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KEVIN E. O'BRIEN CLERK  
UNITED STATES  
BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

In Re	)	Chapter 7
	)	
WALTER LYLE RANDALL and	)	No. B-97-11255-PHX-GBN
SHARON RANDALL,	)	
	)	
Debtors.	)	
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DAVID HVIDSTEN and DOLORES	)	Adversary No. 97-586-GBN
HVIDSTEN, as Trustees for	)	
Universal Equities Corporation	)	
Employees Pension Trust,	)	
	)	
Plaintiffs,	)	
	)	FINDINGS OF FACT;
vs.	)	
	)	CONCLUSIONS OF LAW
WALTER RANDALL and	)	
SHARON RANDALL,	)	AND ORDER
	)	
Defendants	)	
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Plaintiffs' complaint seeking to determine the dischargeability of their claim and to deny debtors a bankruptcy discharge was heard as a bench trial before this Court on June 28, June 29, June 30 and August 14, 2000. Post trial briefing occurred and closing argument was conducted on October 18, 2000.

The Court has considered the Joint Pretrial Order, post hearing briefs, the declarations and testimony of witnesses,

1 admitted exhibits, and the facts and circumstances of this case.  
2 The following findings and conclusions are entered:

3 Findings of Fact

4 1. On July 13, 1995, plaintiffs Hvidsten were awarded  
5 judgment against Sharon K. Randall and debtors' marital community  
6 for fraud and misrepresentation in the amount of \$467,414.08 by  
7 the Maricopa County Superior Court. Exhibit 31. On November 12,  
8 1997, plaintiffs obtained a judgment against Walter L. Randall  
9 for \$431,000.00 plus costs and fees in the same state action.  
10 Exhibit 32. No fraud finding was made in the latter judgment.

11 2. On February 19, 1997, debtors Walter L. Randall and  
12 Sharon K. Randall filed this voluntary Chapter 7 bankruptcy case  
13 in the United States Bankruptcy Court for the District of Arizona  
14 at Tucson. Venue was ordered changed to the Phoenix division on  
15 June 26, 1997.

16 3. Plaintiffs filed their adversary complaint against  
17 the defendant debtors on June 9, 1997.

18 4. During her direct and redirect testimony at trial  
19 on June 28, 2000, defendant Sharon K. Randall **was** repeatedly  
20 impeached by her own earlier sworn testimony. The Court does not  
21 find her a credible witness.

22 5. She cannot recall what happened to certain Mexican  
23 realty which was the subject of litigation brought against  
24 debtors by creditor Gary Yahnke. Nor is she aware of what  
25 property debtors owned in Mexico. She cannot recall if debtors  
26 attempted to have Mexican realty transferred to them through a  
27 partnership.

1           6. Debtors' personal bills were paid through a bank  
2 account established in the name of an entity known as Nomex.  
3 Debtors have not complied with plaintiffs' discovery request for  
4 all personal accounts and bills. No documents are available to  
5 establish what debtors were paid or received for their business  
6 operations in Mexico. Ms. Randall testified debtors would be  
7 paid by check as well as by cash. The entity Marine Mart also  
8 paid some of debtors' personal expenses through the Nomex  
9 accounts.

10           7. Debtors have no documents to establish that check  
11 14423 dated January 22, 1996 from Action Marine to Ms. Randall  
12 for \$3,535.57 is actually reimbursement for boat show expenses or  
13 for a commission. Exhibit 63.

14           8. During her examination, Ms. Randall was shown a  
15 number of checks from exhibit 58. She is not sure why the checks  
16 were written and has no documents to explain them.

17           9. Ms. Randall signed the bankruptcy papers without  
18 reading them. The schedules state there are no books and records  
19 available for Nomex, although Ms. Randall concedes she kept some  
20 of the books and records. The schedules reflect debtors had an  
21 income of \$3,000.00 per month and expenses of \$3,858.83 per  
22 month, with no listed bank or savings accounts. Bankruptcy  
23 Schedules B, I and J, Exhibit 29. Debtors were actually living  
24 through loans from their business interests, but there are no  
25 documents to establish this.

