## United States Bankruptcy Court
## Eastern District of Wisconsin

Cite as: [Unpublished]
[aff'd, 266 B.R. 838 (E.D. Wis. 2001)]

**Nipulchandra Patel, Plaintiff, v. Robert J. Bukowski and Christine F. Bukowski, Defendants.**
(In re Robert J. Bukowski and Christine F. Bukowski, Debtors)
Bankruptcy Case No. 96-25586-RAE; Adversary Case No. A96-2635

United States Bankruptcy Court
E.D. Wisconsin

May 26, 1999

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Thomas S. Utschig, United States Bankruptcy Judge (sitting by designation).

### MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This adversary proceeding is the latest chapter (though perhaps not the last) in an acrimonious dispute between two former business partners. After more than four years, a trial in state court, various appeals, and now this bankruptcy proceeding, the parties may well concur with Ambrose Bierce's statement that "litigation is a machine which you go into as a pig and come out as a sausage."[(1)] The sausage in question is the plaintiff's judgment against the debtor Robert Bukowski for compensatory and punitive damages totaling $643,930.00. The issue facing the Court is whether the debtors are entitled to a discharge.

The plaintiff asserts that the debtors should be denied a discharge under various provisions of 11 U.S.C. § 727. In the alternative, the plaintiff seeks to have his claim excepted from discharge under 11 U.S.C. §§ 523(a)(4) and (a)(6). As may be expected, the debtors heartily oppose these contentions. The matter was stayed for a considerable period while the debtors pursued their appeal of the underlying state court judgment. That judgment has now been affirmed by the Wisconsin Court of Appeals. Both sides have filed voluminous summary judgment motions regarding the dischargeability issues, and the matter is now ripe for determination.

The facts are as follows. The debtor, Robert Bukowski, formed Alpha Consulting Group, Inc. ("Alpha I") in 1989. Alpha I was an investment management consulting firm. The plaintiff began working at Alpha I in November of 1989. The plaintiff alleged in the subsequent state court lawsuit that the parties agreed that he would move from New York to Milwaukee and would become a co-owner of the business. Mr. Bukowski allegedly agreed that once Alpha I became profitable, he would issue stock to the plaintiff. According to the plaintiff, however, once the business did actually realize profits, Bukowski refused to share. In fact, he forced the plaintiff out of the business.

The plaintiff brought an action in state court against Bukowski. He sought compensatory damages for Bukowski's refusal to share the business with him, as well as punitive damages. He testified that Bukowski manufactured a "list of lies" in order to discredit his ownership claim, and that Bukowski never compensated him for his ownership interest in the business. Bukowski, however, testified that the plaintiff was merely an employee of Alpha I and never had any ownership interest in the company. Ultimately, the jury found in favor of the plaintiff, awarding him compensatory damages of $542,391.00 and punitive damages of $101,539.00.

The Bukowskis filed bankruptcy on July 10, 1996, within a few weeks of the jury's verdict and only two days after the trial court denied their post-trial motions. Their schedules reflect that this claim represents the bulk of their debts.(2) Bukowski also terminated his involvement with Alpha I and began working for another company, Alpha Investment Consulting Group, L.L.C. (or "Alpha II"). This business was started shortly after the bankruptcy petition was filed. It is apparently owned by Michael Hallmann, a friend of Mr. Bukowski.(3) The plaintiff alleges that Bukowski took "steps" to ensure that the clients of the old business would transfer their relationship to the "new" Alpha. In this regard, Mr. Bukowski admits that he contacted these clients to "let them know" he had changed jobs. Client letters reflect the transfer of business from one entity to the other.(4)

In their bankruptcy schedules, the debtors listed Mr. Bukowski's stock interest in Alpha I as having a value of "$0."(5) The chapter 7 trustee apparently inquired about the stock, as the debtors' attorney wrote a July 16, 1996, letter to the trustee in which he justified this valuation and stated: "Notwithstanding the fact that the business [Alpha I] continues to operate at a profit, we believe that the stock has no value primarily because it is service oriented and would certainly collapse without Mr. Bukowski." See "Exhibit A" to the affidavit of Robert Bukowski opposing the plaintiff's motion for summary judgment.

Apparently concerned that the debtors were attempting to "strip" the Alpha I business and deny him a means to collect the judgment, the plaintiff sought to acquire the corporate stock from the trustee. While the timing of his offers and acquisition of the stock have been the subject of some debate, the facts are that he initially offered a few hundred dollars, which culminated in a written offer to purchase the stock for $2,000.00.(6) The trustee accepted the offer and subsequently sold the stock for that amount in November of 1996. In one of his briefs, the plaintiff characterizes his initial efforts in contacting the trustee as advising the trustee "that Alpha I was apparently being stripped of all of its clientele and other assets." See plaintiff's brief in opposition to Christine Bukowski's motion for summary judgment on Patel's § 727 claim seeking denial of discharge at p. 4. The trustee apparently found the plaintiff's offer of greater benefit to the estate than pursuing the alleged "transfers" of property.(7)

Whether the debtors did in fact "strip" the business assets from Alpha I remains disputed and is to a certain extent the subject of this adversary proceeding. The record is clear, however, that by the time the plaintiff acquired the corporate stock from the trustee, Alpha I was no longer in operation. Mr. Bukowski had departed, setting up shop with Alpha II one floor above the location of his old business. He continues to service many of the same clients for Alpha II, and earns a salary of (8) approximately $6,000.00 per month.

The plaintiff brought this adversary proceeding to prevent the debtors from avoiding his judgment. He contends that they violated several sections of § 727 and should be denied a discharge. First, he contends that Mr. Bukowski transferred assets in violation of § 727(a)(2). Second, he contends that the debtors misrepresented the value of an asset in violation of § 727(a)(4). And finally, he contends that they failed to satisfactorily explain the "loss" of value in the stock as required by § 727(a)(5). He also asserts that even if they are entitled to a general discharge, his judgment should be excepted from discharge under either 11 U.S.C. § 523(a)(4) or (a)(6). Both sides have filed motions for summary judgment.[(9)] The Court will address each issue in turn.

**General Observations**

While there is no constitutional or "fundamental" right to a discharge in bankruptcy, the intent of the bankruptcy code is to provide debtors with a "fresh start." Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755, 764 (1991). As the Grogan court stated:

> [A] central purpose of the [bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." [citation omitted].

