UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

BARBARA LYNNAE PURO,

Debtor.

MEMORANDUM DECISION AND ORDER FOR JUDGMENT

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MALMBERG DEVELOPMENT CORPORATION,

Plaintiff,

v.

BARBARA LYNNAE PURO,

Defendant.

BKY 08-35350

ADV 09-3069

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At St. Paul, Minnesota
December 16, 2013.

The Defendant in this adversary proceeding is the debtor in the underlying case. The Plaintiff objects to the grant of a general discharge under Chapter 7 to her. Trial was ordered and convened; it lasted nearly three days. The Plaintiff appeared by its attorney, S. Steven Prince. The Defendant ("the Debtor") appeared in person and by her attorneys, Thomas J. Flynn and Richard J. Reding. The following memorandum of decision is based on the evidence received at trial and legal briefing and argument by counsel. The latter included two sets of post-trial briefing, plus proposed findings of fact and conclusions of law submitted at the court's direction.[1]

[1]Due to the large number of points of fact raised and subjected to the process of proof, findings of fact and conclusions of law will be mingled throughout this memorandum. This will facilitate better linkage between individual findings and the specific law that applies to them.

INTRODUCTION

The origins of this adversary proceeding lay in the residential real estate sales industry, before the end of its market bubble in the economic crash of 2008. Both parties were engaged in that industry. They were associated with each other for a brief period of time. Most of the points of factual controversy between them concern financial attributes and consequences of real estate sales, financing and investment, and the structures and processes used for professional involvement in them. As the main part of its case, the Plaintiff accuses the Debtor of grossly and fraudulently misrepresenting her interests in such attributes and her disposition of them, in the disclosures that she was legally required to make for her bankruptcy case.

PARTIES

The Plaintiff is a real estate brokerage based in Savage, Minnesota. It is owned by Eric Malmberg. At relevant times it transacted with the public under the business name of RE/MAX Advantage Plus.

From mid-January to mid-November, 2006, the Debtor was associated with the Plaintiff as a real estate sales agent, under an independent contractor relationship. Pl. Exh. 67. The Debtor held a real estate salesperson's license from the State of Minnesota for about five years, from 2004 to 2009.[2]

Eric Malmberg terminated the Debtor's agency relationship with the Plaintiff in November, 2006 when three issues emerged from his review of her performance. The Debtor had received direct payment of commissions on several sales she had handled, and had negotiated payment and used funds without a contractually-required accounting to the Plaintiff as broker. A review of her client files revealed a number of engagements as agent that had not been revealed

[2]On June 11, 2009, the Debtor executed a consent to the revocation of her real estate salesperson's license. The Minnesota Department of Commerce had tendered that document to her under an advisory that it was prepared to take formal administrative action against her based on allegations that she had participated in the perpetration and execution of fraud upon lenders in connection with residential real estate transactions. On that consent, the Minnesota Commissioner of Commerce ordered the revocation of the Debtor's license on January 11, 2009. As part of that disposition, she was thenceforth barred from engaging in residential mortgage originating or servicing. Pl. Exh. 71.

to the Plaintiff, were poorly documented, were not being handled through the Multiple Listing Service, or were otherwise "problematic" under the agency agreement. Finally, clients of the Plaintiff, Gerald and Mary Kay Lejchar, had complained to Eric Malberg of conduct on the Debtor's part that they characterized as negligent and fraudulent. Trial Tr. 492:21 - 496:18.[3]

The Lejchars later sued the Debtor, the Plaintiff, and others in the United States District Court for the District of Minnesota, basing their suit on the Debtor's actions in connection with a real estate sale involving them. They asserted liability under the federal Racketeer Influenced and Corrupt Organizations Act. The Plaintiff moved for summary judgment in the Lejchars' lawsuit and the motion was granted.

In mid-October, 2007, the Plaintiff sued the Debtor in the Hennepin County, Minnesota District Court under an indemnification clause in the agency agreement, seeking to recover the attorney's fees and costs it had incurred in the Lejchars' action. The Debtor defended the action and opposed the Plaintiff's motion for judgment on the pleadings. The Plaintiff prevailed; a judgment in its favor in the amount of $90,883.86 was docketed on June 18, 2008. Pl. Exhs. 26 and 27. The Debtor did not appeal that judgment. This gave the Plaintiff the status of a creditor of the Debtor.

SUBSEQUENT COURT PROCEEDINGS: DEBTOR'S DIVORCE AND BANKRUPTCY FILING; COMMENCEMENT OF THIS ADVERSARY PROCEEDING

As of 2008, the Debtor had been married to Deron Evan Puro for nearly ten years. After an order for judgment was entered in the Plaintiff's lawsuit against the Debtor, a petition to dissolve the marriage was filed in the Scott County, Minnesota District Court. Deron Puro was the nominal petitioner.

A Marital Termination Agreement was executed by both parties on June 27, 2008.[4] It was filed on July 15, 2008; and the dissolution proceeding was quickly presented to a judge of

[3] After the Plaintiff terminated its association with the Debtor, she went to work with a Coldwell Banker brokerage in December, 2006 as a salesperson.

[4] The Plaintiff assigns large significance to the fact that this was nine days after it received its judgment against the Debtor.

the Scott County District Court. The Puros did not consult an attorney or attorneys before finalizing the terms of the Marital Termination Agreement. Pl. Exh. 28, 28.2, 28.36 - .38.

The result was the entry of a Judgment and Decree of Dissolution of Marriage on July 15, 2008. Pl. Exh. 28, 28.42 ff. Under its terms, Deron Puro and the Debtor were to share joint custody of their two minor children. Deron Puro was granted all right, title, and interest in two parcels of real estate--the Savage, Minnesota homestead in which the Puros had lived as husband and wife, and a cabin near Stone Lake, Wisconsin. The Marital Termination Agreement also provided for Deron Puro to receive a 2006 Lincoln Navigator SUV. This vehicle had been previously titled in TRAE, Inc., a "Subchapter S" corporation that the Puros had formed when the Debtor began working as a real estate agent. The Debtor had used the Navigator as a vehicle for several purposes during her involvement in real estate sales.

The Debtor was granted a 1990 Subaru Impreza automobile (of negligible value) and 100% of the shareholding in TRAE, Inc. (Previously, the stock had been held in fractional shares, 51%-49%, by Deron Puro and the Debtor respectively.) Other aspects of the Decree's terms and the parties' post-dissolution performance under them will be discussed where relevant, later.

On October 6, 2008, the Debtor first consulted an attorney regarding filing for bankruptcy, paying him $3,600.00. She and Deron Puro had discussed filing for bankruptcy before she consulted the lawyer. Deron Puro had authorized her to pay the attorney's fee and the costs by using the checking account that the Puros had formerly held jointly, but which had been awarded to him in the divorce. Trial Tr. 62:7-23; Pl. Exh. 9, 9.31 . On October 14, 2008, her petition under Chapter 7 was filed. All required statements and schedules accompanied the petition.

The Plaintiff timely filed the complaint that commenced this adversary proceeding.[5] In it, the Plaintiff seeks to have the Debtor denied a general discharge under Chapter 7. Neither the Trustee nor the United States Trustee filed a complaint for the same relief.

[5]The Debtor, the Plaintiff, and the trustee in her case stipulated to one extension of the deadline for filing a complaint in objection to discharge.

THIS ADVERSARY PROCEEDING: THEORIES FOR DENIAL OF DISCHARGE AND THEIR SUBMISSION TO THE COURT

As the trial and appellate courts have observed, denial of discharge in bankruptcy is a weighty, even "harsh" remedy. *In re Korte*, 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001) (citing several pronouncements by bankruptcy judges). However, the remedy does lie "to prevent the debtor's abuse of the Bankruptcy Code." *Id*. As a result, most of the statutory grounds for denial of discharge go to serious wrongdoing by debtors, committed during the very effort to obtain bankruptcy relief, or in close proximity with the bankruptcy process. "At the trial on a complaint objecting to discharge, the plaintiff has the burden of proving the objection." Fed. R. Bankr. P. 4005.

In its complaint, the Plaintiff impugned the Debtor's conduct in relation to her bankruptcy case as just that fraudulent and just as inimical to the processes of bankruptcy administration. The Plaintiff cited numerous instances of the Debtor's conduct--pre-petition, at filing, and post-petition. Ultimately, the Plaintiff legally classified particular acts by the Debtor under multiple rubrics for denial of discharge--as pre-petition transfers of assets with wrongful intent, 11 U.S.C. § 727(a)(2)(A); as false declarations of fact, given under penalty of perjury on her bankruptcy statements and schedules or under oath at her meeting of creditors, 11 U.S.C. § 727(a)(4)(A); as abject failures to document or to retain and produce documentation for various transactions and transfers of assets, material aspects of her financial posture, etc., 11 U.S.C. § 727(a)(3); or as a general failure to account with corroboration for the insolvency that prompted her bankruptcy filing, 11 U.S.C. § 727(a)(5).

At first glance, the Plaintiff's effort seemed over-pled, redundantly analyzed, and founded more on blunt truculence than on zealous but careful advocacy. But the antagonism was not unilateral.[6] The trial opened with a sharp, gratuitous, and disruptive objection from the defense,

[6]Cross-motions for summary judgment were filed, apparently on the thought that the other side's case was trash and the movant's own case was clear-cut and overpowering. As fact-intensive and complicated as the parties' disputes were, the motions had to be denied. They were a waste of time and resources.

to simple wording in the Plaintiff's opening statement--admittedly argumentative, but not out of line in context. The matter then plodded across two and a half days. The majority of trial time was spent in labored interrogation of the Debtor, successively as adverse witness and as proponent of her own defense. The Debtor's testimony was, by turns, hesitant; evasive; self-contradictory; oblivious to memory; and defiant. It was difficult to receive and to puzzle through later.

Matters were not made any easier by the Plaintiff's heavy reliance on the Debtor's own testimony to make out the ostensible lies that it accused her of telling. "Proving the negative" of an intentional deception is hard enough, without trying to establish it by forcing admissions from an opponent on the witness stand.

Over the several days of trial, the parties sunk into hard-bitten, overt antagonism. The Plaintiff was accused of blindsiding the defense by using the testimony of a particular witness; but the contention was not raised until a motion to strike was made the day *after* that witness testified without objection.

At the end, counsel were ordered to organize the welter of their respective cases by submitting proposed findings of fact and conclusions of law and post-trial briefing. When that came in, it did not make fact-finding that much easier. The Plaintiff's counsel presented 182 separate numbered findings. Despite the manifest deficits of their own client's testimony, defense counsel approached dismissiveness in their insistence that all of the Plaintiff's accusations had very simple answers, and their client had to be completely absolved of evasion or fraudulence.

The usual judicial job to ascertain a true state of affairs, and then to gauge the Debtor's representations and recitations against it, was complicated even further by the record. But in the end, after a long comparison of the content of successive statements from the Debtor, it was possible to draw some conclusions on which rulings can be made to determine the Debtor's worthiness for discharge.

PLAINTIFF'S POINTS OF COMPLAINT: TRANSACTIONS, TRANSFERS, AND OMISSIONS

The Plaintiff accuses the Debtor of submitting bankruptcy statements and schedules for her case that had multiple, compounded lies and omissions; of transferring money and hard assets to third parties within the year before she filed for bankruptcy, and in the face of the Plaintiff's rapidly-proceeding lawsuit against her; and of refusing and evading her statutorily-prescribed accountability for her insolvency and the transfers of property that led to it.

Some of these allegations of wrongdoing relate directly to the Plaintiff's underlying accusation, that the Debtor was a knowing confederate and participant in a scheme to defraud mortgage lenders and others, purveyed in the mid-2000s by one Zack Dyab.[7] The subject matter of others has nothing to do with that; it goes to the Debtor's conduct in relation to legal processes, bankruptcy-related and otherwise, after the Plaintiff's receipt of judgment put her under considerable personal and marital stress.

As the derelictions that merit denial of discharge, the Plaintiff identifies eight or more particular transactions, sequences of events and acts, or aspects of the Debtor's bankruptcy filing. For its legal argument, the Plaintiff often cites particular points to support two or more of the separate statutory bases for denial of discharge that it invoked. The resultant theory gets complicated. Some of the cross-applications assume a pat, conclusory tone. To make more sense of all this, it is worthwhile to itemize the points of complaint first, with some reference to the evidentiary record, before separately analyzing their application to the statutory provisions.

1. The Fox Hollow Transaction and Ensuing Transfers, September 2006

On September 13, 2006, the Debtor received (via wire transfer into the business checking account of TRAE, Inc.) the sum of $297,500.00 from Signature Title Company. Pl. Exh.

