UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re
SAMUEL POZZANGHERA
SHARON POZZANGHERA

Case No. 90-13673 K

Debtors

MICCICHE, INC.

Plaintiff

-vs-

AP 91-1122 K

SAMUEL POZZANGHERA
SHARON POZZANGHERA

Defendants

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Today, in one of its most solemn duties, the Court denies discharge in bankruptcy to two Debtors. It is clear that these Debtors feel themselves to have been "wronged" by the particular creditors who have successfully pursued this result. But in these Debtors' efforts to stave off these creditors through the processes of this Court, they chose to manipulate those processes to their

own definitions and uses. There is a pattern of abuse of civil process in these Debtors' conduct and a disregard for the solemnity of oaths and affirmations, and it is visited upon them today in one of the harshest judgments a Bankruptcy Court may render.

Their manipulations have cost the bankruptcy estate some share of $180,000 which the Debtors received and concealed after they filed bankruptcy. Further, they have not justified the absence of books and records to explain numerous pre-bankruptcy transactions. As a consequence, they will remain forever liable to their creditors.[1]

Because of the severity of the ruling and the complexity of the facts at Bar, the Court will set forth its findings at some length.

FINDINGS OF FACT

1. In May of 1986, Debtor Samuel Pozzanghera retired from service as a police officer on the force of the City of Rochester. His higher education consisted of two years at a Community College, resulting in a two-year degree. Upon retire-

[1]Even as to persons convicted of crimes, there is a time when their debt to society is deemed paid. Unless the Debtors are able to reach settlement terms with all of their creditors, denial of discharge under 11 U.S.C. § 727 is, on the other hand, a "life sentence" and permits the Court no discretion as to duration or "restitution." Perhaps reform of this penalty is needed.

ment, he began to receive a pension from his law enforcement service.

2. He and his wife, Debtor Sharon Pozzanghera, determined he would learn the real estate business as a second career.

3. In late 1986, apparently in connection with the decision to learn the real estate business, Samuel Pozzanghera alone, or Samuel and Sharon Pozzanghera together incorporated "Sharmas Enterprises, Inc." (The name is apparently formed from the first four letters of the name "Sharon" and a backwards recitation of the first three letters of the name "Samuel.") It appears that the Debtors had hopes of a far-reaching empire embracing appraising and development, as well as sales.

4. He took real estate courses, and in 1987 became a licensed real estate "agent."

5. In 1987 and early 1988, he worked for two other real estate brokers before he was introduced to Raymond Micciche who, together with Mrs. Micciche, owned a corporation that owned "Town Crier-Micciche Associates" Real Estate agency.

6. On May 19, 1988, Samuel and Sharon Pozzanghera signed an agreement with Raymond Micciche as President of Micciche, Inc., whereby the Pozzangheras "individually or as agents for a corporation to be formed" would purchase certain assets of the business known as "Town Crier Ltd. - Micciche Associates Realtors" for $200,000. In that agreement and subsequent addenda it was

established that the purchase price would be paid in installments; that promissory notes would be issued by a new corporation, Sharmas Realty, Inc.; that those notes would be guaranteed by the Pozzangheras individually; that the stock in Sharmas Realty, Inc. would be pledged as security, and that a security interest would be taken by Micciche, Inc. in the assets of Sharmas Realty, Inc.

7. At some point in time, Mr. Pozzanghera (called "Sam" or "Samuel") supposedly discovered authority to the effect that a sales agent could not own, under New York Law, any interest in the agency for which he or she works - that he or she must become a "broker" before acquiring an ownership interest. It further appears that it was their belief that he or she must become "the broker of record" for that agency, before he or she could become an owner of that agency.

8. Paragraph 4 of an addendum to the agreement (Exhibit 6, document 2) specifies that Raymond Micciche

> "agrees to act as the broker of record for the business, the purchase of which is contemplated by the Agreement and this Addendum, until such time as the Purchaser receives a real estate broker license from the State of New York and has become a member of the National Association of Realtors and the Rochester Real Estate Board as the Designated Realtor. The Purchaser agrees to apply for and diligently pursue these designations. This period shall not extend beyond January 1, 1989. Buyer agrees to purchase an Errors and Omissions Policy for the protection of Raymond Micciche during the period Raymond Micciche shall act as broker of record. Buyer shall indemnify and hold Seller, Raymond Micciche and Colleen Micciche harmless from all

> liability and loss of any kind or nature, including reasonable attorneys fees which any of them may incur as a result of the use by Buyer of Raymond Micciche as broker of record."

9. The agreement and addenda also contained a provision entitled "Transfer of Responsibility for Operating Expenses," which provided "Buyer agrees to assume responsibility from date of closing for all utilities, rent, phone service, computer rental, advertising expenses ... cleaning and maintenance of office and any other expenses necessary for the operation of a real estate business. Buyer agrees to purchase his own insurance necessary for the operation of the office."

10. "Closing" upon the contract and addenda occurred on July 14, 1988.

11. In this transaction, the Debtors were represented by attorney John Ferr, who testified before this Court, and represented that in his view this was a "simple" sale of a business, which subsequently "went bad."

12. Nonetheless, Samuel and Sharon Pozzanghera insist that they did not purchase the agency, nor did they acquire any interest in the Purchaser, Sharmas Realty Incorporated, by virtue of this transaction. Rather, they claim that thereafter they were working only "to purchase" the agency and ultimately to redeem the Sharmas Realty Inc. stock by payment of the promissory note, and completion of the process of substituting Samuel Pozzanghera for Ray Micciche as broker of record. They assert that in the meantime

Ray Micciche was the owner of the real estate agency - that the substitution never occurred (they allege through fault of Ray Micciche) and the promissory notes were never paid in whole or in part.

13. During the period from July 14, 1988 until late 1989, several persons were acting as an owner and chief principal officer of Sharmas Realty Inc. and of the real estate agency it owned ("Town Crier-Sharmas Realty"). Raymond Micciche signed as President or owner principally in those instances in which it was expected or required that the "Broker of Record" be acting on behalf of the organization, since neither of the Pozzangheras could (under their understanding of the law) acknowledge their ownership. But Samuel Pozzanghera and Sharon Pozzanghera each held themselves out as owner and as President or other officer of the entity in numerous other instances in evidence.

14. During the same period, only the Pozzangheras controlled the books and records of account for the organization, and the banking accounts. They currently assert that they did that only as managers of the day to day affairs of the organization pursuant to the "transfer of responsibility" clause of the agreement (Finding #9), and not as owners or officers.

15. The fact that more than one person, including Raymond Micciche, acted as chief executive officer of the entity, and the undisputed fact that he at all times pertinent hereto remained "broker of record" for Sharmas Realty Inc.'s real estate

office has led several State Courts to conclude either that he was responsible for the payment of commissions to sales agents because he was "broker of record" or that a material issue of fact existed as to "control" of the organization for the limited purpose of affixing liability for payment of agents' commissions.

