The below described is SIGNED.

Dated: March 28, 2005

JUDITH A. BOULDEN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re: DANIEL DAVID WARREN and KATHLEEN ANN WARREN, Debtor(s).	Bankruptcy Number: 04-26507 Chapter 7
ADRIAN MATHAI, ZUBIN MATHAI, OTE DEVELOPMENT U.S.A., INC., 9056-0566 QUEBEC, INC., dba OTE CANADA, Plaintiff(s), vs. DANIEL DAVID WARREN and KATHLEEN ANN WARREN, Defendant(s).	Adversary Proceeding No. 04-2671 Judge Judith A. Boulden

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MEMORANDUM DECISION

In anticipation of filing this chapter 7 petition, the debtors generated $90,000 by selling many of their assets, some at fire-sale prices. The debtors then spent the funds by purchasing

exempt assets and prepaying future living expenses. Upon completion of all the transactions, the debtors had no realizable assets that could be liquidated to repay their over 6,000 creditors. When the debtors filed their bankruptcy papers, they did not list some of the sales and expenditures, and only added some of the omitted transactions after they were discovered by the plaintiffs/creditors.

Is the debtors' conduct, as they describe it, merely their desperate attempt to provide post-petition food and housing for themselves and their five children, and their failure to list the various transactions merely an unfortunate, unintentional oversight? Or, as the plaintiffs/creditors assert, was this a calculated scheme by the debtors to engage in an extraordinary, deliberate, and sustained selling frenzy and spending spree designed to hinder, delay, or defraud their creditors and then hide their actions through a false oath on their bankruptcy papers?

This timely filed proceeding seeking denial of discharge has now been tried by the parties and taken under advisement. Having considered the stipulated facts, credibility of the witnesses, the exhibits received, the arguments of counsel, and having made an independent review of applicable law, the Court hereby enters the following Memorandum Decision containing Findings of Fact and Conclusions of Law under Fed. R. Bankr. P. 7052.

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I. FINDINGS OF FACT

A. The Parties

To put this 11 U.S.C. § 727(a)(2) and (4)(A)[1] complaint in perspective, a description of the pre-petition relationship between the parties is unavoidable. A background discussion on how these parties became so intertwined in the litigation and disputes that propelled them into this bankruptcy court is also necessary. Adrian Mathai and Zubin Mathai (collectively, the "Mathai Brothers"), together with the entities they control, are disputed creditors of this estate and plaintiffs in this proceeding (the "Plaintiffs"). The Mathai Brothers developed, owned, and operated SyPRO, LLC (SyPRO), an entity that provided a mechanism to assist webmasters in charging their customers for use of their Internet web sites through credit card or telephone billings. SyPRO collected the full charge from the customers, deducted a fee, and remitted the balance to the webmasters.

Daniel David Warren (Mr. Warren) and Kathleen Ann Warren (Mrs. Warren) are the debtors in this chapter 7 case (collectively, the "Warrens" or the "Debtors"). Both Mr. and Mrs. Warren are certified public accountants. Mr. Warren has over 23 years of accounting experience, having been employed for eleven years by "Big Five" national firms, and holds himself out as specializing in tax compliance and planning. Since 1996, Mr. Warren has conducted his own accounting business through various entities owned and operated by him and

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[1] Future statutory references are to Title 11 of the United States Code unless otherwise noted.

Mrs. Warren.[2] In 1998, through one of his entities, Mr. Warren began performing accounting services for SyPRO for a fixed fee, and SyPRO eventually hired him as Chief Financial Officer. Mrs. Warren was employed for three years by "Big Five" accounting firms and has over eighteen years experience as an accountant, although much of that time was as a part time accountant for entities related to the Debtors.

B. Relationship Between the Parties

To operate its business, SyPRO was required to process its customers' charges through a merchant account. Difficulties arose with SyPRO's bank in processing the charges, their merchant account was terminated, and Adrian Mathai was placed in MasterCard's Terminated Merchant File thus halting all business activities of SyPRO. In an effort to retain SyPRO's clients and to continue operations, Mr. Warren devised a scheme to create GloBill.com, LLC (GloBill) to carry on SyPRO's business, to resolve the merchant account issue, and to conceal the Mathai Brothers' affiliation with the merchant account process. The scheme provided that the membership interests of GloBill were owned, directly or indirectly, by the Warrens and their related entities. At this point the relationship between the parties was such that the Mathai Brothers trusted Mr. Warren and agreed to the scheme. The Warrens and their entities also provided accounting services to GloBill. The Mathai Brothers continued to provide operational

[2] The Warrens provided evidence that they were affiliated with the following accounting entities:

Warren Associates LLP, with Mr. Warren as manager, and the Warrens as partners, from 1/1/1998 to 4/21/04;

BusinessCare, with Mr. Warren as manager, and the Warrens as members, from 9/2/03 to 4/21/04 (or from May 1996 to post-petition);

BC Plus LLC, with Mr. Warren as manager, and the Warrens as members, from 4/22/04 to the present.

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services to GloBill and were contractually granted an option to gain ownership and control of GloBill upon certain conditions. Certain assets of SyPRO were transferred to GloBill, and GloBill continued to provide the same service to the webmasters previously provided by SyPRO. Mr. Warren's salary increased, and eventually GloBill assumed over $700,000 of the Warrens' debt in what Mr. Warren represented to the Mathai Brothers was a tax transaction favorable to GloBill.

The Mathai Brothers eventually decided that GloBill should be sold, and entered into an agreement wherein Mr. Warren was to search for a buyer, for which service he would be paid a fee. No buyer was forthcoming, and the Mathai Brothers came to distrust Mr. Warren and what they viewed as his lack of effort to obtain a buyer. Although the Mathai Brothers believed that GloBill was experiencing record sales and revenue, Mr. Warren reported to the Mathai Brothers that GloBill was short of cash to pay the webmasters and called for the Mathai Brothers to make cash infusions into GloBill to shore up its cash position. Mrs. Warren, who assisted in GloBill's accounting, also made several insistent demands that the Mathai Brothers make cash contributions to cover operating expenses. Despite the fact that the Mathai Brothers made the demanded cash infusions, their distrust of Mr. Warren grew and they became suspicious of his operation of GloBill. In August 2002, Mr. Warren decided to place a hold on the webmasters' checks issued for their share of the credit card charges to retain the funds in GloBill's account.

The Mathai Brothers believed that GloBill should have sufficient cash flow to meet its expenses, that Mr. Warren's action of placing a hold on the webmasters' checks placed their business in extreme jeopardy, and that the Warrens were defrauding them. To confirm their belief, the Mathai Brothers hired a private investigator to pose as a buyer to attempt to obtain

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financial information about GloBill from Mr. Warren. They believed the information they obtained through the private investigator/buyer confirmed their concerns that, in addition to the fixed salary and defined fringe benefits previously agreed upon, the Warrens were removing amounts from GloBill significantly higher than agreed upon. In late September 2002, the Mathai Brothers attempted to exercise their option to regain control of GloBill and sued the Warrens and their various entities in Pennsylvania.

Mr. Warren refused to surrender control of GloBill or its assets, contesting that the Mathai Brothers had not exercised their option to acquire control according to the parties' agreement and asserting that use of the private investigator/buyer was a breach of the parties' implied covenant of good faith and fair dealing. The Mathai Brothers, believing that Mr. Warren's actions in managing GloBill would cause the webmasters to transfer their business to GloBill's competitors, then caused GloBill's cash flow stream to be redirected to a new merchant account through a new entity. The Mathai Brothers' actions essentially terminated GloBill's cash flow. Of some $450,000 in funds left in GloBill's accounts, and in spite of a debt of over $1.6 million owed to webmasters, the Mathai Brothers assert that Mr. Warren transferred approximately $300,000 to himself or his entities in payment of debts GloBill allegedly owed to either the Warrens or their entities.

