IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

In re: Brandon Lynn Barber, Debtor **No. 5:09-bk-73807**
Ch. 7

Legacy National Bank **Plaintiff**

v. **Adv. Proc. No. 5:10-ap-07041**

Brandon Lynn Barber **Defendant**

OPINION AND ORDER

Before the Court is a Complaint Objecting to Dischargeability of Debt and Discharge of Debtor filed by Legacy National Bank [Legacy] on February 19, 2010. In its Complaint, Legacy requested relief under 11 U.S.C. § 523(a)(2)(B) and § 727(a)(2)(A), (a)(3), and (a)(4)(A). The debtor, Brandon Lynn Barber, filed his Answer on March 22, 2010. The Court held a hearing on the complaint and answer on August 19, 2010. At the hearing, Legacy withdrew its request for relief under § 523(a)(2)(B) and § 727(a)(3). At the conclusion of the hearing, the Court took the remaining matters under advisement. For the reasons stated below, the Court grants the relief requested under § 727(a)(2)(A) and (a)(4)(A), and denies Barber his discharge under § 727.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J). The following order constitutes finding of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Applicable Law

Legacy is proceeding under § 727(a)(2)(A) and (a)(4)(A) of the bankruptcy code in an effort to deny Barber his discharge. Under § 727(a)(2)(A), the Court shall grant the

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by L Williams

debtor a discharge, unless—

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
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> > (A) property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A). Under § 727(a)(4)(A), the Court shall grant the debtor a discharge, unless "the debtor knowingly and fraudulently, in or in connection with the case—made a false oath or account." 11 U.S.C. § 727(a)(4)(A). If the elements of either section are met, Barber's discharge must be denied. "Denying a discharge to a debtor is a serious matter not to be taken lightly by a court." *In re Erdman* (*McDonough v. Erdman*), 96 B.R. 978, 984 (Bankr. D.N.D. 1988). Generally, a denial of a discharge is a "'harsh and drastic penalty.'" *Korte v. U.S. Internal Revenue Serv.* (*In re Korte*), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001) (quoting *American Bank v. Ireland* (*In re Ireland*), 49 B.R. 269, 271 n.1 (Bankr. W.D. Mo. 1985)). Because of the severe nature of the remedy provided for in § 727, the statute's provisions "'are strictly construed in favor of the debtor.'" *Id*., 262 B.R. at 471 (quoting *Fox v. Schmit* (*In re Schmit*), 71 B.R. 587, 589–90 (Bankr. D. Minn. 1987)). The Court will detail the facts relevant to the § 727(a)(2)(A) and (a)(4)(A) claims separately and provide its analysis below.

Section 727(a)(2)(A) Claim

Legacy alleges that Barber transferred or concealed funds belonging to Barber within one year before July 31, 2009, the date Barber filed his bankruptcy petition, with the intent to hinder, delay, or defraud his creditors. The alleged acts of transfer and concealment are several, and the Court will only discuss in detail the two categories of actions that the Court finds meet the elements of § 727(a)(2)(A). The two categories are based on the entity and the person that Barber used to transfer and conceal funds: his limited liability company, NWARE Investments, LLC [NWARE], and friend James Van Doren, a New York resident.

Transfer and Concealment of Funds Using NWARE

According to Barber's last Amended Statement of Financial Affairs, in the year prior to his bankruptcy filing, Barber was a party to thirty-four lawsuits. In approximately thirteen of these lawsuits, a judgment has been awarded in favor of the party opposing either Barber or an entity in which Barber had an interest. Barber's Amended Schedule F states that CGCMT 2006-C5 Springdale, LLC [CGCMT], holds a claim resulting from a default judgment against Barber in the amount of $2,318,231.11 and that the claim was incurred on October 1, 2008. The claim of CGCMT is one of only four unsecured non-priority claims for which Barber stated the date the claim was incurred, out of fifty-seven unsecured non-priority claims.

On October 6, 2008, less than one year prior to filing his bankruptcy petition and less than five days after the CGCMT judgment was entered against Barber, Barber formed NWARE.[1] Barber was an employee and the sole member of NWARE. Barber did not testify specifically why NWARE was formed, but he admitted that NWARE generated money through infusions of funds from several individuals, including Justin Salter, James Van Doren, Bob Gaddy, and Jeff Whorton. In 2009, several hundred thousand dollars was transferred to NWARE's First Security Bank Account [the NWARE Account] for Barber's benefit, some portion of which was transferred prior to July 2009.[2] (Trial Tr. vol. I, 90–91, August 19, 2010.) From bank records and the testimony at trial, in the year before Barber filed his bankruptcy petition, Justin Salter transferred at least $31,300.00[3] to NWARE; James Van Doren, or his entity, Epsilon Investments, LLC [Epsilon],

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[1] The Court takes judicial notice that the Arkansas Secretary of State shows that NWARE's Articles of Organization were filed on October 6, 2008.

[2] Barber closed the NWARE Account at the end of August 2009. Barber opened a new NWARE account at the Bank of Arkansas on September 2, 2009.

[3] Of this amount, Barber wrote a check on Salter's account to NWARE for $16,500.00. Barber could not recall if he had permission from Salter to write the check. (Trial Tr. vol. I, 161.)

transferred at least $42,500.00 to NWARE; and, Whorton transferred at least $30,000.00 to NWARE. (Legacy Ex. 88–89, 95.)

Barber's position is that the infusions of funds to the NWARE Account from the several above-named individuals were loans and not income. In fact, Barber reported very little income on his schedules. Barber's Amended Schedule I, filed on October 31, 2009, states that Barber's monthly gross and net wages, salary, and commissions at the time of filing was $238.23, his regular income from the operation of a business was $2,083.00, and that his combined average monthly income was $2,321.23. Barber testified that promissory notes for the alleged loans existed, and that they were between the lender (Salter, Whorton, Gaddy, or Van Doren) and either Barber or NWARE. (Trial Tr. vol. I, 142–44.) However, no promissory notes were introduced into evidence.