16. Another corporation, Sharmas Holdings, Inc. was incorporated by the Pozzangheras, they claim in August of 1988. In the summer and fall of 1988, the Pozzangheras caused Sharmas Enterprises, Inc. (not Sharmas Holdings, Inc.) to acquire an interest in an entity attempting to clear the way for the construction of a television station in Batavia, New York. (Although Sharon Pozzanghera denies active involvement therein, she accompanied Mr. Pozzanghera to England in this regard for three weeks and attended the meetings pertinent thereto, and also "took notes" at meetings that occurred in this regard here in Western New York.) Of record, it was Sharmas Enterprises, Inc., and not the Pozzangheras personally, or Sharmas Realty, Inc., or Sharmas Holdings, Inc. that acquired the interest in the rights to build and operate the television station. Sharmas Enterprises, Inc. supposedly borrowed $200,000 from a Fred B. Kravetz and invested in a "Genesee Communications, Inc."; Sharmas Enterprises, Inc.'s stock in Genesee Communications, Inc. was supposedly pledged to Fred Kravetz as security. (A letter-agreement is offered as the only evidence of the Kravetz transactions.)

17. Raymond Micciche attended meetings regarding the

proposed television station; he was fully aware of the Pozzangheras' involvement therein at a time when the Pozzangheras' had not made payments on the promissory notes which ran in favor of Micciche, Inc.

18. As of March 30, 1989, those payments had not been made, and a meeting was held at which the Micciches agreed to delay any immediate litigation if certain assurances were provided by April 5, 1989. One assurance consisted of proof of commitment for financing of nearly $20 million for the television station, since the Pozzangheras promised that if they obtained financing for the television station in that amount they would use a portion thereof to satisfy the Micciche notes (which were less than $200,000 in principal) plus interest.

19. The conditions were not met, nor were the notes otherwise paid. Thus, on April 18, 1989, Micciche, Inc. sued Sharmas Realty, Inc., Sam Pozzanghera and Sharon Pozzanghera in State Court. It sued on the notes only (not on the underlying contract), and succeeded in pressing a motion for "Summary Judgment in Lieu of Complaint" over the defense that there had been "a forbearance agreement." No allegation was made in the Pozzangheras' defense in that lawsuit that there had been any conduct on the part of Micciche (other than forbearance) that relieved the Debtors of obligation.

20. Judgment was entered against Sharmas Realty, Inc., Samuel Pozzanghera and Sharon Pozzanghera, on June 23, 1989, in

favor of Micciche, Inc. in the amount of $211,691.01 plus interest from the date of entry.

21. On October 19, 1989, a Restraining Notice was signed, and in due course it was served on the judgment debtors.

22. Nonetheless, immediately thereafter and in the face of the Restraining Notice, more than $12,000 was taken from the Sharmas Realty, Inc. account by Sam and Sharon Pozzanghera (on October 26, 1989) and deposited in a secret bank account in the name of Sharon Pozzanghera's mother, Jeanette Kuba. (The "Kuba account." This is pronounced "Coo-bay.") From October 26, 1989 until the Kuba account was closed in January of 1990, substantial monies of Sharmas Realty, Inc. were deposited therein ($40,000 or more). The Debtors now claim (as explained at Finding #23) that some monies of their own personally or of Sharmas Enterprises, Inc., were part of the deposits, and the Debtors contend that these were loans to Sharmas Realty, Inc. (No notes or other meaningful evidence of such "loans" was produced.)[2]

23. Disbursements from the Kuba account appear to be for the payment of sales agents and other business obligations of the realty, with the exception of three car payments made on Sam

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[2]Similarly, as to the Sharmas Realty account itself, Mr. Pozzanghera has offered a compilation he prepared (Exh. 217) reflecting $63,149.53 he purports to have deposited from his own monies. Supposedly, these undocumented "loans" explain various payments from Sharmas Realty to pay creditors or expenses of the Debtors personally. (Stips. 129, 130, 131, 278 & 279.)

Pozzanghera's car. Samuel Pozzanghera testifies that the money deposited in the Kuba account after the initial deposit consisted of "agents'" money and "loans" from Sharmas Enterprises to avoid criminal charges for bad checks, etc., and that these monies, therefore, were not (in his view) subject to the Restraining Order. Approximately $40,000 of Sharmas Realty Funds were deposited into the Kuba account and disbursed supposedly for business expenses of Sharmas Realty, Inc., particularly agents' commissions. In deposition in connection with this proceeding, Samuel Pozzanghera vehemently asserted that the monies that went into the Kuba account belonged to the agents and brokers, and were, therefore, not subject to the Restraining Order (in his view). However, at trial, Pozzanghera admitted that not all of the monies disbursed from that account went to agents or brokers.

24. Sharon Pozzanghera was fully aware of the Kuba account at all times, and maintained the check ledger on that account. Though she has denied this, she has also admitted "making out" some of the checks which her mother supposedly signed, drawn on this account.

25. On October 18, 1989, Sharon Pozzanghera was involved in a serious car accident in which she was injured, as were the two children of the debtors. Sharon Pozzanghera's leg was broken in several places.

26. In light of her injury, a scheduled October 23, 1989 deposition to ascertain the availability of assets to satisfy the

judgment was adjourned to November 9, 1989. On the same day (October 23, 1989) Mr. Pozzanghera talked two Deputy Sheriffs out of conducting an execution sale of the office equipment and furniture of the real estate office which was part of the security for the obligation of Sharmas Realty, Inc. and the Debtors to Micciche, Inc.[3]

27. Sam and Sharon Pozzanghera appeared for deposition on November 9, 1989 under protest, having requested (in vain) a further adjournment because of Sharon Pozzanghera's extreme pain and discomfort and the fact that she was confined to a wheelchair.

28. The two Pozzangheras were, at that deposition, evasive and belligerent to an extent that was later found to be contemptuous by a State Court Judge. Further, they now claim that a great many highly relevant answers given under oath at that deposition, that are at odds with their defense to the current action under 11 U.S.C. § 727, were untruthful at the time that those answers were given. They seek now to explain their lack of veracity by Mrs. Pozzanghera's pain and discomfort and Mr. Pozzanghera's concern for Mrs. Pozzanghera's well-being and his consequent lack of focus on the matters then at hand. They now "disaffirm" testimony at that deposition;

by which they asserted that they were the sole owners of

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[3]He convinced them that some of what they sought to sell was leased, and not owned by the office -- apparently a deception.

the stock of Sharmas Realty, Inc.(contrast with Finding #12);

by which they denied the existence of any other bank accounts (they abandoned those denials at deposition once it was clear that the examining attorney was already aware of the Kuba account, at which point the answers were evasive and belligerent);

by which they refused to permit examining counsel to examine subpoenaed documents that they had brought;

by which they refused to answer questions regarding ownership of shares of Sharmas Enterprises, Inc.;

by which they denied there having ever been any issuance of stock in Sharmas Holdings (contrast with Finding #45J);

by which they claimed not to "remember" any other corporations, partnerships, or sole proprietorships that Mr. Pozzanghera might be involved in; and

by which they denied having received any dividends, wages, salary or other distributions of any type or nature whatever from Sharmas Enterprises, Inc. or Sharmas Holdings, Inc.