The relationship between the parties having thus disintegrated, the next year and a half was spent in litigation. In October of 2002, Mr. Warren caused GloBill and other entities to sue the Plaintiffs in the United States District Court for the Northern Division of California (California Litigation) seeking injunctive relief to prevent the Mathai Brothers from dealing with GloBill's assets, for a constructive trust, disgorgement, damages, and other claims. The

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Plaintiffs transferred the claims in their pending action in Pennsylvania as a counterclaim in the California Litigation, seeking indemnity and contribution, asserting fraudulent diversion of funds upwards of $2 million, conversion by the Warrens of amounts in excess of their agreed salary and defined benefits, fraud, and breach of contract. The Warrens answered the Plaintiffs' counterclaim, and asserted claims for wrongful civil proceeding and abuse of process in their own counterclaim. No direct claim was made by Mr. Warren against the Mathai Brothers for wages.

C. The Warrens' Bankruptcy Planning

On March 16, 2004,[3] shortly before the commencement of a planned three week trial, the parties met with a United States Magistrate Judge in a settlement conference. By that time, the Warrens had incurred substantial legal expenses, had exhausted GloBill's assets in part to pay for continued litigation, and anticipated that they would not have the personal means to fund the trial. Mrs. Warren, who participated in the conference and believed that the Warrens' financial distress was a result of the Mathai Brothers' actions, became frustrated over the Mathai Brothers' claims and their refusal to accept a settlement offer. Apparently the United States Magistrate Judge made a statement about bankruptcy in relation to the Warrens' inability to continue to fund the litigation, although exactly what was said is unclear. Two days later, on March 18th, the Warrens met with bankruptcy counsel to discuss their financial condition, the California Litigation, and to plan their strategy.

Although the exact content of the discussions with their attorney is not of record, the Warrens evidently discussed that upon filing their case certain of their assets must be surrendered

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[3] For ease of reference, all dates will be for the year 2004 unless stated otherwise.

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to the chapter 7 trustee for liquidation to pay their creditors, but that exempt property would not be seized. Mrs. Warren adamantly testified that she did not believe that they owed any money to the Mathai Brothers and she did not want any of their assets liquidated by the chapter 7 trustee to pay the disputed claim. Mr. Warren continues to assert that he has been wronged by the Mathai Brothers and is entitled to a continued stream of payments from the now defunct GloBill. Therefore, the Warrens immediately set about liquidating their personal assets, converting the proceeds to exempt property, and prepaying their future living expenses. What follows is a description of how they accomplished this plan prior to filing this chapter 7 case six weeks later on April 22nd.

D. Liquidation, Conversion to Exempt Assets, and Prepayments

1. Home

Prior to filing, the Debtors lived in a 6,000 square foot house on Rolling Knolls Drive in Provo, Utah (the "Rolling Knolls House") that required a monthly payment of $5,000. In late December 2003, they refinanced the home at 100% of the property's value paying off over $60,000 in credit card bills in the process. In so doing, the Debtors extracted any equity they had in the home and took approximately $46,000 cash from the transaction, leaving the home encumbered in an amount exceeding $700,000.

Three months later (or 13 days after first consulting with their bankruptcy attorney), the Debtors purchased a house at 665 East 2780 North, Provo, Utah (the "665 East House") for $169,000, for which they paid earnest money of $5,000 and received a credit of $25,000 and a $5,000 repair allowance. Thus, instead of having a home with no equity and a $5,000 per month mortgage payment, the Debtors acquired real property valued at $169,000 but encumbered for

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only $139,000. The transaction fixed $30,000 in equity for their homestead and reduced their monthly mortgage payment from $5,000 to only $1,020 a month.

2. Coin Collection

The $25,000 credit used to purchase the 665 East House came from the transfer of collectable coins. The Debtors had long been involved in purchasing and selling coins on E-Bay and elsewhere. The activity was more than just a hobby. Mrs. Warren testified she maintained a Quick Book register of records of their coin transactions and the revenue generated, but no such documentation was presented at trial. Mr. Warren, on the other hand, indicated he did not keep a coin inventory, bill of sale, purchase agreement, or receipt for the transactions related to the liquidation of the coins. Although the Warrens assert the coin transactions did not result in much profit in the past, they had at least broken even in the venture. In 2002, they made $2,900 on sales of $11,000 in coins, and in 2003 they made $549 on sales of $112,171 in coins. By 2004, the Warrens' collection was valued, at cost, in excess of $98,000.

From the beginning of 2004 to the date of filing, the Warrens proceeded to liquidate their coin collection, and the revenue generated was a significant source of funding for their household expenses. All told, the Warrens assert they liquidated the $98,000 coin collection for about $52,000, taking a loss of over $46,000. A backpack, with an undisclosed number of coins from the Warrens' collection, was transferred to a relative of the seller of the 665 East House, resulting in a $25,000 credit toward the purchase of the home. Although not all the coins were liquidated to purchase the 665 East House, the Warrens were willing to take a substantial loss on the coins allocated for the house down payment in order to buy the property. Because of the alleged failure to keep any records, there is no evidence of which coins comprised those traded for the $25,000

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credit, or when, where, for what amount, or to whom the remaining coins were sold. Nor is there any record that supports the alleged $46,000 loss that occurred.

Considering the detail with which these two CPAs approach the record keeping for the rest of their financial transactions – including meticulous computer records and numerous cash receipts – the omission of any records related to the 2004 coin transactions, the liquid nature of the coin collection, coupled with the alleged substantial loss, leaves the entire story regarding the pre-petition liquidation of the coin collection extremely suspect.

3. Miscellaneous Personal Property

After meeting with bankruptcy counsel on March 18th, the conversion of the Warrens' property began in earnest. It is uncontroverted that between March 23rd (five days after first meeting with their bankruptcy attorney) and March 30th, the Debtors sold three late model vehicles to car dealers for a total of $33,500.[4] Between April 13th and April 17th, the Debtors sold jewelry;[5] a piano;[6] and miscellaneous personal property, including: a pool table, couch, roto-tiller,[7] office and home furniture,[8] and a safe,[9] for a total of $3,824. For all of the sales excepting

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[4] On Tuesday, March 23rd, a 2001 GMC Sonoma was sold for $13,000; and just over a week later on Tuesday, March 30th, sales of a 2000 Chevrolet Safari for $8,500 and a GMC Savanna for $12,000 occurred.

[5] The jewelry sold for $500. The Debtors eventually claimed property valued at $33 under this exemption, including their wedding rings valued at $10.

[6] The piano sold for $1,419. The Debtors claim property valued at $5 under this exemption, including books and animals.

[7] The pool table, couch, and roto-tiller sold for $650.

[8] The office and home furniture sold for $705.

[9] The safe and other furniture sold for $550.

the coins, the evidence indicates the transactions were with unaffiliated entities that were not clients of the Debtors, were arm's length transactions for which the Debtors received fair value and the Debtors actually parted with the property. All told, the Warrens liquidated assets generating close to $90,000 in cash or credits.