[7] After being charged in the United States District Court for the District of Minnesota, Zack Dyab pleaded guilty to charges of conspiracy to commit wire fraud and aiding and abetting a monetary transaction in criminally deprived property. He is currently serving 60- and 120-month concurrent terms of imprisonment on those charges, plus an additional 12 months on the charge of failing to self-surrender for his original sentence. The Eighth Circuit Court of Appeals recently affirmed the district court's denial of his motion for relief under 28 U.S.C. § 2255. *Dyab v. United States*, ____ Fed.Appx. ____, 2013 WL 6283902 (8th Cir. Dec. 5, 2013) (per curiam).

4, 4.7. The Debtor testified that this payment was made in connection with the closing on the sale of real estate at 2955 Fox Hollow in Prior Lake, Minnesota. Trial Tr. 181:24 - 182:16.

On two prior occasions in this litigation, the Debtor described the receipt of this money in written statements under oath as follows:

> On about September 13, 2006, TRAE, Inc. received approximately $297,500 *as a loan repayment* (Exhibit H).

Affidavit of Barbara Puro (to support Debtor's motion for summary judgment), 3 [Dkt. No. 24][8]; and Affidavit of Barbara Puro (filed as part of Debtor's trial brief) 3 [Dkt. No. 40] (emphasis added as to both sources).

At trial, however, the Debtor stated that the payment of $297,500.00 was the *disbursement* of a loan made *to her* or TRAE, Inc. by one Craig Potts. She identified Potts as her client and the seller of the Fox Hollow property. Per the Debtor's revised testimony, he funded this ostensible loan out of the proceeds of that sale. Trial Tr. 182:7 - 183:12; 184:14-16. The Debtor stated that she got this loan because she needed $300,000.00 for an investment in a planned unit real estate development in Shafer, Minnesota, "Tatanka Run 1st Addition" ("the Tatanka Run project") that Zack Dyab was developing. Trial Tr. 184:14-20.

When the contrast between her two statements was pointed out to her at trial, the Debtor first responded with a flat denial of the transaction having been a repayment of a loan. Trial Tr. 183:5-12. After then using the words "It was a repayment," she reversed again, terming that "a miscalculation," "a misstatement," and "a mistake." Trial Tr. 189:12-21. On the third day of trial she acknowledged that her lawyer for this adversary proceeding had told the Plaintiff's lawyer that the receipt of the $297,500.00 had been a repayment on a loan and had included $70,000.00 in interest. Trial Tr. 599:6-16. She denied that that statement had reflected the reality. *Id*.

[8] Exhibit H to the first affidavit was a page from a record of electronic money transfers bearing the date of September 13, 2006, issued by M&I Bank, and apparently from the account of Signature Title Company. For a transfer of $297,500.00 made to an account at "Wells Fargo-Mpls," and a notation of "TRAE INC," the last line is "OBI-PAYOFF."

The Debtor has never provided any documentation for a loan from Potts. She stated that Potts did not require an agreement, note, or other documents. Trial Tr. 188:6-15. She testified in summary fashion that Potts later forgave the loan, or at least had not pressed her for repayment. *Id*. She did not schedule Potts as a creditor for her later bankruptcy filing. Trial Tr. 187:20-22. The HUD-1 settlement statement prepared for the Fox Hollow sale did not describe the $297,500.00 disbursement to TRAE, Inc. as a loan. Trial Tr. 199:3-24.

The TRAE, Inc. checking account had a balance of $13.00 before it received the $297,500.00 wire transfer on September 13, 2006. Pl. Exh. 4, 4.7-.8.[9] On the same date, the Debtor made out a check in the amount of $120,000.00 to Zack Dyab as payee. The check was negotiated, on the same date. Pl. Exh. 4, 4.8. On September 14, 2006, the Debtor had $145,877.57 wire transferred from the TRAE, Inc. account to "Rame's Enterprises." *Id*.

At the time, Zack Dyab was using a business entity in the development of the Tatanka Run project that was identified, in various places, as "Rame's Enterprise Inc.," "Rames Enterprises," and "Rames Enterprise LLC." Dyab apparently had submitted or was preparing to submit a "Planned Unit Development and Subdivision Agreement" to the City of Shafer in connection with the development. Pl. Exh. 59.[10]

At trial, the Debtor testified that she had TRAE, Inc. pay these sums to Dyab and his company as an investment in the Tatanka Run project under a joint-venture arrangement. She stated that she made the investment in exchange for her having exclusive listing rights for the financed residences, plus a share of the profits from the development. Trial Tr. 283:20 - 284:2.

The Debtor has never produced any executed document for such a relationship. On successive days, she attributed her non-production to, first, having never been given an executed

[9]At month-end for August, 2006, the account had had a negative balance of (12.00). Pl. Exh. 4, 4.6. On September 1, an "Overdraft Xfer from Credit Card or Line" credited the account in the amount of $25.00.

[10]The name "Tatanka Run 1st Addition" was taken from this document.

copy, Trial Tr. 184:9-13; and then to not having been able to locate one for trial, Trial Tr. 333:1-13.[11] The unexecuted copy she produced in electronic format for discovery, Pl. Exh. 60, has no provision for exclusive listing rights among its terms.

The Debtor testified that the Tatanka Run project never got completed and her investment in it was soon a total loss. Trial Tr. 184:17 - 185:10. It is undisputed that Dyab or Rames Enterprises lost the real estate to foreclosure. At the time of trial the property was on the portfolio of Bank Cherokee. Def. Exh. O.

In the Debtor's original personal income tax return for tax year 2006 and the returns that she filed for TRAE, Inc. for 2006 and 2007, there was no line-entry for the receipt of $70,000.00 in interest income, and no claim of business-loss deduction linked to the ostensibly-failed investment. Pl. Exh. 15-17. In 2009, however--after the Plaintiff started investigating the Fox Hollow transaction--the Debtor had her tax return preparer assemble an amended *personal* return for tax year 200***7***. In them, the Debtor declared $70,000.00 in interest income and claimed a $300,000.00 business loss deduction. Pl. Exh. 107, 107.2-.3, 107.8. The amended return uses these round numbers for the line-entries. *See also* Trial Tr. 189:1-16. The Debtor has never declared debt-forgiveness income to any taxing authority, linked to the loan from Potts that she asserted in her later testimony. Trial Tr. 194:2-7.

At trial, the Debtor admitted that she had not transferred the full $297,500.00 in receipts from the Fox Hollow transaction to Dyab or Rames Enterprises. (By inference, she did not transfer the even sum of $300,000.00 either, as recited through her after-the-fact claim of business-loss deduction for tax year 2007.) She acknowledged that she had transferred only $265,877.57 in total, and had kept $30,000.00 of the funds herself. Trial Tr. 186:10 - 187:19.

Finally, on another occasion the Debtor assigned a very different character and significance to the structure of the disbursement out of the Fox Hollow sale and the disbursements-on to Dyab and Rames Enterprises. *Infra* at 33-37.

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[11] This later statement came in response to a leading question.

2. Transfers Involving Tierney-Puro Account in Disposition of Proceeds of Hamilton Road Transaction, November 2006

The Debtor has two sons from a marriage prior to her marriage to Deron Puro. One of those sons, Timothy Tierney, maintained a joint bank account with Deron Puro in 2006.[12] On November 20, 2006, this account received a wire transfer from Hometown Title, LLC, in the amount of $163,553.44. Trial Tr. 423:15-18. The Debtor identified those funds as part of the proceeds of a sale (possibly refinancing) transaction involving a Minnesota property with the street address of 7930 Hamilton Road. Trial Tr. 213:1-21; 423:11-24.

On the same day, a like amount was wire-transferred from that account to the checking account that the Debtor then held jointly with Deron Puro. *Id*. On November 21, 2006, the Debtor had two wire transfers made out of the joint spousal account, one in the amount of $103,000.00 to Rames Enterprises and one in the amount of $60,000.00 to Zack Dyab.

For her motion for summary judgment in this adversary proceeding, the Debtor stated by affidavit that the funds had been sent to the Tierney-Puro account by mistake, and that Zack Dyab was entitled to receive them under the terms of a real estate transaction that she had participated in as agent. Dkt. No. 24, ¶ 20. At trial, she testified that Dyab had instructed her to provide an account number for a wire transfer, and she had mistakenly given the number for the Tierney-Puro account rather than the joint spousal account. Trial Tr. at 212:20 - 214:12. She offered no explanation as to why proceeds from a real estate closing were to be routed through her personal account. She was unable to explain why she did not route the mistakenly-transferred funds back to the closing company as the party originally charged with properly disbursing them.

And again, on another occasion the Debtor attested to a very different state of affairs surrounding this sequence of transfers. *Infra* at 37-38.

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[12] Deron Puro testified to having had a close relationship with both of the Debtor's Tierney-surnamed sons, since they were very young. Tr. of Depo. of Deron Puro [Pl. Exh. 33], 137:10-12; 178:5-8. (The transcript of a pretrial deposition of Deron Puro was received into evidence by stipulation in lieu of his in-court testimony. Henceforth, it will be termed "Tr. of Depo. of Deron Puro.")

3. Transfers and Transactions Related to Stone Lake Cabin

Before the Debtor and Deron Puro married in 1998, he owned a home at 8850 McColl Drive, Savage, Minnesota ("the McColl Drive homestead" or "the McColl Drive house"). He had received the underlying real estate from his parents. Before contracting marriage, the Debtor and he entered an antenuptial agreement, Pl. Exh. 58, which they prepared and signed. Neither received the advice of an attorney. The face of this document suggests that its purpose was to ensure that Deron Puro retained the McColl homestead in the event of a divorce. *See also* Trial Tr. 347.

Somewhere around 1986, Deron Puro's father had built a recreational cabin on land near Stone Lake in Sawyer County, Wisconsin. The title to the property somehow became vested in Deron Puro's aunt after that. She sold the cabin to Deron Puro in 2005. Tr. of Depo. of Deron Puro, 32:6 - 34:1. The recorded warranty deed names both the Debtor and Deron Puro as grantees. Pl. Exh. 21, 21.1; Tr. of Depo. of Deron Puro, 34:25 - 35:6.

To pay his aunt the $150,000.00 price of the cabin, Deron Puro borrowed the money and gave a mortgage against the McColl homestead to secure the loan. On the purchase, Deron Puro and the Debtor took joint title to the cabin. After the purchase, the cabin was free and clear of liens and remained so until January, 2008.

On March 4, 2005, the two signed an amendment to their antenuptial agreement. Pl. Exh. 58. This one-page document is terse and primitively-worded. It appears to embody an acknowledgment of "Real Property added" to the scope of the original agreement, on separate dates. For the Stone Lake cabin, it gives "11/28/2004" (reciting that Deron Puro "refinanced his pre-marital real property," i.e., the McColl Drive homestead, "to purchase a family cabin," i.e., the one at Stone Lake). After reciting Deron Puro's inheritance of "a family farm on 2/14/2005," the amendment says:

> . . . both parties agree that if dissolution of marriage occurs Mr. Puro will retain full legal rights to all of his real property.

Pl. Exh. 58, 58.6.

In January, 2008--after the Plaintiff had sued the Debtor in the Hennepin County District Court--Deron Puro and the Debtor applied to Johnson Bank for a loan in relation to the cabin. Pl. Exh. 14, 63:11 - 64:3. In March, 2008, they received a loan of $125,000.00 and granted Johnson Bank a mortgage against the cabin property. Pl. Exh. 14, 63:11 - 64:17.

After that, Deron Puro undertook to have a number of improvements made to the cabin--replacement of the foundation, roof, and porch; installation of a furnace; construction of a garage; and the addition of appliances.[13] Tr. of Depo. of Deron Puro, 130:23 - 131:5.

4. Dissolution of Puro Marriage; Post-Divorce Relationship and Transactions

As noted earlier, *supra* at 3-5, the Debtor and Deron Puro presented a mutual request for the dissolution of their marriage, on stipulated terms, to the Minnesota state courts. They did this within six weeks of the time that the Plaintiff received a substantial judgment against the Debtor.[14] The terms of the decree left Deron Puro with sole title to two parcels of real estate that had been jointly-titled immediately before the dissolution proceedings, plus all interest in an unencumbered motor vehicle of substantial value that previously had not been individually titled in either spouse. They left the Debtor with very little, indeed--a vehicle 15-plus years old and the full equity in a corporate entity that was truly an empty shell.

[13]Deron Puro testified that the cabin was "just a shell" before then. Tr. of Depo. of Deron Puro, 130:23 and 131:4. (The Debtor testified to the same thing. Trial Tr. 348:7-10.) The resulting image--of bare rafters, bare joists--seems quite remote, given the fact that the structure was built some twelve years previously and presumably it was used in the meantime. Probably, the wording was exaggeration.

[14]The Plaintiff's attorney made quite a big deal of how the Debtor and Deron Puro stated differing reasons for the breakdown of the marriage--he citing strife over his long-term alcoholism, she mentioning that but giving more emphasis to the high tension from her stress over the Plaintiff's claims in litigation against her. The relevance of this dithering was obscure, unless it was directed toward the urged finding that the divorce was collusive and a sham. But, really, the probity toward that point was low and the conclusion far from compelled. The reasons for the breakdown of any decade-long marriage are usually complex; the self-awareness of conflicted and distracted spouses is often low. There is a discrepancy in the content of this testimony, sure; but it can be as readily attributed to simple human fallibility in an unhappy situation, and to different takes on the same confusion, as to anything else.