All of these were, by their admissions, falsehoods under oath (rationalized by Mrs. Pozzanghera's condition), but were prior to one year before the filing of their petition and thus cannot be the basis of an adverse finding under 11 U.S.C. § 727(a)(4)(A) and (a)(7).

29. On February 23, 1990, a State Court Order was entered finding the debtors and Sharmas Realty, Inc. guilty of a contempt of court that was "calculated to and actually did defeat,

impair, impede and prejudice the rights and remedies of the plaintiff, judgment creditor." By that time, it appears that the Kuba account had been closed.

30. On March 16, 1990, Sam and Sharon Pozzanghera individually and on behalf of Sharmas Realty, Inc. sued Micciche, Inc., Ray Micciche and Colleen Micciche as well as the Town Crier franchisor.[4] For this purpose they engaged the services of an attorney other than the attorney who had represented them in the acquisition of the Micciche, Inc. assets. They alleged that the Micciches had breached the original agreement, and they sought to reopen the judgment that had been entered against them upon the promissory notes. The attorney who represented them in that lawsuit also represented them with respect to the personal injury claim arising from the auto accident (Finding 25), and eventually in the matter currently at Bar, though not in the filing of the initial bankruptcy petitions.

31. The Micciches, having determined at deposition that there might be some value to Sharmas Enterprises, Inc., and having been told by the Pozzangheras that the Pozzangheras were the principal owners thereof, sought to have the State Court direct the Pozzangheras to turn over their shares in Sharmas Enterprises, Inc.

32. On March 27, 1990, Sam Pozzanghera, in response to

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[4]They now claim that he had no authority to cause them to sue on behalf of Sharmas Realty, Inc.

the above effort, made an affidavit. Despite the oath he took in making that affidavit, he now disavows its accuracy. It overstated substantially (he now testifies) the debts of Sharmas Enterprises, Inc. in an effort to persuade the State Court that creditors of Sharmas Enterprises would be unjustly and unfairly injured if the Micciches were placed in control of Sharmas Enterprises, Inc. Samuel Pozzanghera currently testifies that the overstatements of the Sharmas Enterprises, Inc. debts resulted from the fact that he used "estimates," "off the top of my head," "just for the purpose of lawsuit." [Emphasis added.] For example, the Affidavit stated that Fred Kravetz was owed $720,000, which amount was overstated by at least $100,000 (according to the Pozzangheras' current account as manifested in the schedules and statements which Samuel Pozzanghera filed on behalf of Sharmas Enterprises, Inc. on the 17th of December, 1990).[5]

33. In mid-1990 and late 1990, the Debtors continued their efforts to put together the "television deal," in what Mr. Pozzanghera suggested was a "last ditch" effort to "see that everyone got paid." Importantly, in June of 1990 (on the eve of appointment of a receiver for Sharmas Enterprises, Inc.), they

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[5]If that amount was not overstated, then the Debtors have failed and refused to disclose substantial payments to Mr. Kravetz which might have been preferential, and fail to explain the source of any such payments. Indeed, but for a letter agreement relating to a single $200,000 transaction (Exh. #41), nothing has been offered to support the existence of any transaction with the said "Mr. Kravetz."

visited yet another attorney (the third attorney in two years) regarding the books and records of Sharmas Holdings, Inc. and considering the possibility of incorporating one or more new corporations.

34. On July 25, 1990, the State Court appointed a receiver of the stock of Sharmas Enterprises, Inc. owned by Samuel and Sharon Pozzanghera. The Order further directed the Debtors to surrender such shares and restrained them from transferring or selling the shares or otherwise realizing the value thereof. And the Order directed them not to make or suffer any sale, assignment, pledge, encumbrance or transfer of any property in which Sharmas Enterprises, Inc. had an interest.

35. At trial, the Debtors produced a Stock Transfer Ledger for Sharmas Enterprises, Inc., apparently kept in Sharon Pozzanghera's handwriting, which asserts that Sharmas Holdings, Inc. is the predominant shareholder of Sharmas Enterprises, Inc., having received 69 shares that were issued on November 25, 1986 and 80 shares issued on September 22, 1988. The objecting creditor suggests that the Stock Transfer Ledger is a fabrication, violating the State Court Receivership Order; see 11 U.S.C. § 727(a)(2)(A).[6]

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[6] The Debtors are aware of (1) their November 9, 1989 deposition testimony to the effect that they were the principal stockholders of Sharmas Enterprises, Inc., and that Sharmas Holdings was a "shell" corporation with no assets and no issued stock; (2) Sam Pozzanghera's March 27, 1990 Affidavit (in opposition of the Motion to turn over the stock in Sharmas Enterprises, Inc.), which Affidavit was silent as to the existence of Sharmas Holdings, Inc., and (3) a November 8, 1988 letter from

36. In November of 1990, the Judgment Creditor again went to state court seeking a Contempt Order, but the Pozzangheras filed their Petition under Chapter 7 of the Bankruptcy Code on December 5, 1990, and a Petition on behalf of Sharmas Enterprises, Inc. on December 17, 1990, thus staying further state court action.

37. In filing the Bankruptcy Petitions, the Pozzangheras utilized a fourth attorney, one with whom they had apparently had no prior dealings, and whose name they obtained on a "referral" from an unnamed source. They apparently did not discuss the prospect of bankruptcy with the attorney who handled the agency acquisition, or with their personal injury attorney or with the firm they had consulted from May, 1990 forward regarding other corporate matters. The Plaintiff asks the Court to draw the inference that the Pozzangheras consciously sought an attorney who was unfamiliar with their past activities, so that they could control the information that he received. As discussed below, the Court does draw that inference.

38. In the Schedules and Statements which they signed and filed along with their personal petition (which Schedules and Statements were prepared by their attorney's office from

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the Pozzangheras' then-attorney in connection with the television station efforts, which represented to a different attorney in that connection the names of stockholders of Sharmas Enterprises, Inc., and did not mention Sharmas Holdings, Inc.

See also Stips. 197-220.

information they provided) the Debtors did not disclose the fact that they had consulted two attorneys other than the one they disclosed in response to question 15(a), they scheduled ownership of 69 shares of Sharmas Enterprises, Inc. and valued that asset at -0-, but they did not list any ownership interest in Sharmas Realty, Inc. They listed as an asset a lawsuit against Micciche with "undetermined" value. They listed as exempt a personal injury cause of action of "undetermined" value.

39. In the Sharmas Enterprises' schedules and statements, signed by Samuel Pozzanghera as president, Fred Kravetz was disclosed as holding an asset of Sharmas Enterprises, towit, stock of "GCI" being held "as security for a loan given 1988;" Sharmas Holdings was claimed to be the majority shareholder, Fred Kravetz was disclosed as having been given a collateral security mortgage on all corporate real estate in April 1990. No documentation is in evidence regarding the mortgage transactions, and little with regard to the GCI transaction.