4. Cash

The parties have stipulated that as of March 21st, in addition to the cash generated by sales of assets, the Warrens had in excess of $36,000 on deposit in their various bank accounts, $26,000 of which was borrowed funds for the purpose of settling claims with the Plaintiffs. When the parties failed to reach a settlement in the California Litigation, the Warrens returned the loan proceeds but retained $10,000 cash which was spent prior to filing. As the Debtors liquidated their assets, they spent the accumulated cash in two ways: they converted the cash to over $20,000 in property later claimed as exempt, and they prepaid approximately $11,000 in future expenses. The Warrens purchased two vehicles from private individuals for $3,800[10] between March 22nd and March 25th. They subsequently repaired or reconditioned the vehicles for an additional $5,000, but only a month later, the two vehicles were valued at the reduced rate of $3,500 on the Debtors' schedules (the "Schedules"). The Debtors spent $3,000 on grocery items (six month's worth listed as food storage valued at $1,000 in the Schedules) and optical supplies, $2,000 on clothes (valued at $10 on the Schedules), and $2,000 on a mattress (valued at $100 on the Schedules).

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[10] A 1989 Chevrolet Caprice for $1,100 and a 1995 Chrysler Town and Country for $2,700.

The Warrens and the Mathai Brothers stipulated that the Warrens spent over $8,000[11] in improvements to the 665 East House, which includes a $5,000 repair allowance allocated in the closing. Between April 7th and 16th, the Warrens prepaid $900 in 2004 real property taxes, $5,051 to their health care provider, $4,080 in prepaid mortgage payments, and $1,513 to prepay malpractice insurance premiums for one of their accounting businesses, Warren Associates. As of the date of filing, the Debtors also had credits with their various utilities and credit cards of $748.22. Prepaying taxes, insurance, utilities, and mortgage payments was something the Debtors had never done before.

E. Bankruptcy Schedules

One of the Plaintiffs allegations is that the Debtors made a false oath or account in filing the Schedules and their statement of financial affairs (the "SofA"). A review of the SofA, the Schedules, and the subsequent amendments (the "Amended Schedules" or "Amended SofA" or together, the "Amendments") raises numerous questions on this point. Thus, a detailed review of the disclosures made in these documents and the related evidence is necessary.

1. The Original Schedules and SofA

The Warrens report paying their chapter 7 bankruptcy counsel $960 on March 23rd for services related to their filing. Not listed are the funds they paid counsel for the filing of

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[11] The stipulation indicates the home improvements include $4,500 for painting and $1,000 for flooring. There is also some additional evidence that the Warrens spent over $7,000 beyond the $5,000 credit in home improvements.

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bankruptcy petitions on behalf of other entities: GloBill and Warren Associates.[12] Schedule D lists $858,415.45 in secured debt related to the Rolling Knolls House and the 665 East House; Schedule F lists 13 credit card creditors with claims of approximately $125,400 and claims of over $16,000 in legal fees. The balance of the over 6,000 creditors (amounting to a stack of paper four and a quarter inches thick), each with a contingent, disputed, and unliquidated claim listed at zero, were the same creditors as those listed in GloBill's schedules. The assets the Warrens list include $20 in cash and $95.04 in accounts. Fourteen computers, for which Mr. Warren paid Dell Computers $31,000 in October 2003,[13] are valued at $200. The Warrens value their kitchen table and chairs at $30; six televisions at $50; a washer/dryer, refrigerator, two desks, and five lateral files at $100 each grouping; a Ford Taurus at $500; office supplies at $500; and a telephone system at $200. Most of the Debtors' remaining personal property is valued between $0 and $20. The Warrens also list a sanctions claim against the Mathai Brothers of $21,142.07 and a claim for back wages against GloBill or the Mathai Brothers[14] for $1,508,016.93. The wage claim is set forth in the California Litigation as against GloBill, which

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[12] The Warrens also anticipated that a petition would be filed for BusinessCare but that did not occur. Mr. Warren listed himself on GloBill's schedules with an unsecured claim of approximately $1.6 million in the GloBill case, and listed various other personal debts as obligations of GloBill. The GloBill case was eventually dismissed with the Mathai Brothers charged with making distribution of the remaining assets of the entity to the webmaster creditors, but it is no longer operating.

[13] Mr. Warren was a guarantor on the lease GloBill maintained with Dell Computers. He negotiated down the balance owed to Dell Computers and acquired the fourteen computers, monitors and other peripherals, through the assistance of GloBill's attorney. He had the computers transported from California to Utah on October 17, 2003 and gave nine CRT monitors to friends who helped him transport them. He later re-transported the computers back to California.

[14] Although Mr. Warren asserts the wage claim is also against the Mathai Brothers, the relief sought in their Counterclaim in the California Litigation is for wrongful bringing of the Pennsylvania action in GloBill's name, and an abuse of civil process claim related to the Pennsylvania Action, not a loss of wage claim.

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is no longer operating. Excluding the Warrens' cars, valued at $3,500, IRAs, and the claims against the Mathai Brothers and/or GloBill, the value of their remaining personal property is listed at approximately $3,200. Exempt property, excluding the Debtors' cars, home, and IRA is valued at approximately $2,800.

The SofA lists answers to the following questions as indicated:

Question 1. Income from employment or operation of business

Date	Who	Amount	Source
2004 up to 4/22/04	Daniel Warren	$8,339.64	BusinessCare
	Kathleen Warren	$8,639.64	BusinessCare
		$16,979.28	
2003	Daniel Warren	$2,125.00	Warren Associates
	Kathleen Warren	$1,500.00	Warren Associates
	Daniel Warren	$8,860.00	GloBill
		$12,485.00	
2002	Daniel Warren	$27,185.48	Warren Associates
	Kathleen Warren	$18,000.00	Warren Associates
	Daniel Warren	$121,211.57	GloBill[15]
		$166,397.05	

Question 2. Income other than from employment or operation of business

	Amount	Source
2004 up to 4/22/04	($46,160.97)	net coin sales
2003	$549.44	net coin sales

15 Other evidence indicates that the Warrens received net cash compensation from GloBill of $2,123,396.30 from February 1, 1998 through January 31, 2004, but GloBill ceased producing revenue in the fall of 2002.

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	$1,105.00	GloBill.com partial reimbursement for personal guarantee called by Dell Computers
2002	$2,907.87	net coin sales

In answer to Question 3 regarding payments to creditors, the Warrens list payments to three creditors totaling $56,982.28.

Since the Warrens simply netted out the revenue from the coin sales, they failed to disclose the total amount of income from the 2004 coin sales of $52,000 in response to either Question 1 or 2. The listing of payments to creditors fails to list all payments and fails to disclose the prepayments of taxes, insurance, mortgage payments, and utilities. Question 10 relates to "other transfers." In response, the Warrens list the sales of jewelry, the piano, the office and home furniture, the GMC truck, pool table, couch, roto-tiller, Chevrolet Safari, GMC Savanna, a safe, as well as the transfer of a house for $250,000 in May 2003; however, the answer fails to disclose the transfer of $98,000 in coins. Reviewing Questions 1, 2, and 10 together does not give any information, or even a hint of the true nature of the coin transactions, either as to the amount gained, the loss incurred, or whether the transactions represented a business venture.

In answer to Question 9 on the SofA, regarding payments related to debt counseling or bankruptcy, the Warrens list only two payments on March 23rd totaling $960. A later amendment indicates a series of payments on April 11th totaling $2,250 for the bankruptcy filings of other entities. The answer to Question 19 lists only Mr. Warren as a bookkeeper, although Mrs. Warren admitted she was also a bookkeeper.