112 L. Ed. 2d at 764. Grogan also recognized, however, that the "opportunity for a completely unencumbered new beginning" is limited to the "honest but unfortunate debtor." Id. at 764-65. The plaintiff contends that these debtors are neither honest nor unfortunate, and that they have manipulated circumstance and law to their benefit.

The bankruptcy code contemplates that upon filing, the debtors will fully disclose all of their assets and liabilities and will assist the trustee in liquidating those assets to pay creditors. The code then permits the discharge of their remaining debts. If the debtors fail to adequately disclose relevant financial information or otherwise act to disrupt the orderly liquidation of non-exempt assets, they face the denial of their discharge under the various provisions of 11 U.S.C. § 727(a). In addition, Congress has determined that certain debts should not be avoided in bankruptcy, and the code provides that such debts shall be excepted from discharge under 11 U.S.C. § 523(a).

The purpose of § 727 is to make full financial disclosure a "condition precedent" to the grant of a discharge. In re Lawrence, 227 B.R. 907, 916 (Bankr. S.D. Fla. 1998); see also Broad Nat'l Bank v. Kadison, 26 B.R. 1015 (D. N.J. 1983). In fact, a chapter 7 debtor's duty of full disclosure extends even to assets which are worthless or without significant value to creditors. Matter of Hughes, 184 B.R. 902 (Bankr. E.D. La. 1995). The success of the bankruptcy system hinges upon each debtor's veracity and willingness to make full disclosure. Id. at 909; see also In re Gipe, 157 B.R. 171, 178 (Bankr. M.D. Fla. 1993). The debtor has the "paramount duty" to carefully consider all questions in the bankruptcy schedules and to see that each is answered accurately and completely. In re Kasal, 217 B.R. 727 (Bankr. E.D. Pa. 1998).

Nonetheless, the bankruptcy code favors the discharge of an honest debtor's debts, and as a result the provisions of § 727 are to be "construed liberally in favor of the debtor and strictly against the creditor." In re Weldon, 184 B.R. 710 (Bankr. D. S.C. 1995); see also In re Reader, 183 B.R. 630 (Bankr. D. Idaho 1995); In re

Bodenstein, 168 B.R. 23 (Bankr. E.D. N.Y. 1994); In re Gill, 159 B.R. 348 (Bankr. M.D. Fla. 1993). The same is true of the exceptions to discharge found in § 523(a). These exceptions to discharge should be confined to those "plainly expressed," Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998), and must be construed with an eye toward the equitable principles underlying the bankruptcy law. Matter of Faden, 96 F.3d 792 (5th Cir. 1996).

Since excepting a debt from discharge can significantly impact the debtor's ability to make a fresh start, all such exceptions are to be strictly construed in favor of the debtor and against the creditor, who also bears the burden of proof.[(10)] In re Scarpinito, 196 B.R. 257 (Bankr. E.D. N.Y. 1996); see also In re Dempster, 182 B.R. 790 (Bankr. N.D. Ill. 1995); In re Cox, 182 B.R. 626 (Bankr. D. Mass. 1995); Matter of Gross, 175 B.R. 277 (Bankr. N.D. Ind. 1994). The grounds for denial of discharge must be proven specifically, and the proof must be directed at the transfer or concealment alleged. A debtor should not be denied a discharge on "general equitable considerations." In re Parnes, 200 B.R. 710 (Bankr. N.D. Ga. 1996).

The parties have each filed a series of motions for summary judgment on the relevant claims. Motions for summary judgment are governed by Fed. R. Civ. P. 56, made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. This rule provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56. In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue as to any material fact exists, not to resolve any factual issues. Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S. Ct. 2548, 2556, 91 L. Ed. 2d 265 (1986). Summary judgment should be granted if there can be but one reasonable conclusion as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

**Preclusive Effect of Prior State Court Judgment**

The presence of the prior state court judgment has raised the issue of its preclusive effect in this proceeding. Collateral estoppel or "issue preclusion" refers to the effect a prior judgment has in foreclosing litigation of an issue of law or fact that has been actually decided or litigated in the initial action. Meyer v. Rigdon, 36 F.3d 1375, 1378 n.1 (7th Cir. 1994). Collateral estoppel must be distinguished from res judicata or "claim preclusion," which refers to the preclusive effect a judgment has in foreclosing litigation of matters which "were or could have been" raised in an earlier suit. Id. The Supreme Court has held that res judicata does not apply in bankruptcy dischargeability proceedings. Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). However, under appropriate circumstances collateral estoppel may preclude a party in a bankruptcy adversary proceeding from relitigating issues which were previously decided in another forum. Certain conditions must be met before the prior judgment may be given such preclusive effect:

1. The issue sought to be precluded must be the same as that involved in the prior action.

2. The issue must have been actually litigated.

3. The determination of the issue must have been essential to the final judgment.

4. The party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987).

In this case, the plaintiff seeks to preclude the debtors from litigating certain issues he believes are encompassed by the state court verdict. Primarily, the plaintiff believes that the state court jury determined (i) the value of the corporation; (ii) the presence of a fiduciary relationship between the parties which was violated by Mr. Bukowski; and (iii) the willful and malicious nature of Mr. Bukowski's actions toward the plaintiff. Clearly, the prior judgment was hotly contested and "actually litigated." Mr. Bukowski was represented by competent counsel. Therefore, the Court's obligation is to determine whether these issues were in fact addressed and resolved in the prior case, and whether that determination is identical to the inquiry which must be made by this Court.(11) The Court will address the specific application of the collateral estoppel doctrine to these issues as they arise in the course of the opinion.

**Objections to Discharge Under 11 U.S.C. § 727(a)**

The plaintiff objects to the debtors' receipt of a discharge. In his motion for summary judgment, the plaintiff contends the debtors have violated three separate statutory subsections of § 727(a).(12) The first is § 727(a)(4), which provides that a debtor may not receive a discharge if the debtor "knowingly and fraudulently" made "a false oath or account" in or in connection with the case. To succeed in proving a violation of this section, the plaintiff must demonstrate:

1. The debtor made a statement under oath.

2. The statement was false.

3. The debtor knew the statement was false.

4. The debtor made the statement with fraudulent intent.

5. The statement was material to the bankruptcy case.

In re Chaplin, 179 B.R. 123 (Bankr. E.D. Wis. 1995). A fundamental purpose of this statute is to ensure that those interested in the administration of the bankruptcy estate receive dependable information on which they can rely without having to dig out the true facts through examination or other investigation. In re Haverland, 150 B.R. 768 (Bankr. S.D. Cal. 1993).