The NWARE Account essentially functioned as Barber's personal checking/debit account. (Trial Tr. vol. I, 91–93.) Barber explained that the NWARE Account was used as his personal account because Barber was not able to "open a personal checking account at that time, so yeah, I think *we* used NWARE as the account for—you know, record, for different things for me." (Trial Tr. vol. I, 91, emphasis added.) The "different things" included, for the most part, Barber's personal expenses. For instance, Barber either stated or admitted that he is sure NWARE might have paid his rent; assumes that NWARE paid his living expenses, legal bills, support obligations, and entertainment; and that his Schedule J reflects the kinds of expenses NWARE customarily paid for him.

Throughout his testimony, Barber repeated his explanation for why NWARE paid Barber's personal expenses—that he "couldn't open a checking account personally." (Trial Tr. vol. I, 91.) However, contrary to his explanation, Barber held two personal checking accounts and a savings account at Citibank during the period of time in which

Barber was using the NWARE Account to pay his personal expenses.[4] Barber held the savings account and one of the checking accounts in his name only, but the second checking account was held in the name of "Brandon Barber ITF [his daughter]," which the Court will refer to as the ITF Account.[5] Barber stated that the ITF Account was his personal account and not in trust for his daughter. Barber stated that the ITF Account was set up as a beneficiary account to "get around how much money you can—can be insured federally." (Trial Tr. vol. I, 105–08.)

From the NWARE and Citibank bank statements and testimony at trial, the Court gleans three additional points. First, the deposits, withdrawals, and ending balances of Barber's Citibank accounts dwindled significantly in the year before Barber's bankruptcy filing, with a marked decrease around the time NWARE was formed in October 2008. In contrast, the NWARE Account, established less than one year prior to his filing, flourished with deposits and withdrawals in tens of thousands of dollars.[6] Second, despite the $2,225.13 balance in the NWARE Account on the day Barber filed his bankruptcy petition, Barber did not disclose the NWARE Account in his schedules even though he used the account "for the most part," if not exclusively, for his personal expenses. Third, Barber's explanation for why he had to use the NWARE Account for his personal expenses is not satisfactory. Barber did not explain why a bank would not

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[4] The NWARE Account was opened in November 2008 and closed in late August 2009. Bank statements reflect that Barber's Citibank savings account was open from April 2, 2008 through February 5, 2009. One of Barber's Citibank checking accounts was open from April 2, 2008 through July 6, 2009. The other checking account, an account in trust for his daughter, was open from July 15, 2008 through February 24, 2009.

[5] ITF stands for "in trust for."

[6] The monthly statement ending balances for the NWARE Account were small—ranging from $399.54 to $4,413.01—relative to the amounts deposited and withdrawn from the NWARE Account. For instance, the statement ending July 31, 2009 (the day Barber filed his bankruptcy petition), reflects a beginning balance of $3,219.53, deposits in the amount of $38,255.00 and withdrawals or debits in the amount of $39,249.40.

allow him to open a personal checking account, and Barber had, and was using, his own Citibank accounts during the same period of time he was using the NWARE Account. As will be discussed below, and based on the evidence and testimony at trial, the Court finds that Barber used NWARE and the NWARE Account to transfer and conceal cash belonging to Barber and in an effort to place the cash beyond the reach of his creditors.

Transfer and Concealment of Funds Using Van Doren

James Van Doren, a New York resident, was one of several people who infused funds into NWARE. However, Van Doren and Barber had a particularly unusual relationship. At trial, Barber testified concerning three substantial transfers of money made by Barber or made on Barber's behalf to Van Doren or to Van Doren's entity, Epsilon. Barber admitted that these three transfers took place within the year prior to his bankruptcy filing. (Trial Tr. vol. I, 129–30.)

The three transfers consisted of the following: (1) Barber transported a briefcase containing approximately $30,000.00 in cash to Van Doren; (2) Barber endorsed a check in the amount of $64,000.00 to Van Doren; and (3) Barber transferred $180,000.00 to his attorney's law firm, which, of that amount, the law firm then transferred $150,000.00 to Epsilon. Regarding the briefcase, Barber and Legacy's attorney shared the following exchange:

> Legacy: You also took him a few months earlier a briefcase that had 30,000 dollars of cash in it, didn't you?
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> Barber: I don't remember how it all transpired, but he did. I was just living in a real rough place, where, whenever I was in New York, and, so, that was—it was more just a protective measure that he had—
>
> Legacy: Again, for whatever the reason, Mr. Barber, just so that we have a clear answer to my, I think, clear question, you took a briefcase to Mr. Van Doren that contained 30,000 dollars and had him put it in his account so that you could live out of that 30,000 dollars?

Barber: I had that cash, and, again, I don't remember the specifics. A briefcase, as far as what, you know, the—

Legacy: You gave the cash to Mr. Van Doren?

Barber: Other things, but, yes. Yes, I gave the cash to hand over.

(Trial Tr. vol. I, 126–27.) Regarding the $64,000.00 check, Barber testified as follows:

Barber: I didn't have a checking account, so, yes, I had to sign it over to him to get. It wasn't income, but I signed it over to him.

Legacy: And, again, the deal that you had is that the 60,000 dollars from that, essentially, Mr. Van Doren would pay your expenses—

Barber: He was helping—

Legacy: —as needed.

Barber: He was helping me out, because I didn't have a checking account. I couldn't. I couldn't. I would—I'd love to have one. I couldn't have one.

(Trial Tr. vol I, 128–29.) However, as stated earlier, Barber had at least four active accounts during this time—a Citibank checking account, a Citibank savings account, the ITF Account, and the NWARE Account.[7] Barber also stated that he believed he might not have deposited the $64,000.00 check in one of his bank accounts because he is "pretty sure" the check was made out to "an entity," and that in New York, "they're much more strict on banking as far as what checks you can deposit." (Trial Tr. vol. I, 156–57.) Despite this assertion, Barber did not recall that anyone had refused to let him deposit the check in the entity's checking account. (Trial Tr. vol. I, 156–57.) Also, Barber implied that giving Van Doren the cash in the briefcase and endorsing the check to Van Doren

[7] Barber's Statement of Financial Affairs filed on October 31, 2009, actually shows that Barber had several other open accounts in the year prior to his bankruptcy filing, but the testimony at the hearing only related to these four accounts.

was easier than using his Citibank account because he was traveling "back and forth" to New York. However, Barber admitted that Citibank has locations in New York.