40. At the time that the Debtors met with their bankruptcy counsel they discussed with him the matter of the personal injury cause of action and the exemptibility of any recovery thereon. He explained to them (correctly) that the state of the law is unsettled and unclear as to the extent to which the proceeds of such causes of action are exempt. He expressed an opinion that the proceeds would be exempt, but cautioned that a challenge might ensue.

41. The Debtors emphatically deny ever having discussed their perceived value of the lawsuit with their bankruptcy attorney, their personal injury attorney, or, for that matter, any attorney until after the section 341 meeting in their bankruptcy as discussed later.

42. That meeting of creditors under 11 U.S.C. § 341 occurred in their personal case on February 5, 1991.

43. At that meeting an attorney representing the Micciches was present.

At this point it becomes useful for the Court to make two sets of parallel chronological findings specific to the issues presented in the pleadings and at trial. The first group of findings will be those addressing the personal injury cause of action.

44A. At the meeting under 11 U.S.C. § 341, the Trustee asked about the accident. He was told by the Debtors and bankruptcy counsel that he should talk to the Pozzangheras' personal injury attorney about it. The question of exemptibility of the proceeds of that action was discussed. The Debtor's attorney expressed his opinion that the proceeds would be exempt. The Micciches' attorney expressed his opinion to the contrary. The Trustee indicated his uncertainty on that question. Mr. Pozzanghera recalls no discussion of the amount of the claim at that meeting. (As "Murphy's Law" commands, there is no verbatim record of the proceedings at that meeting; the tape was erased and

re-used sometime (after August 5, 1991, presumably) in accord with the 6-month disposition schedule for such recordings.)

44B. At deposition in this adversary proceeding, Mrs. Pozzanghera testified that she told the Trustee at that meeting that there was no settlement being considered at that time and none under consideration.

44C. Less than a week after the Section 341 meeting, the Debtors' personal injury attorney (who also represents them currently at this Bar) supposedly called them and suggested that they come to his office to discuss a settlement offer he received. The Debtors claim that they had never discussed the value of the personal injury claim with any attorney prior to that day. They claim that they had not formulated any opinion of the value of that claim prior to that day, except that they had concluded on their own that the maximum that they would seek for that claim would be $300,000 since they believed that to be the limit of the other motorist's insurance coverage and did not wish "to cause hardship to the other motorist." The Debtors testify that at that meeting their attorney said that this was "the first bona fide offer" they had received.

44D. They did not then "discuss the bankruptcy" with their personal injury attorney, they testified. Whether he even knew or did not know about the filing of their bankruptcy petitions is not in evidence.

44E. This attorney did not take the stand.

44F. On February 12, 1991 (one week after their § 341 meeting), in the presence of their personal injury attorney, the Debtors signed a release accepting $180,000 in settlement of the personal injury claim.

44G. They did not consult with their bankruptcy counsel in this regard, nor did they instruct their personal injury counsel to do so. They admit that they did not express concern to personal injury counsel either about signing the release or receiving the funds. It is not clear whether this attorney was aware of the bankruptcy even at that time.

44H. They picked up the settlement check no more than two or three weeks after the release was signed on February 12, 1991. The Court thinks it doubtful that even that much time elapsed.

44I. The Debtors testify that Sharon Pozzanghera endorsed the check, and Sam Pozzanghera deposited it in a bank account, but they did not spend or otherwise disburse it immediately.

44J. On February 28, 1991, the attorney for the Micciches wrote to the Debtors' bankruptcy counsel requesting, inter alia, that he "explain the status of the personal injury lawsuit of Sharon Pozzanghera."

44K. Bankruptcy counsel either discussed or gave that letter to the Debtors, and asked for assistance in preparing a reply.

44L. The Debtors admit that they did not tell him that the claim had already been settled and that they already had (or were about to receive) the funds.

44M. On March 20, 1991, bankruptcy counsel responded to Plaintiff's counsel that "no personal injury action has been commenced." Sam Pozzanghera admits having told his bankruptcy counsel that "no personal injury action had been commenced," in connection with counsel's preparation of the response to that letter.

44N. The Pozzangheras held the proceeds of that settlement, $180,000, until after this complaint objecting to their discharge under 11 U.S.C. § 727 was filed by Micciche, Inc. on April 8, 1991, and they were served with process in connection therewith. Thereafter, in late April, or in May or later the money was dissipated by them. Its current whereabouts are not in evidence. Mr. Pozzanghera admitted at trial that he informed bankruptcy counsel of the settlement only in response to the fact that the Section 727 complaint was filed.

44O. The Debtors testified that they decided that it was permissible for them to use the proceeds because of their belief that the Trustee had said that they would hear from him within 30 days after the first meeting of creditors if he was going to make an objection to their claim of exemption for any proceeds of the personal injury action. (There is no other evidence that the Trustee made any such statements. He denies it.) They further

testified that their attorney had informed them that the Micciche's attorney had been in contact with "the insurance company" by the time they received the settlement check and that they assumed that the Micciches' attorney would inform the Trustee of the settlement. Thus, they claim, they believed that all pertinent parties had known of the settlement for a number of weeks, and they held the money until well past the 30-day point (following the first meeting of creditors) before they disbursed the funds.

44P. By Affidavit dated February 13, 1992, the Trustee attests that he did not learn that the personal injury claim had been settled until he was so notified by the Micciche's attorney on February 7, 1992 (almost one year after the settlement, and many months after the commencement of the objection to discharge). He further attests that the Debtors had not offered to turn over any portion of the settlement proceeds to him for benefit of creditors.[7]

44Q. On February 10, 1992, the Plaintiffs filed a Summary Judgment motion addressing that portion of the current complaint that asks the Court to deny discharge on the basis of fraudulent concealment of the proceeds of the personal injury claim. That motion squarely (but mistakenly) challenged the exemptibility of those proceeds. The Court denied the motion on

[7]The fact that the payor of the $180,000 accepted a release without consulting the Trustee suggests that the payor was not aware of the bankruptcy.

the grounds, inter alia, that ultimate exemptibility or non-exemptibility of those proceeds is not pertinent to the resolution of the Section 727 cause of action.

44R. Although the Debtors, through their personal injury counsel, contested that motion and contested the balance of the Complaint at the present trial, they have not to this day offered to explain the present whereabouts of those funds, offered to deliver them to the Trustee, or offered to place them in safekeeping pending the Court's consideration. They have never amended their Schedules to claim the $180,000 exempt. (The Trustee thusfar has not sought turnover of said funds.

The Court will now proceed with a second set of parallel chronological findings beginning with the meeting of creditors in their personal case on February 5, 1991.

