin and Edgar pursuant to subpoenas, for the Court to retain so that interested parties, including the attorney for the Debtor, could review them. On January 18, 1996, upon the request of the Internal Revenue Service (the "IRS"), the Federal Bureau of Investigations (the "FBI") and the Office of the United States Attorney for the Western District of New York (the "U.S. Attorney"), the Court released the documents to the U.S. Attorney for review by those agencies. Thereafter, on May 1, 1996, with the consent of the attorney for the Debtor, the records were returned to the attorney for Edgar.

After the Debtor elected to proceed pro se in the Conklin and Edgar Adversary Proceedings, a joint trial was conducted on October 17 and 18 and November 18, 1996.

SUMMARY OF DECISION

The Debtor's discharge is revoked and his discharge is denied because Conklin and Edgar proved by a preponderance of the evidence presented and admitted at trial that: (1) the Debtor's discharge was obtained through his fraud, and neither Conklin nor Edgar knew of such fraud until after his discharge was entered, in that the Debtor: (a) with intent to hinder, delay and defraud his creditors, the U.S. Trustee, the Court and his Chapter 7 Trustee, concealed property of the estate after the date of the filing of his petition; (b) without justification concealed financial records, from which his financial condition or business transactions might be more fully ascertained; and (c) knowingly and fraudulently made false oaths or accounts; and (2) the Debtor acquired property after the filing of his petition that was property of the estate, and he knowingly and fraudulently failed to report the

acquisition of such property to the U.S. Trustee, the Court or his Chapter 7 Trustee, and neither Conklin nor Edgar discovered the existence of such property or the failure to report it until after the Debtor's discharge was entered.

DISCUSSION

I. SECTION 727(d)

For a debtor's discharge to be revoked under Section 727(d)(1), it must be shown that: (1) the discharge was obtained by fraud in fact; (2) the party seeking revocation did not know of the fraud before the granting of the discharge; and (3) the fraud, if known, would have resulted in the denial of a discharge under Section 727(a).² See *In re George*, 179 B.R. 17 (Bankr. W.D.N.Y. 1995).

² Section 727(a) provides in pertinent part:

- (a) The court shall grant the debtor a discharge, unless—
- (1) the debtor is not an individual;
 - (2) the debtor, with intent to hinder, delay, or defraud a creditor or an 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—
 - (A) property of the debtor, within one year before the date of the filing of the petition; or
 - (B) property of the estate, after the date of the filing of the petition;
 - (3) 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 of the circumstances of the case;

For a debtor's discharge to be revoked under Section 727(d)(2), it must be shown that the debtor knowingly and fraudulently failed to report the acquisition of property after the filing of the petition. This may be proved by showing that the debtor had access to the omitted information and either knew that failure to disclose it would be seriously misleading or that the debtor acted so recklessly as to imply fraudulent intent. *See In re Puente*, 49 B.R. 966 (Bankr. W.D.N.Y. 1985). It also must be shown that the party seeking revocation did not know of existence of the property or the failure to report it before the granting of the discharge. *See In re George*, 179 B.R. 17 (Bankr. W.D.N.Y. 1995).

II. FINDINGS OF FACT

I make the following findings of fact:

A. **ACCOUNT #09-900330-15 MAINTAINED AT CANANDAIGUA NATIONAL BANK & TRUST COMPANY IN THE NAME OF SELECTED FLOWERS (THE "SELECTED FLOWERS ACCOUNT"):**

1. On April 2, 1993, prior to the filing of his petition and while the Conklin State Court Action was pending and after the Edgar Judgment had been

-
- (4) the debtor knowingly and fraudulently, in or in connection with the case—
 - (A) made a false oath or account;
 - (B) presented or used a false claim;
 - (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
 - (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

obtained, the Debtor opened the Selected Flowers Account.