Both parcels of real estate were by that time encumbered by consensual mortgages securing substantial debt. The cabin was also subject to the Plaintiff's claim of judgment lien.[15] The Debtor received the aged vehicle that Deron Puro had mainly and customarily used to that point. Deron Puro received the newer and more valuable one that had clearly been intended for "show appeal" directed at real estate clients.

At the hearing on the dissolution, the Debtor asked the judge about signing the "summary of real estate transfer form," a document for recording that was one requirement for the transfer of the title to the real estate. Pl. Exh. 10, 70:5; Trial Tr. 53:14 - 54:16. After the Judgment and Decree was entered, she did execute quit claim deeds in favor of Deron Puro--on July 16, 2008 for the McColl homestead and on July 25, 2008 for the cabin. Trial Tr. 58:20 - 59:3; 60:19 - 61:13.

The Debtor understood that such transfers of title could prevent a lien under a judgment against her from attaching to the properties, if the quit claim deeds were filed before a judgment attached. Trial Tr. 58:6-15.

Notwithstanding the stipulated award to Deron Puro of the full interest in the McColl homestead, the Debtor did not permanently move out of the house. Subject only to a temporary sojourn at an address in Inver Grove Heights, Minnesota during the time surrounding her bankruptcy filing, the Debtor resided at the McColl Drive house at all times between the entry of the Judgment and Decree and the trial in this adversary proceeding. Tr. of Depo. of Deron Puro, 48:21 - 50:7; Trial Tr. 294:19-20.

As found earlier, during their marriage the Puros had maintained a joint checking account at Wells Fargo Bank, on which both had full holder's privileges. After the dissolution was finalized, Deron Puro arranged with the bank to become the sole main holder on the account. Pl.

[15] It is not contested that the Plaintiff naturalized its judgment against the Debtor in Sawyer County, Wisconsin before the filing of the quit claim deed that she executed pursuant to the terms of the Marital Termination Agreement and Judgment and Decree. Pl. Exh. 30 (quit claim deed showing recording on July 25, 2008); and 53, 53.4 (showing "Judgment Date Recorded 4/15/2008).

Exh. 28, 28:20.[16] Despite that, the Debtor retained a check card for the account--whether bearing her name or not is unclear from the record--and she made very active use of the account for her own personal purposes. Among other things, she made payment on her own credit card accounts, paid her attorney's fees, and paid premiums on her two adult sons' auto insurance coverage from the formerly-joint account. Deron Puro expressed significant confusion over the Debtor's right to use the account after the dissolution; her access to funds on deposit in it; and her actual use of the account. Tr. of Depo. of Deron Puro, 77:20 - 80:21, 160:19 - 164:20. He did say that he had never given the bank permission to honor deposits or withdrawals by the Debtor after he came to be the sole recordholder of the account. Tr. of Depo. of Deron Puro, 79:9 - 80:21; 160:19 - 164:20.

5. Renovation of McColl Homestead

In August, 2008--two months after the dissolution was finalized--the Debtor submitted an application to the City of Savage for a building permit, as to proposed renovation work to be done on the McColl homestead. She named herself and Deron Puro as the applicants, though by that time she had executed the quit claim deed divesting herself of legal title.

The scope of the proposed work was large: an addition of over 1,000 square feet of living space (a large open room over the garage space, said by the Puros to be intended for a "theater room" or entertainment place), and the addition of a fourth garage stall. When the permit was granted, the Debtor undertook to act as if she were the general contractor for the project. She used the former joint marital bank account to make payments to providers of materials and labor, and she dealt directly with most such providers herself. Based on actual expenses paid, the work cost at least $100,000.00 to complete, and possibly up to $160,000.00. Tr. of Depo. of Deron Puro, 124:4 - 124:23; Pl. Exhs. 76 - 101.

[16] Conclusion of Law 14 of the divorce decree awarded the then-current balance in this account ($1,836.00) to the Debtor. Pl. Exh. 28, 28:74. At trial, no one ever explained why the Puros had changed their minds as to the disposition of the account structure itself.

6. Withdrawals from South Metro Credit Union Shortly Before Bankruptcy Filing

After the dissolution was finalized, the Debtor held an account at the South Metro Credit Union. During the three statement periods from July 1 to September 30, 2008, the Debtor withdrew a total of $33,509.00 from this account. Trial Tr. 265:20-24.[17] This included a single, lump-sum withdrawal of $21,000.00 made on August 25, 2008. Trial Tr. 261:6-21.

7. Non-Disclosures on Bankruptcy Statements and Schedules

The Schedule B ("Personal Property") that the Debtor filed with her bankruptcy petition on October 14, 2008, did not include an entry for her ownership interest in TRAE, Inc. in Item 13, "Stock and interests in incorporated and unincorporated businesses." Pl. Exh. 9, 9.8. Item 18 of the accompanying Statement of Financial Affairs, "Nature, location and name of business," did name "T R A E INC," at the address of the McColl homestead, responsive to the directive to disclose "all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, . . . or in which the debtor owned 5 percent or more of the voting or equity securities . . . ."

After the trustee in her bankruptcy case inquired about the nature of her interest in TRAE, Inc., the Debtor filed an amended Schedule B. Item 35 was amended to add a recitation for "100% Interest in TRAE, Inc. Corp. Used to receive debtor's real estate commissions." The associated value was recited at "$1,000.00."

Item 10 of the Debtor's original Statement of Financial Affairs, for "Other transfers" of property, recited only two events: her transfer in 2007 of a 2002 Audi automobile to her son Ryan Tierney, and her trade-in of a 2003 Mercedes automobile for a "current leased 2008 Mercedes." There was no mention of the various transfers of title to Deron Puro that she had executed after the divorce was finalized. In an Amended Statement of Financial Affairs filed on October 21, 2008, the Debtor added an entry for a transfer to Deron Puro, dated at July 15, 2008, of a "1990 Impreza

[17] The transfers themselves apparently occurred during a shorter period, about five weeks from August 7 to September 11. Trial Tr. 479:17-24 (Plaintiff's counsel's summary of relevant content of account statements).

awarded to debtor; 2006 Lincoln, Homestead and lake cabin in Sawyer WI awarded to Deron Puro pursuant to prenuptial decree in dissolution."[18] Pl. Exh. 12, 12.2.

A "motor vehicle record display" issued by the State of Minnesota Department of Public Safety on August 5, 2010, showed "TRAE, INC." as the recordholder of title on the 2006 Lincoln Navigator as of that date. Pl. Exh. 36, 36.1. In early 2011, the average "private party value" for a vehicle of this year, make, and equipment per the Kelley Blue Book ranged from $21,585.00 (fair condition) to $24,885.00 (excellent condition).

Neither the original Statement of Financial Affairs nor the amended one included entries at Item 7, "Gifts," or at Item 9, for multiple, substantial transfers of money that ran from the Debtor to her adult son, Ryan Tierney, during the year before her bankruptcy filing. During that time, Ryan Tierney was a student at the University of Wisconsin-Superior. He was living in a house in Superior, that he owned himself. Trial Tr. 529:22.[19] With the Debtor's permission, he himself had accessed the Puros' joint spousal checking account to make transfer-withdrawals, or the Debtor had transferred funds to him by check or other means, in a total of at least $10,600.00 during that year. Trial Tr. 253:13 - 254:14. Both he and the Debtor attributed these transfers to meeting Ryan Tierney's needs for housing, transportation, living expenses, and college tuition. *Id*. These transfers included one in the amount of $1,000.00 that the Debtor identified to Ryan Tierney's contemporaneous birthday. Trial Tr. 254:2-5.

When interrogated at her meeting of creditors about transfers having been made to her sons Tim and Ryan Tierney during 2008, the Debtor's answer was equivocal: "Not that I can recall." Pl. Exh. 14, 45:16-19.

Neither item in either version of the Statement of Financial Affairs disclosed that the Debtor had given her engagement ring and wedding band "back" to Deron Puro within the year

[18] Yes, the wording is just that clumsy.

[19] This is what Ryan Tierney testified to. In her testimony, the Debtor placed the house in Duluth. Trial Tr. 82:2-16.

before her bankruptcy filing, ostensibly for safekeeping and an ultimate receipt by their daughter (then ten years old). Pl. Exhs. 9 - 12; Pl. Exh. 14, 82:24 - 84:1; Trial Tr. 70:1-24, 73:9-17.

8. Debtor's Non-production of Books and Records to Trustee and In This Litigation

On learning of the Debtor's late withdrawals from the South Metro Credit Union account, Mary Jo Jensen-Carter, the Trustee of her bankruptcy estate, asked the Debtor to obtain account statements for the year prior to the bankruptcy filing and to furnish them to her.[20] Jensen-Carter also gave the Debtor a list of other financially-related documents that she wanted. Trial Tr. 126:1-21.

The Debtor never delivered any full account statements for any month to Jensen-Carter, by mail or otherwise. She initially demurred about the production of any account records, on the ground that the financial institutions would require Deron Puro's consent and he would not give it. Trial Tr. 360:5 - 362:14. Very soon after the meeting of creditors, the Debtor furnished Jensen-Carter with only one thing, a one-page "screen shot" report printed from the Credit Union's website, with very little transactional information on it and none about the withdrawals in the second month preceding her bankruptcy filing.

TREATMENT OF THESE POINTS AGAINST BALANCE OF EVIDENCE AND LEGAL THEORIES FOR DENIAL OF DISCHARGE.

The discussion so far has gone only to the bare nature of acts, transactions, and transfers that the Plaintiff impugns as fraudulent. For the application of those points, the Plaintiff's counsel propelled his case on a shotgun approach, both factually and legally. Many of the proffered points of fact crossfired among the several legal theories.

It is now time to determine whether the Debtor's involvement in these interludes was as compromised and deceptive as the Plaintiff insists. The Plaintiff insisted on maintaining every

[20] Under prescription from the Office of the United States Trustee, trustees routinely require debtors to produce bank account records for relevant periods. The statutory authority is a debtor's duty under 11 U.S.C. § 521(a)(4), to provide the trustee with all books and records relating to the property of the estate. The Debtor had described this account as a savings account in her Schedule B, Item 2.

last assertion of fact and law to the end. That requires additional findings on other evidence. All findings will be mustered to the multiple theories for denial of discharge.

1. Preliminary Issue: Receipt of Testimony of Detective Mark Stock

On the second day of trial, the Plaintiff called Mark Stock as a witness. He was an officer with the Police Department of the City of Minnetonka, then assigned to the Department's detective division. Detective Stock testified first that he had been a member of an *ad hoc* local law enforcement group "working mortgage fraud investigation," in a joint state-federal effort.

The Plaintiff elicited Detective Stock's testimony about an interview of the Debtor conducted on August 4, 2010 by Special Agent Jennifer Cohn of the Federal Bureau of Investigation and himself. Detective Stock stated that a criminal defense attorney representing the Debtor was present during the interview. The Debtor later testified that an Assistant United States Attorney was also present. Trial Tr. 554:19-24.

Detective Stock testified to the content of statements that the Debtor had made to Special Agent Cohn and himself during the interview. At the instance of the Plaintiff's counsel, he used a document to refresh his recollection. He identified this as a form completed by Special Agent Cohn "summarizing that meeting," "known as an FD 302. He also referred to his own notes of the meeting.

Per Detective Stock, the Debtor had made statements regarding transactions involving her and Zack Dyab, including the Fox Hollow and Hamilton Road transactions. He testified that the Debtor had given a very different account of her involvement with Dyab, from what she had testified earlier in the trial of this matter.

The defense did not object when the Plaintiff's counsel called Detective Stock as a witness. His interrogation-in-chief was completed without objection. Trial Tr. 501:14 - 510:15. The Debtor's attorney cross-examined him briefly. Trial Tr. 510:22 - 511:10. Defense counsel then stated that the form FD 302 was "an exhibit that was not produced, not shown to us prior to the trial, produced here today." Trial Tr. 511:22-25. He announced his intention to "call the attorney for her

and say what happened at that meeting." Then he announced that he would "drop this at this time," i.e., he had no further questions of Detective Stock. Trial Tr. 512:7-10 and 13-14.

The Plaintiff's attorney acknowledged that he had not provided defense counsel with "a copy of this document before." Trial Tr. 512:19-21. He stated that he and defense counsel "had numerous discussions about this document" and the content of the statements that it attributed to the Debtor. Trial Tr. 512:22 - 513:1. He then stated that he had previously cited the content of the form FD 302 to the Debtor's attorneys (criminal and bankruptcy defense counsel alike), to urge that she "simply stipulate to the denial of the discharge" because of "the insanity of proceeding with this case," i.e., this adversary proceeding, in light of her prior statements. Acknowledging that all that went to "a settlement discussion," he justified making his statements on the record as "not for the truth of the matter asserted." Trial Tr. 513:1-17.