Van Doren stated in his deposition that he believed the $64,000.00 check was made out to Barber personally, that the check was "written to [Barber] by someone that was, I guess, subleasing his Cowboys box, his box at the old Texas Stadium," and that Barber no longer owned the box.[8] Van Doren also testified to Barber's explanations for placing the cash and check with Van Doren:

> Van Doren: The explanation for the check was that [Barber] really just didn't have a bank account where he felt as though he could put—he could make that deposit and it would be safe. And he had some really important bills to pay . . . ."
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> Legacy: By that, did you understand that he meant that he didn't have a bank account that wouldn't be garnished?
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> Van Doren: I wasn't entirely sure what he meant, but I did know that a lot of banks were foreclosing on him. . . . So I thought—I could understand why he might—you know, I knew he had creditors after him, so I did know there were probably people that were trying to recover it.
>
> Legacy: And then what about the 30,000?
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> Van Doren: The briefcase was more a situation of—he said 'Look, I have this cash, and I just don't want to carry it around.' He was, by then, I think, living in a little one—kind of studio apartment up in the 90s on the Upper East Side. It wasn't the safest or nicest area. He didn't really know the landlord very well, and that guy had a key. He just didn't feel safe having that with him and just asked me if I would hold onto it for him.

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[8] Van Doren's deposition was admitted into evidence, but the testimony and other evidence at trial prove the necessary elements of § 727(a)(2)(A) without considering Van Doren's deposition. However, Van Doren's deposition is useful because it corroborates other evidence and provides straightforward responses. In contrast, many of Barber's responses were evasive and only sometimes definitive.

> Legacy: Well, another option would have been for him to deposit it in a bank account, wouldn't it?
>
> Van Doren: Yeah, although—yes, it would. He always had a lot of cash.

The third transfer to Van Doren—the transfer of $150,000.00 from Barber to Barber's attorney's law firm to Epsilon—differed from the above two transfers in two ways. First, the explanation for the transfer was unrelated to Barber's living situation and his alleged inability to open a checking account; second, the transfer involved bank accounts. Barber's testimony and bank account records allow the $150,000.00 to be traced from Barber and, eventually, back to Barber. (Trial Tr. vol. I, 121–26.) On August 11, 2008, less than one year prior to the date Barber filed his bankruptcy petition, Barber's Citibank checking account received a transfer of $95,230.03 from the ITF Account. The next day, August 12, Barber's Citibank checking account received another large transfer, this time in the amount of $95,500.00.[9] Also on August 12, Barber transferred $191,000.00 from his Citibank checking account to the Knight Law Firm.[10] Approximately three months later, on November 14, the Knight Law Firm transferred $150,000.00 to Epsilon.

Barber's testimony about why he authorized the transfer of $150,000.00 indicated that the transfer was to help Van Doren and Van Doren's partner recoup money that they had lost on deals with Barber. Van Doren stated that the $150,000.00 was a payment that Brandon was making to Epsilon in order to "continue doing transactions and [Barber] wanted to do them through Epsilon" and to "find a way to help us get our money back and, you know, make us whole as he had promised." Van Doren also stated that he understood the money to be Barber's but that "he wasn't entirely certain of how he got it

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[9] It is not clear where the $95,500.00 originated, though Barber testified that it may have come from real estate transactions involving Bob Gaddy.

[10] Barber did not know why he transferred this money to the Knight Law Firm, but he did state he owed his attorney a lot of money, which his attorney emphasized in closing argument.

other than through some transaction, but yeah, I understood it to be his, not [Knight's]." Van Doren did not know why Brandon transferred the money through the Knight Law Firm instead of to Van Doren directly.

Despite the purported causes for the three transfers to Van Doren, the sum of approximately $245,000.00[11] was used for Barber's personal expenses and outings:

> Legacy: And as a result of those three transfers, James Van Doren and/or Epsilon Investments covered at least 245,000 dollars worth of your living expenses during that period of time?
>
> Barber: Again, this is all from money that I borrowed, but, yes, they —they did. He helped me—he helped me pay for things that I couldn't pay for because of my situation.
>
> Legacy: . . . So it's correct that you transferred 245,000 dollars to Van Doren and his company, and Van Doren and his company covered your living expenses to the tune of 245,000 dollars?
>
> Barber: I guess you could say it that way.

(Trial Tr. vol. I, 130–31.) Van Doren confirmed that the cash in the briefcase and the endorsed check were not funds intended to go to Van Doren, but rather money that Barber was placing with Van Doren for Barber's use.

> Legacy: I understand that the $94,000.00 essentially was Barber parking money with you that he then was going to ask—want back to spend for himself. Is that right?
> . . .
>
> Van Doren: Yeah. It was not—that was not money that was intended to go to me.

Barber received the benefit of the funds he placed with Van Doren by making charges on Van Doren's credit cards. (Trial Tr. vol. I, 126–30.) According to Van Doren's

[11] The Court recognizes that the approximately $30,000.00 in cash, the $64,000.00 check, and the $150,000.00 equals $244,000.00; however, at trial, the parties used $245,000.00 as the amount transferred by Barber to Van Doren or Epsilon.

deposition, around September or October 2008—the time that Barber endorsed the $64,000.00 check to Van Doren—Barber began to ask Van Doren "to cover various things" with the express understanding that Van Doren would pay for these expenses out of the money that Barber had given him. Van Doren "covered" Barber by allowing Barber to make charges on Van Doren's Chase credit card. In addition, Van Doren made purchases on Barber's behalf with Van Doren's Citi AAdvantage World Mastercard. While these charges were used to cover Barber's personal expenses, they were not restricted to ordinary or necessary living expenses. Barber admitted that, within the year prior to his bankruptcy filing, Barber generated all or a portion of a $2,500.00 charge at a nightclub in New York.[12] (Trial Tr. vol. I, 128.) Van Doren stated that he agreed to this arrangement because he and Barber had been good friends for decades, and Barber owed him a lot of money. Van Doren reasoned that he had a better chance of being repaid if he remained closely involved with Barber.

In addition to the transfers made through NWARE, the Court finds that Barber also transferred and concealed approximately $245,000.00 using Van Doren in order to place the money beyond the reach of his creditors. The Court's findings of fact and conclusions of law regarding both categories of transfers are discussed below.