2. The Selected Flowers Account signature card (Plaintiff's Exhibit 6 at Trial) and Resolution for Bank Accounts (Exhibit 7 at Trial):
 - a. listed Selected Flowers as a sole proprietorship of the Debtor as of April 2, 1993;
 - b. showed the Debtor's Social Security number, for tax reporting purposes;
 - c. listed an address of 707 Pittsford-Victor Road, Pittsford, New York, one of the locations where the Debtor conducted his flower business at the time; and
 - d. showed the additional signature of the Debtor's father, Joe Russell, as of July 6, 1993, and indicated that he was an additional owner.
3. The April through September, 1993 monthly statements for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed total deposits into the Account for that pre-petition period of \$30,850.94.
4. The October, 1993 monthly statement for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed:
 - a. A balance of \$18.18 on October 21, 1993, the date of the filing of the Debtor's petition;
 - b. A deposit of \$500.00 into the Account on October 26, 1993, five days after the filing of the Debtor's petition;
 - c. Deposits and an interest credit to the Account from the date of the filing of the Debtor's petition through October 31, 1993 totaling \$1,294.05; and
 - d. A balance as of October 31, 1993 of \$836.31.
 - e. On October 28, 1993, Check #1052, dated October 21, 1993, signed by David Russell and made payable to the Debtor's attorney in the Chapter 11 case in the amount of \$720.00 was honored (Plaintiff's Exhibit 326 at Trial).

5. The November, 1993 monthly statement for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed:
 - a. Deposits totaling \$7,755.89;
 - b. Checks honored totaling \$6,426.57; and
 - c. A balance, as of November 30, 1993, of \$2,165.63.

6. The December, 1993 monthly statement for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed:
 - a. Deposits totaling \$2,969.18;
 - b. Checks honored totaling \$3,774.23; and
 - c. A balance, as of December 31, 1993, of \$1,360.58.

7. The January, 1994 monthly statement for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed:
 - a. Deposits totaling \$2,637.87;
 - b. Checks honored totaling \$4,042.32; and
 - c. A balance, as of January 31, 1994, of -\$43.94.

8. The February, 1994 statement for the Selected Flowers Account (Plaintiff's Exhibit 3 at Trial) showed:
 - a. Deposits totaling \$7,189.94;
 - b. Checks honored totaling \$7,133.94; and
 - c. A balance, as of February 28, 1994, of \$12.09.

9. Cash was deposited into the Selected Flowers Account as follows:
 - a. \$6,945.00 for the period of November 1, 1993 - December 31, 1993, the period covered by the Monthly Financial Report;

- b. \$10,252.00 for the period between October 21, 1993, the date of the filing of the Debtor's petition and February 24, 1994, the date when the Court granted the Conversion Motion; and
 - c. \$13,852.00 for the period from October 21, 1993 to March 1, 1994 when the Court signed the Conversion Order.
10. Checks deposited into the Selected Flowers Account for the period November 1, 1993 - December 12, 1993, a period covered by the Monthly Financial Report, included:
- a. Check #4137, drawn on an account in the name of Doris & Walter Weick, dated December 1, 1993, made payable to David Russell in the amount of \$16.20, which indicated that it was for "flowers"; and
 - b. Check #389, drawn on an account in the name of John C. Palermo, dated December 25, 1993, made payable to David Russell in the amount of \$10.00, which indicated that it was for "flowers".
11. A deposit made to the Selected Flowers Account on October 26, 1993 included Check #165 drawn on an account in the name of Lorane C. Chapman, dated October 25, 1993, made payable to David Russell in the amount of \$15.00, indicated that it was for "flowers - graves".

B. SELECTED FLOWERS:

1. A transcript of the Chapter 11 341 Meeting on November 30, 1993 (Plaintiff's Exhibit 4 at Trial) indicated the Debtor testified under oath that he had operated a "business where I sell wholesale to certain parties and then I also have street vending, which is done in various locations around Monroe County." and that the only d/b/a's for the business were Western New York Wholesale Florists, Rochester Hodge Florist, Tri-City Flowers, Hodge Union Florists, Uptown Wholesale, Upstate New York Wholesale Florists and David Russell Enterprises.
2. A transcript of the Chapter 11 341 Meeting conducted on November 30, 1993 (Plaintiff's Exhibit 4 at Trial) indicated that the Debtor testified under oath with respect to bank accounts, the operation of a business, and income or partners in his business, as follows:

TRUSTEE: You have no bank accounts whatsoever at the present time?