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1 without paying creditors. He does not know the value of the  
2 items he took from the abandoned business. Mr. Randall has  
3 purchased property under an arrangement in which his name does  
4 not appear in the records.

5 16. Mr. Randall ran the Mexican corporation,  
6 Distribuidores, and would be the best source of information  
7 concerning that business.

8 17. Mr. Randall, during his direct testimony on  
9 June 29, 2000, did not know how the couple's house payments were  
10 being made.

11 18. Mr. Randall provided input into the bankruptcy  
12 schedules and statements for this case and signed them under  
13 penalty of perjury. Exhibit 29. He had no books and records  
14 available to review before signing, however.

15 19. His position is that credit card bills that were  
16 paid out of the Nomex account were business, rather than personal  
17 debt. He has no documents to prove this.

18 20. Mr. Grant Randall in his direct testimony advised  
19 that his brother, Walter Randall, had all the business books and  
20 records of Distribuidores, Grant Randall's Mexican business.  
21 Grant Randall did nothing to manage Distribuidores. Walter had  
22 full discretion. Although Grant didn't authorize Walter to pay  
23 debtors' personal house payment and personal attorney fees out of  
24 the business account, Walter had the authority to do so, if he  
25 wished.

26 21. Debtors' expert witness, Jorge Suarez, a Nogales,  
27 Arizona CPA, testified that debtors' business, Nomex, would be a

1 "C" corporation for Federal income tax purposes. Income tax  
2 records must be prepared and retained for Nomex for at least  
3 three years. Mr. Suarez would recommend keeping such records for  
4 seven years. The parties in control of a foreign business must  
5 annually file reports with the federal government, as well.

6 22. Mr. Walter Randall's deposition testimony is that  
7 his memory isn't the best, documents really tell the story. He  
8 cannot trust his own memory, documents are better, he feels.

9 23. The sworn direct testimony of Sharon K. Randall  
10 on June 28, 2000 that she did not keep the business books for  
11 debtors' Randall Marine business was impeached by her sworn  
12 deposition testimony on October 6, 1999. Exhibit 72 at P. 24.

13 24. Whether the Mexican corporation Distribuidores is  
14 actually owned by debtors rather than Grant Randall is a  
15 substantial and material fact in this bankruptcy.

16 25. Formal paperwork establishing Distribuidores and  
17 reflecting principal ownership by Melvin Grant Randall was signed  
18 on November 22, 1991. Exhibit B to exhibit 50. Also, see,  
19 Exhibit C (English translation). Debtors are not shown as  
20 holding any interest in this Mexican corporation. However,  
21 debtors' son and daughter have listed interests. Id. The  
22 daughter, Shannon Kay Randall, is expressly reflected to be a  
23 minor and was represented by debtors as her parents at the  
24 incorporation. Melvin Grant Randall was not present and was  
25 represented at the incorporation by debtor Sharon Randall.  
26 Steven Kent Randall was not present either and was represented by  
27 his father, debtor Walter Randall. Id. Neither of the children

1 put any money into the corporation. Direct testimony of Sharon  
2 Randall. In his February 27, 1996 deposition, Walter Randall  
3 denied that any family members, including his brother Grant, held  
4 any interest in this corporation. Exhibit 71B at P. 81  
5 (referring to the corporation as "Marine Mart").

6 26. During the time Distribuidores was being formed,  
7 defendants were debtors in possession in an Arizona chapter 11  
8 bankruptcy case. 91-04565-PHX-SSC. Ultimately, this case was  
9 converted to chapter 7 and dismissed on December 22, 1992 for  
10 debtors' failure to provide required financial documentation as  
11 expressly ordered by the Court and for failure to schedule a  
12 substantial real property interest. Exhibits I and J to Exhibit  
13 22; direct testimony of Walter Randall.

14 27. Although he is the majority shareholder of  
15 Distribuidores, Grant Randall isn't sure if it owns two fishing  
16 boats or not. His initial testimony was that Distribuidores did  
17 not own the shop in Mexico from which it services the Mexican  
18 fishing fleet. When confronted with conflicting testimony from  
19 his March 6, 2000 deposition, Exhibit 76 at P. 26, his June 29,  
20 2000 trial testimony was that the corporation did own the boat  
21 shop.