Under this section, a debtor's discharge may be denied if the debtor makes deliberate omissions in regard to an interest in property. In re Wade, 189 B.R. 522 (Bankr. M.D. Fla. 1995). However, the existence of false or inaccurate statements is not, in and of itself, sufficient cause to deny a debtor's discharge on "false oath" grounds unless it is shown that the statements were knowingly and fraudulently made. In re Quinones Rivera, 184 B.R. 178 (D. Puerto Rico 1995). It is only the "pernicious debtor" who is denied a discharge based on a false oath or account, not a debtor who was careless or who failed to fully understand an attorney's instructions. In re Gannon, 173 B.R. 313 (Bankr. S.D. N.Y. 1994). Where assets of some substantial value were omitted from the debtor's schedules, the conclusion that they were omitted with fraudulent intent may be warranted. Where the non-disclosed assets are of little or no value, fraudulent intent will not be presumed. In re Ross, 217

B.R. 319 (Bankr. M.D. Fla. 1998).

The essential issue under this subsection is the plaintiff's belief that the debtors misrepresented the "value" of the corporate stock in their schedules. As indicated, the schedules reflect the debtors' apparent belief that the corporate stock in Alpha I had a value of "$0." The plaintiff contends that this was a knowing and material misrepresentation because the state court jury had only a few weeks previously concluded that the business was worth over $1 million. The plaintiff also believes that principles of collateral estoppel require that this value be utilized.

As indicated previously, collateral estoppel does apply in bankruptcy proceedings. See Grogan, 112 L.Ed. 2d at 763 n.11. However, collateral estoppel can only be applied in situations where the issue previously litigated was identical to the matter which must be decided in the present case.(13) A review of the jury verdict and jury instructions reflects that the jury was not specifically required to determine the "value" of the business, and it is a misinterpretation of that verdict to argue that the jury necessarily awarded the plaintiff "half" of the business. The plaintiff does point to various statements made by counsel during the state court trial which indicate that the jury did make such a valuation determination. However, it is impossible to conclude from the verdict whether that is actually what happened. The jury concluded that $542,391.00 was the amount which would fairly compensate the plaintiff for his injuries. While it is easy to believe this means that the jury concluded the business was worth, as the plaintiff suggests, some $1,085,000.00, the jury was not called upon to make such a specific determination.(14)

However, presupposing that the jury did in fact award compensatory damages based solely on a valuation of the business as a whole, that determination would have been based on an examination of the business as an ongoing concern. In fact, the plaintiff himself contends that the jury's verdict is a reflection of a "standard" valuation of the business as an amount equal to "two times annual revenues." See plaintiff's brief in opposition to Robert Bukowski's motion for summary judgment on Patel's § 727 claim seeking denial of discharge at p. 3. Given the fact that Alpha I had annual revenues of about $500,000.00 the prior year, this calculation would give the company approximately the $1 million value asserted by the plaintiff.

This technique is obviously one method of establishing a value for this business. The question is whether it is the *only* possible valuation technique, and if the debtors were required to utilize it when valuing the stock for bankruptcy purposes. The bankruptcy code itself reflects the understanding that "value" can vary depending upon circumstance. For example, 11 U.S.C. § 506(a) provides that when valuing collateral "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." Generally speaking, a statement regarding the value of property reflects nothing more than the declarant's personal opinion and, as such, would not support the denial of a discharge for making a "false oath." In re Sumpter, 136 B.R. 690 (Bankr. E.D. Mich. 1991).(15)

The plaintiff relies heavily on Matter of Prince, 85 F.3d 314 (7th Cir. 1996), for certain arguments related to the possible transfer of the "goodwill" of Alpha I, which the plaintiff believes violated § 727(a)(2). However, that case is also quite instructive as to the variety of "values" an asset may have in the context of a bankruptcy proceeding. Prince was a chapter 11 reorganization case. The parties sought to value the debtor's stock interest in his orthodontics practice. The Seventh Circuit concluded that the value of the stock included the business's goodwill as the debtor intended to continue operating. The court stated:

> In general, stock as an asset has value because of its capacity to generate cash flows in the future. Shareholders may expect to receive future cash flows from the stock in three ways: (1) as dividends when corporate profits are periodically distributed to the company's shareholders; (2) as capital appreciation (or decline) when the stock is sold at some point in the future for a profit (or loss); and/or (3) as liquidation distributions when, upon dissolution of the company, the shareholders receive the residual value of the company's assets after all creditor claims have been satisfied. In financial terms, the value of the stock on any given day (its "present value") is how much money an investor would be willing to pay on that given day in order to obtain the right to receive the stock's cash flows in the future.

Id. at 319 (citation omitted).(16)

Given the reorganization efforts of the debtor, the Prince court concluded that liquidation value (the value of the business's physical assets) was not an appropriate estimation of value. Id. at 320. Where a business is expected to continue as a going concern, the company's expected future earnings from operations often far exceed the liquidation value of its physical assets. In such a context, liquidation is generally "an inaccurate approximation" of what the shares are worth to the shareholders. Id. However, the Prince court did not rule out the use of a liquidation analysis under appropriate circumstances. If the business is dissolving, "liquidation distributions are the only foreseeable future cash flows to the shareholder, and thus liquidation value is an accurate tool for measuring the stock's present value." Id.

The debtors allege that the discrepancy, if any, between the schedules and the jury verdict is that they did not value the business as a going concern, but instead chose to utilize a liquidation analysis. The jury heard testimony of the value of the business as an ongoing concern. The record indicates that the debtors disputed this valuation and prepared their schedules during the appeal period while the judgment was not final. Therefore, it is questionable whether they were precluded from asserting a different valuation in their schedules or elsewhere when they certainly had the ability to contest the verdict on appeal. Furthermore, the use of a different valuation in the bankruptcy context may well be appropriate given that they filed a chapter 7 liquidation case, not a chapter 11, and further indicated an intent to dissolve the business.