MR. RUSSELL: No, I don't.

TRUSTEE: Do you have any partners in your business?

MR. RUSSELL: No, I don't.

TRUSTEE: At the present time you are just not operating with no income?

MR. RUSSELL: That's correct.

C. 505 WEST MAIN STREET, PALMYRA, NEW YORK ("WEST MAIN STREET"):

1. At both his Chapter 11 and Chapter 7 341 Meetings, the Debtor testified that he formerly owned West Main Street, but that he had lost it approximately ten months prior to the filing of his petition when title was reconveyed to the prior owner who had maintained a mortgage on the property.
2. During the pendency of his Chapter 11 case, the Debtor received and cashed six checks drawn on an account in the name of Ron's Auto Service, located at 505 West Main Street, made payable to Dave Russell, indicating that they were for "rent" (Plaintiff's Exhibit 339 at Trial), which checks totaled \$4,523.00 as follows:
 - a. Check #1030, dated November 23, 1993 in the amount of \$800.00;
 - b. Check #1066, dated December 6, 1993 in the amount of \$1,000.00;
 - c. Check #1102, dated December 22, 1993 in the amount of \$445.00;
 - d. Check #1176, dated December 24, 1993 in the amount of \$858.00;
 - e. Check #1202, dated February 1, 1994 in the amount of \$700.00; and
 - f. Check #1262, dated December 25, 1994 in the amount of \$720.00.

D. ACCOUNTS MAINTAINED AT THE ROCHESTER COMMUNITY

**SAVINGS BANK IN THE NAME OF DEBTOR'S WIFE, SUSAN RUSSELL
(THE "RCSB ACCOUNT")**

1. There were a number of bank accounts maintained at the Rochester Community Savings Bank ("RCSB") in the name of Susan Russell, the Debtor's wife, including accounts numbered #0330243393 (referred to as "Account #393"), checking account #0342520178 (referred to as "Account #20178"), #0330227317 (referred to as "Account #317"), #9001537406 (referred to as "Account #406), and #9001819309 (referred to as Account #309").

2. At his Chapter 11 341 Meeting, the Debtor testified that two of the d/b/a's that he had started and did business under were Rochester Hodge Florist and Hodge Union Florists.

3. From October 1, 1993 through November 24, 1993, there were eleven checks drawn on Account #20178, signed by Susan Russell, and made payable to David Russell, which were endorsed in blank by David Russell on the back of each check. Each check was then deposited into the Fleet Bank account of Ziembiec Wholesale Florists, Inc. These checks were as follows:

- a. Check #1001, dated October 1, 1993, prior to the filing of the Debtor's petition, in the amount of \$150.00 (Plaintiff's Exhibit 64 at Trial);
- b. Check #1005, dated October 9, 1993, prior to the filing of the Debtor's petition, in the amount of \$100.00 (Plaintiff's Exhibit 65 at Trial);
- c. Check #1011, dated October 14, 1993, prior to the filing of the Debtor's petition, in the amount of \$125.00 (Plaintiff's Exhibit 66 at Trial);
- d. Check #1035, dated November 4, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$100.00 (Plaintiff's Exhibit 67 at Trial);

- e. Check #1048, dated November 11, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$50.00 (Plaintiff's Exhibit 68 at Trial);
- f. Check #1050, dated November 12, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$100.00 and which bears a notation on the front of "Rochesters Hodge" (Plaintiff's Exhibit 69 at Trial);
- g. Check #1053, dated November 20, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$200.00 (Plaintiff's Exhibit 70 at Trial);
- h. Check #1060, dated November 21, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$50.00 (Plaintiff's Exhibit 71 at Trial);
- i. Check #1061, dated November 22, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$100.00 and which bears a notation on the front of "Rochester Hodge" (Plaintiff's Exhibit 72 at Trial);
- j. Check #1062, dated November 23, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$200.00 (Plaintiff's Exhibit 73 at Trial); and
- k. Check #1035, dated November 24, 1993, subsequent to the filing of the Debtor's petition, in the amount of \$200.00 and which bears a notation on the front of "Roch. Hodge" (Plaintiff's Exhibit 74 at Trial).