Findings of Fact and Conclusions of Law Regarding § 727(a)(2)(A) Claim

The objecting creditor, Legacy, has the burden of proving by a preponderance of the evidence that—

> (1) the act complained of was done within one year prior to the date of petition filing;
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> (2) the act was that of the debtor;
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> (3) it consisted of a transfer, removal, destruction or concealment of the

[12] Justin Salter also incurred charges on Barber's behalf for Barber's extraordinary expenses. *See infra* p.20, n.16.

> debtor's property; and
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> (4) it was done with an intent to hinder, delay, or defraud either a creditor or an officer of the estate.

Korte v. U.S. Internal Revenue Serv. (*In re Korte*), 262 B.R. 464, 472 (B.A.P. 8th Cir. 2001). Based on the record in this case, and construing the provisions of § 727(a)(2)(A) strictly and in Barber's favor, the Court finds that Legacy has proven each element of § 727(a)(2)(A) beyond a preponderance of the evidence with regard to the transfers of money through NWARE and Van Doren.

The first element has been met because the testimony and other evidence show that the acts in question—the transfers through NWARE and the three transfers of money through Van Doren or Epsilon—occurred in the year prior to the date Barber filed his bankruptcy petition, July 31, 2009. Regarding the second element, the Court finds that these acts of transfer were either actions of Barber or actions permitted by Barber. When testifying about the NWARE transfers, Barber stated that "we," a pronoun inclusive of Barber, used NWARE to pay expenses that Barber generated. While other persons may have performed the perfunctory actions necessary to loan, deposit, withdraw, or transfer funds, the actions were taken at Barber's direction and for Barber's benefit. Concerning the transfers to Van Doren, Barber caused approximately $245,000.00 in funds to be transferred to Van Doren or Epsilon, either by delivering the money directly or causing his attorney's law firm to transmit the money on Barber's behalf.

The third element has two requirements relevant to this case—first, that Barber transferred or concealed property, and second, that the property that was transferred or concealed belonged to Barber. With regard to the first requirement, while the Court has used the common meaning of the term "transfer" throughout this Order, the transmissions of the money at issue also constitute "transfers" under § 727(a)(2)(A). The bankruptcy code defines the term "transfer" as:

> (A) the creation of a lien;
> (B) the retention of title as a security interest;

> (C) the foreclosure of a debtor's equity of redemption; or
> (D) *each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—*
> *(I) property; or*
> *(ii) an interest in property*

11 U.S.C. § 101(54) (emphasis added). Depositing money in a bank account is a method of disposing of property, and hence, a "transfer." *Morrissy v. Dereve* (*In re Dereve*), 381 B.R. 309, 326 (Bankr. N.D. Fla. 2007). Therefore, the transmissions of money between NWARE and its lenders, and between NWARE and Barber, are within the definition of "transfer" provided in § 101(54). Barber's acts of placing money with Van Doren also constitute a "transfer" even if no title was intended to pass to Van Doren. "[T]he legislative history of § 101(54) provides that 'any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title because possession, custody, and control are interests in property.'" *Leucht v. Leucht* (*In re Leucht*), 221 B.R. 1003, 1009 (Bankr. M.D. Fla. 1998) (quoting S. Rep. No. 95-989, at 27 (1978)).

In addition to using NWARE and Van Doren to transfer his money, Barber also concealed his money from his creditors by placing it in both the NWARE Account and with Van Doren instead of using his own bank accounts. While Barber disclosed the existence of NWARE on his petition and schedules, he did not disclose the $2,225.13 held by NWARE in the NWARE Account at the time Barber filed his bankruptcy petition. While this non-disclosure constitutes separate grounds for denial of discharge under § 727(a)(4)(A), it is also evidence of how Barber intended to use NWARE's corporate form to prevent the cash held in the NWARE Account from being discovered. Additionally, placing the money with a resident of New York, instead of depositing the money in a bank account in Barber's name, also kept Barber's available cash hidden from his creditors. In sum, the first requirement of the third element has been met with regard to both transfer and concealment.

Regarding the second requirement of the third element, the Court finds that the money Barber caused to be transferred through and concealed by NWARE and Van Doren were Barber's property. NWARE was formed as a separate legal entity, but NWARE's only known purpose—to generate income through loans made to Barber or on his account—served no corporate function. Although money passed between NWARE and Barber, Barber did not list any debts owed by Barber to NWARE or by NWARE to Barber. Barber's treatment of NWARE renders the entity Barber's alter ego and NWARE's corporate status should be disregarded for purposes of determining Barber's personal property interests. When "one legal entity is but an instrumentality or alter ego of another, by which it is dominated, a court may look beyond form to substance and may disregard the theory of distinct legal entities in determining ownership of assets in a bankruptcy proceeding." *Freelife Int'l, L.L.C. v. Butler* (*In re Butler*), 2007 WL 866660, *5 (B.A.P. 10th Cir. 2007) (quoting *Blomberg v. Riley* (*In re Riley*), 351 B.R. 662, 671 (Bankr. E.D. Wis. 2006) and rejecting the debtors' argument that property of his entity was not the debtors' property where the debtors treated the entity "as their own, and ignored the separate corporate status."); *Winchel v. Craig*, 934 S.W.2d 946, 950 (Ark. App. 1996) (citing Arkansas case law stating that corporate entities may be disregarded where the corporate structure has been fraudulently or illegally abused to the detriment of a third party). Because the Court finds that the corporate status of NWARE should be ignored, the funds transferred to and out of the NWARE Account were Barber's personal property.[13]

With regard to the funds transferred to Van Doren, there is no dispute that the funds in the briefcase belonged to Barber. Also, Van Doren testified that he believed the check Barber endorsed to him was made out to Barber personally, while Barber thought the check was written to an entity. However, Barber was not certain and did not name the

[13] Even if the corporate status could not be ignored, Barber maintained an equitable and a beneficial interest in the funds sufficient to satisfy the third element.

entity. Regardless of the payee, the money embodied by the check belonged to Barber and Barber utilized the money, albeit indirectly, for his ordinary and extraordinary expenses.