As a result, even if the jury did value the stock, collateral estoppel does not dictate that the Court rely upon the jury verdict to determine its "true" value. Rather, the Court must determine whether the debtors' alleged use of a "liquidation" analysis constitutes a false oath. The plaintiff sweeps with a broad brush in describing the value of the "Alpha I business," but what the debtors listed on their schedules was a very simple asset: stock in a closely-held corporation which was very dependent upon the involvement of its principal for its ongoing viability and value. Such stock often has little market value. Mr. Bukowski was apparently told by his counsel that he might lose control of his stock interest in Alpha I upon filing chapter 7, and valued the business in his schedules based upon his belief that absent his involvement, the company had no particular worth.

Determining whether a debtor's valuation of an asset was false can be difficult, given that in many instances such "self-appraisals" are little more than a statement of opinion.(17) Several cases are instructive about this type of false or fraudulent oath. In In re Sumpter, 136 B.R. 690 (Bankr. E.D. Mich. 1991), the creditor contended the debtors misrepresented the value of their home, which had been listed on the schedules as having a value of $96,000.00. Other evidence, including the debtors' reaffirmation agreement, indicated that the value was more in the neighborhood of $133,000.00. The court concluded that the debtors' valuation, which utilized the "state equalized value" of the home, was not a false oath or account. Id. at 698-99.

Similarly, in In re Parnes, 200 B.R. 710 (Bankr. N.D. Ga. 1996), the court was confronted with the debtor's alleged misrepresentation of the value of his dental practice. The court concluded that the debtor's "unknown" valuation was not a false oath despite different valuations found in either his earlier affidavits in various divorce proceedings or the financial statements given to a secured creditor. The court accepted the debtor's explanation, which was that certain valuations presumed a willing sale by both he and his father, while the other contemplated a forced sale of only his interest in the business. The court concluded that the debtor's explanation was "reasonable and not given with any intent to mislead the trustee or the creditors." Id. at 718.

These cases can be contrasted with both In re McGee, 157 B.R. 966 (Bankr. E.D. Va. 1993) and In re Ross, 217 B.R. 319 (Bankr. M.D. Fla. 1998). In McGee, the debtor failed to list his 7% stock interest in a company on his schedules. At the 341 meeting, he informed the trustee and creditors that the interest was "worthless." However, the debtor had been contacted only a few days before by a potential purchaser interested in acquiring the company. The court concluded the debtor made a false oath because the debtor had to have known that the stock had some value based upon the possible sale of the company. 157 B.R. at 973-74.

In Ross, the court also found that the debtor had fraudulently undervalued her corporate stock when she listed the stock as being worth only $10.00 in her schedules. The corporation in question owned certain hard assets (real estate) which had value in excess of the company's debt obligation. The court concluded that "[the] Defendant could not have believed in the veracity of her $10 valuation on her bankruptcy schedules." Id. at 329. Ross and McGee both involved situations where even under a liquidation analysis, the corporate stock in question had residual value to the stockholders because there was equity available in these companies in excess of any liability.

These cases reflect a few basic principles which guide the inquiry in this case. First, the valuation methodology of the debtor must have a cogent basis. The debtor in McGee claimed his stock interest was worthless but the evidence indicated otherwise. In Ross, the debtor could not justify the valuation even on a liquidation basis because there was substantial equity which would inure to the shareholders under a liquidation distribution. Unlike the debtors in those cases, however, the Bukowskis provided ample justification for their valuation. They provided a balance sheet which reflected that the corporation's liabilities exceeded its assets. They further justified the valuation in correspondence to the trustee reflecting that as a service entity, its value was dependent upon the continued involvement of Mr. Bukowski, something which was not a given.

Like the debtors in Sumpter and Parnes, the debtors in this case offered a cogent explanation of their valuation. While the plaintiff may dislike the use of liquidation value, he has not been able to demonstrate that they misrepresented that analysis. His contention, at best, is that they should have used the going concern value of the business. As Prince suggests, however, liquidation value is appropriate where the business is dissolving. Were the debtors attempting to reorganize as in Prince or the other case cited by the plaintiff, In re Thomas, 231 B.R. 581 (Bankr. E.D. Pa. 1999), a liquidation value would not be an accurate reflection of the stock's value because the debtors would have an anticipation of additional future cash flow from their stock ownership. In this case, the record is clear that the debtors did not intend to continue the Alpha I business and were in fact under no obligation to do so. Given that there was no foreseeable "liquidation distribution" from Alpha I because its debts exceeded its assets, the zero valuation was not so unreasonable as to be false.

The plaintiff has the burden of demonstrating both the falsity of the statement and that the debtors made the statement with fraudulent intent. Chaplin, 179 B.R. at 127. He has proven neither. The debtors' explanation of their valuation methodology is cogent and understandable. It is supported by the facts, and the plaintiff has pointed to nothing which contradicts their liquidation value. The debtors' self-appraisal cannot usually support the denial of their discharge as it reflects nothing more than a statement of opinion. Sumpter, 136 B.R. at 696. The valuation in this case was a clear representation of the debtors' honest and valid opinion. There is no basis for denying the debtors' discharge under § 727(a)(4), and the Court finds there is no disputed material fact which would preclude summary judgment on this issue in favor of the debtors.

The plaintiff next cites § 727(a)(5). This section provides that a debtor may not receive a discharge if:

> [T]he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

This section essentially mandates that the debtor explain any loss of assets. It requires a "satisfactory" explanation of the whereabouts of the debtor's assets, which must consist of more than vague, indefinite, and uncorroborated assertions by the debtor. Matter of D'Agnese, 86 F.3d 732 (7th Cir. 1996). It must be noted that this test relates to the credibility of the proffered explanation, not the propriety of the disposition. In re Maletta, 159 B.R. 108 (Bankr. D. Conn. 1993). The debtor's explanation need not be meritorious to avoid denial of discharge; the court need only decide whether the explanation satisfactorily describes what happened to the assets, not whether what happened was proper. In re Silverstein, 151 B.R. 657 (Bankr. E.D. N.Y. 1993).