In the end, apparently, the Plaintiff's counsel argued all this to defuse defense counsel's insinuation "that this particular document and its contents are in some way a significant surprise to the defense." Trial Tr. 513:17-21.

After that, no one stated any need for further testimony from Detective Stock. He was released from compulsion of subpoena and allowed to leave. Trial Tr. 514:4-11. After a break was had and a last piece of evidence for the Plaintiff was stipulated into the record, the Plaintiff rested and Debtor's counsel called his client's first witness. At the very end of the day, the Debtor's attorney announced his intention to call the Debtor's criminal defense counsel as a witness the following day. Trial Tr. 545:4-7.

The next day, however, the defense did not produce the attorney as a witness. Counsel opened by announcing his "objection to Mr. Stock's testimony yesterday," on the ground that it "was totally inadmissible under federal criminal law and Federal Rules of Evidence." Trial Tr. 551:11-19. He interrogated the Debtor about the circumstances of the August 4, 2008 interview, toward a foundation for his objection. Trial Tr. 552:15 - 558:19.

After that, defense counsel cited Rule 410 for the first time. Trial Tr. 563:14 - 564:20. A lengthy colloquy followed, between the court and both parties' lawyers. Trial Tr. 564:21 - 577:2.

After the evidentiary record was closed, the court noted a threshold issue: whether the Debtor could even challenge the use of Detective Stock's testimony as evidence, given its prior receipt without objection. Post-trial briefing on the defense's objection was ordered and received [Dkt. Nos. 46 and 55]. Counsel were directed to both the issue of timeliness and the substantive aspects of Rule 410.

Fed. R. Evid. 103 governs the preservation of an objection to the introduction of evidence. In pertinent part,

> A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context . . . .

Fed. R. Evid. 103(a)(1).

The challenged evidence is Detective Stock's testimony as to the Debtor's participation in the August 4, 2010 interview, in the presence of the other participants including him. On the second day of trial, this evidence went into the record as elicited, without contemporaneous challenge from the defense. There was no formal *ruling* regarding its admissibility, because none was required then. However, by its terms Rule 103(a)(1) governs a motion to strike evidence already in the record; so it gives the guidance for the Debtor's late-coming challenge.[21]

The real question, then, is whether the Debtor's late-coming "objection" was timely. The Eighth Circuit long ago set forth the first principle for the governing construction:

> The rule is well settled in this circuit that for an objection to be timely it must be made at the earliest

[21]When the Debtor's counsel raised his "objection" a day after Detective Stock testified, the court ruled that it would be treated as a motion to strike and the threshold issue would be whether that option was still open to the defense. For the record, i.e., to cover the rule's other consideration, the receipt of Detective Stock's evidence does impact a "substantial right" of the Debtor. The content is relevant to several of the Plaintiff's grounds for objection to discharge. It also goes directly to the credibility of her own opposing testimony.

> possible opportunity after the ground of objection becomes apparent, or it will be considered waived.

Terrell v. Poland, 744 F.2d 637, 638-639 (8th Cir. 1984) *citing Isaacs v. United States*, 301 F.2d 706, 734 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962); *Marx v. United States*, 86 F.2d 245, 251 (8th Cir. 1936). *See also United States v. Shores*, 700 F.3d 366, 370 (8th Cir. 2012); *United States v. West*, 612 F.3d 993, 996 (8th Cir. 2010); *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 761 (8th Cir. 2006); *United States v. Carter*, 270 F.3d 731, 735 (8th Cir. 2001); *McKnight v. Johnson Controls, Inc.,* 36 F.3d 1396, 1407-1408 (8th Cir. 1994); *United States v. Solomonson*, 908 F.2d 358, 362 (8th Cir. 1990).

Though the rule allows a motion to strike, it sets limits on that option where there was no objection contemporaneous with the receipt of the evidence:

> A motion to strike . . . is sufficient to preserve error for review when the evidence appears admissible when offered and only upon subsequent developments does it appear objectionable.

United States v. Solomonson, 908 F.2d at 362 *citing Isaacs*, 301 F.2d at 734 (quoting *Marx v. United States*, 86 F.2d at 251). More to the point here, where the grounds for the objection are apparent during the course of the testimony, a motion to strike after the fact does not preserve the substance of the objection for the purposes of appeal. *Terrell v. Poland*, 744 F.2d at 638-639; *McKnight v. Johnson Controls*, 36 F.3d at 1407-1408.

The defense raised many contentions with the content and receipt of Detective Stock's testimony. Most of them are not relevant to the question of whether it should be stricken.[22]

[22]There was a vague complaint in oral argument about whether the Plaintiff, a private party, should even have had access to the FD 302. That point was not briefed. Then there was an argument that the use of the form and its content had been a "trick," and the defense had not even been made aware of the Plaintiff's possession of it. That was countered by attorney Prince's own (equally unsworn) insistence that the defense had known about it for a long time. Ultimately, it is not relevant whether the Plaintiff and its lawyer had engaged in subterfuge. In a different direction, there was a broadly-pitched relevancy argument as to the subject matter. That will be addressed on the merits under 11 U.S.C. §§ 727(a)(3) and (a)(5). When the request to strike was presented, the defense seemed to be taking issue with Detective Stock's use of the form during his time on the witness stand, i.e., whether he was reading its content verbatim into the record, or only using it to prompt his own memory of the Debtor's statements. That argument had already been lost; the point was mooted when the defense failed to dispute the nature, content, *or use* of the form when the Plaintiff's attorney physically brought it to Detective Stock at the witness stand. (Defense counsel never denied that they had received a copy of the

As to timeliness, the question is: when did it become apparent that Detective Stock's testimony might cover the content of a plea discussion that would be subject to objection under Rule 410?

The defense argues that the grounds for an objection did not become apparent until after Detective Stock had completed his testimony. And, it seems, the defense does not put that point of apparency anywhere before, during, or right after his time on the witness stand. As counsel would have it, the objectionability did not emerge until "defense counsel conferred with Ms. Puro and called her criminal attorney. It was *then* revealed that Detective Stock's testimony related to a potential plea agreement." Brief [Dkt. No. 46], 2 (emphasis added).

This, however, is wrong. It is refuted by Detective Stock's description of the events of the interview; the Debtor's own testimony; and the defense's own briefing on the issue. The defense has acknowledged two aspects of the Debtor's trial testimony: "Ms. Puro testified that during the August 4, 2010 meeting she was presented with a proffer agreement which she signed," and she "testified that her exposure to criminal indictment was discussed." Brief [Dkt. No. 46], 2. By the Debtor's own admission, she had known from her very participation that the interview included plea discussions as part of an inducement for her cooperation in the Government's case against Zack Dyab. Trial Tr. 554:2-18; 554:25 - 555:11. Given that, it was patent that an objection under Rule 410(a)(4) could be made to the content of any statement made by her during the interview. That conclusion could have been drawn by anyone aware of the applicability of the Federal Rules of Evidence.

The Debtor could have objected to any testimony by Detective Stock as soon as he was called, on a simpler ground: he had not been disclosed in the Plaintiff's witness list.[23] But

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form on the second day of trial before court convened, as the Plaintiff's counsel represented when he defended his use of this witness and the document.) Much of this argumentation seems devoted to defeating the factual content of the form itself; and ironically and anomalously, the form is not in the record. Ultimately, both sides are at fault for the messy posture of this evidence, coming as it did out of a mutually-evasive and passive-aggressive dance during the litigation.

[23] The witness list, mandated by the court's Order for Trial, is found at Dkt. No. 38.

more to the point of Rule 410, it was obvious that Detective Stock was being called to testify on his contacts with the Debtor, regarding the subject matter of the Zack Dyab investigation. Nothing indicates he would have been a competent witness for any other purpose relevant to the Plaintiff's case.

Beyond that, the grounds for an objection under Rule 410 were apparent as soon as the Plaintiff's counsel asked Detective Stock whether he remembered the Debtor's statements during the August 4 meeting. Trial Tr. 502:14-16. At that point, objection could have been made to the whole line of questioning and the issue under Rule 410 would have been on the table.

On this record, one can not assign the point of objection under Rule 410 to any time later than the moment Detective Stock broached the subject of what the Debtor had said. The Debtor argues that a basis for objection became apparent only after her attorney and she had thought thoroughly about what had already gone into the record. It would make for terrible policy if that argument were adopted.[24] On the day that Detective Stock's evidence went into record, defense counsel clearly was concerned about the risk of having facts found on its content. But on that day counsel gave no voice to removing it from the record, or to the impropriety of offering it. Rather, once the point became adversarial, the express thought was to counter Detective Stock's

[24]The defense insinuated that the Debtor could not possibly have known the thrust of Detective Stock's testimony at the time he was called, and hence her lawyers could not have known of its significance until they did their later due diligence with the Debtor and her criminal defense attorney. This elides several things. First, the Debtor was present during Detective Stock's testimony. She certainly could have alerted her lawyers to the threat posed by it, even if the defense as a whole was previously unwitting. Second, the Debtor's counsel knew that his client had been under criminal investigation. Trial Tr. 575:10-12. Third, the Debtor's version of the interview, if shared with counsel before the trial as it should have been, could not reasonably have been seen as impervious to question or doubt. That itself raised a red flag about why Detective Stock was being called. And fourth, it had already been telegraphed to the defense that the events at the interview were of interest to the Plaintiff, when the Plaintiff's lawyer interrogated the Debtor about the interlude during her testimony as an adverse witness. Were the Debtor's argument logically extended, a client-party under the same onus could deliberately withhold everything about the relevant aspects of such an interview from his unknowing attorney for a subsequent civil proceeding; allow it all in without objection; and then have the leisure of post-trial review to set up a destabilizing motion to strike. The Debtor accuses the Plaintiff of sandbagging in its calling of Detective Stock; but the way in which the defense handled the receipt of his testimony into evidence is not exempt from the same label.

version of the events with one from the Debtor's criminal defense counsel. But then, this avenue was not taken on the following day.[25]

The demand to remove the testimony from the record was made too late after its potential objectionability was apparent. Under Eighth Circuit precedent, the motion to strike was untimely; it should have been made no later than right after Detective Stock gave his first quotation of the Debtor's statements regarding the Fox Hollow transaction.

Because the Debtor did not timely challenge the receipt of Detective Stock's testimony, her request for relief under Rule 410 cannot be granted. The testimony will remain in the record, for whatever relevance it has to any of the Plaintiff's substantive theories.[26]

2. 11 U.S.C. § 727(a)(2)(A)

A debtor under Chapter 7 may be denied discharge where

> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under [the Bankruptcy Code], has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

[25] And all of this begged the question why the FD 302 was never offered as an exhibit. At least to one who is not familiar with the sensitivities of Rule 410, that is still a mystery.

[26] A formal ruling on the substantive issue under Rule 410, whether the "testimony concerned a plea discussion," is not necessary. Anyway, it is far from clear that the record was developed enough to reach that issue on its merits. The Eighth Circuit has adopted a totality-of-the-circumstances approach to determine whether a past exchange of statements was a plea discussion for the purposes of Rule 410. *United States v. McCauley*, 715 F.3d 1119, 1125-1126 (8th Cir. 2013). Five "normal plea discussion events" bear on the inquiry, as non-exclusive circumstances: 1) whether a specific plea offer was made; 2) whether a deadline to plea was imposed; 3) whether an offer to drop charges was made; 4) whether the Sentencing Guidelines were discussed; and 5) had the defendant retained counsel for the defense of charges. *United States v. Morgan*, 91 F.3d 1193, 1196 (8th Cir. 1996). The only evidence in the record that goes to these points is the Debtor's, and it is not a lot. She quoted the law enforcement officials as proposing a sentence of 53 months to her for her cooperation, which was described as down from a sentence of "[u]p to 30 years of imprisonment," per their statement to her. Trial Tr. 555:5-7; 558:7. The latter reference may have been to a guidelines-suggested duration, but nothing so explicit appears in the Debtor's recounting. It is uncontested that a lawyer on her behalf was present. It does not appear that she had been formally charged at that point--she attested to refusing to sign an information that had been prepared, presumably a charging document that was offered to her during the interview, but that was all that she said that went to the initiation of charges and it was vague. There is nothing from which to identify the nature or number of possible or actual charges, and nothing to indicate that law enforcement was making any proposal conditional on prompt acceptance by the Debtor, i.e., setting a deadline for the closing of an offer.

> (A) property of the debtor, within one year before the date of the filing of the [bankruptcy] petition . . . .

11 U.S.C. § 727(a)(2)(A). The elements of the statute have been judicially phrased as:

> 1. The actions of transfer by the debtor took place within twelve months prior to the filing of its petition for bankruptcy relief;
>
> 2. The debtor took the actions with the intent to hinder, delay, or defraud its creditors or a trustee in bankruptcy;
>
> 3. The debtor itself took the action; and
>
> 4. The action was the transfer or concealment of property.