Finally, the Court finds that the fourth element has also been met—Barber transferred and concealed his money through NWARE and Van Doren with the intent to hinder, delay, *and* defraud his creditors. "[T]he debtor's actual intent must be found as a matter of fact from the evidence presented." *Jacoway v. Mathis* (*In re Mathis*), 258 B.R. 726, 733 (Bankr. W.D. Ark. 2000). "'Constructive intent cannot be the basis for the denial of a discharge.'" *Id*. (quoting *Lovell v. Mixon*, 719 F.2d 1373, 1377 (8th Cir. 1983)). However, when a "creditor introduces circumstantial evidence proving the debtor's intent to deceive, the debtor 'cannot overcome [that] inference with an unsupported assertion of honest intent.'" *Id.* (quoting *In re Van Horne*, 823 F.2d 1285, 1287 (8th Cir. 1987)). "Because a debtor rarely admits to a fraudulent intent, the objecting party must generally rely on a combination of circumstances that suggest the debtor harbored the necessary intent." *Id.* Courts in this jurisdiction generally look to certain factors, or "badges of fraud," to determine whether fraudulent intent exists. *Id.* at 733–34. The factors are—

> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
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> (5) the transfer was of substantially all of the debtor's assets;
>
> (6) the debtor absconded;
>
> (7) the debtor removed or concealed assets;
>
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
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> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and,
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> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. (citing Ark. Code Ann. § 4-59-204(b)(1)–(11) (1996)). It is not the number of badges present, but the "'confluence of several'" badges of fraud that can "'constitute conclusive evidence of an actual intent to defraud.'" *Id.* at 734 (quoting *Brown v. Third Nat'l Bank* (*In re Sherman*), 67 F.3d 1348, 1354 (8th Cir. 1995)).

Several of the above badges, and other indicators of fraudulent intent, are present in this case. First, Barber maintained control over the funds he caused to be transferred through NWARE and over the funds transferred through the Knight Law Firm to Epsilon. Barber also maintained control over the funds he transferred to Van Doren by preserving his right to cause Van Doren to expend the amount of the funds transferred to Van Doren on Barber's behalf. Second, the unique or complicated nature of the transfers through NWARE and Van Doren are evidence that Barber avoided using accounts in his name to protect his available money from garnishment, attachment, or execution. Third, Barber's explanations for using NWARE and Van Doren to store his money were not credible. Barber chose an incredulous method to transfer approximately $30,000.00 in cash, and his explanation for doing so—that he could not get a checking account—explains nothing. Barber already had accounts, accessible and in use. Likewise, the fact that Barber allegedly lived in an unsafe area does not explain how and why he thought transporting cash in a briefcase would be safer than depositing the cash in a bank account. Fourth, Barber received no consideration from Van Doren in exchange for the cash in the briefcase or the endorsed check, and it is undisputed that Barber transferred these funds to Van Doren for his benefit—the payment of his ordinary, and extraordinary, personal expenses. Similarly, Barber introduced no promissory notes that were given in consideration of the various "loans" made to him through NWARE. Fifth, in the year

prior to his bankruptcy filing, Barber had been, and was being, pursued by his creditors. As stated previously, according to his Amended Statement of Financial Affairs filed on October 31, 2009, Barber was a party to thirty-four lawsuits in the year prior to filing his bankruptcy petition. From the face of Barber's Amended Statement of Financial Affairs, it appears a judgment had been awarded against Barber, or an entity in which he had an interest, in approximately thirteen of these thirty-four lawsuits, and approximately eight of the thirty-four lawsuits were "ongoing."

Sixth, during the year prior to filing his bankruptcy petition, Barber developed a pattern and course of conduct of using inexplicable transactions to perform simple transfers of money. Barber's testimony about these transactions was tedious and obfuscatory, which detracts from his credibility. Also, Barber's course of conduct in late 2008 and in 2009 was preceded by certain transactions with Bob Gaddy in early to mid-2008, and Barber testified, in reference to these transactions, that "the whole goal of all this, obviously, was I was trying not to file bankruptcy . . . ." (Trial Tr. vol. I, 113.) Therefore, Barber was cognizant of the prospect of bankruptcy before he conducted the transfers that are the subject of this Order. It is plausible, then, that the transfers were part of a strategy to preserve Barber's assets for himself and to seek bankruptcy relief at a time when his personal creditors would have fewer assets to recoup. Finally, and as discussed in the next section, Barber's failure to disclose all of his financial assets in his schedules is further proof of Barber's intent to defraud his creditors.

Based on the above factors, the Court is convinced that during the year prior to the date Barber filed his bankruptcy petition, Barber was actively engaged in transferring and concealing his available money with the intent to delay, hinder, and defraud his creditors. After reviewing the record thoroughly, and giving Barber the benefit of every doubt, this Court cannot reasonably conclude otherwise. The totality of the circumstances and the confluence of the badges of fraud prove by a preponderance of the evidence that Barber had the intent to hinder, delay, and defraud his creditors in the year prior to filing his bankruptcy petition.

Accordingly, the Court concludes that Barber made transfers of his property to and through NWARE and Van Doren in an effort to avoid collection and garnishment and to conceal his true financial condition from his creditors, and the bankruptcy court, in the year prior to his bankruptcy filing, with the intent to hinder, delay, and defraud his creditors. Therefore, the elements of § 727(a)(2)(A) have been met, and the Court must deny Barber his discharge.

Section 727(a)(4)(A) Claim

Legacy also alleges that Barber failed to disclose his debts, income, and other financial information truthfully in his bankruptcy schedules and statements, and that he failed to do so knowingly and with fraudulent intent. Barber filed some of his schedules and statements with his bankruptcy petition on July 31, 2009. On September 11, 2009, Barber filed the remaining schedules and statements. On October 31, 2009, Barber filed Amended Schedules F, I, and J, and an Amended Statement of Financial Affairs. On August 18, 2010, one day before trial, Barber filed another Amended Schedule F. After reviewing Barber's original and amended schedules and statements, and the other evidence at trial, the Court has determined that Barber failed to disclose (1) the $2,225.13 balance held in the NWARE Account on the date Barber filed his bankruptcy petition, (2) Barber's claim for a commission from Justin Salter, and (3) the total amount of loans from Justin Salter.[14]

In order for Barber to be denied a discharge under § 727(a)(4)(A) because of these non-disclosures, Legacy must prove that the debtor "knowingly and fraudulently, in or in connection with the case—made a false oath or account." 11 U.S.C. § 727(a)(4)(A). An omission in the schedules may constitute a false oath. *National Am. Ins. Co. v. Guajardo* (*In re Guajardo*), 215 B.R. 739, 741 (Bankr. W.D. Ark. 1997).