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In short, there were significant omissions on the Warrens' bankruptcy papers relating to their estate. These omissions were not remedied at the § 341 meeting in May. In fact, it was not until the Plaintiffs conducted a Rule 2004 examination in late June that the information regarding the remainder of the sales, including the coins, and the payments and prepayments, were disclosed. After the Rule 2004 examination, the Warrens testified that they began to prepare amended schedules, but those documents were not actually filed until July 19th – over a week after this denial of discharge complaint was filed alleging claims under §§ 727(a)(2) and 727(a)(4)(A).

2. The Amendments

The Amended SofA does not change the responses to Question 1, and amends answers to Question 2 as follows:

Question 2. Income other than from employment or operation of business

	Gross Amount	Net Amount	Source
2004 up to 4/22/04	$52,434.73	($46,160.97)	gross/net coin sales
2003	$112,171.14	$549.44	gross/net coin sales
	$1,105.00	$1,105.00	GloBill.com partial reimbursement for personal guarantee called by Dell Computers
	$32,000.00	$32,000.00	Fidelity IRA
2002	$11,032.41	$2,907.87	gross/net coin sales

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Question 3 was amended to reflect pre-petition payments to 15 creditors (only three of which were on the original Schedules) totaling $89,129.03.[16] The Amended SofA lists the payments made to prepay mortgage payments, insurance premiums, and utilities. The amendments and testimony do not clarify exactly how much was prepaid, instead they include both a payment then due as well as the prepayment of future obligations. However, it appears that, together with 2004 prepaid property taxes[17] – which were not included in either the original or the Amended SofA – the Warrens prepaid significant amounts that may have totaled in excess of $12,000.[18] In any event, they prepaid as much as the insurance and utility creditors would allow. Both the Warrens acknowledged, as accountants, that prepayment of insurance premiums constitutes an asset, and yet they failed to list the prepaid assets in the Schedules, allegedly upon advice of counsel.

F. The Warrens' Explanation of Pre-Bankruptcy Activity

The Warrens testified that the liquidation of their assets, and payment and prepayment of creditors, was done solely to protect their family from the effect of filing bankruptcy, and not in any attempt to hinder, delay, or defraud their creditors. They testified that when GloBill ceased business and there were no funds left to pay the Warrens' living and legal expenses, Mr. Warren continued his accountancy work through one of his entities, BusinessCare. He had several clients, but the income generated from the practice was insufficient to meet the Warrens'

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[16] Less the post-petition payments of Citi Card and AT&T each dated May 4th of $365 and $223 respectively.

[17] The Debtors prepaid their 2004 real property taxes by $900 on April 12th. They turned over the excess to the Trustee in November 2004 after transferring the 664 East House in September.

[18] The Debtors paid $5,051 to health insurance provider, $4,080 in prepaid mortgage payments and $1,513 to prepay malpractice insurance premiums for their accounting business.

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monthly living expenses. Mr. Warren testified that his plan was to cease doing business as BusinessCare upon filing the chapter 7 and to transfer the paying clients post-petition to a new entity, BCPlus. The Warrens would then devote their energies to growing the new accounting business, free from the debts and obligations of the old business, and free from their personal debt. Since the Debtors stocked up on household goods and prepaid their mortgage, utilities, taxes, and insurance, once shed of their debts (and their obligations to the Mathai Brothers) through the bankruptcy filing, they could focus on their new business. The Warrens testified that they thought the new business would eventually generate sufficient income to meet the $3,547 per month expenses listed in the Schedules. However, there is no evidence that the Warrens changed their method of accountancy practice in any manner that would result in increased cash flow.

Shortly after the bankruptcy filing, the Warrens moved to California and each sought employment, abandoning the BCPlus plan. Mrs. Warren quickly became employed at $2,000 to $2,500 per month, or about $19 per hour. Mr. Warren also obtained employment after a short job search. He was hired at $8,000 per month starting August 16th. Together, the salaries are more than sufficient to meet their expenses.

Because they moved from Utah,[19] many of the prepaid creditors, such as their medical insurance carrier, refunded a portion of the prepaid sums due to lack of coverage or service in

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[19] Around September 1st, without Court approval, the Warrens transferred their interest in the 665 East House back to the original seller for $10,000. Therefore, from March 31st, the Warrens paid $5,000 plus $25,000 from the coin sales down, plus prepaid mortgage payments for May, June, July, and August totaling $4,080, plus an amount possibly exceeding $7,000 spent on home improvements, for a total of approximately $41,080. The Debtors then received $10,000 back when they transferred the house back to the Seller.

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their new location. Eventually, once the Plaintiffs learned of the prepayments and of the rebated funds, the refunds were surrendered to the chapter 7 trustee for administration.

The Court has had the opportunity to judge the credibility and demeanor of the Warrens. The Court finds Mr. Warren to be generally evasive, coy, and lacking in credibility. Mrs. Warren appears more forthright, but her testimony, protestations notwithstanding, was inconsistent in several significant respects.

II. CONCLUSIONS OF LAW

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157. Venue in this division is proper. This is a core proceeding as contemplated by 28 U.S.C. § 157(b)(2)(J).

Plaintiffs seek denial of the Warrens' discharge pursuant to §§ 727(a)(2) and 727(a)(4)(A). The primary purpose of bankruptcy law is to give *honest* debtors a "fresh start." Certain provisions of § 727 prohibit a discharge for those who "play fast and loose with their assets or with the reality of their affairs."[20] Plaintiffs bear the burden of proof[21] and must prove each element of §§ 727(a)(2) or (a)(4)(A) by a preponderance of the evidence.[22] Once the Plaintiffs establish a *prima facie* case for denying a discharge, the burden of going forward shifts

[20] *Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 110 (1st Cir. 1987) (discussing the purpose of § 727).

[21] *See* Fed. R. Bankr. P. 4005.

[22] *See First Nat'l Bank of Gordon v. Serafini* (*In re Serafini*), 938 F.2d 1156, 1157 (10th Cir. 1991) (adopting the preponderance of the evidence standard to § 727). *C.f. Grogan v. Garner*, 498 U.S. 279 (1991) (applying preponderance of the evidence standard to § 523(a) action).

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to the Warrens.[23] Ultimately, the burden rests with the Plaintiffs[24] to prove denial of discharge is warranted because exceptions to discharge are construed strictly against the complaining party and liberally in favor of the debtors.[25]

A. Section 727(a)(2)

To prevail on an objection to discharge brought under § 727(a)(2)(A),[26] the objector must show that "(1) the debtor transferred, removed, concealed, destroyed, or mutilated, (2) property of the estate, (3) within one year prior to the bankruptcy filing, (4) with the intent to hinder, delay, or defraud a creditor."[27] The pivotal issue in dispute in this case is intent. A court must

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[23] *See Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616, 619 (11th Cir. 1984). *See also Everspring Enter., Inc. v. Wang* (*In re Wang*), 247 B.R. 211, 214 (Bankr. E.D. Tex. 2000) (explaining "[s]hould an objecting party establish a prima facie case based upon the grounds recited under § 727, the burden shifts to the debtor").

[24] *See First Union Nat'l Bank v. Golob* (*In re Golob*), 252 B.R. 69, 75 (Bankr. E.D. Va. 2000) (citing *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 249 (4th Cir. 1994)).

[25] *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996).

[26] Section 727(a) states that:

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

[27] *Gullickson v. Brown* (*In re Brown*), 108 F.3d 1290, 1293 (10th Cir. 1997). *See also Holaday v. Seay* (*In re Seay*), 215 B.R. 780, 789 (10th Cir. BAP 1997).