In re Bateman, 646 F.2d 1220, 1222 (8th Cir. 1981) (applying corollary provision of Bankruptcy Act of 1898, § 14c(4)). An objection to discharge under this provision must be premised on a transfer of property *of the debtor-defendant*, i.e., an asset that itself would otherwise have been subject to seizure at the instance of a creditor, or that itself would have passed into the bankruptcy estate but for the transfer. *In re Wagner*, 305 B.R. 472, 475 (B.A.P. 8th Cir. 2004).

Most disputes under § 727(a)(2)(A) center on the debtor's intent, and whether the plaintiff has proved the requisite *actual* intent to hinder, delay, or defraud, as is its burden. *Lovell v. Mixon*, 719 F.2d 1373, 1376-1377 (8th Cir. 1983). In this context, the courts have addressed the natural difficulties of proving subjective states of mind in two ways.

First, proof of a purely gratuitous transfer, i.e., "when a debtor transfers valuable property without payment," gives rise to a presumption of fraudulent intent. *In re Armstrong*, 931 F.2d 1233, 1239 (8th Cir. 1991); *In re Bateman*, 646 F.2d at 1222; *In re Sandiford*, 394 B.R. 487, 490 (B.A.P. 8th Cir. 2008). Second, the courts may consider objective indicia of fraud in aspects of the debtor's conduct, and may find fraudulent intent where they are logically consistent with it. *In re Armstrong*, 931 F.2d 1233, 1237 (8th Cir. 1991); *In re Korte*, 262 B.R. at 473.

Here, as a general theme of its case, the Plaintiff took sharp and vocal exception to a number of the Debtor's dispositions of large amounts of money or facially-valuable property, that

occurred prior to her bankruptcy filing. When it finally structured its case for post-trial submission, however, the Plaintiff only presented two groupings of transfers.

a. Transfer of Real Estate and Vehicles in Consequence of Divorce

The Plaintiff loudly impugns the Debtor's divorce from Deron Puro as a sham. It points to how the Puros commenced divorce proceedings, seemingly in a coordinated fashion, on the very heels of the entry of its judgment against the Debtor; the rushing of a consensual process through the family court; and the facially-slanted division of the few substantial assets that the Puros held in the summer of 2008, in the final terms.

As the Plaintiff sees it, the outcome of the divorce proceeding left the outward aspects of the Puros' personal relationship and living situation almost unchanged from the pre-dissolution norm--but the Debtor was divested of the title and ownership of two parcels of real estate and a valuable motor vehicle with almost nothing granted to her toward an equitable division of property.

In close proximity to a bankruptcy filing, an inordinately-uneven and collusive division of marital assets through a divorce proceeding can constitute a transfer within the scope of § 727(a)(2)(A). *In re Clausen*, 44 B.R. 41, 44-45 (Bankr. D. Minn. 1984). The focus for analyzing this particular situation goes back to the necessary, statutorily-specified subject of an avoidable transfer: the *debtor's* property.

Thus, in *Clausen*, a Minnesota-resident, insolvent debtor was adjudged to have made a transfer with intent to hinder, delay, and defraud, when he defaulted entirely in a divorce proceeding venued in Texas, through which his wife was granted full right, title, and interest in the marital residence in Texas and only a very small distribution of other marital assets was made to him. 44 B.R. at 44-45.

Here, however, the situation is different from *Clausen*, and much more nuanced. Deron Puro owned the McColl Drive homestead before he married the Debtor. Before marrying, the parties entered an antenuptial agreement to acknowledge and memorialize that ownership and

to provide for him keeping the property in the event of divorce. In turn, the money required to acquire the Stone Lake cabin came directly out of the premarital asset previously reserved to Deron Puro--the McColl Drive homestead--because the purchase was funded by a loan that was secured by a lien against the McColl Drive property. That extraction and application of premarital value was acknowledged under the crude post-marital amendment to the antenuptial agreement. That one-page document memorialized a recognition that the cabin was a tacit proceed of his premarital property right in the McColl Drive property, and it evidenced that the Puros' agreement "that if dissolution of marriage occurs Mr. Puro will retain full legal rights to all of his real property." Pl. Exh. 58, 58.6.

The Plaintiff makes much of the fact that record title to both parcels of real estate had been put into joint ownership between Deron Puro and the Debtor in 2004, years before the divorce proceedings were commenced. Pl. Exhs. 21 and 23. To the extent that any presumption or inference of a vesting of an undivided ownership in the Debtor would arise from that, it is rebutted by the fact that the Puros did not amend the original antenuptial agreement to alter the reservation of full ownership of the McColl Drive homestead to him, despite the change in record title; and then a year later they gave the same reservation to the cabin via the amendment.

To opposite effect, the record contains evidence--the Debtor's testimony, Trial Tr. 36:6-23--that the form of title was changed to joint tenancy at the demand of financial institutions at both times, as a prerequisite for loans of money on the security of a newly-granted mortgage against the subject properties. *See also* Tr. of Depo. of Deron Puro, 82. Whether that demand was justified under the law of either forum state is not relevant on the question of the parties' intent. On the evidence, the finding is merited that the vesting of joint title was the lenders' condition for giving financing. More to the point, there is no evidence that the reconveyances reflected an actual, intentional transfer or vesting of an undivided one-half interest to the Debtor in either property.

There is one other potential rationale for characterizing the decree's real estate-related provisions as a transfer of a valued interest in the properties. That would be on the thought

that an *increase in equity* in either property that resulted from a paydown on debt or improvements made with money *earned* by the Debtor or Deron Puro during the marriage, might be a value-component that would be subject to an accounting and division in divorce notwithstanding Deron Puro's retention of his premarital interest and all value traceable to that. However, the only evidence that the Plaintiff presented on that prospect was the broad acknowledgment by both of the Puros that funds from their joint marital account, including money she had earned had been used toward the making of mortgage payments on one or both properties. There was no specificity or quantification. Tr. of Depo. of Deron Puro, 84; Trial Tr. 37:3 - 38:5.

Ultimately, the Plaintiff relies on the bare status of record title to the properties as it stood immediately pre- and then post-dissolution to make out a relinquishment of a valuable property interest by the Debtor to Deron Puro without consideration. With only that as evidence, there was no transfer cognizable under § 727(a)(2)(A). The change in title alone was not backed by a transfer of actual value, that might otherwise have passed into the bankruptcy estate. Given the lack of quantified proof that the Debtor forsook a marital acquest of equity buildup by relinquishing the properties, the notion of a transfer of real estate by the Debtor cognizable under § 727(a)(2)(A) fails entirely.

The stipulated division of motor vehicles is the Plaintiff's other cited instance of an un- or under-compensated loss of marital property, via Deron Puro being awarded the Navigator and the Debtor being awarded the 15 year-old, near-junker. There is no issue of value, insofar as the analysis is concerned.[27] But this transfer fails to legally qualify as a predicate for § 727(a)(2)(A), on the very circumstance that the Plaintiff brandishes (with some justification) as evidence of the Debtor's shiftiness. The public record title to the Navigator, from the time of its acquisition, remained unchanged--in TRAE, Inc., the Debtor's artificial business entity--for two years after the divorce despite the ostensible award to Deron Puro.

[27]The Plaintiff gleaned various written pronouncements of value from commonly-used websites and put them into the record without objection from the defense. Pl. Exh. 36. On their face, they would bear out the Plaintiff's insistence that the Navigator was worth as much as $23,000.00.

As the Plaintiff points out, Minnesota law now provides for a nearly-impervious presumption of ownership from the status of record title for registered motor vehicles.[28] The title to the Navigator was originally registered in TRAE, Inc. when it was acquired for the Debtor's use in her real estate endeavor; and it remained there to the date of the divorce. Because the original registration is presumed to reflect the holder of legal ownership, the purported transfer-by-decree to Deron Puro was not a transfer of property *of the Debtor*. Even if some legal effect is assigned to the divorce decree's provisions, it would not trigger § 727(a)(2)(A). *In re Wagner*, 305 B.R. at 475-476.[29]

Yes, the timing and terms of the Marital Termination Agreement and its effectuating decree smack of pretext and deception on their very face, given their coincidence in time with the rapid ripening of the Plaintiff's legal effort against the Debtor. One is left with the disturbing thought that the Debtor and Deron Puro rushed facially-slanted terms to judicial approval with just the sneaky, temporizing intent that the Plaintiff attributes to them. Deron Puro could not give any reason why the assets were divided the way they were. Tr. of Depo. of Deron Puro, 60 ff.[30] However, the evidence does not indicate that the Puros built up very much wealth at all over the course of a 10-year marriage, that would properly have been divided as marital property. As a result, the record does not establish that property of real value, owned, held, or claimable by the Debtor in her individual right, was transferred in consequence of the rush to a marital split. The Plaintiff does not have a basis for denying the Debtor a discharge in consequence of the division of property in the divorce, under § 727(a)(2)(A).

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[28] *In re Lien*, 415 B.R. 715, 720 (Bankr. D. Minn. 2009) (collecting Minnesota Supreme Court decisions).

[29] In a way, the Plaintiff's use of the decree's disposition of the Navigator for its count under § 727(a)(2)(A) cuts at cross purposes with the way it argues the status of the Navigator for its count under § 727(a)(4)(A). *See* pp. 42-43, *infra*.

[30] Of course, one must consider the source; he also testified repeatedly to his heavy drinking at all relevant times, until he went through treatment in April, 2009 after the divorce. *Id*.

b. Transfers of Money To or Through Debtor's Adult Son, Ryan Tierney

In the earlier litigation of this matter, the Plaintiff made much of how the Debtor had paid many of her son Ryan Tierney's college and living expenses during the year-plus before her bankruptcy filing, in a total that exceeded $10,000.00. The defense did not deny that she had made these payments, either through her own action or by allowing Ryan free access to the joint marital checking account for withdrawals as he needed.

By and large, this theme was directed toward the Plaintiff's count under § 727(a)(4)(A), on the point that the Debtor had not disclosed any of those payments in her Statement of Financial Affairs. At times, though, there was an insinuation that these transfers had been set up to get the money out of her hands, so creditors could not seize it.

That inuendo died away at trial, for want of proof. It was not even submitted post-trial. However much the Debtor may have been veering toward insolvency at the same time, there is nothing in the record to make out a strategy of that sort, as shallow as it would have been. The evidence only bears out that the Debtor made these transfers as a supportive parent. There is no evidence of an accompanying intent to hinder, delay, or defraud creditors.

c. Conclusion on § 727(a)(2)(A)

Throughout this litigation, the Plaintiff loudly raised large issues over a number of instances in which the Debtor parlayed money and other assets away from herself and to various purposes known and unknown. However, the transfers just noted are the only two that it submitted for consideration under § 727(a)(2)(A). As to one or another of the statutory requirements, both fail. The Debtor is not to be denied discharge under this provision.

3. 11 U.S.C. § 727(a)(3)

Discharge under Chapter 7 may also be denied to a

> . . . debtor [who] has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was

> justified under all of the circumstances of the case
> . . . .

11 U.S.C. § 727(a)(3).

A plaintiff objecting to discharge under this provision has the initial burden of proving up an inadequacy of financial records, from which the defendant-debtor's financial condition or business transactions might be ascertained. *In re Swanson*, 476 B.R. 236, 240 (B.A.P. 8th Cir. 2012). Once that is shown, the burden shifts to the debtor, "to offer a justification for his recordkeeping (or lack thereof)." *Id*. *See also In re Sendecky*, 283 B.R. 760, 764 (B.A.P. 8th Cir. 2002), *aff'd*, 65 Fed.Appx. 99 (2003). As to the debtor's response, "[§]727(a)(3) does not contain an intent element, but, rather, imposes a standard of reasonableness. The debtor is required to take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate." *In re Wolfe*, 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999) (interior quotes and citations omitted).[31]

As to specific transactions or the time(s) as to which records should reflect financial condition, the statute sets nothing specific. The courts have generally set the scope of the inquiry on a case-by-case basis, dependent among other things on the depth and duration of the debtor's insolvency, the nature of the likely precipitants of it, the possibility of any past wrongdoing toward creditors, the extent and nature of the debtor's business activity, and the debtor's sophistication and acumen. *In re Losinski*, 80 B.R. 464, 472 (Bankr. D. Minn. 1987); *In re Drenckhahn*, 77 B.R. 697, 707-708 (Bankr. D. Minn. 1987). In appropriate cases, the courts have required debtors to produce records or justify their absence for long periods of time preceding the bankruptcy filing. *In re Skurat*, 14 F.2d 490 (D. Minn. 1926) (decided under Bankruptcy Act of 1898; considering transactions from eight years before bankruptcy filing). *See also In re Losinski*, 80 B.R. at 473

[31]The Bankruptcy Appellate Panel emphasizes that "the objecting party [still] bears the ultimate burden of proof with respect to all elements of this [sic] claim," i.e., an objection to discharge under § 727(a)(3). *In re Swanson*, 476 B.R. at 240. This of course is accurate in the abstract, given the dictate of Fed. R. Bankr. P. 4005. However, realistically, the judicial task shifts once a debtor produces whatever records he can, and offers a justification for not having more. At that point, the job is to weigh the justification in light of the nature of records produced and the magnitude of the absence of more.