[14] Barber amended Schedule F the day before trial to disclose the total amount of loans from Salter. However, as discussed later, the Court declines to accept the late amendment.

The NWARE Account Balance

The first non-disclosure is straightforward. In his schedules and statements, Barber disclosed the existence of NWARE, his 100% ownership interest in NWARE, and that NWARE had a value of zero dollars. However, Barber did not disclose the NWARE Account, which is a checking account, as a [c]hecking, savings or other financial accounts" on Schedule B. The NWARE account had a balance of $2,225.13 on the day Barber filed his bankruptcy petition.[15] However, as established above, Barber had access to money in the NWARE Account and he used the money in the NWARE Account for his personal expenses. Despite the fact that the NWARE Account was held in the name of an entity, it functioned as Barber's personal checking account, and the funds in the account were assets of Barber's bankruptcy estate.

Claim for Commission From Salter

The second non-disclosure is more complicated. In January 2009, Barber acted as the "liaison" between Justin Salter and Gary Combs in a real estate transaction. At trial, Barber distinguished his role from that of a broker: "I won't say I'm so much brokering the deal but I'm obviously the liaison between them meeting in the meetings, putting the whole thing together, letting them negotiate through me." (Trial Tr. vol. I, 145.) While Barber testified that he did not know the specifics of the deal that was negotiated through him, he knew "it was a good deal for Justin [Salter]." Salter testified to the specifics of the deal, and he likewise acknowledged that the transaction that took place resulted in a good deal for Salter. The deal resulted in a transfer of land between two of Salter's entities—from Riverwalk Farm Estates, LLC [Riverwalk], to Northrock Commercial Properties, LLC, [Northrock]—for a sale price of $1,029,786.34. (Legacy Ex. 103.) However, Northrock obtained financing for the transaction in the amount of

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[15] The Court is aware that it is possible that NWARE could have a value of zero dollars *and* the NWARE Account could have a positive checking account balance because of potential claims against NWARE. Therefore, the Court is not finding that the value of NWARE was listed incorrectly.

$3,500,000.00, which is the amount Gary Combs guaranteed. Of the amount financed, $1,244,956.96 "ended up" in Salter's personal bank account for his individual use. (Trial Tr. vol. I, 213–16.)

Salter admitted that at the beginning of the transaction, he and Barber had discussed paying Barber a commission for his role as liaison. However, Salter testified that he did not give Barber any of the proceeds from the sale. After the sale, beginning in February 2009, Salter expended $354,647.13 on Barber's behalf.[16] Of this amount, $111,828.98 was expended before Barber filed his bankruptcy petition. (Trial Tr. vol. I, 135; Legacy Ex. 95.) Salter stated that these expenditures were loans and were not paid to Barber as a commission for Barber's role as liaison between Salter and Combs. Barber agreed with Salter's characterization of the expenditures as loans, and Barber claims that, to date, he has not been paid or "credited" for his role as liaison. Barber testified that he thought he would be compensated for arranging the deal between Salter and Combs by receiving "credits."[17] According to Barber, he still owes Salter $294,647.13 that Salter loaned him in 2009, but Barber "still hope[s] to get credits" against his debt for his role in the real estate transaction. (Trial Tr. vol. I, 132–33, 138, 141–42.) Salter also testified that, at the time of the hearing, Barber owed him between $320,000.00 and $325,000.00, and that he expects to be paid back.

Barber did not disclose his claim for a commission from Salter on any of his schedules or statements. While Salter may have subsequently decided not to pay Barber, this does not negate the fact that Barber has an alleged claim for compensation from Salter for the work

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[16] For instance, Salter incurred an expense of $15,000.00 at Hard Rock Casino, and also purchased $27,587.68 worth of furniture for Barber at I.O. Metro. On June 30, 2009, Salter wrote Barber a $25,000.00 check, and Salter spent $2,700.00 on Barber's airline ticket in June 2009. (Legacy Ex. 95.)

[17] Barber's use of the term "credits" when referring to the expectations that he had in January 2009 is confusing because in January 2009 Barber did not owe Salter money. (Trial Tr. vol. I, 133, 139–42.)

Barber performed as a liaison. The Court notes that the alleged claim against Salter is significant. Barber testified that "five to six percent is what you would get at a real estate company." (Trial Tr. vol. I, 137.) Salter testified that, in his experience, a representative of one side of a real estate transaction would receive a commission of three percent. Three percent of the $1,200,000.00 Salter stated he received would result in a commission to Barber of $36,000.00. (Trial Tr. vol. I, 229.)

Disclosure of Loans

The third non-disclosure concerns the total amount of money Salter loaned to Barber in 2009. As stated above, several hundred thousand dollars was transferred to Barber or to NWARE for Barber's benefit in 2009, some portion of which was transferred prior to July 2009. In his original schedules filed with his bankruptcy petition, Barber did not disclose any debts owed or transfers made to Whorton, Salter, Gaddy, Van Doren, or Epsilon. On September 11, 2009, Barber amended Schedule F and disclosed a personal loan from Van Doren in the amount of $10,000.00.[18] He also filed his Statement of Financial Affairs and disclosed the following: (1) a payment to James Van Doren, as a creditor, in the amount of $20,000.00 for "NY rent"; (2) the transfer of Barber's former marital home to Jeff Whorton for $1,550,000.00 and $25,000.00 worth of furniture on October 7, 2008; and (3) a $10,000.00 payment made by Justin Salter to the Knight Law Firm the day before Barber filed for bankruptcy relief for "debt counseling or bankruptcy." Although Barber disclosed the loan from Salter on his Statement of Financial Affairs, he did not amend Schedule F to list Salter as a creditor at that time.