22 28. Although Grant Randall is the 96% shareholder and  
23 President of Distribuidores, he appeared to the fact finder to  
24 know remarkably little about it. He was repeatedly impeached by  
25 his own prior testimony. Reluctantly, the fact finder feels this  
26 gentleman is not credible in regards to financial dealings with  
27 his troubled brother.

1           29. He funded the creation of the corporation through  
2 a payment of \$14,400.00 from the sale of a Chris-Craft boat in  
3 Mexico. The corporation was created for Walter Randall to run  
4 after Walter lost everything and wanted to go to Mexico.

5           30. The corporation's name on its business location  
6 is Marine Mart. Grant Randall believes the name Marine Mart was  
7 used as well by debtors for the 1985 operation in Mexico of their  
8 business known as Randall Marine. Grant Randall has no objection  
9 to debtors use of their business name for his corporation.  
10 However, he has no idea how to value the good will and reputation  
11 added to his corporation by the use of debtors' business name.

12           31. By contrast, Sharon Randall testified the Marine  
13 Mart name referred only to Distribuidores and not to any business  
14 owned by debtors. Debtors insist their only Mexican business is  
15 Nomex, an unsuccessful import-export business. Nomex currently  
16 exists only as two checking accounts, which must be used to clear  
17 American dollar checks received in Mexico by Distribuidores.

18           Both debtors' testimony that Nomex had no assets and  
19 was simply a name on two checking accounts holding funds of  
20 Distribuidores (mixed with their own personal funds) is impeached  
21 by the sworn written statement of Sharon Randall of May 16, 1997  
22 that she paid office rent until 1997 using Nomex funds or cash.  
23 Exhibit 37 at paragraph 3.

24           32. A professor from the American Graduate School for  
25 International Management credibly testified there was no need for  
26 an American clearing account. The Central Bank of Mexico allows  
27 dollar accounts in Mexico. In fact, if American dollars are



1 received in Mexico, they must be deposited in a Mexican bank.  
2 June 30, 2000 testimony of Dr. F. John Mathis.

3 33. Ms. Randall concedes that certain dollar checks  
4 were successfully deposited in a Mexican bank. Exhibit 59. On  
5 June 30 cross examination, Mr. Randall recalls an American check  
6 being cashed by a Mexican bank as well.

7 34. Elvira Y. Guevara, who kept the bank accounts for  
8 debtors, understood that Marine Mart and Nomex were the same  
9 business. Deposition of February 18, 2000 at P. 25-26. Exhibit  
10 78. One checking account was for Nomex and one was for Marine  
11 Mart. Ms. Randall conceded that Ms. Guevara apparently believed  
12 Walter Randall was doing business as Marine Mart. Walter Randall  
13 has sworn he did not do so. Yet American freight forwarder MMV  
14 forwarding would use "Walter Randall dba Marine Mart" as the  
15 address for imported goods. Exhibit 33.

16 35. In May and June 1994, Walter Randall spoke on the  
17 telephone with Daniel J. Gallagher, who falsely represented to  
18 debtor that he wished to arrange a purchase of the Mexican  
19 corporation. Actually, Gallagher was surreptitiously working for  
20 plaintiff.<sup>1</sup> See generally, Deposition of Gallagher of March 29,

21

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22 1Plaintiff David Hvidsten is a tough cookie. He arranged  
23 for Darrell K. Brown, Sharon's Randall's brother, to also make  
24 pretext phone calls to debtors to gather incriminating  
25 statements. (Mr. Brown denies this.) Hvidsten personally signed  
26 a lien release at Brown's request, Exhibit 14, which Hvidsten  
27 knew was worthless as the lien was actually held in the name of  
28 Universal Equities. While socializing with Grant Randall,  
plaintiff learned debtors would attend the function as well and  
arranged for debtors to be served with process at the party. He  
has spent years and thousands of dollars chasing debtors through  
(continued...)