(collecting decisions from courts that found material, records from ten or more years pre-petition).

Here, by comparison, the Plaintiff would put the Debtor to the statute's burden over a relatively short time, back to mid-2006. This would take the duration of records and justification to a point just over two years before her bankruptcy filing. This is appropriate under the circumstances, particularly if any thought went into delaying the actual event of filing beyond any window of vulnerability to avoidance for transfers that had questionable character. *See* 11 U.S.C. § 548(a)(1) (upon requisite proof, trustee may avoid as fraudulent, transfers of property of debtor "made . . . on or within 2 years before the date of the filing of the [debtor's bankruptcy] petition").

The Plaintiff identifies three major gaps in the Debtor's ability to document over that time, that came out of its pretrial discovery and investigation.

a. The Fox Hollow Transaction: Nature of Receipt, Nature of Disbursement

The Debtor's participation in the Fox Hollow transaction is the most intense part of the Plaintiff's case under § 727(a)(3). The Debtor did not produce a bit of documentation to bear out any of the three narratives she gave for her receipt and pass-on of nearly $300,000.00. She offered no explanation at all for her inability to produce such records. This fails muster under § 727(a)(3), for several reasons.

First, were the disbursement of the money to TRAE, Inc. made as some other person's "repayment" of a loan as she stated twice in sworn affidavits, there should have been some sort of documentation to reflect the loan at its origination, and to memorialize the terms of repayment and satisfaction. The Debtor did not produce any.

Second, the failure to produce any documentary proof at all was both unexplained and inexplicable, were the payment a disbursement of a loan to her or TRAE, Inc. from Potts, her client, as the Debtor testified in an ostensible explanation. For a loan transaction of over a quarter of a million dollars, prudence would have dictated that something be memorialized--by a simple promissory note, if nothing else. Instead, through her brief testimony on the point, the Debtor stated that Potts had been willing to make her that large a loan, for application to a speculative investment

of hers (the Tatanka Run project), with no documentation to evidence the loan or to establish any terms of repayment or satisfaction--and, apparently, no grant of collateral security. Trial Tr. 188:6-15. That explanation was just not facially credible, even given the backdrop in time and general economic conditions.[32] The Debtor's halting demeanor in delivering it did not help. The whole narrative might have been rehabilitated by producing Potts to testify, and by him testifying credibly. But, the Debtor did not produce him and had no justification for not doing so.[33]

The discrepancy between these two versions of reality imposed a heightened burden on the Debtor to document or justify. Then the record received a third alternate narrative, given by the Debtor months before trial. Detective Stock quoted the Debtor as

> . . . explain[ing] . . . this was going to be a cash back deal to Mr. Dyab and that she had agreed to put together a fraudulent second mortgage to justify this pay off and that--and then that money was to be given back to Mr. Dyab in exchange for her to get--to be the exclusive listing and selling agent on the Shafer project that Mr. Dyab was working on.

Trial Tr. 505:21 - 506:4. Detective Stock further quoted the Debtor as admitting that "she had held back some of the money," as "her profits on the deal." Trial Tr. 506:8-17. At one point in the trial, the Debtor admitted to receiving and keeping some $13,000.00 in addition to the $30,000.00 that she had earlier acknowledged. She stated that this amount had been her commission on the original sale that had generated the $297,500.00. Trial Tr. 420:1-21.[34]

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[32] From the vantage point of presiding over a decade's worth of bankruptcy cases involving failed real estate ventures and bankrupt individual purveyors of them, one can observe that 2006 was the last full year of the overheated, frenetic conditions of the real estate bubble of the last decade. That phenomenon was characterized by irrationally-loose credit, sloppy documentation, and excessive speed to closing in sales and financing transactions alike. By mid-2007, things started to slow, turn, and tighten. Then it all crashed, in the fall of 2008.

[33] Defense counsel never even mentioned the possibility of calling Potts. From another direction, Deron Puro attested in 2010 to knowing nothing about where the Debtor would have obtained $300,000.00 in 2007, in order to fund a real estate investment. Tr. of Depo. of Deron Puro, 100.

[34] This statement contradicted testimony that the Debtor had given only the day before, where she denied that the $13,000.00 component (by separate check) had been the payment to her of a commission. Trial Tr. 273:1 - 280:15. She had described "[t]he purpose of this [as] for a loan," Trial Tr. 273:20-21, "[b]ecause I was borrowed money from the seller," Trial Tr. 274:9.

Detective Stock's quotation of the Debtor is redolent of clandestine, wrongful conduct and collusion on her part, and the content was made out by her own admission to him and Special Agent Cohn.[35] In light of these three widely-variant narratives, it was incumbent on the Debtor to produce evidence to corroborate one of them.[36] Documentary evidence for an original, arms-length sale, involving Potts or another real seller-client, would have at least made out a bona fide source for the $297,500.00 that the Debtor received. In turn, this could have given a small amount of support to the notion of a loan from Potts to her, no matter how loosely the money had been handled.

But, given her statements to law enforcement officers in 2010, with their specter of fraud in a connection to Dyab's scheme, it was even more imperative for her to have documented an outside source for the funds, whether legitimate or not. She did nothing toward that, even though she could have produced documentation or a credible excuse as late as the course of the trial. *In re Losinski*, 80 B.R. at 469; *In re Drenckhahn*, 77 B.R. at 709.

Then, there was the other end of the ostensible flow of the funds. The Debtor did not even document an actual receipt or subsequent deposit of the component of the funds that she admitted keeping for herself, or a rationale in written contract or law for her entitlement to that specific component of the $297,500.00. She produced no documentation to evidence the end-receipt of the bulk of the funds, that she was ostensibly investing in Dyab's Tatanka Run development.

The only two documents in the record (given to the Plaintiff in discovery) are worthless as to this issue. The first is a copy of a document entitled "Planned Unit Development and Subdivision Agreement" between "Rame's Enterprise Inc." and the City of Shafer is in the record, Pl. Exh. 59.2 - 59.58. It is clearly only a draft. (It bears the name of a Center City lawyer

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[35] As a result, there was no hearsay issue over his quoting her in his testimony. *See* Fed. R. Evid. 801(d)(2).

[36] The subject matter of the transfer certainly bore on her financial condition or business transactions, at a time in sufficiently close proximity to her bankruptcy filing that it was material under § 727(a)(3). *Supra* at pp. 31-33.

and law firm as drafter; they are identified as counsel for the city.) It says nothing about capitalization for the project coming from the Debtor or TRAE, Inc.

The second is a document that the defense produced in discovery, an electronic-format text for a "Joint Venture Agreement" running between "T R A E Inc." and "Rames Enterprise LLC." Its terms ostensibly provided for a contribution of $300,000.00 from TRAE, Inc. on or before October 1, 2006, toward "a joint venture to develop the property located in Schaefer [sic], MN for profit." Pl. Exh. 60. The printout of this document (stipulated into evidence) includes analysis of metadata for the e-format, which notes a "CREATION DATE" and a "LAST SAVE TIME" of "4/14/2009 10:11:00 AM" for both events. When questioned about the origin of this document and the significance of that notation with its implications, the Debtor was unable to say anything of substance. She appeared baffled by the question. Trial Tr. 185:19 - 186:5.

$250,000.00, more or less, is a lot of money. As evidenced by the very formal face of the planned unit development agreement, the initiation of the Tatanka Run development was subject to public oversight by the City of Shafer. The City had the right to demand "written evidence . . . that the Developer ha[d] the capital necessary for acquisition and development." Pl. Exh. 59, 59.16. Yet, the Debtor produced nothing in writing that documented this substantial investment contemporaneously to its ostensible making, or that proved up the uses to which Dyab actually put the money.[37]

As to her substantial activity in relation to the Fox Hollow transaction and its ostensible followup, the Debtor's proffer fails under § 727(a)(3). Incomplete explanations and vague excuses, testimonial in nature alone, do not suffice. Testimony from an official of the City of Shafer, planners or architects for the project, or other sorts of persons actually involved at such an inception, would have gone a way to flesh out the Debtor's story as to the intended and actual end-destination of her payment to Rames Enterprises and Dyab. It also might have bolstered a more specific excuse for her lack of documents. None of that was forthcoming, either.

[37] Deron Puro attested to knowing nothing about a $300,000.00 loss his wife would have incurred in 2007--but, again, consider the source.

The Debtor's failure of documentary accountability as to the Fox Hollow transaction merits denial of discharge under § 727(a)(3).

b. The Hamilton Road Transaction: Nature of Receipt, Nature of Disbursement

The Plaintiff also cites the Debtor's failure to document her handling of monies out of the Hamilton Road transaction for its objection under § 727(a)(3). As with the Fox Hollow transaction, it points to both phases of the sequence: the deposit of the funds by wire transfer to a personal bank account held by members of the Debtor's family, but as to which she was not a holder in title or privileges; and the actions she took to direct the funds out of that account to receipt by Rames Enterprises and Dyab.

The Plaintiff assigns shaky credibility to the Debtor's story on both. It challenges the likelihood of anyone making such a mistake in instructions for the wire transfer, i.e., giving an account number for a personal account not even her own, rather than the account data for TRAE, Inc. It also questions the propriety of routing the funds out of there directly to Rames Enterprises and Dyab, rather than returning them to the closing company or routing them through TRAE, Inc. as may have been originally intended.

The Debtor produced no documents to back up her vague story as to the source of these funds in a bona fide real estate transaction. She produced no documentation as to the reasons why Rames Enterprises and Dyab were to receive them. Given the magnitude of the transfer, its close proximity to the Fox Hollow transaction, its relative proximity to the bankruptcy filing, and its anomalous nature, the information that would have been contained in any such documents was material to the Debtor's financial condition and the conduct of her business. She gave no explanation for her failure to produce hard evidence as to the reality of things. If it were all an honest mistake as she insisted, the documentation should have been available from both ends of the sequence, institutional or corporate.

Those circumstances alone would have made this failure an independent basis for denial of discharge under § 727(a)(3). But on top of that, Detective Stock's evidence gave a

powerful boost to the Plaintiff's demand for accountability from the Debtor. He quoted the Debtor as admitting

> . . . that Mr. Dyab basically had put together this cash back scheme, that he was asking her help with as far as funneling that large amount of cash, that $163,000.00 back to himself. She was uncomfortable with that money going through her account, but for some reason felt that she was more comfortable with it going through her son's account.

Trial Tr. 504:16-24. The substance of this quotation substantially contradicted the Debtor's shallow protest of a triggering mistake and a clumsy effort to remedy it. With it in the record, the burden on the Debtor to produce documentation of the reality of the sequence, and her unjustified failure to do so, are all the stronger a basis for denial of discharge under § 727(a)(3).

c. Cash Withdrawals in Close Proximity to Bankruptcy Filing

As a third ground under § 727(a)(3), the Plaintiff cites the established fact--admitted by the Debtor--that she withdrew, in cash, $33,509.00 from an account at South Metro Credit Union for which she was the holder, between July 1 and September 30, 2008, during the second calendar month before she filed for bankruptcy. Trial Tr. 265:20-24. One of those withdrawals was in the amount of $21,000.00. Trial Tr. 261:6 - 262:4.

At trial, the Debtor was unable to account with any specificity for the uses to which the cash had been put. At first she just said, "I spent it" with no connected reason. Trial Tr. 264:13-22. Then she just attributed it to "living expenses." Trial Tr. 265:22-24.

The remoteness of this explanation was patent. Expenditures of $10,000.00 to $15,000.00 per month for daily living would have been so far beyond the apparent historical consumption patterns of the Puro household, that the statement is flatly unbelievable.

Once again, this imposed a heightened burden on the Debtor to back up her hazy statement with bills, receipts, cancelled checks, bank records, or other hard evidence of real expenditures of the sort she attributed, toward the total of the cash withdrawals. She did not even try to meet that burden. She did not offer an excuse for not doing so.

Due to its very close proximity to the Debtor's bankruptcy filing, this subject matter was directly material to the administration of the estate. Certain dispositions of the withdrawn cash could have been preferential or fraudulent transfers avoidable by the trustee under 11 U.S.C. §§ 547(b) and 548. Without the Debtor's cooperation in producing documentation and records, the trustee could not pursue such recoveries for the benefit of creditors. The nexus between the Debtor's duty of accounting and the real interests of the estate is very close, for this failure of the Debtor to account by documentation. As a result, this point is the simplest and strongest ground for denial of discharge under § 727(a)(3).

d. Discrepancy Between Gross Deposits Into the Puros' Bank Accounts and Gross Income Reported for Tax Liability for 2008

The Plaintiff's last challenge to the Debtor under § 727(a)(3) is calculation-intensive. The Debtor's rejoinder is less so; but in the end it is sufficient.