On October 31, 2009, Barber filed his second amended Schedule F and added a loan from The Bob Gaddy Trust in the amount of $850,000.00; a loan from Jeff Whorton in the amount of $30,000.00; and a loan from Justin Salter "c/o Knight Law Firm" in the amount

[18] Barber disclosed a $10,000.00 personal loan from Van Doren; however, Van Doren, or his entity, transferred at least $31,300.00 to NWARE in the year before Barber filed his petition.

of $50,000.00. Barber did not disclose the date that any of these claims were incurred, even though Schedule F requires that debtors disclose that date. Finally, on August 18, 2010, one day before trial, Barber filed his third Amended Schedule F to add "Personal Loans 2009" from Justin Salter in the amount of $111,828.98. Therefore, Barber disclosed a total of $991,828.98 in loans from Whorton, Salter, the Bob Gaddy Trust, and Van Doren, *eventually*.[19]

Findings of Fact and Conclusions of Law Regarding § 727(a)(4)(A) Claim

Under § 727(a)(4)(A), in order for the Court to deny Barber a discharge for the above-stated omissions, Legacy, as the objecting party, must establish by a preponderance of evidence that—

1. the debtor made a statement under oath;
2. the statement was false;
3. the statement was made with fraudulent intent;
4. the debtor knew the statement was false; and
5. the statement related materially to the debtor's bankruptcy.

Helena Chem. Co. v. Richmond (*In re Richmond*), 429 B.R. 263, 307 (Bankr. E.D. Ark. 2010) (citing *Smith v. Cooper* (*In re Cooper*), 399 B.R. 637, 646 (Bankr. E.D. Ark. 2009)). Concerning the first and second elements, Barber's failure to disclose the NWARE Account balance in his schedules and statements at the time of filing, and Barber's claim for a commission from Salter both function as false statements made under oath. *National Am. Ins. Co. v. Guajardo* (*In re Guajardo*), 215 B.R. 739, 741 (Bankr. W.D. Ark. 1997) (stating that the omission of information from verified schedules and statements constitutes a false statement made under oath).

[19] It is unclear whether the $111,828.98 listed on Barber's August 18, 2010 Amended Schedule F includes the $50,000.00 loaned from Salter "c/o Knight Law Firm" listed on his October 31, 2009 Amended Schedule F. If so, the total amount loaned that was eventually disclosed would total approximately $1,040,000.00.

Additionally, Barber failed to disclose $111,828.98 in loans from Salter until he amended Schedule F the day before trial. Until that amendment, Barber's liabilities had been stated falsely on his schedules. Generally, bankruptcy courts allow debtors to amend their schedules liberally. *In re Kaelin*, 308 F.3d 885, 889 (8th Cir. 2002). However, "the policy of freely allowing amendment . . . is not an absolute and can be tempered by the actions of the debtor." *Id*. Specifically, a debtor will not be allowed to amend his schedules if the court finds bad faith on the part of the debtor. *Id*. In this instance, the Court finds bad faith on the part of Barber regarding his late amendment, and declines to allow the amendment. The Court does not believe Barber's omission was inadvertent error; rather, Barber only disclosed as much information as he believed was necessary to accomplish his desired goal. For example, Legacy entered into evidence a rental application that Barber completed in order to rent a New York apartment. (Legacy Ex. 87, attach. JVD 0154.) On the application, Barber listed NWARE as his employer and stated that his annual income was $400,000.00. The application was dated June 11, 2009—a little more than one month prior to the bankruptcy filing. Barber testified at trial that the reason he stated his income was $400,000.00 on his rental application but only $2,321.23 per month on his bankruptcy schedules, which totals approximately $28,000.00 in annual income, was because Barber "was hopeful [the apartment] would go in my name and not have to be in strictly Mr. Van Doren's name." Barber also testified that he believed he was capable of making $400,000.00 in 2009, even though, according to his schedules, he was only on task to generate approximately $28,000.00 (Trial Tr. vol. I, 86–89.) There was no evidence presented to show any material change in Barber's financial circumstances from June 11, 2009 to July 31, 2009, that would justify a reduction of yearly income from $400,000.00 to $28,000.00. When Barber was asked whether his yearly income as stated on his rental application or his income as stated under oath on his schedules was the correct amount of his income at that time, Barber answered that "the under oath part is definitely the correct income at that time." (Trial Tr. vol. I, 89.)

Barber's income and liabilities are moving targets depending on what form Barber is submitting and for what purpose it is being submitted. Barber did not amend his

schedules to add $111,828.98 in loans from Salter until over one year after Barber filed his bankruptcy petition. Such a late amendment is evidence that Barber treated the disclosure of his finances on his schedules and statements with reckless disregard. Further, the fact that Barber waited until the day before trial to disclose the total amount loaned is evidence that the amendment was a defensive maneuver to counter Legacy's position that the $111,828.98 was actually income. Barber had to classify the previously undisclosed amounts as *something* because he did not categorize the money at all prior to the day before trial. Because of Barber's bad faith and reckless disregard for the disclosure of his assets, the Court declines to allow the amendment. Therefore, the Court finds that, in addition to providing a false oath by omitting the NWARE Account balance and the claim against Salter, Barber also gave a false oath by failing to disclose timely the total and actual amount loaned by Salter.

With respect to the third and fourth elements, whether a debtor makes a false oath with the necessary knowledge and intent to be denied a discharge under § 727(a)(4)(A) is a matter of fact. *Korte*, 262 B.R. at 474. Intent can be "proven by circumstantial evidence or by inferences drawn from a course of conduct." *Ramsay v. Jones* (*In re Jones*), 175 B.R. 994, 1002 (Bankr. E.D. Ark. 1994). The surrounding circumstances and the debtor's course of conduct may be essential in determining the debtor's subjective state of mind because of the improbability that the debtor will concede fraudulent intent. *Cepelak v. Sears* (*In re Sears*), 246 B.R. 341, 349–50 (B.A.P. 8th Cir. 2000).