45A. By letter dated February 28, 1991, counsel for the Micciches wrote to the Pozzangheras' bankruptcy counsel asking a number of questions (besides the question regarding the status of the personal injury lawsuit, described above). (Stipulated Exhibit No. 36.)

45B. Sharon Pozzanghera does not recall discussing the contents of this letter with her bankruptcy counsel and claimed, at trial, not ever to have seen his response thereto.

45C. On the other hand, bankruptcy counsel testified that upon receiving the February 28, 1991 letter, he did consult with <u>both</u> defendants, and that his letter in response thereto

(Exhibit No. 37) is an accurate representation of what the defendants told him. He made no independent investigation.

45D. Some of the information sought in the February 28, 1991 letter pertained to business relationships and transactions of which bankruptcy counsel was not previously aware, which were not contained in the schedules, and of which Micciche had knowledge because during the period of time in which Micciche shared the realty office with the Pozzangheras, Micciche had open access to correspondence and other information involving the Pozzangheras' various ventures.

45E. Mr. Pozzanghera "believes" that bankruptcy counsel did give him a copy of the February 28, 1991 letter.

45F. Despite Mrs. Pozzanghera's uncertainty (Finding #45B), I find that both Mr. Pozzanghera and Mrs. Pozzanghera met with bankruptcy counsel regarding the information sought in the February 28, 1991 letter and assisted him in the preparation of his response, dated March 20, 1991 (Stipulated Exhibit No. 37).

45G. The letter sent by bankruptcy counsel to the Micciches' counsel on March 20, 1991, responded, on behalf of Samuel Pozzanghera, Sharon Pozzanghera, and Sharmas Enterprises, Inc. It denied that Samuel or Sharon Pozzanghera ever had any interest in Genesee Communications or Pulsar Video, and represented that Pulsar Video was owned by one "Mr. Fortunato" and that no stock was ever issued in Pulsar Video. It represented that Sharmas Enterprises owned 47% of Genesee Communications, and that that

stock was "given to one Fred Kravetz as security for monies owned to Sharmas Enterprises." There are insufficient records produced, from which the veracity of these statements could be determined.

45H. The letter denied that the Debtors claimed any rights from the development of television station Channel 51.[8] It represented that the stock of Genesee Communications was pledged to Fred Kravetz in September of 1988 as security for monies exceeding $200,000, and that no repayments were ever made on those loans. Only one "letter-agreement is offered to support the Kravetz transaction.

45I. The letter denied any use by any of the debtors of any funds of Sharmas Realty, Inc. for personal obligations of the debtors. (Contrast Findings 22 & 23.)

45J. The letter represented that the only person who contributed any funds for purchase of stock in Sharmas Holdings, Inc. was Jeanette Kuba, that Sharon and Samuel Pozzanghera never had any control or ownership in that corporation and represented that the Debtors have no documentation concerning who the shareholders of the corporation might be as of March 20, 1991.

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[8]No mention was made of the fact that Mr. Pozzanghera was to receive a commission on financing he was able to place relative to that project.

THE DISPUTE REGARDING OWNERSHIP OF SHARMAS REALTY, INC.

The dispute regarding ownership of Sharmas Realty, Inc. is of minimal consequence to this proceeding, although most of the evidence submitted and testimony provided in this proceeding involves that dispute, which "spilled over" from state court to here.

Much is made by the Plaintiff of the fact that the Pozzangheras have not admitted, and did not disclose to this Court, their ownership of Sharmas Realty, Inc. The Pozzangheras claim that all they acquired was a "right to acquire" the stock of Sharmas Realty, Inc.; that Raymond Micciche refused to appropriately relinquish control of the realty; that his defalcations relieved them of the obligations on the notes; that Micciche owns Sharmas Realty, Inc.; and that any obligation of the Pozzangheras on the notes should be discharged.

That dispute was litigated in State Court in connection with Raymond Micciche's liability as "broker of record" for payment of real estate agent commissions. It has been a matter of enormous contention among the parties. The matter has been fully tried to this Court, and the Court will render the dictum that the Debtors did buy that Agency and owned it in what their then-attorney called a "simple" sale that later "went bad." (Finding #11.) Despite the

pledge of stock, they owned it as surely as does a car buyer own a car even though he lets the title certificate be held by the lender as security. (Indeed, they sued Micciche on behalf of Sharmas Realty, Inc. (Finding #30)). Such holding is not inconsistent with other courts' having held Raymond Micciche liable as an officer (one among three) and as the Broker of Record.

But it is clear that the failure to list ownership in Sharmas Realty, Inc. is of no operative consequence under 11 U.S.C. § 727 in light of the fact that on January 3, 1991, the Debtors filed an amended petition page in which Samuel and Sharon Pozzanghera included "Town Crier Sharmas Realty" in the caption of their case.

There is no allegation that as of the date of the filing of the petition, Sharmas Realty, Inc. had any value for the Debtors as shareholders. There is no allegation that the Pozzangheras ever denied the existence of the corporation or that they in this case have denied "doing business as" Town Crier Sharmas Realty.[9]

However dispositive the disputes regarding Sharmas Realty, Inc. might be in a complaint by the Micciches against the Pozzangheras under 11 U.S.C. § 523 (which is also pending), it is of minimal consequence in the present action. The existence of

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[9]The admission to "doing business as" Town Crier Sharmas Realty should have sufficed to alert the Trustee and creditor to the need to examine possible voidable transfers relating to that entity (or "non-entity"), and to inquire into its ownership.

that dispute serves only (for present purposes) to explain the basis of some of the actions undertaken by the Pozzangheras, which actions are of critical importance to the matter at bar.

THE TESTIMONIAL CONDUCT AND DEMEANOR OF SAMUEL AND SHARON POZZANGHERA

The Court carefully observed the demeanor of the Debtors Samuel and Sharon Pozzanghera at trial. They are not credible witnesses.

Samuel Pozzanghera, when confronted with earlier sworn statements (in affidavits submitted to State Court) or in depositions under oath, was prone to belittling the solemnity of his prior oaths. Thus, for example: Mr. Pozzanghera was confronted with the fact that at deposition in this adversary proceeding he stated without reservation that "no money whatsoever went to Sam Pozzanghera" [referring to himself in the third person], and with the fact that he also stated that the money that went in to the Kuba account was "money that belonged to agents and associate brokers," rather than his own money or "the corporation's money." Then he admitted at trial that many of the disbursements from the Kuba account went to business expenses other than brokers' commissions, and he was confronted at trial with the fact that at least $1,657.00 was paid from the Kuba account to make car payments on his car. Even so, at trial he insisted that the Kuba account was not set up to avoid the Micciches' efforts to execute on their

judgments but that rather he would now say that only the monies in the Kuba account after the initial deposits were agents' monies, and that some of the monies in the initial deposits were loans from him.