E. BROKERAGE ACCOUNTS MAINTAINED WITH CHARLES SCHWAB ("SCHWAB"), DEAN WITTER REYNOLDS, INC. ("DEAN WITTER") AND OLDE DISCOUNT CORPORATION ("OLDE")

- 1. Prior to the filing of his petition, the Debtor maintained an account with Dean Witter opened in May, 1993 and closed in August, 1993, which was assigned account #476-138468-4-099 (the "Dean Witter Account").

2. On July 6, 1993, within two months after the Dispositive Judgment was granted, a check on the Dean Witter Account, made payable to David Russell in the amount of \$1,059.75, dated July 1, 1993, was deposited into Account #20178, maintained in the name of Susan Russell (Plaintiff's Exhibit 126 at Trial).

3. A transcript of the Chapter 11 341 Meeting conducted on November 30, 1993 (Plaintiff's Exhibit 4 at Trial) indicated that the Debtor testified under oath with respect to transfers as follows:

TRUSTEE: ... the debtor lists all property other than property transferred during the ordinary course of business and financial...within one year immediately preceding the commencement of this case. You have indicated that is.... The next question asked is there any assets that you owned within the last year that have been transferred either by gift or security within the last year? Is that a true statement that there have been no such transfers?

MR. RUSSELL: No, there hasn't

4. The Debtor and Susan Russell maintained brokerage account #7707-7243 with Schwab (the "Schwab Account").

5. In July, 1993, within two months after the Dispositive Judgment was granted, the following checks drawn on the Schwab Account totaling \$8,429.26 were deposited into Account #406, maintained in the name of Susan Russell:

- a. Check #35565, made payable to David W. Russell and Susan C. Russell, joint tenants, in the amount of \$1,751.69, deposited on July 9, 1993 (Plaintiff's Exhibits 23 and 23-A at Trial);
- b. Check #01011, dated July 12, 1993, made payable to David W. Russell and Susan C. Russell, joint tenants, in the amount of

\$2,725.52, deposited on July 12, 1993 (Plaintiff's Exhibits 24 and 24-A at Trial); and

- c. Check #01059, dated July 15, 1993, made payable to David W. Russell and Susan C. Russell, joint tenants, in the amount of \$3,952.05, deposited on July 15, 1993 (Plaintiff's Exhibits 25 and 25-A at Trial).

6. The October, 1993 monthly statement for the Schwab

Account (Plaintiff's Exhibit 2 at Trial) showed:

- a. An opening cash balance on October 1, 1993 in the amount of \$4,305.90; and
- b. An ending cash balance on October 31, 1993 in the amount of \$2.49.

7. Account #111-02444 BJ4 was maintained at Olde in the name of Susan C.

Russell (the "Olde Account").

8. Documents (Plaintiff's Exhibit 1 at Trial) delivered pursuant to subpoena by

Olde in connection with the Olde Account showed that:

- a. An application to open the Account was signed by Susan C. Russell on February 16, 1994;
- b. The application indicated that a former or current brokerage firm's name was Dean Witter, where a margin account was maintained;
- c. The records of Olde in connection with the Olde Account included an April 27, 1994 Affidavit of Sole Ownership, executed by the Debtor, which indicated that: "I am engaged in business under the assumed name and style of Selected Flowers at 707 Pittsford-Victor Road....I am the sole owner of the business so conducted and no other person, firm or corporation has any interest therein....All property in the name of Selected Flowers belongs to me and is my sole property.";
- d. The Olde Account was initially funded on March 9, 1994 with a

credit of \$7,500.00;

e. The following checks were drawn on the Selected Flowers Account, signed by David Russell and made payable to Olde Discount for credit to the Olde Account:

i. Check dated March 30, 1994 in the amount of \$6,600.00;

ii. Check dated April 15, 1994 in the amount of \$1,110.00;

iii. Check dated April 28, 1994 in the amount of \$650.00; and

iv. Check dated May 2, 1994 in the amount of \$325.00.