In this case, the plaintiff complains that the debtor has failed to explain why the stock's value plummeted from over $1 million to $0 within just a few months. As indicated, however, the jury verdict cannot be used as an absolute indicator of the stock's value. The debtors' explanation of the purported decrease in value is simple: Mr. Bukowski took himself out of the equation. As indicated in the letter from the debtor's attorney to the trustee, their valuation was based upon their belief that the business would collapse without Mr. Bukowski's continued involvement. He was not obligated to remain with Alpha I, and did not do so. The explanation, while perhaps not "proper" in the plaintiff's eyes, is nonetheless perfectly satisfactory within the meaning of § 727(a)(5) as it is consistent with the facts in evidence. D'Agnese, 86 F.3d at 734.[(18)] Accordingly, summary judgment in favor of the debtors is appropriate on this claim as well.

Finally, the plaintiff objects to the debtor's discharge under §§ 727(a)(2)(A) and (B). These subsections provide that the debtor may not obtain a discharge if:

> [T]he 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.

Before a chapter 7 discharge may be denied under this section, it must be shown that there was an actual transfer or concealment of valuable property belonging to the debtor which reduced assets available to creditors and which was made with fraudulent intent. In re Garcia, 168 B.R. 403 (D. Ariz. 1994).

The plaintiff's essential complaint is that the debtor transferred an "asset" when he quit operating the Alpha I business and started working for Alpha II. In this regard, the plaintiff points out that the state court jury found that the parties had been operating a "joint venture." He thus construes what occurred as an impermissible transfer of the "Alpha I business." The conceptual problem with this argument is two-fold. First, notwithstanding the jury verdict, any "joint venture" here was operated through a corporate form. The asset of the debtor - and the asset of the estate - at issue is therefore the corporate stock. The stock was disclosed on the debtors' schedules and administered in short order by the chapter 7 trustee. It was not transferred. Second, to the extent that the assets of the corporation could somehow be construed as assets of the debtor personally, the only thing which appears to have been "transferred" is the client base of the business.[(19)]

In this regard, the plaintiff has been unable to produce any evidence that those clients were obligated to continue a business relationship with Alpha I. Absent such evidence, it is clear that those clients are free to conduct business with whomever they please. The case law is clear that a former employee can solicit clients from a former business without liability unless there is some contractual obligation, either upon the client or the employee, to refrain from doing so. In the case of In re Golden Distributors, Ltd., 122 B.R. 15, 21 (Bankr. S.D. N.Y. 1990), the court stated that:

> [T]he [former employees'] solicitation of customers of the debtor whose names were readily obtainable from classified telephone directories and other public sources does not constitute an impermissible obtaining of possession or control . . . of property of the debtor's estate, or from the debtor's estate.

The plaintiff has also failed to demonstrate that Mr. Bukowski was under any obligation to either continue with the Alpha I business or had executed a non-competition agreement which would preclude him from soliciting business from Alpha I in the event he departed from the company. His solicitation of business from the customers of Alpha I therefore does not constitute a "transfer" of an asset.

The plaintiff, however, asserts that even the Golden case supports his notion that a transfer took place because Mr. Bukowski has attempted to "continue" Alpha I and has held himself out as related to the company, thereby acquiring or transferring the "goodwill" of the business. See Golden, 122 B.R. at 20. Clearly, Mr. Bukowski has sought to continue in his chosen profession, that of investment manager. The name of the new business is indeed virtually identical to that of Alpha I. But there is no evidence that by engaging in the same profession or even by operating under a similar name he acquired the goodwill of the Alpha I entity. Rather, any goodwill was his own; the clients followed him because of their relationship with him, not with Alpha I. To the extent the earnings of Alpha I represented the labors of Mr. Bukowski, it must be remembered that the post-petition earnings of a chapter 7 debtor are not property of the bankruptcy estate. See 11 U.S.C. § 541(a)(6).[(20)]

Had Mr. Bukowski not filed bankruptcy but instead simply left Alpha I in the hands of the plaintiff and opened up a shop across the street, the plaintiff would have been hard pressed to assert any legal claim against him. There was no non-competition agreement which compelled the debtor to operate in some other location, nor was there any requirement that the debtor stay away from clients of Alpha I. Partners often depart and open operations which compete with their former businesses. Furthermore, given the absence of any exclusivity agreements between the clients and Alpha I, there was no obligation that they continue utilizing the company in the absence of Mr. Bukowski.(21)

The debtor's testimony is that he left all the hard assets with Alpha I. Clearly, those assets were of relatively inconsequential value, and in fact were not even worth as much as the company's outstanding liabilities. There is nothing else which could have been transferred. The reality reflects the statements made by the debtor's counsel to the trustee early in the case that the business was dependent upon the continued involvement of Mr. Bukowski. The plaintiff can point to absolutely nothing which requires that continued presence. The plaintiff is justifiably distressed that Alpha I is apparently no longer a viable entity. Clearly, the plaintiff also feels that it is inequitable for Mr. Bukowski to quit Alpha I and resume operations under a similar name. However, under this section there must be a cognizable transfer of valuable property which reduced the assets available to creditors; the debtor will not be denied a discharge on "general equitable considerations." Parnes, 200 B.R. at 715. The debtor's move to another company, for whatever reason, does not constitute a "transfer" of assets within the meaning of § 727(a)(2). Accordingly, summary judgment in favor of the debtors on this claim is appropriate as well.(22)

**Exception From Discharge Under 11 U.S.C. § 523(a)**

The plaintiff also contends that the debt should be excepted from discharge under §§ 523(a)(4) and (a)(6). The first of these provisions provides that a debtor cannot discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The plaintiff points out that the state court verdict provides that the debtor did in fact breach a "fiduciary responsibility" owed to the plaintiff. Therefore, the plaintiff contends that collateral estoppel prevents the re-litigation of this issue.

The problem with this argument is that the term "fiduciary capacity" in § 523(a)(4) has been narrowly construed by the courts. The broad, general definition of a "fiduciary" as one involving confidence, trust, and good faith is not applicable in the bankruptcy context. In re Lewis, 97 F.3d 1182 (9th Cir. 1996); see also In re Librandi, 183 B.R. 379 (M.D. Pa. 1995). For bankruptcy purposes, the elements required to satisfy the "fiduciary fraud" exception are: (i) the existence of either an express or technical trust; (ii) the debtor is a fiduciary of such trust; and (iii) the debtor commits fraud or defalcation while acting as a fiduciary of the trust. In re Eisenberg, 189 B.R. 725 (Bankr. E.D. Wis. 1995).