In this case, Barber's non-disclosures were not accidental omissions concerning irrelevant matters. Rather, the omissions related to Barber's ongoing financial affairs. For instance, Barber was actively using the NWARE Account for his personal expenses before and after he filed his bankruptcy petition.[20] Similarly, with regard to Barber's claim against Salter,

[20] In the twenty-six days after July 31, 2009, the date Barber filed his bankruptcy petition, $176,672.35 was transferred into the NWARE Account and $178,897.48 was transferred out. The NWARE Account was closed at the end of August. In September 2009, Barber opened another NWARE account at the Bank of Arkansas. The Bank of

Barber was engaged in financial transactions with Salter shortly before and after he filed his bankruptcy petition. Even if Barber thought that the claim against Salter was worthless, not collectable, or subject to setoff, it was not for Barber to decide whether the interest was significant enough to be reported. *Guajardo*, 215 B.R. at 742. "All assets and transactions must be reported, even if the assets are worthless or unavailable to creditors." *Id*. As stated previously, the claim against Salter was not worthless, but Barber's chapter 7 trustee cannot pursue the claim if he is unaware of its existence.

Additionally, although Barber's affairs were complicated, Barber's schedules remained deficient one year after he filed his petition. The schedules and statement of financial affairs prompts the disclosure of financial assets and liabilities through specific questions, making it less likely to forget to list an asset. *Johnson v. Baldridge* (*In re Baldridge*), 256 B.R. 284, 291 (Bankr. E.D. Ark. 2000). Barber possessed, at a minimum, a reckless indifference to the truth in completing his schedules and statements, and the Court regards the non-disclosed matters as statements that are intentionally false. *Ramsay v. Jones* (*In re Jones*), 175 B.R. 994, 1002 (Bankr. E.D. Ark. 1994). Based on the totality of the circumstances, the Court finds that Barber purposefully omitted the NWARE Account balance, his claim for a commission from Salter, and the total amount of loans from Salter with fraudulent intent and with knowledge that the statements were false. Accordingly, the third and fourth elements have been met.

The fifth and final element has also been met. The threshold for materiality of the false oath is low, and it depends on whether the false oath "'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.'" *Sears*, 246 B.R. at 347 (quoting *In re Chalik*, 748 F.2d 616, 618 (11th Cir.1984). The materiality of the NWARE

Arkansas account statement for the period of September 2, 2009 through September 30, 2009, shows that $61,348.00 was deposited in this account and $59,642.96 was withdrawn.

Account is unquestionable. The NWARE Account had a balance of $2,225.13, and the account was used as Barber's personal checking account. Also, it does not matter that the NWARE Account was not held in Barber's name; a bank account with a positive balance at the time of filing that was used by Barber for personal expenses is an asset of his estate. *O'Neal v. DePriest* (*In re DePriest*), 414 B.R. 518, 524–26 (Bankr. W.D. Mo. 2009) (stating that the debtor, who was 100% owner of a LLC, had a duty to disclose in his schedules a bank account in the name of the LLC that he used mainly for personal expenses). The disclosure of the account would have provided interested parties the opportunity to discover Barber's personal assets. The fact that the bank account had a balance of only $2,225.13 on the day Barber filed bankruptcy does not affect its materiality, because even "the omission of a relatively modest asset will merit denial of discharge, if done with knowledge and fraudulent intent." *Id*. It is axiomatic that,

> [f]ew, if any, assets are more material to a consumer debtor's financial affairs than a bank account, for it is from that kind of asset that the creditors can discern not only an overall picture of the debtor's financial affairs, but also the details of the debtor's finances. Accordingly, the omission of *any and all bank accounts to which the debtor had access* constituted a false statement that related materially to the case.

Johnson v. Baldridge (*In re Baldridge*), 256 B.R. 284, 290 (Bankr. E.D. Ark. 2000) (emphasis added).

Likewise, the failure to list the claim against Salter and loans from Salter were material omissions. The omission of each resulted in an inaccurate summary of Barber's financial condition. The omissions would have made it difficult for the chapter 7 trustee and Barber's creditors to evaluate accurately their rights under the code. The bankruptcy code, through § 727(a)(4)(A), "'requires nothing less than a full and complete disclosure of any and all apparent interests of any kind.'" *Korte,* 262 B.R. at 474 (quoting *Fokkena v. Tripp* (*In re Trip*), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998)). The disclosure requirement has implications beyond the administration of each individual bankruptcy case because "[t]he failure to comply with the requirements of disclosure and veracity necessarily affects the creditors, the application of the Bankruptcy Code, and the public's

respect for the bankruptcy system as well as the judicial system as a whole." *Guajardo*, 215 B.R. at 742. Each omission related to the assets and affairs of Barber's estate and were material omissions. Therefore, the Court finds that the fifth and final element of § 727(a)(4)(A) has been met.[21]

Conclusion

For the reasons stated above, the Court finds that the elements of § 727(a)(2)(A) and (a)(4)(A) have been met, and the Court denies Barber his discharge.

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[21] The record is replete with additional information that leads to unanswered questions concerning some of Barber's other activities and the accuracy of his bankruptcy petition and schedules. For example:

1. The unexplained location of approximately $588,000.00 that was transferred to the Knight Law Firm as a payment to Epsilon, but that Van Doren said he never received, (Trial Tr. vol. I, 118-20).
2. The complicated real estate transactions with Bob Gaddy that may have resulted in the $95,000.00 transfer through the Knight Law Firm.
3. Why Barber used the ITF account for his own purposes.
4. The circumstances surrounding the sale of Barber's marital home to Jeff Whorton, who later sold the home to Justin Salter, allegedly to allow Barber to receive (and prevent Legacy from receiving) in excess of $300,000.00.
5. The origins of large sums of money to which Barber had access during the two months following the filing of his bankruptcy petition.
6. Barber's failure to list any transfer of his interest in the [Dallas] Cowboys box, which Van Doren believed Barber no longer possessed. And if Barber still owned the box, the failure to list the existence of a sublease.
7. Why Barber wrote a check on Salter's account for $16,500.00 to NWARE for Barber's benefit, but could not recall whether he had the authority to write the check or why he was in possession of Salter's checkbook.
8. Why Barber did not know who signed his ex-spouse's name on forms that Barber submitted to Legacy.

Although the questions arise based on the testimony and information presented to the Court, the Court finds that Legacy did not present sufficient proof concerning these circumstances to meet the elements of either § 727(a)(2)(A) or (a)(4)(A).

IT IS SO ORDERED.

November 9, 2010

DATE

BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Marshall S. Ney, attorney for Legacy
K. Vaughn Knight, attorney for the debtor
U.S. Trustee
All creditors and interested parties