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find "*actual* intent to defraud creditors," in order to deny a discharge under § 727(a)(2).[28] However, fraudulent intent may be established by circumstantial evidence, or by inferences drawn from a course of conduct.[29]

1. Pre-Bankruptcy Planning

The issue raised by the Plaintiffs is whether the Warrens' sale of "virtually all personal property assets of value that could have otherwise been liquidated by the Trustee"[30] and acquisition of exempt property with the proceeds constitutes a transfer implicating fraudulent conduct, as articulated in § 727. This question entails not only issues of statutory construction, but also underscores that "[f]raud in bankruptcy planning appears to enjoy the same precise definition as pornography – the federal courts know it when they see it."[31]

It is important to note that a debtor's conversion of one form of exempt property to a different form of exempt property, absent something more, would not ordinarily be the basis for a § 727(a)(2) claim because creditors are not hindered, delayed, or defrauded by such a transfer.[32] For example, the Warrens' sale of household furnishings that would have been exempt, and conversion of the proceeds to a different form of exempt property, did not reduce the value of

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[28] *Marine Midland Bus. Loans, Inc. v. Carey* (*In re Carey*), 938 F.2d 1073, 1077 (10th Cir. 1991) (discussing evidentiary standard for § 727(a)(2)).

[29] *Farmers Coop. Assoc. of Talmage, Kan. v. Strunk*, 671 F.2d 391, 395 (10th Cir. 1982). *See also Carey*, 938 F.2d at 1077.

[30] Compl. ¶ 18.

[31] *Bank of Okla. v. Boudrot* (*In re Boudrot*), 287 B.R. 582, 585 (Bankr. W.D. Okla. 2002) (quoting John M. Norwood & Marianne M. Jennings, *Before Declaring Bankruptcy, Move to Florida and Buy a House: the Ethics and Judicial Inconsistencies of Debtors' Conversions and Exemptions*, 28 SW. U.L. REV. 439, 442 (1999)).

[32] *Carey*, 938 F.2d at 1076.

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their estate to the detriment of creditors. Exempt property simply has been converted to another type of exempt property.

Further, prebankruptcy planning, or the conversion of nonexempt assets into exempt assets, is not, by itself, improper. As stated by another court in this Circuit, "debtors are entitled to plan the use of their exemptions so long as they do not do so with the intent to hinder, delay or defraud creditors. . . . [But] such determinations are fact specific."[33] This Court would be hard pressed to penalize debtors for "downsizing" from a residence they cannot afford to one that they can. Another court explained, "while some pre-bankruptcy planning is appropriate, the wholesale expenditure of non-exempt assets on the eve of bankruptcy, including conversion to exempt assets . . . may not be."[34] Thus, a "precarious balance" exists between the competing interests of debtors and creditors in pre-bankruptcy planning and "judicial decisions on the issue vary greatly."[35]

2. Transfers

The liquidation of assets pre-petition to exempt assets qualifies as a "transfer" under § 727(a)(2). The context of the statute indicates that conduct, which results in a denial of discharge should reduce property of the estate available *for distribution to creditors*. A "transfer," as defined by the Code, includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of *disposing* of or *parting with property* or with an interest

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33 *Boudrot*, 287 B.R. at 586 (summarizing *Carey*, 938 F.2d at 1077).

34 *NCNB Tex. Nat'l Bank v. Bowyer* (*In re Bowyer*), 916 F.2d 1056, 1060 (5th Cir. 1990), *rev'd*, 932 F.2d 1100, 1102 (5th Cir. 1991) (concluding, on reconsideration, that the court did not give adequate deference to the bankruptcy court's factual findings).

35 *Boudrot*, 287 B.R. at 585.

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in property . . . ."[36] Section 727(a)(2) also speaks in language that indicates a *depletion* of assets of the estate. However, the complex transactions in which the Warrens engaged (transfer of assets of the estate to cash, then transfer of the cash to other property of the estate that they claim as exempt), have not, in a technical sense, depleted the assets of the estate. This is because exempt property is property of the estate until a valid claim for exemption ripens.[37] The transfers nevertheless result in the reduction of the estate that is available for distribution to creditors. Therefore, such transfers qualify as actionable under § 727(a)(2) because, consistent with the prohibitions on recovery of transfers under other sections of the Code,[38] the Warrens' actions depleted the assets of the estate that would have been available *for the benefit of creditors*.[39]

3. Proving Intent

To deny the Debtors' discharge, the Court must find that the Warrens' rearranged the property of the estate with actual fraudulent intent to put the property beyond the reach of

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36 § 101(54) (emphasis added).

37 *In re Weeks*, 106 B.R. 257, 259 (Bankr. E.D. Okla. 1989) (describing the difference between the Bankruptcy Act of 1898 in which exempt property never entered the estate, and the current Code in which exempt property is property of the estate until it is later removed from the property in the trustee's possession and returned to the debtor upon a valid claim of exemption).

38 *See generally* §§ 544, 545, 547, 548, and 549.

39 *See Sloan v. Zions First Nat'l Bank* (*In re Castletons, Inc.*), 990 F.2d 551, 556 (10th Cir. 1993) (emphasizing that under § 547(c)(5) a transfer must be "to the prejudice of other creditors holding unsecured claims") (internal citations omitted). *See also Gill v. Winn* (*In re Perma Pacific Prop.*), 983 F.2d 964, 968 (10th Cir. 1992) (explaining that § 547 seeks to prevent a transfer that depletes the estate of an asset which would otherwise be available for distribution to other creditors); *Manchester v. First Bank & Trust Co.* (*In re Moses*), 256 B.R. 641, 649 (10th Cir. BAP 2000) (finding a transfer under § 547(b) was recoverable because the transfer paid to one creditor diminished the debtor's estate that would have been available to all creditors); *Gonzales v. DPI Food Prod. Co.* (*In re Furrs Supermarkets, Inc.*), 296 B.R. 33, 39 (Bankr. D. N.M. 2003) (discussing contemporaneous exchange for value defense to § 547 that protects transfers that do not result in diminution of the estate available for creditors but instead replenish the estate by an infusion of assets roughly equal to the transferred value).

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liquidation for the benefit of creditors. It is not necessary for the Plaintiffs to prove that each transfer was fraudulent, because "[i]f a single ground for denial of discharge is established, the inquiry ends."[40]

"The general facts surrounding a case are key instruments used to gauge intent because an individual's intent is seldom admitted to and is difficult to prove."[41] A variety of fact specific events may lead to a determination of whether or not a debtor intends to hinder, delay, or defraud his creditors. "[D]ebtors can be said to act with an intent to hinder their creditors if they intend to impede or obstruct them. They can be said to act with intent to delay if they intend to slow or postpone their creditors."[42] Both by inference and by assessment of a debtor's credibility, the Court may reach a conclusion regarding intent, regardless of a debtor's protestations to the contrary.

> To infer fraudulent intent, courts look for . . . situations in which a debtor conceals prebankruptcy conversions, converts assets immediately before the filing of the bankruptcy petition, gratuitously transfers property, continues to use transferred property, and transfers property to family members. Courts also consider the monetary value of the assets converted in determining whether the debtor acted with fraudulent intent. . . . Other indicia of fraud include: "(1) that the debtor obtained credit in order to purchase exempt property; (2) that the conversion occurred after entry of a large judgment against the debtor; (3) that the debtor had engaged in a pattern of sharp dealing prior to bankruptcy . . . and (4) that the conversion rendered the debtor insolvent."[43]

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[40] *Woolman v. Wallace* (*In re Wallace*), 289 B.R. 428, 433 (Bankr. N.D. Okla. 2003) (concluding it is not necessary to consider each and every ground for denial of discharge).