While the plaintiff suggests that the state court jury's findings are entitled to preclusive effect, that is only true to the extent that the jury found a "fiduciary relationship" within the meaning of state law. The existence of a fiduciary relationship of the specific kind required to trigger the statutory exception to discharge found in § 523(a)(4) is "a question of federal law." Meyer v. Rigdon, 36 F.3d 1375, 1382 (7th Cir. 1994). The jury verdict may have preclusive effect as to the breach of a state law fiduciary duty, but it remains for this Court to determine whether that fiduciary relationship falls within the "subset" of fiduciary obligations encompassed by the word "fiduciary" in § 523(a)(4). Matter of Woldman, 92 F.3d 546 (7th Cir. 1996).

The Court finds as a preliminary matter that there is no express or technical trust relationship between the parties. Eisenberg, 189 B.R. at 730. The plaintiff contends that the relationship between the parties was one of such "inequality" that it nonetheless justifies "the imposition on the fiduciary of a special duty." Id. As the Seventh Circuit recognized in Woldman, there has been a split in the circuits as to whether fiduciary obligations between equals, for example general partners in a partnership, or joint venturers, are "part of this subset." Id. at 547. The Seventh Circuit, however, has held that this section only applies to:

> [T]hose fiduciary obligations in which there is substantial inequality in power or knowledge in favor of the debtor seeking the discharge and against the creditor resisting discharge, and does not reach "a trust that has a purely nominal existence until the wrong is committed."

Id. at 547; see also Matter of Marchiando, 13 F.3d 1111, 1116 (7th Cir. 1994). Accordingly, the fiduciary obligations owed by one general partner, or one joint venturer, to another are not within the purview of § 523(a)(4). As the Woldman court indicated, such obligations fall "at the opposite end of the broad spectrum of fiduciary obligations from the case in which a trustee defrauds a child beneficiary or a lawyer defrauds a client or a general partner defrauds a limited partner." 92 F.3d at 547.

In the present case, the state court jury found that the parties operated Alpha I as a joint venture. The jury also concluded that Mr. Bukowski violated a fiduciary obligation owed to the plaintiff. While that is sufficient under state law, it is not enough under § 523(a)(4). Any inequity in position, power, or knowledge occurred only at the time the wrong was committed (*i.e.*, Bukowski acted to oust the plaintiff from the business). Prior to that time, all evidence indicates that the plaintiff was not at any particular disadvantage or that there was any "substantial inequality in power or knowledge" as would bring this case to the nondischargeable end of the spectrum. The plaintiff points to the fact that Mr. Bukowski handled "administrative" matters, including the finances, but does not allege any facts which would indicate that the plaintiff was ever denied access to such information or was otherwise prevented from dealing with the assets of the business until the time that Mr. Bukowski sought to terminate their relationship.

As the Marchiando court stated, the key distinction is between a trust or fiduciary relation which has an existence "independent of the debtor's wrong" and one that has no particular existence before the wrong is committed. 13 F.3d at 1115. The Woldman case expressly provides that joint venturers fall into this latter category, and therefore the relationship between Mr. Bukowski and the plaintiff does not qualify under § 523(a)(4).[(23)] The plaintiff has failed to allege any facts which would be sufficient to demonstrate any particular "inequality" of power between the parties until the moment the "wrongful act" occurred. As a result, there is no issue of material fact and there is no question that this is not the type of fiduciary relationship required by § 523(a)(4). The debt cannot be excepted from discharge under this section.

Finally, the plaintiff also seeks to except the judgment from discharge under § 523(a)(6), which provides that a debtor cannot discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." This Court has long held that for an act to be "willful," it must be intentional and deliberate; for it to be "malicious," the intent must be to harm. In re Cilek, 115 B.R. 974 (Bankr. W.D. Wis. 1990). The debtor must know that his act will harm another and proceed in the face of that knowledge. Id. at 998. In the recent Geiger decision, the Supreme Court stated that:

> [T]he (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences of an act," not simply "the act itself."

140 L. Ed. 2d at 95 [citations omitted; emphasis in original].

The recent case of Matter of Miller, 156 F.3d 598 (5$^{th}$ Cir. 1998), indicates that the Supreme Court may have altered the traditional interpretation of the "willful and malicious" exception to discharge. Clearly, the Supreme Court resolved a minor dispute over whether the section covered intentional acts which "cause" injury or only those which are done with the actual intent to injure. Id. at 603. The debtor cites Miller as suggesting that an act done with intentional disregard for the rights of another might not fall within the definition of "willful and malicious." Miller, however, makes no such broad pronouncements. Rather, the court states that its interpretation of Geiger is that an injury is willful and malicious where there is "either an objective substantial certainty of harm or a subjective motive to cause harm." Id. at 606. This is further made clear by the court's observation that "[i]f [the debtor's] actions were at least substantially certain to result in injury to [the creditor], then the debt is nondischargeable under § 523(a)(6)." Id.

Geiger itself makes no such sweeping modifications to existing case law on § 523(a)(6). Rather, the Court was concerned with the distinction between intentional conduct and merely "negligent" or "reckless" conduct. A broad reading of the section could encompass "a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor." Geiger, 150 L. Ed. 2d at 96. The Court's examples of conduct which might fall within this broad interpretation included "intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic" or "a knowing breach of contract." Id. The Court found this interpretation incompatible with the notion that exceptions to discharge should be "confined to those plainly expressed." Id.

Mr. Bukowski seeks to minimize his conduct and the findings of the state court jury on this issue. He contends that what occurred here was nothing more than the "knowing breach of contract" mentioned by the Supreme Court in Geiger. He suggests that the verdict is not sufficient to preclude him from obtaining a discharge. The plaintiff, on the other hand, contends that collateral estoppel should apply and that the findings of the state court jury must be given full effect. The fact that the Supreme Court mentioned breach of contract in this context is appropriate, for there are many instances in which a breach of contract may not constitute willful and malicious conduct. At the same time, the Geiger decision cannot be read as limiting § 523(a)(6) to such intentional torts as battery and the like. Miller, 156 F.3d at 605. The ultimate inquiry remains the same. The Court must determine whether the debtor acted "willfully and maliciously" when he forced the plaintiff from Alpha I.