1 2000, Exhibit 77; transcription from electronic recording,  
2 Exhibit 39A.

3 36. Mr. Randall admits that during these conversations  
4 he repeatedly referred to the corporation as "his corporation"  
5 and "his shop." He mentioned that the title to the property is  
6 "his." Direct testimony of June 28, 2000. He then mailed or  
7 faxed to Gallagher Exhibit 39C,<sup>2</sup> a business description of  
8 May 26, 1994 which continuously uses the personal pronoun. It  
9 contains no indication he is a corporate employee working for  
10 others. Although he told Gallagher he would retire after the  
11 sale, he concedes he really couldn't do so if he was just selling  
12 the business for his brother. Cross examination of June 30,  
13 2000. Also see, Exhibit 39A at P. 9. During the conversation,  
14 he claimed to have "created" the corporation. Id. at P. 12.

15 37. The testimony of David Hvidsten of June 30 and  
16 August 14, 2000, including his testimony confirming the Gallagher  
17 conversations is credible.

18 38. Debtors' denials that the Distribuidores/Marine  
19 Mart corporation was their business are not credible

20  
21  
22 1(...continued)  
23 state and federal court and into Mexico. He also sued Brown and  
24 moved into the Brown family home. The Court does not intend to  
25 borrow money from Mr. Hvidsten.

26 21n his final witness appearance on August 14, 2000, Mr.  
27 Randall testified, for the first time, that he did not believe he  
28 signed Exhibit 39C. This denial was not made during his earlier  
testimony, nor in his May 13, 1997 deposition. See, Pgs 59-60 of  
Exhibit 71D where he recalls possibly drafting the document. The  
Court is incredulous.

1                   39. To the extent any of the following conclusions of  
2 law should instead be considered findings of fact, they are  
3 hereby incorporated by reference.

4                                   Conclusions of Law

5                   40. To the extent any of the above findings of fact  
6 should instead be considered conclusions of law, they are hereby  
7 incorporated by reference.

8                   41. Pursuant to 28 U.S.C. §1334(a), jurisdiction of  
9 this bankruptcy case is vested in the United States District  
10 Court for the District of Arizona. That Court has referred,  
11 under 28 U.S.C. §157(a), all cases under Title 11 and all  
12 adversary proceedings arising under Title 11 or related to a  
13 bankruptcy case to this Court. Amended General Order of May 20,  
14 1985. This case and adversary proceeding having been  
15 appropriately referred, this Court has jurisdiction to enter a  
16 final order and judgment determining dischargeability and  
17 debtors' right to a discharge. 28 U.S.C. §157(b)(2)(I), (J).

18                   42. Under Section 727(a)(3) of Title 11, U.S. Code,  
19 a bankruptcy discharge may be denied if debtors have concealed,  
20 destroyed, mutilated, falsified or failed to keep or preserve  
21 recorded information, including books, documents, records and  
22 papers from which debtors' financial condition or business  
23 transactions might be ascertained, unless such act or failure to  
24 act is justified under all the circumstances. The Court  
25 concludes debtors failed to keep or preserve recorded information  
26 from which their financial conditions and transactions can be  
27

1 ascertained. This failure is not justified under the  
2 circumstances of this case.

3 43. The purpose of the above legal requirement is to  
4 make the privilege of a bankruptcy discharge dependent on a true  
5 presentation of debtor's financial affairs. Creditors are not  
6 required to risk the withholding or concealment of assets under  
7 cover of a chaotic or incomplete set of books and records. Cox  
8 v. Lansdowne (In re Cox) 904 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990).  
9 Debtors' failure to present complete records puts a true  
10 presentation of their financial affairs at risk in this case.

11 44. Debtors must present sufficient written evidence  
12 which enable creditors reasonably to ascertain their present  
13 financial condition and follow their business transactions for a  
14 reasonable period in the past. 904 F.2d at 1402. Debtors have  
15 failed to do so.