[41] *Adamson v. Bernier* (*In re Bernier*), 282 B.R. 773, 781 (Bankr. D. Del. 2002) (explaining analysis for intent under § 727(a)(2)(A)).

[42] *Boudrot*, 287 B.R. at 586.

[43] *Cadle Co. v. Stewart* (*In re Stewart*), 263 B.R. 608, 611 (10th Cir. BAP 2001) (citing *Carey*, 938 F.2d at 1077 n.4).

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The events that indicate fraudulent intent under state law are similar.[44]

Several factors are present which weigh in the Warrens' favor, including: that they have not given property away gratuitously; probably have not transferred property and then continued to use it; have not transferred their property to their family members; and have not obtained credit in order to purchase exempt property. However, there are rumblings from the Plaintiffs that the Warrens transferred property for less than actual value, or have valued their property unrealistically low. The evidence is unrebutted that the cars, furnishings, piano, and other personal property (except for the coins) were transferred for fair value. However, the values the Warrens list on the Schedules for their remaining personal property is suspicious. The suspect values include: computers that Mr. Warren paid $31,000 for in October 2003 and then valued at only $200 on the Schedules six months later; the cars purchased for $3,800, improved by $5,000, then valued at only $3,500; wedding rings valued at only $10; as well as the myriad of personal property valued at only a buck or two. But being suspect does not carry a burden of proof by a

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[44] Utah's version of the Uniform Fraudulent Transfer Act states that "actual intent" to hinder, delay, or defraud a creditor may be inferred by consideration of whether:

(a) the transfer or obligation was to an insider;
(b) the debtor retained possession or control of the property transferred after the transfer;
(c) the transfer or obligation was disclosed or concealed;
(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(e) the transfer was of substantially all the debtor's assets;
(f) the debtor absconded;
(g) the debtor removed or concealed assets;
(h) 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;
(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

UTAH CODE ANN. § 25-6-5(2) (2004)

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preponderance of the evidence, and without contrary valuation evidence, or other evidence weighing in favor of fraudulent intent, the Plaintiffs' claims would fail.

The evidence in support of fraudulent intent includes the following.

a. The Coins

First, the most blatant indication of conduct falling within § 727(a)(2) is the Warrens' transfers of the coins. The transfers were concealed and obscured by the manner in which they are reported in the SofA. The Warrens' responses do not begin to indicate the scope of the transactions because they only report their net sales in Question 2 and fail to list the transfers in Question 10. The Warrens did not voluntarily disclose the transfers; it was only after the Amendments were made in response to the Rule 2004 examination that the extent of the transactions was revealed.

Timing also argues against the Warrens. According to the Warrens' testimony, a portion of the coins were liquidated between the first of the year and March 2004 at a loss. If so, the transactions in which the loss was sustained occurred within the few months preceding bankruptcy. The rest of the coins were transferred for a down payment on the 665 East House, just days prior to the bankruptcy filing. That transfer occurred just after the settlement conference regarding the California Litigation in which the Warrens determined they could not afford to defend the Plaintiffs' claims.

It is impossible to ascertain if any of the coin transactions involved insiders, or whether the Debtors retained possession of the coins allegedly sold, because there are no records of the transactions in evidence. Although Mrs. Warren testified she kept computer records of the transactions related to the coins, none were produced. There is no way of knowing how many

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coins were sold, to whom, when, and on which coins a loss was taken. Given the meticulous detail in which the Warrens keep their finances, it is not credible that they failed to retain records related to these transactions. This unusual lack of data indicates that the Warrens are attempting to hide the nature of these transactions.

Finally, the coin collection was not transferred for equivalent value. The Warrens did not obtain even cost for the coins, as they had in the past, so that the assets of the estate would be preserved for creditors, but instead dumped the remainder of the coins to obtain the one asset they desired – the 665 East House. Given the commodity nature of the coin collection, the transactions for cash, and the alleged loss as opposed to breaking even as in prior years, the Warrens' version of the coin transactions is not credible and indicates an attempt to hinder, delay, or defraud their creditors.

b. Other Transactions

The scope of the other transactions also argues against the Warrens. Not only did they liquidate a substantial amount of property and generate over $90,000 from the sales, they spent the entire $90,000 plus an additional $10,000 in cash immediately prior to filing. The number and volume of purchases just prior to filing is startling. Even though the Debtors purchased many items during the months leading up to filing, most property listed on the Schedules is listed at a nominal value, implying either an error in valuation, or manipulation to place all property within the exemption limits.

Some examples of other facts which support an inference of an intent to hinder, delay, or defraud include:

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(1) The Warrens' Business Dealings

The Warrens' prior business dealings indicate a pattern of sharp dealing, satisfying one of the factors necessary to prove fraudulent intent.[45] First, Mr. Warren devised the scheme to prevent parties dealing with GloBill from knowing that the Mathai Brothers were affiliated with the company. Second, Mr. Warren took all of GloBill's assets to pay himself and his entities, rather than paying GloBill's other creditors. Third, the Warrens explained an intent to transfer their client base from BusinessCare to a new entity, BCPlus, post-petition, leaving the debt in the old entity rather than satisfying it. Given their prior dealings, it is not unusual that the Warrens would devise a plan that would liquidate every single liquid asset that would have been available to creditors into exempt assets.

(2) Insolvency

It is difficult to determine if the Warrens' conversion of their assets rendered them insolvent. The Warrens' only assets left after the transactions are the claims against GloBill and the Mathai Brothers, which cannot be valued with certainty. However, the larger claim against GloBill is against a defunct entity whose remaining assets are earmarked for the unpaid webmaster creditors. Even if the claim against GloBill was liquidated in the Warrens favor, it probably would not be collectable.

(3) The Warrens' Credibility

All told, the Court must determine if the Warrens' explanation that they were simply trying to position themselves to support their family and grow their new business post-petition is

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[45] *Carey*, 938 F.2d at 1077 n.4.

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true, or if, instead, they were attempting to hinder, delay, or defraud their creditors. The Court concludes that the evidence weighs in the Plaintiffs' favor.

Many of the badges of fraud have been proven, and the Warrens' explanation of their conduct is not credible. To state that Mr. Warren is evasive is to understate his conduct on the stand. It is one thing for a witness to seek clarification on a question, it is quite another to constantly request rephrasing or clarification on common terms and phrases. Mr. Warren was not just attempting precision in his responses, he was attempting to word-smith his answers to avoid being caught in a deception.[46] Mrs. Warren's statements that she gave no thought to creditors (especially the Mathai Brothers) during the time she was liquidating assets and spending the proceeds is simply not credible. She was converting assets and spending cash only days after the California Litigation settlement conference, and she vocally denied any obligation owed to the Mathai Brothers. Nor is it credible that the Warrens thought the new accounting business would be any more successful than the old one, given that they planned no changes at all in how they were to run the business. The Warrens readily obtained employment just after filing for bankruptcy protection at wages more than sufficient to meet their family expenses. This tends to prove that their alleged panic about being able to provide for their family post-petition was likewise not credible.

4. Section 727(a)(2) Conclusion

Mr. Warren's pattern of sharp dealing is entirely consistent with a scheme to liquidate each and every asset, no matter the loss, to prevent payment to the Mathai Brothers. "[N]early

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[46] *Swift v. Bank of San Antonio* (*In re Swift*), 3 F.3d 929, 931 (5th Cir. 1993) (describing the debtor's credibility, "the court observed his evasiveness and deception, not only at trial but also in the filing of his schedules and in his testimony at the section 341 creditors' meeting").