Mr. Pozzanghera rationalizes the Kuba account by asserting that Micciche did not "recognize" that Micciche and the debtors "had a fiduciary duty" to pay the agents and other business expenses of the realty, and Mr. Pozzanghera swears now that the Kuba account was opened strictly to "observe that fiduciary duty." Thus, he claims, it was not opened to hinder or delay Micciche, Inc. and its efforts to collect upon its debt. (See Findings # 21-23.) Mr. Pozzanghera typically argued such a noble "angle" as to his violations of Court Order or of oath. He seems not to respect the fact that such matters are for the issuing court to address, not for him to presume.

When confronted with an affidavit that he submitted to State Court regarding the liabilities of Sharmas Enterprises, Inc., which affidavit he now says overinflated the corporate debt, he belittles the earlier affidavit as being "approximations, for lawsuit purposes," and "just for purposes of litigation." (See Finding #32.) Is an oath not binding if it is only incident to civil process?

Further, much of the deposition testimony that he gave in November of 1989, in proceedings in enforcement of the Micciche judgment, he now says was false testimony but is explained by his

concern for his wife's pain and discomfort at deposition (following the car accident), and his having been "intimidated" and "confused" by the questions. (Although he was represented by counsel at the deposition, he never expressed to counsel any confusion or intimidation.) (See Findings #27, 28.)

Thus Mr. Pozzanghera's pattern is to explain evasion of process or false oaths as being either (1) a moral imperative, (2) intended only "for lawsuit purposes;" or (3) the product of confusion, intimidation, or distraction. It's never, "I wasn't telling the truth then."

The testimony of Sharon Pozzanghera at trial reflects similar low regard for her prior oaths. For example, at deposition in this adversary proceeding, upon inquiry regarding negotiations over the personal injury action, she stated "I had talked several times to my attorney about - okay, you're saying an amount. We had said that there was several different figures thrown around, he was handling the negotiations. I was told that there was a possibility that they had been - that we were going to have to go to trial because they had only come in with some really low offer and I had told my attorney I wouldn't consider that.... There wasn't an offer that I know of. We were talking about a settlement amount that I would settle for. It was all hearsay talk.... I didn't set a minimal amount. A reasonable amount.... around $300,000 is what I was looking for." (See Findings 44B.)

At trial she, like her husband, denied ever having

discussed the value of the lawsuit with any attorney or even among themselves, except to note that $300,000 would be the maximum limit of the other driver's insurance coverage. (See Finding 44C.) Confronted with the disparity, Mrs. Pozzanghera stated at trial, "I was confused. I didn't understand. I did say this.... We talked about hypotheticals, not offers." Then she offered "I don't know why I answered it this way."

The Court could understand isolated instances of confusion, but Mrs. Pozzanghera claimed to be confused or uncertain about many more matters in which she had integral involvement. She is not an innocent bystander. She was actively involved in the couple's business affairs. She maintained various books and records including the books and records of Sharmas Realty, Inc. She executed many documents as an officer of various of the business entities at issue, and she twice met with an investigator for the New York Department of State in early 1990 in connection with the real estate operations, and reviewed or prepared business records in connection with those meetings. Despite her pain and discomfort at the November 9, 1989 deposition, she injected her recollections and arguments regarding business matters into those proceedings.

Yet as of trial she only "believes" that as of the summer of 1988 she maintained the stock transfer ledger of Sharmas Enterprises, Inc., (which is handwritten) and only "believes" that it contains her handwriting.

She doesn't remember whether she ever gave the ledger to

their corporate attorney.

She "thinks" that the handwriting in the stock transfer ledger for Sharmas Holdings, Inc. is indeed her handwriting, and though she claims to have given all Sharmas Holdings, Inc. documents to her mother (Jeanette Kuba) at some time prior to 1990, she testified that the 1990 entries that appear in her handwriting resulted because she "helped" her mother make the entries.

She doesn't remember anything about a Receiver being appointed or a restraining notice issued to her in connection with the Micciche's enforcement efforts. On the other hand, she knows that she never told her bankruptcy attorney about the Kuba account.

Although she kept the Sharmas Enterprises ledger and minute book, as well as the day-to-day records of Sharmas Realty, Inc. she doesn't "know" whether she ever provided information to her bankruptcy counsel to permit him to respond to the letter from Micciche's attorney of February 27, 1991.

She testified that she didn't "sign" the checks from the Kuba account, but that she "might" have "written out" some of the checks. When confronted with Exhibit 20 (a photocopy of a $2,191.27 check drawn on the account of "Jeanette Kuba" made payable to the personal injury attorney on January 20, 1990 and in which the "memo" line reads "Sharmas Realty monies") she testified -- "I don't know" whether I signed it.

In sum, both Samuel Pozzanghera and Sharon Pozzanghera were, at trial, inclined to make absolute testimonial statements

until confronted with contradictory evidence. The difference was explained away, typically, by belittling the earlier representations (even if they were under oath), by "splitting hairs," or by post hoc rationalizations or selective recall.[10]

THE DEBTORS MISREPRESENTED AND CONCEALED THE EXTENT OF THE PERSONAL INJURY CLAIM, AND THE $180,000 PROCEEDS THEY RECEIVED

Although the Supreme Court has stated that the standard of proof in Section 727 cases is merely "a fair preponderance of the evidence,"[11] the Court finds that the plaintiff has amply proven - clearly and convincingly proven - that (1) Samuel and Sharon Pozzanghera wilfully and knowingly concealed from the Trustee in bankruptcy the fact that they had received $180,000 in settlement of the claims for personal injury suffered by Mrs. Pozzanghera, and (2) that they transferred those funds and have either dissipated them or continue to conceal them, in violation of 11 U.S.C. § 727.

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[10]In Finding 44C above the Court notes that both Debtors swear under oath now that the $300,000 figure mentioned in earlier testimony regarding the "value" of the personal injury suit wasn't a "value" figure, but the maximum they would seek (the limit of the other driver's insurance), so as not to cause hardship to the other driver. In light of the extensive testimony regarding Mrs. Pozzanghera's pain and surgery and the injuries to the children, I find their explanation to be unworthy of belief.

[11]*Grogan v. Garner*, 111 S.Ct. 654 (1990).