In this regard, the state court jury found that the plaintiff did have an interest in the Alpha I business. The jury also found that the debtor had improperly prevented the plaintiff from obtaining the benefit of that interest. While the debtors argue that the debt is not "willful and malicious," the state court jury found that Mr. Bukowski's conduct was such that it justified an award of punitive damages. The verdict form asked the jury to determine whether Mr. Bukowski had acted "maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." The jury instructions specifically provide that

> [a] person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person acts in intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

The state court jury expressly found that the debtor acted maliciously and in intentional disregard of the plaintiff's rights. Despite Mr. Bukowski's protests to the contrary, the formulation utilized by the state court is essentially the same inquiry that must be made in determining whether a debt is nondischargeable under § 523(a)(6). This instruction even fits the Miller court's restatement of standard for "willful and malicious" injury as being one where there is either an objective substantial certainty of harm or a subjective motive to cause harm. Miller, 156 F.3d at 606. Had the jury found nothing more than a "knowing" breach of contract, or that Mr. Bukowski had engaged in negligent or reckless conduct, neither the jury instructions nor the verdict form would have permitted the imposition of punitive damages. At the simplest level, the state court jury found that Mr. Bukowski's actions were intentional and deliberate, and that he acted with either an intent to harm the plaintiff or proceeded in such a manner that harm was unavoidable. Id.; see also Cilek, 115 B.R. at 998.

Collateral estoppel is intended to protect litigants from the burden of having to relitigate an issue which has already been conclusively decided in a previous proceeding. Meyer, 36 F.3d at 1379. In this case, the state court jury heard days of testimony from the parties. The jury reviewed the documents, listened to experts, and made its decision. While Mr. Bukowski might wish it otherwise, that verdict is conclusive on this point. The doctrine of collateral estoppel precludes him from contending that the debt in question is not for a "willful and malicious injury" within the meaning of § 523(a)(6). The state court jury found that the debtor did not merely act recklessly or negligently, but that he acted in a manner consistent with the meaning of "willful and malicious" conduct under § 523(a)(6). The debt is therefore nondischargeable under this section.

Accordingly, the debtors' motions for summary judgment on the § 727 claims are granted. The plaintiff's motion for summary judgment under § 727 is denied. The plaintiff's motion for summary judgment under § 523 is denied as to the claim under (a)(4) and granted as to (a)(6). The plaintiff shall have judgment against Mr. Bukowski excepting the debt from discharge in the original amount of $643,930.00, together with accrued interest. Each side shall bear their own costs and fees.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

**END NOTES:**:

1. Ambrose Bierce was a 19th century American writer, perhaps most famous for his "Devil's Dictionary," published in 1906. Despite its title, the book had no religious overtone but was instead a collection of sardonic definitions.

2. Schedule F, Creditors Holding Unsecured Non-Priority Claims, reflects total unsecured debt of $721,632.00. Of this amount, $643,930.00 is the judgment. An additional $67,000.00 amount is listed for attorneys' fees, presumably incurred in connection with the state court lawsuit. The only other listed unsecured debts were a

"personal loan" of $9,502.00 from Alpha I and $1,200.00 owed to American Express. The remainder of the debtors' schedules do not reflect a lavish standard of living. They list their home as having a value of $165,578.00, encumbered by both a first and second mortgage. A few household goods, sporting equipment, and a 403(b) pension plan worth about $18,000.00 are the bulk of their assets.

3. The parties dispute whether Bukowski contacted Hallmann about the new business or whether Hallmann was the initiating party. Ultimately, this issue is irrelevant to the outcome, but it highlights the parties' apparent inability to agree on anything of substance in this case.

4. Another disputed issue is whether Mr. Bukowski "transferred" client files from Alpha I to Alpha II. Mr. Bukowski asserts that he only made copies of the files for those clients who wished to follow him to the "new" Alpha.

5. The schedules disclosed the ownership of a "100% stock interest in Alpha Consulting Group, Inc." The debtors further stated that the stock had no cash value as the corporation's liabilities exceeded the value of any assets. They attached a copy of a balance sheet dated June 12, 1996, to support their statement. The balance sheet reflects that as of that date, Alpha I had total assets of $65,170.39 and total liabilities of $84,062.07.

6. During the briefing process, the plaintiff sought to amend certain responses to requests for admission served on him during discovery. The plaintiff originally admitted he made an offer to purchase the stock in August of 1996. The debtors sought to utilize this admission as evidence that the corporate stock was relatively worthless even in August, before any of the alleged transfers took place. The plaintiff then requested the opportunity to amend his answer to provide that his only "offer" was the one contained in a letter sent to the trustee on September 27, 1996. The Court partially denied this motion to amend discovery as untimely, but did indicate that where the record was clear, the Court would resort to the record for establishing a time line of events. In this regard, the plaintiff's written offer was made in September; the record is also clear that the plaintiff contacted the trustee about the proposed purchase well in advance of making the written offer.

7. The chapter 7 trustee filed a notice of proposed sale of property which was dated as of October 4, 1996. It contains a statement that the trustee believes the sale of the stock for $2,000.00 to the plaintiff is in the estate's best interest. The notice states "[i]t gives the estate the opportunity to get some monetary recovery for the stock . . . [i]t is a better alternative for the estate than abandonment."

8. The record indicates that Mr. Bukowski had been making $5,000.00 per month at Alpha II, but that his salary increased in November of 1998. The plaintiff also is quick to point out Mr. Bukowski's lack of a "continuing understanding" of what his salary will be. The plaintiff also directs the Court's attention to Mr. Bukowski's deposition testimony that he would be happier "making zero" than paying anything to the plaintiff. See November 6, 1998, deposition of Robert Bukowski at pp. 23-24. The plaintiff believes these remarks to be concrete evidence of Mr. Bukowski's fraudulent intent, when they are more likely the heated remarks of a man engaged in costly litigation for the past five years. It should be noted, however, that the schedules reflect that while with Alpha I Mr. Bukowski earned considerably more than his present salary of $72,000.00 per year. In 1994, he earned $97,300.00, and in 1995 his salary was $101,539.00.