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every asset in [the Debtors'] estate had been tampered with before bankruptcy."[47] The Debtors are seeking more than a fresh start, they want a head start.

> It would constitute a perversion of the purposes of the Bankruptcy Code to permit a debtor . . . to convert every one of his major nonexempt assets into sheltered property on the eve of bankruptcy with actual intent to defraud his creditors and then emerge washed clean of future obligation by carefully concocted immersion in bankruptcy waters.[48]

Similar to the *Boudrot* court, this Court is "struck by . . . [t]he Defendants . . . animosity toward the Plaintiff."[49] The level of animosity between these two parties cannot be understated, and strongly argues in favor of a determination that the Warrens would do just about anything to prevent their assets from falling into the Mathai Brothers' possession. Therefore, the Court concludes that the Plaintiffs have met their burden of proof regarding the § 727(a)(2) claim. Unlike in *Carey*, where the debtor's activity and payment were "consistent with what has been approved by Congress to take advantage of exemptions,"[50] the Warrens have abused pre-bankruptcy planning because their purpose was to place assets out of reach of the Mathai Brothers.

B. Section 727(a)(4)(A)

Section 727(a)(4) states that "a debtor's discharge should be denied if the debtor knowingly and fraudulently, in or in connection with the case— (A) made a false oath or

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47 *Id*.

48 *Reese v. Kulwin* (*In re Kulwin*), 187 B.R. 341, 350 (Bankr. D. Kan. 1995) (quoting *First Tex. Sav. v. Reed* (*Matter of Reed*), 700 F.2d 986, 992 (5th Cir. 1983)) *vacated by* 208 B.R. 229 (Bankr. D. Kan. 1997) (vacated due to stipulation by the parties).

49 287 B.R. at 487.

50 938 F.2d at 1078.

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account."[51] A statement contained in a debtor's schedules or statement of affairs, or the omission of assets from the same may constitute a false oath for purposes of § 727(a)(4)(A).[52] Before the court may deny a debtor's discharge pursuant to § 727(a)(4)(A), the plaintiff must demonstrate that the debtor (1) knowingly and fraudulently made an oath and that (2) the oath relates to a material fact.[53] A false statement caused by mere mistake or inadvertence does not warrant denying a debtor's discharge and neither is an honest error or inaccuracy.[54] However, "reckless indifference to the truth . . . has consistently been treated as the functional equivalent of fraud for purposes of § 727(a)(4)(A)."[55]

1. Knowing/Fraudulent

To warrant denial of discharge, the Plaintiffs must prove that the statements made under oath were knowingly and fraudulently made, and not a result of mistake or inadvertence.[56] The intent to defraud element of § 727(a)(4)(A) differs from § 727(a)(2).[57] Because the debtor is usually the only person able to testify directly concerning intent, "fraudulent intent may be

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[51] § 727(a)(4).

[52] *See Job v. Calder* (*In re Calder*), 907 F.2d 953, 955 (10th Cir. 1990) (considering whether or not omission of assets from statement of affairs is material).

[53] *Gullickson v. Brown* (*In re Brown*), 108 F.3d 1290, 1294 (10th Cir. 1997).

[54] *Id*. at 1294-95.

[55] *Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 112 (1st Cir. 1987) (internal quotes and citation omitted).

[56] *Brown*, 108 F.3d at 1294-95.

[57] *First Nat'l Bank v. Davison* (*In re Davison*), No. KS-04-013, 01-23974-7, 02-6018, 2004 WL 2852352, at *4 (10th Cir. BAP June 29, 2004) (explaining that the behavior reviewed under the intent to hinder, delay, or defraud element of § 727(a)(2)(A) focuses on a debtor's transfer of property, an analysis under § 727(a)(4)(A) focuses on whether the debtor has made a false oath).

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deduced from the facts and circumstances of a case."[58] It is not necessary to establish detriment to a creditor to establish fraudulent concealment or a false oath barring discharge.[59]

Factors considered under (a)(4)(A) may include: the number of omissions;[60] the debtor's profession as it relates to the omissions;[61] how the omission is discovered and how quickly the debtor rectifies the omission;[62] any pattern to the omission;[63] "failure to correct all of the inconsistencies and omissions upon making allegedly curative amendments;"[64] whether the debtor had access to an attorney;[65] whether the debtor was attempting to place his personal funds beyond the reach of creditors;[66] the seriousness with which the debtor regarded his duties under

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58 *Calder*, 907 F.2d at 955-56.

59 *Farmers Coop. Assoc. of Talmage, Kan. v. Strunk*, 671 F.2d 391, 396 (10th Cir. 1982).

60 *Calder*, 907 F.2d at 956 (noting as significant that the debtor had not one but four separate omissions).

61 *See, e.g., id*. (stating that a bankruptcy attorney practicing exclusively in bankruptcy law should have been aware that answers must be complete, truthful and reliable); *Cadle Co. v. King* (*In re King*), 272 B.R. 281, 303 (Bankr. N.D. Okla. 2002) (explaining that the debtor holds an undergraduate degree in business management with a minor in economics and was engaged in the field of commercial real estate transactions and finance for thirty-one years).

62 *See, e.g., Brown*, 108 F.3d. at 1295 (reversing the bankruptcy court because the debtor corrected his omision "very early in the process and of his own accord"); *Henning v. Mellor* (*In re Mellor*), 226 B.R. 451, 459 (D. Colo. 1998) (concluding that an inference of fraud may be made if the amendment is not in fact voluntary because it is offered only after the debtor "knew that the cat was out of the bag" or without adequate explanation of the reason for the initial inaccuracy).

63 *Brown*, 108 F.3d at 1295 (discounting the trial court's factual finding of a "pattern of non-disclosure").

64 *Mellor*, 226 B.R. at 460.

65 *King*, 272 B.R. at 303 (factoring in the debtor's assistance of an attorney who practices regularly before the court).

66 *Id*. (noting that the debtor changed bank accounts several times pre-bankruptcy to escape garnishment).

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the Code;[67] and whether the false statements were made in an attempt to advance the debtor's own interests.[68]

The Warrens' excuses for why the omissions occurred do not ring true. Mr. Warren excuses the omissions by explaining that the bankruptcy documents were prepared during tax season, yet Mr. Warren failed to offer any evidence that he was, in fact, busy preparing tax returns and consequently could not focus on the accuracy of his bankruptcy papers. His accountancy specialty lies in tax compliance and planning but he testified he billed his clients on a flat monthly fee for accounting work. Mrs. Warren indicated she simply was not thinking of some of the payments that had been made and the omissions were inadvertent. Neither debtor made an excuse for the omissions of the coin transactions. They said they were preparing bankruptcy papers for two entities and contemplating filing for a third, implying the task was too extensive for them to be accurate.

However, several factors argue that the omissions were intentional and designed to defraud. The Debtors testified that Mr. Warren met numerous times with their attorney and that Mrs. Warren made multiple calls to discuss the Schedules with their attorney, so they cannot argue they did not understand what information to include in the SofA and the Schedules.[69] The Warrens have technical training as accountants and as such, admit that they understand that prepaid insurance is an asset. They also understand the difference between gross and net income.

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[67] *Id.* (pointing out the debtor's cavalier attitude with respect to his duties under the Code).

[68] *Woolman v. Wallace* (*In re Wallace*), 289 B.R. 428, 435 (Bankr. N.D. Okla. 2003) (including the interest of the debtor in its analysis).

[69] *See supra* note 65 and accompanying text.