16 45. The initial burden of proof is on plaintiff. To  
17 state a prima facie case, plaintiff must show (1) that debtors  
18 failed to maintain and preserve adequate records and (2) such  
19 failure makes it impossible to ascertain debtors' financial  
20 condition and business transactions. Once plaintiff shows that  
21 debtors' records are absent or inadequate, the burden of proof  
22 shifts to debtors to justify the inadequacy or nonexistence of  
23 the records. Lansdowne v. Cox (In re Cox) 41 F.3d 1294, 1296 (9<sup>th</sup>  
24 Cir. 1994). Plaintiffs made such a prima facie case. Defendants  
25 failed to justify the lack of recorded information.

1           46. Debtors must provide a credible explanation for  
2 their failure to keep records. Id. at 1296-97. Defendants have  
3 failed to do so here.

4           47. The issue is not how the books became incomplete  
5 or chaotic, but rather, whether debtors' actions or inactions  
6 have made it impossible to ascertain their financial condition  
7 and material business transactions. 41 F.3d at 1296. The Court  
8 concludes debtors have done so here.

9           48. Pursuant to findings 4-22, the Court concludes  
10 debtors are not entitled to a discharge in bankruptcy because of  
11 conduct prescribed by Section 727(a)(3).

12           49. Under Section 727(a)(4)(A), a discharge is to be  
13 granted unless debtors knowingly and fraudulently in or in  
14 connection with the case gave a false oath or account. The  
15 purpose of this section is to ensure that dependable information  
16 is supplied to those interested in the case, so they can rely on  
17 the information without the need for the trustee or other  
18 interested parties to dig out the truth in examination or  
19 investigation. Aubrev v. Thomas (In re Aubrev) 111 B.R. 268, 274  
20 (9<sup>th</sup> Cir. Bankr. 1990). In this case, dependable information was  
21 not supplied by debtors and a creditor was required to conduct  
22 extensive litigation to establish the facts of debtors' business  
23 operations.

24           50. Plaintiffs must prove that (1) debtors' oath was  
25 made knowingly and fraudulently and (2) the false oath related to  
26 a material fact. Plaintiffs must show actual intent. Fogal  
27 Lesware of Switzerland v. Wills (in re Wills) 243 B.R. 58, 64-65

1 (9<sup>th</sup> Cir. Bankr. 1999). The statement must be a matter which  
2 debtors knew to be false and which was wilfully made with intent  
3 to defraud. Baker v. Mereshian (In re Mereshian! 200 B.R. 342,  
4 345-46 (9<sup>th</sup> Cir. Bankr. 1996). Plaintiffs have made the requisite  
5 showings.

6 51. Intent is an element of Section 727(a)(4)(A).  
7 However, fraudulent intent may be established by circumstantial  
8 evidence, or by inferences drawn from a course of conduct. 200  
9 B.R. at 346. Considering the substantiality of the  
10 representation, a Court may appropriately infer that a false oath  
11 or account was provided knowingly and fraudulently. Vaushn v.  
12 Aboukhater (In re Aboukhater) 165 B.R. 904, 910 (9<sup>th</sup> Cir. Bankr.  
13 1994). In this case the Court concludes that the requisite  
14 intent has been established by circumstantial evidence, by  
15 inferences drawn from the surrounding facts, and the  
16 substantiality of the misrepresented facts.

17 52. Materiality is broadly defined. A false  
18 statement is material if it bears a relationship to the debtor's  
19 business transactions or estate, or concerns the discovery of  
20 assets, business dealings, or the existence and disposition of  
21 the debtor's property. A false statement or omission may be  
22 material even if it does not cause direct financial prejudice to  
23 creditors. In re Wills, 243 B.R. at 62. However, since the  
24 purpose of 727(a)(4)(A) is to ensure accurate information without  
25 having to conduct costly investigations, the objection should not  
26 apply to minor errors or deviations in testimony under oath. Id.

1 at 63. The Court concludes plaintiffs have established the  
2 materiality of the false oath or account.

3 53. Pursuant to findings 4, 12, 14, 16, 19-21, 23-38,  
4 the Court concludes debtors are not entitled to a discharge in  
5 bankruptcy because of conduct prescribed by Section 727(a)(4)(A).