The governing principles of law were well stated by another Judge of this Court (Hon. Edward D. Hayes) in the case of *In re Miller*, 97 B.R. 760 (Bkrtcy. W.D.N.Y. 1989):

> The [Plaintiff] first theorizes that the debtor defrauded creditors by concealing or removing property of the estate after the date on which the case was commenced. Accordingly, denial of discharge is sought pursuant to 11 U.S.C. § 727(a)(2)(B).
>
> Whether the debtor had necessary wrongful intent to sustain a denial of discharge is a question of fact. *Matter of Reed*, 700 F.2d 986, 991 (5th Cir. 1983). To deny a discharge under 11 U.S.C. § 727(a)(2), the Court must find that property was concealed or removed with *actual* intent to defraud creditors. *In re Adelman*, 541 F.2d 999, 1003 (2d Cir. 1976) (discussing the predecessor statute to 11 U.S.C. § 727(a)(2)). However, because fraudulent intent is rarely susceptible to direct proof, *In re Saphire*, 139 F.2d 34, 35 (2d Cir. 1943), such intent will be inferred where proven by a preponderance of circumstantial evidence. *In re Rubin*, 12 B.R. 436, 441 (Bkrtcy. S.D.N.Y. 1991); *In re Gordley*, 38 B.R. 630, 632 (Bkrtcy. S.D.Ohio 1984); *In re Shumate*, 55 B.R. 489, 494 (Bkrtcy. W.D. Va. 1985). When evidence is proffered establishing reasonable grounds from which to infer actual intent to defraud, the burden of going forward with proofs to the contrary falls upon the debtor. *In re Freudmann*, 495 F.2d 816, 817 (2d Cir. 1974), affirming *In re Freudmann*, 362 F.Supp. 429 (S.D.N.Y. 1973). Their denials do not suffice to carry the burden and refute the inference of fraudulent intent. *Id.* Further, the Trustee need not be shown to have ultimately suffered by the Debtor's acts to sustain a bar to discharge. *In re Feynman*, 77 F.2d 320, 322 (2d Cir. 1935).
>
> The phrase "badges of fraud" was coined to describe the indicia of fraud from which actual fraudulent intent can be inferred.

> *Freudmann, supra.* Among the badges is the retention and concealment by a Debtor of property rightfully belonging to the bankruptcy estate. *In re May*, 12 B.R. 618, 627 (Bkrtcy. N.D. Fla. 1980). 'Concealment is not confined to physical secretion.... It covers other conduct, such as placing assets beyond the reach of creditors or withholding knowledge thereof by failure or refusal to divulge owed information.' 4 Collier on Bankruptcy ¶ 727.02[6][b] (15th Ed. 1986). Thus a Debtor's concealment of assets and interest by failing to list them in his bankruptcy petition or disclose them under subsequent examination have been held tantamount to fraud. *In re Diorio*, 407 F.2d 1330, 1331 (2d Cir. 1969).

The Court does not believe the testimony of the Debtors that they believed that the Trustee, their personal injury attorney, the Micciches' attorney, and their bankruptcy attorney, would all have been in communication with one another; that their personal injury attorney would have given the Debtors the funds and would then have notified their bankruptcy attorney, the Trustee and the Micciches' attorney; and that their understanding was that they were free to spend the funds if they heard no objection from the Trustee within 30 days after the meeting of creditors.

Rather, the Court finds that the facts that the Debtors did not consult their bankruptcy counsel, held the funds until after they learned that this Section 727 complaint was filed, and only then told their bankruptcy attorney that they had received the funds, but then without consulting him or any other attorney dissipated the funds, compellingly lead to the conclusion that the Pozzangheras specifically avoided asking whether they were free to

disburse the funds. They did not ask because they knew that they would not like the answer.

Having thoroughly considered the entire record in this case, and having observed the demeanor of the parties on the witness stand, the Court concludes that the Pozzangheras considered the Micciches to be the bane of their existence and the cause of all their problems, that they considered even these bankruptcy proceedings to be only a "two party" dispute and that they were absolutely determined that the Micciches would get no chance at any portion of that $180,000.[12] It was explained in this Court's

[12]Even in supplemental responses requested by the Court following trial, the Pozzangheras insist that this is a two-party dispute, emphasizing the fact that no one other than the Micciches have filed an objection to discharge. Both the facts and the law should have disabused the Pozzangheras of this notion. They have scheduled dozens of creditors other than the Micciches in the Petitions they filed on their own behalves and on behalf of Sharmas Enterprises, Inc. The debts owed to these creditors are in the hundreds of thousands of dollars. It is in the nature of objections to discharge under 11 U.S.C. § 727, that the plaintiff who commences such an action is acting as private attorney general, on behalf of all creditors. This is clear under the bankruptcy rules and under the fact that 18 U.S.C. § 152 would prevent the plaintiff from receiving any compensation in exchange for dropping this objection. Thus, creditors who might have possessed a Section 523 cause of action or who might have been willing to press a Section 727 cause of action against the Pozzangheras need not do so if they are satisfied that the 727 cause of action filed by Micciche, Inc. will serve to protect all creditors. Furthermore, the Trustee in this case has not filed a report and account. If assets are discovered, then a notice will go to all creditors advising them of that fact and of the fact that Proofs of Claims may be filed. It would only be at that time that it could be determined how many creditors are seeking to share in the assets discovered by the Trustee. Apart from the possibility of the existence of other assets, the $180,000 should appropriately have been the matter of litigation (or settlement) over the extent of exemption therein. As was stated by the Debtor's astute bankruptcy

earlier decision denying the Micciches' motion for Summary Judgment that the exemptibility of the $180,000 proceeds is not currently in issue (although the now-longstanding failure of the Debtors to produce those proceeds or the fruits thereof may have forever tainted any claim they might otherwise have toward a claim of exemption). It was explained in that decision that the ultimate exemptibility of those proceeds is irrelevant to a complaint under 11 U.S.C. § 727. At issue here is what the Debtors "believed" regarding the exemptibility of those proceeds and whether that belief was reasonable. The Court finds that the Debtors were placed on sufficient notice of a dispute regarding the exemptibility of those proceeds, that they could not have reasonably believed that they were free to accept those proceeds

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counsel in connection with what he told the Pozzangheras at the time of the filing of the bankruptcy, the extent of a personal exemption in the proceeds of a personal injury cause of action is a complex and uncertain issue. Apart from the existence of other assets, it is only if that $180,000 were produced, and only after the resolution of that issue in the current case, that it could be determined whether assets exist against which other creditors might be justified in filing Proofs of Claims.

A bankruptcy case leaving dozens of creditors unpaid is by no means a "two-party dispute." And even in a "two-party dispute," the processes of this Court must be respected and observed.

and to disburse them without consultation at least with their own bankruptcy counsel.[13]

They wilfully and knowingly placed valuable assets beyond reach of the Trustee, and concealed them, and so violated 11 U.S.C. § 727(a)(2)(B).

THE DEBTORS CONCEALED INFORMATION FROM THE TRUSTEE, FROM WHICH THEIR FINANCIAL CONDITION OR BUSINESS TRANSACTIONS MIGHT BE ASCERTAINED

The schedules and statements prepared by bankruptcy counsel in the cases of the Debtors and Sharmas Enterprises, Inc. were based exclusively on the information offered by the Debtors. (Findings #37 and 38).

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[13]The Debtors specifically testified that they never asked either their corporate attorney or their personal injury attorney to represent them in the bankruptcy. Moreover, almost up until the filing of the Petition in bankruptcy they were dealing with yet another firm with regard to other corporate matters. Nonetheless, they chose to select yet a fourth attorney, and Mrs. Pozzanghera especially stated that they did not consult the personal injury attorney about the bankruptcy because he had no experience in bankruptcy. Yet when they accepted the check from him they specifically did not consult their bankruptcy attorney regarding whether they had authority to sign the release or to accept and disburse the proceeds. It is a fair conclusion (as suggested by the Plaintiff), that the Debtors specifically went to a different attorney for the bankruptcy filings, to assure that he would know only what they wanted him to know. See Finding #37. (Although not decisive, it appears that he might not even have known about the bankruptcy filing when he settled the lawsuit and gave the funds to the Debtors.)