9. On March 2, 1994, one day after the Conversion Order was signed, Susan Russell withdrew \$7,500.00 from Account #309 and obtained a draft for that amount made payable to Olde (Plaintiff's Exhibit 220 at Trial).

F. MISCELLANEOUS FINDINGS

1. The Debtor failed to list the Selected Flowers Account on his Schedules, as required by Section 521 and Rule 1007, and he failed to advise the U.S. Trustee of the Account at the November 30, 1993 Chapter 11 341 Meeting, even after he was specifically asked by the U.S. Trustee if he had any bank accounts. This Chapter 11 341 Meeting was conducted after the Debtor would have received the October, 1993 monthly statement which indicated that on the date of the filing of his petition, October 21, 1993, there was a positive cash balance in the Account. The Debtor was obviously aware of the existence of the Account at the time of the filing of his petition because he wrote a check on the Account to his attorney on the date of the filing of his petition and he started using the Account again on October 26, 1993, five days after the filing of the petition. By

the Chapter 11 341 Meeting on November 30, 1993, there had been \$7,755.89 deposited into the Account in the month of November alone.

2. The Debtor failed to list on his Schedules, as required by Section 521 and Rule 1007, his joint interest in the Schwab Account, and he failed to disclose his interest in the Account at both the Chapter 11 and Chapter 7 341 Meetings. The Meetings were conducted after the Debtor received the October, 1993 monthly statement which indicated that there was a positive cash balance in the Account on October 31, 1993, a date just after the filing of his petition.

3. The Debtor failed to list on item #10 of his Statement of Affairs, as required by Section 521 and Rule 1007, his July, 1993 transfer of funds from his Dean Witter Account to the RCSB Account maintained in the sole name of Susan Russell, and he failed to disclose this to the U.S. Trustee at his Chapter 11 341 Meeting even after he was specifically asked by the U.S. Trustee about any such transfers.

4. At his Chapter 11 341 Meeting on November 30, 1993, the Debtor failed to disclose to the U.S. Trustee the deposits made to the Selected Flowers Account from the date of the filing of his petition through the date of the Meeting.

5. At his Chapter 11 341 Meeting the Debtor failed to disclose the deposit on October 26, 1993 into the Selected Flowers Account of the check of Lorane C. Chapman for "flowers", and failed to more fully explain his answer that he was not conducting business in light of this deposit.

6. On the Monthly Financial Report, the Debtor failed to disclose the December, 1993 deposits into the Selected Flowers Account of the checks for "flowers" written by Doris and

Walter Weick and John C. Palermo.

7. At his Chapter 11 341 Meeting and in the Monthly Financial Report, the Debtor failed to disclose any of the eleven checks drawn on Account #20178 in October and November, 1993, made payable to the Debtor, blank endorsed, and ultimately deposited into the account of Ziembiec Wholesale Florists, Inc.

8. At his Chapter 11 341 Meeting and in the Monthly Financial Report, the Debtor failed to disclose the six checks drawn on Ron's Auto Service and made payable to the Debtor, which he subsequently cashed.

9. Significantly more money than earned by Susan Russell as a teacher, or otherwise, was run through her Rochester Community Savings Bank accounts for the period from January 1, 1992 through October 21, 1993, the date of the filing of the Debtor's petition.

10. Assets in which the Debtor had a legal or equitable interest were deposited into the accounts maintained by Susan Russell at RCSB during 1992 and 1993. This indicated a clear pattern by the Debtor of putting his business and other assets outside the reach of his creditors.

11. The Debtor continued to conduct a flower business subsequent to the filing of his petition including the period covered by the Monthly Financial Report, November 1, 1993 through December 31, 1993, all while under the jurisdiction of this Court, and he failed to disclose the same. In fact, the Debtor indicated to the U.S. Trustee at his Chapter 11 341 Meeting and the Court by his Monthly Financial Report that he was not conducting a flower business.