Unlike a debtor who is inexperienced with financial affairs or one who relies on incorrect advice or information in preparing his statements and schedules,[70] the Warrens are sophisticated debtors – each with degrees in accounting and significant finance experience.[71]

The Warrens keep meticulous records including detailed paper and computer records of their financial affairs that should have provided the answers necessary to accurately complete their bankruptcy documents. A simple sort of the computer data will indicate payments made within 90 days of filing. For those numerous transactions made by the Warrens in cash and allegedly not recorded in their computer program (an odd circumstance for transactions involving large sums of money), they eventually produced a large quantity of cash register receipts and other data including items so small as a cash receipt for $10.61 for the purchase of nose hair trimmers. The evidence indicates the information was available to assist the Warrens in compiling their papers. They prepared a list of creditors which amounts to four and a quarter inches thick stack of paper so that all possible contingent debt would be included in their discharge. The Debtors knew how to be inclusive and were quite accurate when it suited them.

The assertion that the Debtors were either too busy or just forgot to list the coin transactions or the payments to creditors is simply not credible. They sold their coin collection at a drastic loss, unlike the transactions in prior years. The sale was made, in part, to fulfill their desire to purchase a new home with equity for a homestead exemption. Just prior to filing, the Warrens converted almost every asset they could into cash and spent significant amounts in a calculated effort to maximize every exemption to which they were entitled. In just one day, three

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[70] *Sholdra v. Chilmark Fin. LLP* (*In re Sholdra*), 249 F.3d 380, 383 (5th Cir. 2001).

[71] *See supra* note 61 and accompanying text.

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days prior to filing, they made purchases at eight different stores. They prepaid insurance, mortgage payments, taxes, and utilities in a manner they had never done before. All in all, these were extraordinary transactions in every respect. The Warrens cannot credibly argue that the matters were so routine they forgot to list them. Nor can they argue that the transactions were so remote in time that they forgot.

The Court rejects the Warrens' argument that the Amendments cure their initial failures. The timing of the Amendments is suspect. The case law is consistent that voluntary amendments to correct oversights made early on in the case – at or around the § 341 meeting – and of a debtor's own volition, negates an implication of fraud.[72] That is simply not the case here because the omissions were not disclosed at the § 341 meeting. The Amendments were only made after the facts were brought to light through the Mathai Brothers' Rule 2004 examination a month after the meeting of creditors.[73] Although the Warrens assert they immediately began preparing the Amendments after the need was exposed by the Plaintiffs, the Amendments were not filed until after the complaint instigating this action was filed.[74] As discussed later, there are still some transactions that remained undisclosed after the Amendments were filed.[75] "Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth

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72 *Mellor*, 226 B.R. at 459 ("a debtor's voluntary filing of an amendment as soon as practicable may be accepted as evidence of the absence of the element of fraudulent intent"). *See also Brown*, 108 F.3d at 1294-95 ("no inference of fraudulent intent can be drawn from an omission when *the debtor promptly* brings it to the court's or trustee's attention *absent other evidence of fraud*").

73 *Sholdra*, 249 F.3d at 382.

74 *See supra* note 62 and accompanying text.

75 *See infra* p. 37.

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into the glare of daylight."[76] The Mathai Brothers have been engaged in a protracted tug-of-war with the Debtors in an attempt to extract evidence of the truth.

2. Material Misrepresentations

After concluding the omissions were knowingly and fraudulently made, the Court must decide whether the omissions are material. A statement is material under § 727(a)(4)(A) "if it is related to the debtor's business transactions, or if it concerns the discovery of assets, business dealings, or the existence or disposition of the debtor's property."[77] The Warrens admit their answers on the SofA were incorrect in several ways. The coin transactions are required to be listed in two respects: the income from the transactions, and the transfers themselves. Question 1 requires a debtor to list *gross* income from employment, trade, or profession, or from operation of the debtor's business. Neither the Warrens' initial nor amended SofA lists the gross income from the coin transactions. The Warrens, apparently not considering their three-year coin transactions to be a business, chose to list the *net* income from the coin sales on Question 2 regarding the amount of income received by the debtor *other* than from employment, trade, profession, or operation of the debtor's business. But in this instance income cannot occur unless there is a sale. Question 10 asks for a listing of all other property transfers, *other than property transferred in the ordinary course of the business or financial affairs of the debtor*, transferred either absolutely or as security within one year immediately preceding the commencement of the case. Neither the Warrens' initial nor amended SofA lists the sales of the coins in answer to this

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[76] *Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 110 (1st Cir. 1987).

[77] *Clark v. Reed* (*In re Reed*), 293 B.R. 65, 70 (Bankr. D. Kan. 2003), (quoting 6 COLLIER ON BANKR. ¶ 727.04[1][b] (15th ed. 2003)).

question. Collectively these answers are inconsistent, either 1) the coin sales were ordinary course business transactions not required to be listed on Question 10, but the *gross* income was required to be listed on Question 1; or 2) the sales were not ordinary course business transactions but instead "other transfers" required to be listed on Question 10. Failure to disclose sales or transfers of a total of $98,594 in assets within the three and a half months prior to filing is material, and describing the transactions as simply a $46,160 loss is misleading. Failure to list 2003 year gross sales of $112,171 and 2002 year gross sales of $11,032 is likewise material because it hides the scope of the Warrens' coin transactions.

Other errors in the Warrens' documents include the failure to list payments to creditors under Question 3. Question 3 requires disclosure of all payments on loans, installment purchases or goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days of filing. The Amendments the Warrens eventually filed indicate a total in excess of $89,000[78] in payments that were actually made, as opposed to the $56,982.28 initially listed. Besides the potential for recovery of preferential transfers, the omissions include over $11,000 in payments that, in part, represent prepayment of insurance, mortgage, and utility payments and may have been recoverable to the estate. The Amendments again fail to include an additional $900 in prepaid 2004 property taxes. Since the Warrens also did not list the prepayments of the insurance premiums as assets on Schedule B, the Trustee had no way to know the assets existed and therefore no possibility of recovering them for the benefit of creditors. The omission of $9,175 in prepaid insurance premiums is material.

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[78] Two payments totaling $588 included in this figure were made post-petition.

3. Omissions Conclusion

The entire prebankrupty planning concept, when viewed in relation to the omissions on the Schedules and the SofA, appears to be a scheme designed by the Warrens to reposition all of their assets out of the reach of creditors and advance their own self-interest. Hiding the full extent of the coin transactions, liquidating the coins at a substantial loss in undisclosed and undocumented transactions, hiding the pre-petition payments to creditors and the prepayment of creditors that would be assets of the estate smack of fraudulent intent.

Based upon the credibility of the witnesses and the evidence presented, the Court rejects the excuse that the Warrens were too busy, did not understand, were forgetful, or simply were inadvertently mistaken in their answers. Instead, the Court concludes that the Warrens were attempting to use up all their assets so that the Mathai Brothers – who both the Debtors believe are not their creditors – would receive nothing, and they were intending to hide the transactions in their bankruptcy papers. The animosity between the Warrens and the Mathai Brothers, and the activities that began just two days after the settlement conference in the California Litigation, further supports this conclusion. The Plaintiffs have carried their burden of proof on the § 727(a)(4)(A) claim.

III. CONCLUSION

Having carefully considered the credibility of the witnesses, the evidence presented, stipulated facts and the arguments of counsel, and having applied the same to the law, the Court

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concludes that the Plaintiffs have carried their burden of proof as to both the §§ 727(a)(2) and 727(a)(4)(A) claims. The Warrens' discharge will be denied. A separate judgment will issue accordingly.

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SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION** will be effected through the Bankruptcy Noticing Center to each party listed below.

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