9. To be completely accurate, the plaintiff's § 727(a)(2) claim and his § 523(a)(4)

and (a)(6) claims are directed solely at Mr. Bukowski. While he originally sought to deny Mrs. Bukowski's discharge under § 727(a)(2), he has now conceded there is no evidence of her participation in the transfers. As concerns his § 523(a) claims, the plaintiff acknowledges that his claim is against Mr. Bukowski individually, as Mrs. Bukowski was not named in the state court lawsuit. However, the plaintiff does assert that Mrs. Bukowski's discharge should be denied under §§ 727(a)(4) and (a)(5). Mr. Bukowski has moved for summary judgment on two other claims asserted by the plaintiff under § 727. In his second amended complaint, the plaintiff alleges that the debtors should be denied a discharge under § 727(a)(6) for failing to "obey any lawful order of the court." He also alleges that they failed to provide adequate financial records in violation of § 727(a)(3).

As Mr. Bukowski contends in his motion, the plaintiff has failed to identify any order of this Court which the debtors may have refused to obey. Likewise, the debtors contend that they supplied all information necessary to determine their financial condition. The vague assertions of the complaint are followed by the equally vague comment (in a footnote) of the plaintiff's response brief that he "acknowledges issues of fact exist" as to these claims. There is nothing in the plaintiff's briefs or supporting affidavits which give substance to these assertions. Therefore, the debtors' motion for summary judgment on these claims is granted.

10. There has been some minor debate in this case as to whether the plaintiff has to prove his § 727 claims by "clear and convincing evidence" or the lesser "preponderance of the evidence" standard. Under Grogan, the burden of proof under § 523(a) is by the preponderance of the evidence. 112 L. Ed. 2d at 765. While there may be some argument that the higher standard is appropriate under § 727(a), the Court for purposes of determining this matter is presuming that the plaintiff need only meet the lesser standard.

11. Collateral estoppel is a judicial doctrine that serves the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Meyer, 36 F.3d at 1379. However, if the issue raised in this case is not identical to that determined in the prior proceeding, collateral estoppel simply does not apply. Id.

12. As indicated previously, the plaintiff's second amended complaint also raised alleged violations of §§ 727(a)(3) and (a)(6). However, the plaintiff did not respond to the debtors' motion for summary judgment on these claims with any reference to evidence which might support the claims.

13. Mrs. Bukowski also alleges that collateral estoppel cannot be applied against her in this context because she was not a party to the state court lawsuit. As it is not necessary to the resolution of this matter, the Court does not decide this issue.

14. In fact, the jury instructions provide that "the law does not require the plaintiff to prove the exact amount of his damages . . . once you are satisfied to a reasonable certainty by a preponderance of the evidence that the plaintiff has sustained some damage as a result of conduct by the defendant, then you are entitled to make a fair and reasonable award of damages based on the relevant evidence." See Exhibit "D" to the Affidavit of George P. Kersten in support of the plaintiff's motion for summary judgment.

15. Of course, this presumes that the statement does in fact represent the declarant's opinion. If a debtor does not genuinely believe property is worth the

amount claimed on the schedules, such a misrepresentation could constitute grounds for denial of discharge. Sumpter, 136 B.R. at 696.

16. Prince also recognized that it is often very difficult to accurately estimate the stock's future cash flow. 85 F.3d at 319. The court stated that where market information is available, looking to the stock's "fair market value" - what an arm's length buyer would be willing to pay - is generally the best means of gauging the stock's present value. Id. The stock in Prince, as in this case, was in a small, closely-held corporation. The court found that the price negotiated between the two shareholders was likely to represent a "reasonably accurate estimation" of the stock's value. There is little evidence here of what the parties anticipated was the cost to buy the other out, although there is some indication that they considered the business to be worth close to $1 million when discussing either mergers or the purchase of "key man" insurance policies. While this is evidence of the "going concern" value of the business, it does not determine whether the business was improperly valued for bankruptcy or liquidation purposes.

17. In fact, debtors' counsel often tell their clients to value assets as what could be obtained if they sold it at a garage sale or in the classified section of their local newspaper. Debtors routinely value assets in their schedules based upon their impression of "what other people would pay for the property if it were for sale." Sumpter, 136 B.R. at 698.

18. Further, as discussed during the analysis of the plaintiff's § 727(a)(4) claim, the debtors' valuation of the business is understandable. Liquidation value was an appropriate measure of value where the debtor was not seeking to reorganize. Prince, 85 F.3d at 320.

19. For purposes of deciding these motions, the Court accepts that it might be possible to construe the assets of Alpha I as assets of the bankruptcy estate. While the plaintiff seeks to characterize the transfer as one of the company's "goodwill," the real question is whether there was any particular obligation on Mr. Bukowski to either continue with Alpha I or to refrain from soliciting the customers of Alpha I upon his departure.

20. The plaintiff's arguments are incompatible. On one hand, he argues that Alpha I was a joint venture, clearly reflecting that its success was the result of the efforts of its principals. Yet he then argues that the company held significant and intrinsic value in its "goodwill" which would seemingly be separated from the actions of the principals. Clearly, the clients sought to do business with Mr. Bukowski, not Alpha I, and they were not led astray by any confusion over the corporate name.

21. In truth, it is unclear what the plaintiff believes should have happened in this case. Certainly the chapter 7 trustee was in no position to take over and operate Alpha I in the event Mr. Bukowski chose to leave. Had Mr. Bukowski not "contacted" the clients of Alpha I upon his departure, they likely would have gone elsewhere in any event, as there appears to have been a period of time where no one was actually "in control." To hold that Mr. Bukowski was somehow under an obligation to continue working for Alpha I reads too much into the notion of "fiduciary responsibility" and arguably violates the principle that post-petition earnings are not property of a chapter 7 debtor's estate. See § 541(a)(6).

22. Christine Bukowski also seeks to dismiss the § 727 claims which the plaintiff has asserted against her on the additional basis that she did not participate in any conduct which would warrant the denial of her discharge. The Court concurs that the

plaintiff has produced no evidence which would indicate that she participated in any misconduct, and the claims asserted against her must be dismissed in any event on this basis as well. See In re Gill, 159 B.R. 348 (Bankr. M.D. Fla. 1993).

23. The plaintiff cites In re Selenske, 103 B.R. 200 (Bankr. E.D. Wis. 1989), for support. However, that case was decided before the Seventh Circuit's decisions in Marchiando and Woldman and is therefore of questionable validity. Under Woldman, there must be a "substantial inequality" in power, which suggests a situation where the complaining partner was unable to have access to information due to age, disability, distance, or has other limitations (such as a limited partner who is rarely on site, or the like).