6 54. Pursuant to 11 U.S.C. 5727(a)(2)(A), the Court  
7 may deny a discharge if debtor, with intent to hinder, delay or  
8 defraud a creditor, has concealed property within a year of  
9 filing the petition.

10 The burden of proof is on the creditor to show that  
11 debtors (1) concealed property (2) the property constituted  
12 property of debtor or the estate, (3) the act occurred within one  
13 year of bankruptcy and (4) debtors executed the act with the  
14 intent to hinder, delay or defraud creditor. Aubrey v. Thomas  
15 (In re Aubrey) 111 B.R. 268, 273 (9<sup>th</sup> Cir. Bankr. 1990).

16 55. Debtors continuing secret ownership of  
17 Distribuidores within a year prior to bankruptcy constitutes the  
18 requisite concealment for §727(a)(2)(A) liability under the Ninth  
19 Circuit's continuing concealment doctrine. Hughes v. Lawson (In  
20 re Lawson) 122 F.3d 1237, 1240-41 (9<sup>th</sup> Cir. 1997).

21 56. Pursuant to findings 4, 12, 14, 16, 18, 20, 24-  
22 25, 27-38, the Court concludes that debtors concealed on a  
23 continuing basis their actual ownership of Distribuidores with  
24 the intent to defraud, hinder and delay their creditors,  
25 principally plaintiffs, within the meaning of Section  
26 727(a)(2)(A). Accordingly, debtors are not entitled to a  
27 discharge.

1           57. A discharge can be denied if debtor fails to  
2 satisfactorily explain any loss of assets or deficiency of assets  
3 to meet debtor's liabilities. 11 U.S.C. §727(a)(5). Whether  
4 debtor satisfactorily explains a loss of assets is a question of  
5 fact. Bell v. Stuerke (In re Stuerke) 61 B.R. 623, 626 (9<sup>th</sup> Cir.  
6 Bankr. 1986). While the burden of persuasion rests at all times  
7 on the objecting creditor, debtors can't prevail if they fail to  
8 offer credible evidence after plaintiff makes a prima facie case.  
9 Debtors failure to offer a satisfactory explanation when called  
10 on by the Court is a sufficient ground for denial of discharge.  
11 Devers v. Bank of Sheridan, Montana (In re Devers) 759 F.2d 751,  
12 754 (9<sup>th</sup> Cir. 1985). Vague and indefinite explanations of losses  
13 based on estimated, uncorroborated documentation are  
14 unsatisfactory for explaining debtors' shifts in fortune. In re  
15 Stuerke at 626.

16           58. Debtors have twice filed bankruptcy, leaving  
17 unpaid creditors. Their voluntary co-mingling of personal funds  
18 into the Nomex business account and use of the account to pay  
19 personal charges, coupled with a failure to fully account for or  
20 reconcile the disbursements, failure to produce full  
21 documentation and vague, questionable assertions that unspecified  
22 personal credit card bills were business expenses, constitute the  
23 requisite failure to satisfactorily explain deficiencies of  
24 assets. Debtors are not entitled to a discharge pursuant to 11  
25 U.S.C. §727(a)(5). Findings 4, 6, 8, 9, 14, 17, 19-20.

26           59. Since the Court has concluded on four independent  
27 grounds that debtors are not entitled to a bankruptcy discharge,




1 plaintiffs' request to determine the dischargeability of their  
2 claim pursuant to Sections 523(a)(2)(A), (a)(2)(B) and (a)(6) is  
3 moot.

4  
5 Order

6 Plaintiffs will promptly file and serve a proposed  
7 judgment. Defendants will have five days from the service date  
8 to file and serve objections to the form of the proposed  
9 judgment.

10 DATED this 17<sup>th</sup> day of November, 2000.

11  
12  
13   
14 George B. Nielsen, Jr.  
Chief U.S. Bankruptcy Judge

15 Copy mailed the 17<sup>th</sup> day  
16 of November, 2000, to:

17 Roger R. Foote  
18 Jackson White Gardner Weech & Walker PC  
19 40 N. Center, Suite 200  
20 Mesa, AZ 85201  
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26  
27  
28 By   
Deputy Clerk