They admit that everything they told him was fully disclosed in the documents his office prepared and filed. Yet the information by which the Trustee could have been alerted to numerous interests requiring investigation and evaluation for the benefit of creditors were not disclosed until challenged by the plaintiff. The Kuba account, TV 51, Pulsar Video, the appointment of a receiver for Sharmas Enterprises, Inc., the Debtors' "co-control" (if not "ownership") of Sharmas Realty, Inc., and Samuel Pozzanghera's right to a commission on any financing obtained for Fortunato's endeavors, are some important examples. Disbursements from Sharmas Realty relating to the "Foxborough Subdivision" and the "Black Clouds" transaction,[14] might be others.

Mr. Pozzanghera claims that none of these have any value for creditors. Because of the lack of records, we will never know whether in truth they had value. Moreover, the determination of whether such interests had value was not the Debtors' decision to make.

As quoted in the *Miller* case, the Second Circuit stated in the case of *In re Underhill*, 82 F.2d 258 (2d Cir. 1936) the standard which still appertains:

> Intent to conceal the financial condition is no longer a necessary element to support an objection to discharge for failure to keep books. The law is not unqualified in imposing a requirement to keep books or records, and it

[14]Stips. 278, 279.

> does not require that if they are kept they shall be kept in any special form of accounts. It is a question in each instance of reasonableness in the particular circumstances. Complete disclosure is in every case a condition precedent to the granting of the discharge, and if such a disclosure is not possible without the keeping of books or records, then the absence of such amounts to the failure to which the act applies. While it is always open to the bankrupt to affirmatively justify his failure to keep records, each case must stand upon its own facts with the inquiry always as to whether the bankrupt has sustained this burden of justification which the statute places upon him for his failure to keep adequate records. Where the bankrupt was involved in many transactions of an extensive character, a substantially accurate and complete record of his affairs is a prerequisite to his discharge. [Emphasis added.]

Thus, full disclosure is the quid pro quo to the privilege of discharge. The possibility that the Micciches knew of the various business dealings of the Debtors is irrelevant. The duty of disclosure is on those who file voluntarily for the protection of this Court. That duty was made clear to the Debtors by their bankruptcy counsel, who they admit told them to tell him "everything." But they elected to "pick and choose" the information he would be given. And thus, for example, it was only in the midst of this trial that the Debtors provided what they now claim to be a full accounting of the transactions handled through the Kuba account, and admit for the first time that not all funds disbursed from that account were disbursed for the benefit of agents. (Of course, they now claim (contrary to prior oath) that

not all funds in the account were "agents' funds." But they offer no proof of their own claimed contributions to that account.)

Similarly, the Debtors have offered no meaningful documentation of any activities involving TV 51, Genesee Communications, or Pulsar Video. They have offered no documentation whatsoever regarding various mortgage transactions with one "Fred Kravetz" regarding lands of the Debtors and of Sharmas Enterprises, Inc.

They claim to have given all books and records of Sharmas Holdings, Inc. to Mrs. Kuba, whom they claim destroyed all of those books and records except, somehow, for a stock transfer ledger which (contrary to prior representations) now bears out their own claims.

As was stated in the *Miller* case, "by proving the existence of the Debtors' investment activities and business interests, the [plaintiff] shifted the burden of providing explanatory documentation to the Debtor. *In re Massa*, 13 F.2d 199 (2d Cir. 1943). The Debtors' complete failure to provide documentation, or adequately explain its absence, is not justified under the circumstances of this case. Accordingly, the [plaintiff's] request for relief pursuant to 11 U.S.C. § 727(a)(3) is granted."

Based on a "fair preponderance" of the evidence, this Court reaches the same conclusion as to the Pozzangheras, although the Court cannot (and need not) determine which prohibited act they

have committed: whether they have concealed such information, destroyed such information, failed to keep or preserve such information, or knowingly or fraudulently withheld such information. 11 U.S.C. § 727 (a)(3) and (4)(D). The Court concludes that they have necessarily committed one or more of those acts, any one of which supports denial of discharge.

THE DEBTORS COMMITTED A PROHIBITED ACT ON OR WITHIN ONE YEAR BEFORE THE DATE OF THE FILING OF THE PETITION OR DURING THE CASE, IN CONNECTION WITH THE SHARMAS ENTERPRISES, INC. CASE

The above findings also establish by a "fair preponderance" of the evidence that the Debtors violated either 11 U.S.C. § 727(a)(3) or § 727(a)(4)(D) on or within one year before the filing of the Sharmas Enterprises, Inc. petition, in connection with the Sharmas Enterprises, Inc. case. That constitutes an independent basis for denial of discharge under 11 U.S.C. § 727(a)(7).

No credible records of that corporation's condition or activities during 1990 have been produced. See Findings 29, 32, 33, 34, 35, 45G and 45H.[15] Furthermore, Mr. Pozzanghera's

[15]See also Stips. 202-218, and in particular 208 and 218 involving issuance of Sharmas Enterprises, Inc. stock to persons named Bennett, Didsbury, Hosquera and Cranston, and for which no documentation has been offered. Also, Stip. 129 involves an undocumented transaction of $5,000 with a Dan Cornwall who did "work" for Sharmas Enterprises, Inc.

affidavit of March 27, 1990 regarding Sharmas Enterprises, Inc.'s debts cannot be reconciled with the Sharmas Enterprises, Inc. schedules. (See Stip. 224, 225, 226, and 227.) The Court does not find the Debtors' testimony, together with the scant (and possibly fabricated) records regarding Sharmas Enterprises, Inc.'s activities during 1990, to be sufficient to fulfill the statutory duty as enunciated above.

CONCLUSION

With one exception,[16] the other allegations of the Plaintiff are either subsumed in the above holdings or are without merit.

Each Debtor's discharge is denied. Judgment shall be entered accordingly and notice thereof served upon the Debtors, the Plaintiff and the Trustee. After the time to appeal has expired,

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[16]It is clear that the Debtors led the Micciches a not-so-"merry chase" in 1989 and 1990. The Pozzangheras did indeed "hinder, delay and defraud" the Micciches by use of the Kuba account (at least), and possibly by manipulations and falsehoods regarding other of their activities and the activities of Sharmas Enterprises. However, it is not necessary to decide whether a violation of § 727 incurred in that particular regard. Whether a specific intent to hinder a particular creditor in favor of other creditors warrants denial of discharge is a problematic issue which can be left for another case, on another day.

the Clerk shall notify all parties in interest of this Judgment, and of any appeals filed.

SO ORDERED.

Dated: Buffalo, New York
September 10, 1993

U.S.B.J.