III. OVERVIEW

Conklin and Edgar introduced in excess of three hundred exhibits which were admitted into

evidence at trial. This documentary evidence and the testimony of the witnesses at trial proved, by a preponderance of the evidence, that: (1) the Debtor, prior to the filing of his petition, during the pendency of his Chapter 11 case, and subsequent to the conversion of his case to a Chapter 7 case, had engaged in a consistent pattern of putting assets in which he had a legal or equitable interest beyond the knowledge and reach of his creditors and the Bankruptcy System; (2) the Debtor intentionally and fraudulently failed to fully disclose all of his interests in property and his pre-petition and post-petition financial activities to the Bankruptcy Court, the U.S. Trustee and his Chapter 7 Trustee; and (3) neither Conklin nor Edgar knew of these matters prior to the entry of the Debtor's discharge.

The evidence at trial showed numerous instances of: (1) the Debtor's failure to disclose assets and potential interests he had in assets; (2) the Debtor's failure to disclose interests he had in property, businesses and business opportunities; and (3) a pattern by the Debtor of putting assets in which he had a legal or equitable interest in the name of his wife, Susan Russell.

Conklin and Edgar raised serious questions about the Debtor's legal and equitable interests in: (1) West Main Street; (2) his residence, 24 Smallwood Drive; (3) a loan to Pat Woodring; (4) Susan Russell's RCSB's accounts and Olde Discount Account; (5) the Debtor's vending licenses; (6) World Class Cleaners; (7) a continuing flower business; and (8) other drycleaning businesses and restaurants.

The Debtor's explanations at trial for his lack of disclosure regarding any legal or equitable interests he may have had in these various assets or business opportunities, included that: (1) he was assisting the Drug Enforcement Administration with a "sting operation" at West Main Street; (2) he

was involved in the drycleaning business only to help former drug addicts; (3) there were miscommunications or misunderstandings with his attorney about what he was required to disclose; (4) he was simply helping the owner of Ron's Auto Service pay his utility bills to New York State Gas & Electric; and (5) he was kiting funds before, during and after his Chapter 11 case. These explanations were completely unsatisfactory and not credible.³

In addition, the Court is convinced that the Debtor is more sophisticated than he would have the Court believe he is, and as he attempted to portray himself at trial. The Court sees the Debtor as one of those individuals who is sophisticated enough to ask only those questions, and in such a manner, that will elicit an answer which he wishes to hear, but who avoids asking questions that may result in answers that he does not wish to hear.

Given all of the facts and circumstances of this case, because of his knowing and intentional: (1) failure to include his interest in the Selected Flowers Account on his Schedules; (2) failure to include his interest in the Schwab Account on his Schedules; (3) failure to disclose on his Statement of Affairs the transfer of funds from his Dean Witter Account to Susan Russell within a year of the filing of his petition, this Court would have denied the Debtor a discharge under Section 727(a)(2), (3) and (4)(A). In addition, for his knowing and intentional failure to disclose to the U.S. Trustee at the Chapter 11 341 Meeting the existence of the Selected Flowers Account and his transfer to Susan Russell of the funds from his Dean Witter Account, after being specifically asked about these

³ The kiting of funds explanation would at least explain some of the Debtor's activities. But that itself could be considered to be a business which the Debtor should have disclosed.

matters, the Court would have denied the Debtor a discharge under Section 727(a)(4)(A). Furthermore, the Court considers the Debtor's failure to disclose on his Monthly Financial Report his receipt of the significant funds more fully set forth in its Findings of Fact to be conduct which constitutes the making of a false oath or account, for which the Court would have denied the Debtor a discharge under Section 727(a)(4)(A).

In summary, the evidence presented clearly demonstrated that the Debtor knowingly, fraudulently and intentionally failed to disclose assets and financial interests which existed at the time of the filing of his petition and which were acquired post-petition while the Debtor was a debtor-in-possession under Chapter 11, and that he knowingly, fraudulently and intentionally made false oaths and accounts to the U.S. Trustee at his Chapter 11 341 Meeting and on his Monthly Financial Report when he indicated that: (1) he had no bank accounts; (2) he had no brokerage accounts; (3) he was not conducting any business, including a continuing flower business; and (4) he had not transferred any assets within a year of the filing of his petition.

CONCLUSION

The Debtor's discharge is revoked and denied pursuant to Section 727(d)(1) and (d)(2).

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: September 30, 1997