The Plaintiff maintains that the Puros' joint marital checking account received deposits of $264,208.44 during 2008; the Debtor's own South Metro Credit Union account received deposits of $33,894.69 for the second quarter of 2008 (July 1 - September 30) alone; and an account for TRAE, Inc. from which the Debtor had made withdrawals for personal uses received $5,267.77 during 2008. Pl. Exh. 1 (various line entries); 125; and 4 (three line entries).[38]

The resulting total of $298,310.00, as the Plaintiff's counsel points out, is about $111,000.00 greater than the total of the gross income reported by the Puros, individually and through TRAE, Inc., for tax year 2008. *See* Pl. Exh. 62, 3 ($153,899.00 gross income reported for TRAE, Inc.); 106,4 ($24,019.00 income from commodity trading reported for Deron Puro); and 106,10 ($9,036.00 in farm income reported for Deron Puro).

The Plaintiff repeatedly insinuates that the excess represents money from one of two possible sources: "Funds collected [by the Debtor] 'off the books' in 2006 and/or 2007, or funds not

[38] For the joint marital account, the Plaintiff's counsel itemized deposits in agonizing detail in his proposed Finding of Fact 179. He gave citations for the other two in his proposed Findings 180 and 181. Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment [Dkt. No. 58], 34-35. The recapitulation appears to be accurate. Thus the point-citations to the pages of Exhibit 1 are omitted here.

disclosed as part of this bankruptcy." *E.g.*, Proposed Finding of Fact 177, Dkt. No. 58, 33-34. However, the Plaintiff's counsel cites no other evidence to support an inference to that effect. The sneering tone of the insinuation detracts from its acceptability rather than enhancing it.

As a theory for denial of discharge, this one is deficient. It fails for at least three reasons. It relies on an undifferentiated consideration of the deposits into the bank accounts. It does not look any further for sources by nature other than reported income. It does not take into account the reasons for the higher level of contemporaneous personal or household expenditure in 2008. (Among other things, the Puros were engaged in the remodeling of the Stone Lake cabin; out-of-state trips; and work on the McColl Drive homestead.)

The Plaintiff is correct in pointing out that the extra money had to come from somewhere. However, its conclusory insistence that the source must have been hidden, probably ill-gotten gains from earlier years, is rebutted by the Debtor's proof.

Between her testimony, that of Deron Puro's mother Diane Schrader, and a few exhibits, the Debtor showed that the deposits to the several accounts went beyond earnings to include $68,485.69 borrowed from Johnson Bank, Pl Exh. 1, 166; $40,000.00 in funds received from Diane Schrader's commodities trading activity, Trial Tr. 320:11-13, 521:3-5, and 525:19 - 526:21; $30,000.00 in contributions to household expenses from Diane Schrader, who was then living in the McColl Drive homestead, Trial Tr. 521:13-24, 320:23-25, and 321:15; and draws on lines of credit in the amounts of $4,700.00 and $8,500.00, Pl. Exh. 1, 156 and 137.

Rather little of the Debtor's proof on that was documentary. However, the accompanying testimony furnished enough corroboration and excuse for the lack of hard evidence.[39]

[39] The Plaintiff's theory should fail just for its conclusory, stretched, and overwrought tone and the lack of evidentiary support. For its rhetorical character, it flunks Lienhard's Principle of Minimum Drama: "The least dramatic explanation of any situation we don't fully understand is the most likely to be true." *See* John H. Lienhard, "Principles of Drama," Episode No. 928, *Engines of Our Ingenuity* [accessed at www.uh.edu/engines/epi928.htm].

This part of the backdrop of the Debtor's bankruptcy filing does not merit denial of discharge under § 727(a)(3).

e. Conclusion on § 727(a)(3)

All but one of the Plaintiff's argued bases under § 727(a)(3) have merit. The Debtor must be denied discharge pursuant to this statute.

4. 11 U.S.C. § 727(a)(4)(A)

Another provision of § 727(a) requires denial of discharge where

> . . .
>
> the debtor knowingly and fraudulently, in or in connection with the [bankruptcy] case--
>
> (A) made a false oath or account . . . .

11 U.S.C. § 727(a)(4)(A). This provision redresses the wrong done when a debtor participates in its own bankruptcy case without the honesty that the process must have in order to achieve statutory goals. *In re Sears*, 246 B.R. 341, 347 (B.A.P. 8th Cir. 2000).

The knowing making of a false entry on bankruptcy statements and schedules is a false oath for the purposes of this provision. *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992) (debtor's knowing failure to include anticipated tax refunds as assets on bankruptcy schedules was false oath). So too is knowingly giving false testimony at a meeting of creditors or in a court hearing in a bankruptcy case. *In re Olson*, 916 F.2d 481, 484 (8th Cir. 1990) (debtor who maintained in testimony "[a]ll during the bankruptcy proceeding" that he had not had financial interests in a business for nearly a decade was chargeable with false oath when bankruptcy court made contrary finding on "a record replete with contrary indications").

To be actionable for denial of discharge, the subject matter of a false oath must be material. *In re Olson*, 916 F.2d at 484. *See also Mertz v. Rott*, 955 F.2d at 598. However, the scope of materiality is broad:

> The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions

> or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.

In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984), quoted with approval in *In re Olson*, 916 F.2d at 484 and *Mertz v. Rott*, 955 F.2d at 598. If failure to disclose assets is the gravamen of an accusation of false oath, the assets' value does not determine materiality. *Mertz v. Rott*, 955 F.2d at 598.

Intent to defraud is an element of a false oath under § 727(a)(4)(A). *In re Bren*, 122 Fed.Appx. 285, 286 (8th Cir. 2005) (per curiam). However, intent may be established by circumstantial evidence; and "statements made with reckless indifference to the truth are regarded as intentionally false." *In re Korte*, 262 B.R. at 474.

The Plaintiff burrowed deeply into the Debtor's business and personal finances and made so many aspects of them into components of its case. As a result, numerous sworn statements for this case are subject to examination as possible false oaths.

a. Scheduling of Debtor's Shareholding in TRAE, Inc. and Its Value

As noted *supra*, at 16-18, the Debtor did not include an entry for her ownership interest in TRAE, Inc. in her original asset schedules for her bankruptcy filing. The Plaintiff makes much of this omission and would have it deemed a large lie. The defense characterizes it as "inadvertent," pointing to the fact that the verified Statement of Financial Affairs filed at the same time did include a reference to TRAE, Inc. as the Debtor's business corporation.[40] The defense's argument goes to the issues of knowledge and intent, as to the simple omission.

Ultimately, the state of the documents and the Debtor's testimony bear out that this was not a knowing misstatement-by-omission that the Debtor made with an intent to cover up the fact of ownership. At trial, she evidenced little understanding of the issue even then; but she was

[40] "Inadvertent," in this sort of context, is probably to be equated with a scrivener's omission on the part of the attorney representing a debtor at the time, or maybe an analytic mistake. Given the complexity and nuance of submissions for a bankruptcy petition, the debtor's lawyer is the one who must analyze the client's financial information to match its data-content to the often-technical inquiries in the forms for a bankruptcy filing.

convincing enough in denying that she had not intended to cover anything up. Trial Tr. 76:21 - 77:4. The role of TRAE, Inc. in the Debtor's past business operations was disclosed in the original Statement of Financial Affairs. It is believable that the Debtor was not aware that she had breached a technical obligation of disclosure by not listing it on the separate schedule as an asset, as well. This was not a complete omission, and it was not a concealment at all; the Trustee gleaned enough to inquire at the meeting of creditors.

The case is a little closer for the value of the ownership interest, when it was formally disclosed via the amendment. Yes, as a matter of strict law the corporation still owned the Navigator; and given the vehicle's unencumbered status, the full amount of its value was directly attributable to the value of the 100% shareholding that the Debtor held at that time. However, just a few months earlier the Debtor had stipulated to Deron Puro receiving the full ownership of the Navigator and the divorce decree had provided for that. Even though the Debtor did not obtain a transfer of title to Deron Puro for two years after that, it was not unreasonable for her to have conceived of the Navigator as no longer owned by the corporation at the time of her bankruptcy filing. Trial Tr. 176:20-23.[41]

On balance, the Plaintiff did not meet its burden on the issue of knowledge and intent on the technically-false recitation of the value of the interest in TRAE, Inc. That recitation is not a false oath sufficient for denial of discharge.

b. Failure to Disclose Transfer of Wedding Rings in Statement of Financial Affairs

As found *supra* at 18, the Debtor admitted at trial that within the year before filing for bankruptcy she had relinquished her combined engagement and wedding ring to Deron Puro on their understanding that he would keep it for their minor daughter's future use. It was not clear from the testimony whether the Debtor did this on a contemporaneous thought that the Puros' marriage had no future. It is clear that she was giving up the ring as her personal asset.

[41] This would not have been the first time that a small businessperson in bankruptcy had blithely exploited the advantages of using an artificial entity pre-petition but failed to recognize or honor the obligations and negative consequences from using the corporate form.

As a class of asset, wedding rings are very much of interest in a bankruptcy filing in this district. Neither Minnesota nor federal law has a specific exemption for wedding or engagement rings. Where not exemptible under the "wild card" provision of 11 U.S.C. § 522(d)(5), they are often subject to turnover to a trustee for liquidation and distribution of the proceeds to creditors.[42]

Item 7 of the Statement of Financial Affairs is clear in its instructions. The common understanding of a transfer like this one is, "gift." Plaintiff's counsel did not question the Debtor as to why she had not discussed the transfer of the ring as such.

On all the evidence, there is no question the Debtor knew she had made the transfer, and she is fairly deemed to have been on notice of the obligation to disclose. Her accompanying intent to knowingly (fraudulently) omit the transfer from her Statement of Financial Affairs is properly inferred. This omission was a false oath, meriting denial of discharge.

c. Failure to Disclose Significant Payments To or For Benefit of Son Ryan Tierney

The same law and analysis apply to the Debtor's omission to disclose the substantial amount of money she had paid to or for the benefit of her son Ryan Tierney, for his educational and living expenses while a college student.

The case for characterizing these payments as a series of gifts is a little closer than it was for the transfer of the wedding ring, whether in the common understanding or legally. Nonetheless, the Debtor's counsel is out of line in just blowing off the Plaintiff's theory. Counsel would characterize such payments as the honoring of a parent's legal duty of support, and thus immune from all question. However, there is no such duty in the State of Minnesota, as to offspring beyond the age of emancipation (18 years).

And again, for this relinquishment of substantial value, the Debtor's testimony as to this subject matter and her awareness of its significance to a bankruptcy filing was not very

[42]The practice is not particularly savory. But on the other hand, possession of an expensive ring or rock is not essential to the post-bankruptcy maintenance of a modest, stable standard of living--the social goal that exemption laws reflect and promote.

satisfying, or satisfactory. She may have done it out of a mother's love, as counsel pleads; but nonetheless she should have (and perhaps did) understand it as a series of gifts. The transfers may or may not have been avoidable in a substantive sense, but that is not the point for § 727(a)(4)(A). The inference that she knowingly omitted to disclose the transfers is appropriately made, and therefore this omission was a false oath meriting denial of discharge as well.

d. Testimony at Meeting of Creditors Re: Closing of Joint Marital Account

While she was under sworn interrogation at her meeting of creditors, the Debtor testified unequivocally that the joint marital checking account that she had shared with Deron Puro was closed. Pl. Exh. 14, 37.25 - 38.6. The Debtor emphasized twice, as to all bank accounts that the Puros had maintained before the divorce and the TRAE, Inc. business bank accounts, "They were closed." Pl. Exh. 37.25 and 38.6. This question by the trustee went directly to the administration of the estate.[43] The Debtor's statement was false.

The account was still open; Deron Puro had gotten the Debtor's record-holder status terminated after the divorce, but he had *not* closed the account. More to the point, the Debtor was still actively using the very same account, exercising withdrawal privileges and apparently continuing to use an older check card as if nothing had ever happened.

At the trial, the Debtor never chalked up this earlier statement to confusion on her part. Given her concurrent use of the very same account, the status of the original account as still open simply was not open to confusion.

The Debtor's knowledge of the falsity of her statement is readily inferred from those circumstances. So is her intent to deceive the trustee, no matter what purpose she had in doing so. This statement was a false oath meriting denial of discharge.

[43] The balances on-hand in checking accounts as of the bankruptcy filing pass into the estate by operation of 11 U.S.C. § 541(a). *In re Pyatt*, 486 F.3d 423, 427 (8th Cir. 2007). Trustees need the records of such accounts for relevant times to determine whether the estate may recover such funds or their value from the debtor. In addition, bank records can provide evidence of avoidable transfers and other pre-petition events relevant to estate administration.

e. Testimony at Trial Re: Providing Trustee With Records for South Metro Credit Union Account

At trial, the Debtor testified that she had obtained all the account records for her personal account at South Metro Credit Union that the trustee had requested at the meeting of creditors, and had personally driven to the trustee's office to deliver them. Trial Tr. 126:22-24.

The Plaintiff called Mary Jo Jensen-Carter, the trustee of the Debtor's bankruptcy estate, to testify to this specific subject. Jensen-Carter stated--directly, blandly, and unequivocally--that her file had no such documentation and that the Debtor had never provided the South Metro Credit Union account records to her as asked and required, other than a one-page "screen shot" with very terse information. Trial Tr. 477:10 - 478:6; 479:1-5.

Of the two, Jensen-Carter was the more credible witness. The Debtor, because of the evasion and dissembling during so much of her earlier testimony, was the less credible. There would have been no advantage for Jensen-Carter from misrepresenting the state of her file, the status of her administration, or the Debtor's compliance with her request. There was no indication that Jensen-Carter had not thoroughly prepared to recall her experience with the Debtor on this specific aspect of the Debtor's duties, and to testify to it, no matter what that experience had been. Defense counsel did not cross-examine her on that.

As a result, it is found that the Debtor lied on the witness stand at trial as to this point. This is a false oath within the very litigation on which other false oaths are sued out. It merits the same consequence, denial of discharge.

f. Testimony at Trial Re: Disposition of Funds from Fox Hollow Transaction

The last basis for the Plaintiff's false-oath objection to discharge lies in the hodgepodge of conflicting narratives and component facts on the Fox Hollow transaction.

During the pendency of this adversary proceeding, the Debtor gave inconsistent accounts as to the nature of the $297,500.00 disbursement that she received--the *repayment* of a loan that TRAE, Inc. or she had previously made, or the *disbursement* of a loan to them. *Supra* at pp. 33-35. Then there were the inconsistencies in the content of her original and amended tax

returns for 2006-2007, the year in which the Fox Hollow transaction took place and the year after. Those differences ran in between the successive returns. The original return took no account at all of her receipt of the money or her subsequent payment-on. The amended version took a tax treatment for both transfers. The only underlying assumption to reasonably attach to the change was that the Debtor's receipt of the $297,500.00 was a loan repayment with an interest component of $70,000.00 that was claimable and taxable as income.[44] The amended return's claim of a business loss deduction--again in an improbable, even number--was tens of thousands of dollars greater in amount than the amount the Debtor acknowledged during trial that she had actually disbursed to Rames Enterprises and Dyab as the ostensible investment in Tatanka Run.

The first part of the claimed tax treatment is diametrically inconsistent with the Debtor's second account during trial: she or TRAE, Inc. had not received taxable interest on a previously-granted and now-repaid loan--but rather, an extension of credit themselves, ostensibly from client Potts.

Both of the statements made during trial could not have been the truth, as to that part of the Fox Hollow transaction. The Debtor's failure to account for either with corroborating documents or a third-party testimony makes it impossible to determine which one was the lie, made under oath to a court or actually in a courtroom.

However, as a threshold point it can be concluded: one or the other *was* a lie; hence a false oath in her bankruptcy case; and hence another ground for denial of discharge.

But then there was Detective Stock's testimony, quoting the characterization of the receipt of the funds that the Debtor gave at the August, 2010 interview. The record does not reflect whether the Debtor was put under oath for her participation in that. (She was likely not.) In any event the statement was not given in connection with her bankruptcy case. Either of those prevents the statement itself from being considered as a false oath under § 727(a)(4)(A).

[44] The relative credibility of an actual receipt in an even-numbered multiple of ten thousand dollars need not be commented on.

However, the statement is a different narrative by the Debtor as to the subject facts--and it is radically different from both versions that she recited at trial. Though it is not necessary, the content of this third version is now treated as a point of comparison with the two that would be actionable under § 727(a)(4)(A).

If anything, the circumstances under which the Debtor made the August, 2010 statement gave its content a significantly higher degree of trustworthiness. The Debtor knew she was in the cross-hairs of a criminal investigation, as a possible co-defendant with Zack Dyab. From the presence of the FBI and an Assistant United States Attorney, she knew it likely would be a federal case if she were prosecuted. The possibility of compounded charges of obstruction of justice would be a powerful incentive to tell the truth, on the thought that the Government's greater investigative powers would uncover a lie more readily than would lying in a civil proceeding involving a private-party opponent. Finally, the Debtor was represented by criminal defense counsel; and it must be presumed that she would have been advised of her Fifth Amendment rights and the grave jeopardy from going ahead to answer with lies.

The content of Detective Stock's testimony has very grave implications. However, with the heightened reliability of his quotation of the Debtor as to the ultimate fact and its greater degree of trustworthiness, it should be used on the merits of § 727(a)(4)(A) even though the inconsistencies in trial testimony satisfy that ground for objection already.

The finding is well-supported, and now made, that the Debtor's receipt of the $297,500.00 from the Fox Hollow transaction was a transfer in aid of the Dyab mortgage fraud scheme. It was not at all the repayment or disbursement of a loan from sources unconnected to Dyab or his scheme. The Debtor's payment-on of the majority of those monies was not an investment of her own money into the Tatanka Run development. Rather, it was a laundering of funds somehow mulcted from their source before they were sent on to her. And finally, any grant to the Debtor of exclusive right to list or promote finished units at the Tatanka Run development

was not in consideration for a bona fide investment by her; but rather, it was to be a payoff for her enabling of that laundering.

All of this independently establishes the knowing falsity of *both* versions of her testimony before this court as to the source of the funds, and *all* of her testimony as to the nature of the end-transfer. These were lies, and much worse ones. That gives an independent ground on which to classify the testimony as a false oath meriting denial of discharge.

g. Conclusion on § 727(a)(4)(A)

During the course of her bankruptcy case and the trial of this adversary proceeding, the Debtor took multiple false oaths. Singly or in multiples, they require the denial of discharge under § 727(a)(4)(A).

5. 11 U.S.C. § 727(a)(5)

Finally, discharge under Chapter 7 may be denied where

> . . .
>
> the 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 . . . .

11 U.S.C. § 727(a)(5). This statutory ground is often intertwined with § 727(a)(3) in creditors' objections to discharge. Both provisions function as a powerful backstop to enforce debtors' general accountability for the circumstances of their insolvency.

As a threshold matter, an objector under § 727(a)(5) must prove that a loss or shrinkage of assets of the debtor actually occurred. *In re Swanson*, 476 B.R. at 241; *In re Vilhauer*, 458 B.R. 511, 514 (B.A.P. 8th Cir. 2011); *In re Sendecky*, 283 B.R. at 765-766. After that, the burden shifts to the debtor to explain the loss or deficiency. *Id*.

Unlike under § 727(a)(3), a debtor is not strictly under an onus to produce written or documentary evidence to make out an explanation. A testimonial explanation may suffice, if detailed and credible enough. *In re Drenckhahn*, 77 B.R. at 710. If the explanation is too vague, indefinite, or unsatisfactory, the debtor's burden is not carried and discharge must be denied. *In*

re Sendecky, 283 B.R. at 766 (interior quotes and citation omitted). Ultimately, the debtor must "convince the trial judge that assets are not missing," *id*., i.e., that their use or loss is fully accounted-for.

The Plaintiff advanced its objection under § 727(a)(5) using most of the same transactions and events it used for § 727(a)(3).

a. Investment of Proceeds of Fox Hollow Transaction

The Plaintiff tried to parlay its assertion that the Debtor had not credibly explained the whole flow of Fox Hollow proceeds to support an objection under § 727(a)(5) as well. In opening this front, its attorney missed the point: the Plaintiff had the initial burden, to prove that the $297,500.00 was property of the Debtor and was swallowed by Rames Enterprises and Dyab without explanation. Given the finding as to the origin of the funds made *supra* at p. 49, the Debtor's receipt and the pass-on are not a loss of the sort that is predicate to § 727(a)(5). A passage of funds through the possession or control of a debtor in a process of laundering illegally-taken money could not be deemed to vest the debtor with a legal ownership interest in the funds. The debtor's subsequent disposal of such monies is not a loss of anything that could have been used to meet the debtor's liabilities.

There is no sustainable objection to discharge under § 727(a)(5) on the Fox Hollow-Tatanka transactions.

b. Disposition of Hamilton Road Funds

Given Detective Stock's near-identical testimony about the nature of the Debtor's handling of the proceeds of the Hamilton Road transaction earlier, this theory of objection has the same result as to this subject matter: denial of discharge is not warranted here.

c. Dissipation of $30,000.00-Plus in Cash Withdrawals in Close Proximity to Bankruptcy Filing

The Plaintiff did meet its burden under § 727(a)(5), as to the Debtor's withdrawals of large sums of cash from her South Metro Credit Union account and their disappearance not long

before her bankruptcy filing. This was a loss of large value in liquid form, that would otherwise have been available to pay her debts.

Under the same analysis as under § 727(a)(3), the Debtor's limp and terse explanation was neither corroborated by documentation; sufficiently detailed; credible; nor satisfactory. She did not carry her responsive burden of production. This failure to explain a substantial shortfall in assets merits denial of discharge under § 727(a)(5).

d. Debtor's Handling of Funds Used for Renovation of McColl Drive Homestead

The last ground asserted by the Plaintiff for denial of discharge seems to fit logically under § 727(a)(5) alone.[45]

It all went back to the fact that, after the divorce was finalized, the Debtor continued to physically reside at the McColl Drive house that Deron Puro had received as his sole property. More than that, the Debtor undertook a general contractor's role and managed a substantial expansion and remodeling of the house and garage structure.

The Plaintiff's counsel dwelt almost obsessively on the amount of time and work the Debtor devoted and the amount of money that was spent to take the work part-way to fruition (though apparently not completely).[46] The accusation was made that the Debtor could not explain the source, the amounts, or the final use of all of this money. The insinuation was that much of it, if not all, was her property, derived from the same indistinct, shadowy historical sources that counsel postulated in his argument on income receipts versus bank deposits. *See*, e.g., Proposed Conclusion of Law 8.p. - q. [Dkt. No. 58].

However, this part of the last post-trial submissions was nothing more than foreboding and murky rhetoric. It was *the Plaintiff's* initial burden to show that money *of the Debtor* that could have been used for her own debts was diverted into improving the McColl drive house.

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[45] The Plaintiff's attorney shotgunned an argument on this factual subject matter, toward other statutory theories. He spent an inordinate amount of trial time, evidence, and argument focused on it. But in the end it really does not go to any of the other statutory provisions.

[46] The phrase "tens of thousands of dollars" was used in brief and proposed findings over . . . and over.

The Plaintiff's lawyer did nothing toward meeting that burden. He never produced a bit of evidence to bear out his wild insinuation that the Debtor had had unsatisfied rights to payment of commissions, loose cash, or something else in money just parked, hidden, somewhere out there--and had called it in to sink into the McColl Drive house afer the divorce.

As a result, a responsive burden never shifted to the Debtor. If it had, however, the defense's evidence on rough numbers and identified sources for the renovation's funding were adequate.

There was no basis for a sustainable objection to discharge here, at all. The excessive time spent and the judicial attention demanded for this conspiratorially-minded theory of objection were wasted.[47]

e. Conclusion on § 727(a)(5)

Denial of discharge to the Debtor is also merited on application of § 727(a)(5), but on only one of the four fact grounds asserted.

6. Outcome

Despite its excessive length, detail, and bombast, the Plaintiff's case for having the Debtor denied a discharge in bankruptcy succeeds on multiple bases in fact and under multiple statutory theories.

ORDER FOR JUDGMENT

On that memorandum of decision,

[47] An equal waste was committed by the effort to impugn the Puros' continued mutual residence under the same roof post-divorce; not to mention the somewhat-morbid speculation regarding the Debtor's living arrangements at McColl Drive. The Plaintiff's counsel devoted an extraordinary amount of time to these issues, using circumstantial evidence. However, whether any of the content of his reconstructed surmises about the Puros' relationship made sense to an outside non-participant was immaterial to an objection to discharge in bankruptcy. The Debtor testified to being of such reduced income that she could not afford a separate residence; the parties' pre-teen twins needed care; and Deron Puro was still actively and heavily drinking at the time. Any arrangements for continued residence in the same house did not have to make sense, but given the circumstances they did. It most likely started as a temporary expedient conceived by people in a relationship distorted by substance abuse. More to the point of counsel's accusation, the circumstances did not *compel* the conclusion that the divorce itself was a sham; and even if it were, that was immaterial.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Defendant's post-trial motion to strike the testimony of Mark Stock is denied.

2. 11 U.S.C. § 727(a)(2)(A) does not operate to deny the Defendant a discharge in BKY 08-35350.

3. The Defendant is denied a discharge in BKY 08-35350, pursuant to 11 U.S.C. §§ 727(a)(3), 727(a)(4)(A), and 727(a)(5).

LET JUDGMENT BE ENTERED IN ACCORDANCE WITH TERMS 2 AND 3.

BY THE COURT:

/e/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE