

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
LISA ANN BETZNER,	)	CASE NO. 07-30392 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
FIRST FEDERAL SAVINGS BANK,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 07-3070
	)	
LISA ANN BETZNER,	)	
	)	
DEFENDANT.	)	

Appearances:

Stephen H. Downs, Esq., attorney for plaintiff, Tiede, Metz & Downs P.C., 99 West Canal Street, Wabash, Indiana 46992; and

Doug A. Bernacchi, Esq., attorney for defendant, 450 St. John Road, Suite 109, P.O. Box 2054, Michigan City, Indiana 46360.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 27, 2009.

Before the court is the Complaint Objecting to Discharge and to Determine Dischargeability of Debt filed by the plaintiff First Federal Savings Bank (“plaintiff” or “Bank”) (now Crossroads Bank) against the defendant Lisa Ann Betzner, chapter 7 debtor (“defendant” or “debtor”). Trial on the Complaint was held, after which the parties filed Proposed Findings of Fact and Conclusions of Law and replies. For the reasons presented in this Memorandum of Decision, the plaintiff’s Complaint is granted and the defendant’s discharge is denied pursuant to 11 U.S.C. § 727(a)(3) and § 727(a)(4)(A).

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) and (J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The defendant debtor filed a chapter 7 bankruptcy petition on March 1, 2007. Three months later, the Bank filed the adversary proceeding now before the court. The Complaint objects to the dischargeability of a debt of more than \$1.3 million allegedly owed to the Bank by the debtor under 11 U.S.C. § 523. It also objects to the debtor's discharge under 11 U.S.C. § 727.

The record reflects these undisputed facts. Before filing bankruptcy, the defendant owned and operated a small, closely held business named "Swingsets, Inc." (the "Corporation" or "Swingsets"), which built children's wooden gym sets. She bought the Corporation from her father in 2002, but had worked for the business since 1991. When Swingsets closed in 2007, the defendant was its president, chief operating officer, and sole shareholder. Swingsets held an account with the Bank since 1998. The Bank held a promissory note, personally guaranteed by the defendant, secured by mortgages on the real estate and by liens on the Corporation's assets – including its accounts receivable, deposit accounts, inventory, equipment, general intangibles, financial records, customer lists, and computer programs. When the debt owed by the defendant, other family members, and Swingsets exceeded \$1.6 million and payments were not being made, the Bank filed a complaint in Wabash

Superior Court on September 15, 2006.<sup>1</sup> The state court entered summary judgment against Lisa Betzner and ordered foreclosure of the mortgage liens. Once the debt had been reduced to judgment, the Bank liquidated the available collateral. The unpaid deficiency balance, at the time of trial in this adversary proceeding, was \$1,337,524.57. The Bank now has turned to the bankruptcy court for relief.

In its Complaint against the defendant, the Bank contended that the \$1.3 million debt must be found nondischargeable, both because (a) the defendant obtained an extension of credit by presenting to the Bank a written statement overstating her assets and understating her liabilities, and (b) she willfully and maliciously injured the Corporation's property by selling or transferring the business's property and converting the proceeds to her own use. *See* 11 U.S.C. § 523(a)(2), § 523(a)(6). The Bank also charged that the defendant's discharge should be denied under § 727(a)(2), (3), (4), (5), and (7). The Complaint alleged that the defendant transferred, destroyed, or concealed certain property; destroyed or failed to preserve recorded information concerning her financial condition or business transactions; knowingly and fraudulently made a false oath or account; misstated the circumstances surrounding the sale or transfer of certain assets; misstated the nature of her family's involvement with another gym set company, Premier Play Stations, LLC ("Premier"); failed to list all her assets and liabilities; misstated the value of her interest in Swingsets Realty, LLC, and Swingsets, Inc., and the value of certain personal property; failed to disclose transfers or sales of assets on her Statement of Affairs; failed to explain satisfactorily a loss or deficiency of assets to meet the debtor's liabilities; and transferred, removed, destroyed, or concealed equipment, receivables, cash or other assets of the Corporation. In her Answer, the defendant denied all the allegations and presented numerous affirmative defenses.

Trial on the issues was had on July 22, 2008. The plaintiff's first witness was Noah Smith, the Bank's Vice President in charge of loans. He testified that the Bank began lending money to Swingsets in 1998 and that he was responsible for the Swingsets account after he came to the Bank in 2000. His primary contact,

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<sup>1</sup> *See* Pl. Ex. 2, *First Federal Savings Bank v. Swingsets, Inc., James Betzner, Lisa A. Betzner, James E. Snavelly, Susan J. Snavelly, and Susan J. Snavelly Revocable Trust*, Decree of Foreclosure, June 25, 2007 (decided after this court's lifting of the automatic stay, ordering foreclosure of mortgage liens and liquidation of other property).

he stated, was Lisa Betzner, who was the President, CEO, and sole shareholder of Swingsets. He noted that the defendant held a bachelor of science degree in business from Indiana University. Although her husband and parents also were guarantors of the Swingsets debt, Lisa Betzner was the Corporation's chief operating officer.

The Bank was successful in its foreclosure lawsuit against Swingsets and its guarantors, including the defendant, in state court. *See* Ex. 1-3.<sup>2</sup> Even though the Bank's motion for summary judgment against Lisa Betzner was stayed by the filing of her chapter 7 petition, Smith stated, after the stay was lifted the Wabash Superior Court granted judgment (in the amount of \$1,605,828.20 plus interest) against the defendant in the Decree of Foreclosure of July 25, 2007. *See* Ex. 2.

Smith introduced the defendant's bankruptcy documents (*see* Ex. 4-6) and the business records found on Swingsets's computers: its balance sheet and assets lists of shop and office inventory (*see* Ex. 7-9). The Corporation's balance sheet stated that, as of December 31, 2006, Swingsets's assets were worth \$1,430,232.39. The debtor's Statement of Financial Affairs ("SFA") stated that Swingsets ceased operation on January 1, 2007. However, Smith noted, on the debtor's original and amended schedules, the current value of Swingsets was listed at \$0. (*See* Sch. B, line 13.) The Bank took over the Swingsets premises on March 7, 2007, six days after the defendant filed bankruptcy. Smith noted that many of the inventoried items on the assets lists were not located. *See* Ex. 10. He pointed out that no cash or accounts receivable were recovered. When the available inventory, machinery and equipment were sold at auction, the proceeds of the sale totaled about \$69,000.00.

Smith testified that the Bank received (by subpoena, not by the debtor's voluntary turnover) the Corporation's bank account records at Wells Fargo Bank ("Wells Fargo") and First Farmers Bank & Trust ("First Farmers"). *See* Ex. 11, 12. At Wells Fargo, the Corporation's balance was \$65,104.92 on December 31, 2006. It was depleted by January 24, 2007. Checks were written and deposits were made on that account until that date, even though the business was reported to have closed on January 1, 2007. On January 25, 2007, the defendant opened an account in the name of Swingsets, Inc., at First Farmers. That bank's business records reflect

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<sup>2</sup> All numbered exhibits were proffered by the plaintiff and were admitted at trial.

Swingsets transactions in its account (5 deposits made, 31 checks written) throughout February and March, 2007. *See* Ex. 12. According to Smith, approximately \$103,000 went into and out of those checking accounts, and the Bank held a lien on those assets of Swingsets in those two banks.

The transcripts of the debtor's 341 meeting (held on March 28, 2007) and the Rule 2004 examination (held on December 17, 2007) were placed in evidence. Smith referred to those transcripts to demonstrate the discrepancies in the defendant's sworn statements. He first pointed out that, in her SFA and on Schedule B, the defendant stated that Swingsets ceased operations on January 1, 2007, and had no assets. However, in the 2004 examination, the debtor revealed the two unreported bank accounts at Wells Fargo and First Farmers and testified that the business actually did not cease operations until the end of February, 2007. It was clear, Smith pointed out, that financial activity continued after January 1, 2007.

Smith noted that the defendant amended Schedule B to include two life insurance policies. However, she failed to list a life insurance policy held by Edward Jones. *See* Ex. 16; Ex. 14 at 90. Nor did she amend her schedules to reflect that Swingsets owed her \$90,000. *See* Ex. 13 at 21. The Bank discovered that the debtor owned an Individual Retirement Account and a 1986 Chevrolet Camaro. *See* Ex. 17, 18. These assets were not included on Schedule B.

In addition to omissions from Schedule B, Smith testified that there were misstatements as well. On Schedule B, the debtor stated that she owned a 15% interest in Swingsets Realty, LLC, and that the current value of her interest in that property was \$500,000. However, the Articles of Organization of the LLC, executed on November 7, 2003, stated that Lisa Betzner owned 50% and that her husband James Betzner owned 50% of the company. *See* Ex. 19. At the 341 meeting, she stated that she owned 15% and that her husband owned 85%. *See* Ex. 13 at 14-15. When she was asked, at the 2004 examination, to explain the difference in the ownership interests, she said she did not know where the "15% interest" came from. *See* R. 14 at 106-07. Nor did she explain the increased value of the LLC – from the \$500,000 valuation, based on a 2002 appraisal, to the \$670,000 valuation, based on a 2006 appraisal. Nor did she amend her schedules to reflect that change in value.

Smith stated that the debtor did amend Schedule E, adding a tax liability, and Schedule F, adding 24 creditors. Schedule F originally had listed only one unsecured creditor, holding a \$9,000 claim. However, the debtor amended it after the Trustee, at the 341 meeting, saw that there was no listed credit card debt and asked her to include it. *See* Ex. 13 at 20-21. On the amended Schedule F, there now are 25 creditors holding unsecured claims in the amount of more than \$150,000. However, according to Smith, the schedules still do not include the \$90,000 loan the debtor made to Swingsets, *see* Ex. 13 at 21-22, or the \$355,000 debt the debtor owed to her father for the purchase of the Swingsets stock. *See* R. 14 at 66-67. Nor does Schedule F include the Bank's state court judgment. *See* Ex. 1, 2.

In the SFA, the debtor stated that there was no property transferred within the two years preceding the bankruptcy. *See* R. 6, ¶ 10. However, Smith testified that the SFA was incorrect. At the 341 meeting, the debtor first testified that, within that time period, she sold a John Deere tractor for \$10,000 and that she used the proceeds to pay the IRS \$4,000 and to pay personal expenses. *See* R. 13 at 18-19. She later stated that her husband actually sold the John Deere. *See id.* at 26. On a personal financial statement dated March 15, 2006, that the debtor gave to the Bank, the John Deere tractor was listed with a market value of \$15,000. *See* Ex. 20. At the 2004 examination, another story was given: The debtor testified that she “gave the John Deere away,” and gave away or sold the Gator, a golf cart, four-wheeler and antique tractor.<sup>3</sup> *See* R. 14 at 127-28. These transfers, whether sold or given away, were omitted from the SFA or the schedules, Smith testified.

Smith then focused on the defendant's relationship to Premier Play Systems, the swingset company owned by Darlene Harris (her sister), James W. Betzner (her father-in-law), and Justin Adams, a Swingsets employee. At the 341 meeting, the debtor testified that she and her husband were “both trying to get a job” at Premier. *See* Ex. 13 at 23-24. At the 2004 examination, the debtor testified that she was employed at Premier in April 2007 as sales manager, in charge of corporate accounts. *See* Ex. 14 at 6-7. When asked who owns

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<sup>3</sup> The debtor also testified, at the 2004 examination, that some of the items – such as the antique tractor, golf cart, and four-wheeler – belonged to her father-in-law. Nevertheless, the four-wheeler was listed as an asset of hers on Plaintiff's Exhibit 20, and no proof was offered that her father-in-law owned the other items.

Premier, however, she testified that it was a “group of private investors from around.” *Id.* at 74. At first she said she didn’t know any of them, *see id.*, but later she admitted that she knew Darlene, her sister. *See id.* at 75-76. She then conceded that Premier’s organizers all worked for Swingsets before starting Premier. She also agreed that Swingsets and Premier have the same type of business, make the same products, and have basically the same customers and vendors. *See id.* at 76-77. Smith then identified Premier’s Articles of Organization, filed with the Indiana Secretary of State on February 26, 2007. The Articles listed the principal office for Premier as the debtor’s residence. Its registered agent James R. Betzner, believed to be the debtor’s husband. *See Ex. 22.*<sup>4</sup>

Smith then introduced the brochures produced by Swingsets and Premier; he pointed out that the gym sets are very similar or identical in both advertisements. *See Ex. 23, 25.* He testified that the “Kidz Klubhouse” specifications were found in the Swingsets computer and that the “Kidz Klubhouse” gym set was pictured on the third page of the Premier brochure. *See Ex. 24, 25.* After reiterating that the debtor had admitted that Premier and Swingsets have the same customers, suppliers, and employees, Smith then presented to the court the final exhibit, Exhibit 30, a letter found on the Swingsets computer (“the letter”):

PREMIER PLAY SYSTEMS, LLC

P.O. Box 232, Wabash, IN 46992

This letter is to inform you that Swingsets, Inc. has changed its name. Lisa and Jim Betzner are forming a new company that will be known as Premier Play Systems, LLC. We want to express our deep commitment to you as our customer and to let you know that this change will not interfere with the product, as you know it. Please direct all remittance and correspondence to the above name and address from here on out. Any correspondence or remittance to the old name and address will cause a delay in your orders. If you should have any questions, please call me at the following number: [telephone number given].

Sincerely,

Lisa Betzner

Ex. 30. The letter encourages Swingsets customers to use Premier, virtually the same company, Smith stated.

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<sup>4</sup> The Articles of Organization, Ex. 22, was executed by James W. Betzner. The registered agent of Premier Play Systems, LLC, is James R. Betzner. The principal office for the LLC and the address for the agent James R. Betzner are identical: 1323 S 800 W, Wabash Indiana 46992. That address is also the residence of the debtor.

On cross-examination, debtor's counsel pointed out that the debtor, in her 2004 examination, had denied drafting that letter. He also asserted that the financial decline in Swingsets was due, at least in part, to the Bank's demand for payment of the Swingsets loan in 2005 and, after negotiating a new loan, the termination of that loan in March 2006. In the end, the Bank's failure to continue helping the debtor's business led to the debtor's and the company's problems, the attorney asserted. When debtor's counsel reminded the witness that the debtor cooperated by submitting many documents to the Bank, Smith responded that she never complied with the Bank's discovery requests for such documents as her tax returns. Debtor's counsel insisted that the debtor did not fail to comply intentionally.

The plaintiff next called Thomas Polk, the manager of Intrasect Technologies, a technical services company in Wabash, Indiana. He stated that he has been in the intellectual technology field for twenty years and has worked for this company eight years, handling data recovery. The Bank hired him to gain access to Swingsets's computers. He explained at length his methodology for examining the desktop computers and the server. Polk determined that the machines had been designed to store information on the server and that the server's shared directory for data had no contents; however, he found one back-up tape. He discovered that the files had been deleted but that the system had stamped a deletion date without actually destroying the files. He then found that the files had been deleted on March 1, 2007, before 11:59 p.m. After executing the restore process, he concluded that the deletion was intentional: The person at the computer would have been required to respond to a box asking whether he or she wanted to delete. For that reason, Polk testified, in his opinion the deletion had to have been deliberate. Even though the server was shut off after the files were deleted, Polk was able to retrieve the documents that had been saved on the server between January 1 and February 28, 2007. He did not know, however, who deleted the files.

After Polk testified, the plaintiff rested.

Lisa A. Betzner, the defendant, was called to testify on her own behalf. She described the circumstances that caused her to file bankruptcy and clarified or contradicted the documents and testimony

presented by the plaintiff. She now worked as Premier's sales manager, she stated. Her father, who did not want to incur more debt, "pulled the plug" on Swingsets. Tr. at 3.<sup>5</sup> She insisted that she had cooperated with the Trustee by providing the Edward Jones insurance information when requested; she had no intention of hiding the policy, which was meant to provide for her children's education. She further asserted that she had no intent to defraud the Bank, her father, or other family members. The debtor denied deleting any files, removing documents, or hiding any back-up tapes on the computer. She also denied that she omitted credit card debt from her schedules; she insisted that she sent the information to her attorney's office. She stated that her 2006 and 2007 tax returns were in the hands of her accountant. *See* Tr. at 16.

Her business suffered, she stated, when the Swingsets controller stole \$50,000, of which she was able to recover only \$13,000 in a settlement. It was further set back when Masquerade, a creditor, failed to pay her its \$500,000 outstanding bill, and its promissory note was unenforceable. In addition, a new client in Michigan cancelled a \$3-6 million order for 4,500 swing sets. *See* Tr. at 9-11. She said she did not know when her business closed, because her husband actually closed the doors. In her view, the value of her business interest in Swingsets, when she filed bankruptcy, was \$0, because she thought she had nothing.

She admitted that she was confused about how much of Swingsets Realty, LLC, she actually owned. In her view, the LLC never existed, and it had \$0 value. Only the real estate, and not the LLC, was worth \$500,000, she stated. When shown Exhibit 17, the Wells Fargo daily check registers, the debtor explained that the amounts withheld from her pay and transferred into her IRA account were simply automatic computerized transfers. Her sister-in-law, who took over the financial business at Swingsets in 2006, did not change the computer, and the deposits into her IRA continued. She further explained that "the checks that are listed on here [in Exhibit 17] were written to me to reimburse me that money. That's all that is." Tr. at 17. According to the defendant, the money withdrawn from the First Farmers bank account (*see* Ex. 12) after the business closed was

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<sup>5</sup> A written transcript of the testimony of the debtor Lisa Ann Betzner at the adversary proceeding trial held on July 22, 2008, was ordered by the plaintiff and was submitted to the court on August 7, 2008.

used to pay Swingsets's debts. *See* Tr. at 20. She also used credit cards to obtain cash advances for the operation of the business and to pay payroll and vendors. *See id.* at 21. The debtor explained that, when outstanding checks bounced and vendors stopped accepting the company's checks, she needed cash advances to pay her suppliers, as well.

The debtor testified that her sister Darlene wrote the letter informing customers that Swingsets had changed its name to Premier. (*See* Ex. 30). However, she said she herself never approved or signed the letter, and did not actually see it until now, at the trial. *See* Tr. at 24. At first she said that Darlene probably sent the letter; then she changed her mind and said that, to her knowledge, her sister did not send out the letter. *See id.* She also insisted that Darlene, not she, is the owner of the new company. She explained that her father-in-law "was part of the startup and the ownership and that some of the information along the line got mixed up and our [Lisa and Jim Betzner's] address ended up on the paperwork." Tr. at 23. The debtor also explained that she gave the Camaro to her nephew, in 2001 or 2002, but that he returned it to her because she did not have a vehicle. When reviewing the list of missing inventory and office equipment (*see* Ex. 12), the debtor stated that she possessed none of those assets and therefore did not omit them on her Schedule B. She believed that her sister bought perhaps \$5,000 of the \$69,000 of items sold at auction after Swingsets closed. *See* Tr. at 33-34. She claimed that she provided to her lawyer a list of all her assets and liabilities. However, she conceded that she was not careful in reviewing her bankruptcy schedules and did not notice which assets were missing. *See* Tr. at 35.

On cross-examination, the debtor testified that she learned about the Exhibit 30 letter in late February, when her sister Darlene called her. Although Darlene might have sent the letter, the debtor insisted that Darlene, and not the Betznors, was taking over the swing set business. "So, I don't know that she would have actually wanted to tell the [dealers] that we [Lisa and Jim] were actually gonna take it over." Tr. at 38. The defendant admitted that she knew about the letter before her 341 meeting; when plaintiff's counsel had asked her if anyone would draft such a letter, the debtor had answered "no." She explained, at trial, that she had answered "no" because she "really didn't think [Darlene] sent it out." Tr. at 41. Then she was asked why she changed her story

at the 2004 examination, testifying that she had forgotten about the letter. She stated that she only remembered the letter today, at the trial. She acknowledged that she had read and signed her lawyer's bankruptcy information form, and knew that she must not lie on the form. She responded that she felt in her heart that the form was true and that she corrected anything wrong that was brought to her attention. Tr. at 44.

The debtor was also asked to explain why she stated under oath that she closed the business on January 1, 2007 (on her SFA and at the 341 meeting), but testified at the 2004 examination that the business doors were open after that. She stated, "Because basically I, in my head, had walked away from the business and as far as doing business with any of the customers, and I basically had it in my head that I was done. And I was trying to keep it on a fiscal year. I really don't know why I said that. . . . I didn't really think that . . . it was that big a deal, and who cares if their – if we were out there for two months – . . . twiddling our thumbs." *Id.* at 39. She insisted that she "was not trying to pull the wool over . . . anybody's eyes" and that she did not know she was supposed to amend her schedules or SFA when she realized there was a problem. *Id.* at 40.

When the Bank reminded the debtor that it had a lien on all the debtor's property, including the cash deposits made by the company into the Wells Fargo and First Farmers accounts, she acknowledged the Bank's lien and admitted that she did not give the money back to the Bank. Nevertheless, she claimed that she wrote checks on those accounts legitimately. Plaintiff's counsel then read off some of the checks: a \$1,505.00 check to herself; a \$5,000.00 check to her husband; checks in the amounts of \$5,000.00, \$1,000.00, \$500.00, and \$1,717.09 to her sister-in-law. *See* Tr. at 47. He asked how those checks could be legitimate. She answered that they were written to pay vendors. In her view, she had the right to pay the vendors, rather than the bank, after the business closed, because the Bank wasn't taking possession until she filed bankruptcy, and she could manage and distribute the Swingsets funds until then. She could not explain why she paid vendors rather than the Bank. *See* Tr. at 49.

Asked about the checks written between January and March 2007, the defendant testified that her sister-in-law Amy kept the office together and wrote most of those checks.<sup>6</sup> She recognized Amy's handwriting on the deposit slip, she said. Although she first testified that she had no idea where the deposited amounts came from, she admitted that they must have been deposits of accounts receivable collected during that period of time. She stated that she had no idea whether the real estate deed was transferred to Swingsets Realty, LLC, or whether the title to the real estate was held by Swingsets, Inc., or by her father. She also said she had no recollection of the 2006 appraisal of the real estate until the 2004 examination; moreover, she thought that the \$670,000 valuation was only an estimate. She testified that, in her mind, "it's not worth anything." *Id.* at 57. The debtor admitted that, although she had not listed it on her bankruptcy schedules, she always held the title to the Camaro; her nephew gave it back to her after she filed bankruptcy and after her Excursion was repossessed.

The defendant testified that she was familiar with the specification sheet for Kidz Klubhouse (Ex. 24) found on the Swingsets's computer. She said it was prepared for Swingsets; the company intended to sell it, had it stayed in business. She said that Premier had the same set, with the same name, and "we didn't think there's something wrong with that." Tr. at 61. When told that the "Kidz Klubhouse" belonged to Swingsets and that the Bank was entitled to all of the property rights, trade names, and product names belonging to Swingsets under the security agreement, the defendant replied that there was not a patent on the products and that everyone shared the sets. *See* Tr. at 62. At first she testified that Premier borrowed the name "Kidz Klubhouse" from Swingsets; she then stated that she took the name and the product over to Premier; finally, she suggested that Darlene took the Klubhouse to be sold by Premier. *See id.* Nevertheless, the defendant admitted that she knew that anything her employees generated while at Swingsets would belong to Swingsets, as well.

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<sup>6</sup> The court compared the signatures on the First Farmers checks (attached to Exhibit 12) with Lisa Betzner's distinctive signature on the Commercial Security Agreement (attached to Exhibit 1). Although it does not claim to be a handwriting expert, the court is skeptical of the defendant's assertion that her sister-in-law, and not the defendant herself, signed most of those checks. Nevertheless, the court makes no finding of fact thereon.

After the trial, the parties filed Proposed Findings of Fact and Conclusions of Law. They were given time to respond to the other side's initial post-trial briefs, as well. Thereafter, the court took the matter under advisement.

### Discussion

The chapter 7 discharge gives a “fresh start” to the “honest but unfortunate debtor.” *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 654, 659, 112 L.Ed.2d 755 (1991) (citation omitted). Courts therefore are required to grant a chapter 7 debtor a discharge unless he falls into one of the exceptions listed in § 727 of the Bankruptcy Code. If the debtor concealed or destroyed financial records or lied under oath with the intent of defrauding creditors, for example, he can be denied a discharge pursuant to § 727(a)(3) or (4)(A). Nevertheless, courts construe objections to discharge strictly against creditors and liberally in favor of the debtor. *See In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996); *Damon v. Chadwick (In re Chadwick)*, 335 B.R. 694, 700-01 (W.D. Wis. 2005). The creditor objecting to the discharge has the burden of proving grounds for the denial of discharge by a preponderance of the evidence. Fed. R. Bankr. P. 4005; *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir. 1999). Once the creditor proves the elements of its objections to discharge, “the burden of production shifts to the debtor who then must come forward with a ‘credible explanation of his actions.’” *Neary v. Stamat (In re Stamat)*, 395 B.R. 59, 69 (Bankr. N.D. Ill. 2008) (quoting *In re Costello*, 299 B.R. 882, 892 (Bankr. N.D. Ill. 2003)). The court turns first to the Bank's contention that the defendant should be denied a discharge under § 727(a)(3).

Section 727(a)(3) provides that a debtor is entitled to a discharge unless he or she “has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained.” 11 U.S.C. § 727(a)(3). This subsection requires that a debtor produce “a true presentation of the debtor's financial affairs.” *In re Scott*, 172 F.3d at 969 (citations omitted). The debtor's records must provide “enough information to ascertain the debtor's financial

condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.” *Union Planters Bank, N.A., v. Connors*, 283 F.3d 896, 899 (7th Cir. 2002) (quoting *In re Martin*, 141 B.R. 986, 995 (N.D. Ill. 1992)). No showing of fraudulent intent is necessary under this section. *See id.* at 900; *In re Scott*, 172 F.3d at 969; *In re Chadwick*, 335 B.R. at 701-02.

The Bank demonstrated that the debtor concealed and attempted to destroy computerized data. It asked the defendant for the Swingsets financial records shortly after the defendant filed bankruptcy. The defendant had testified at her Rule 2004 examination that all financial records were kept on the Corporation’s computers. However, she provided no further information. She stated that she could not remember her code to bypass the security system, her user name, her password, or the location of the back-up tapes, and in fact could not remember things any more. *See* R. 42, Ex. 14 at 113-17. When the Bank searched those computers, it discovered that all the data, including the debtor’s business and financial records, had been deleted from the computer system. At trial, Tom Polk, a qualified data recovery expert in computer technology, stated that the deletion occurred on March 1, 2007, and that, in his opinion, it was intentional. He explained, credibly and in detail, why the deletion could not have been accidental. Despite the deletion, the data were not destroyed, and he was able to retrieve the Corporation’s financial and business information recorded between January 1 and February 28, 2007.

The court finds that the Bank has proven, by a preponderance of the evidence, that the debtor attempted to destroy business and financial records that were stored on her computers. It also proved that the computerized records contained information relevant to the debtor’s financial condition or business transactions. The burden then shifted to the debtor to justify the disposal of those records or the lack of adequate record keeping. *See Smithbuilt Fin’l, LLC, v. Hensley (In re Hensley)*, 381 B.R. 699, 706 (Bankr. N.D. Ind. 2007).

The defendant attempted to justify the disappearance and retrieval of computer records by stating that she herself was computer illiterate, did not delete any information from the computers, and provided information to the best of her ability. However, § 727(a)(3) requires much more from a debtor; it “places an affirmative duty

on the debtor to create books and records accurately documenting [her] business affairs.” *In re Scott*, 172 F.3d at 969 (citing *In re Juzwiak*, 89 F.3d at 429). The debtor mentioned that her sister-in-law handled financial matters, but did not produce her as a witness at trial to clarify the circumstances. As a Swingsets employee, however, the sister-in-law was an agent appointed by the debtor (who was the President of Swingsets) to manage the company’s financial records, and therefore the debtor still was responsible for any failure to keep those records. See *Buckeye Retirement Props. of Ind., LLC, v. Tauber (In re Tauber)*, 349 B.R. 540, 547 (Bankr. N.D. Ind. 2006) (citing *Collier on Bankruptcy*, ¶ 727.02(1) (15th Ed. rev.)). In the end, the defendant offered no refutation of the expert’s opinion that Swingsets’s computer records were deleted intentionally and no plausible explanation to justify the occurrence. The court determines that the defendant thus failed to establish that the attempted destruction of the records was justified. See *Lassman v. Keefe (In re Keefe)*, 380 B.R. 116, 121 (Bankr. D. Mass. 2007) (determining that the debtor’s destruction of personal and business records, by discarding a bin of bank records and project folders, was unjustified under § 727(a)(3)); cf. *United States v. Krause (In re Krause)*, 367 B.R. 740 (Bankr. D. Kan. 2007) (finding that debtor’s destruction of electronically stored evidence on his computers was spoliation; imposing sanctions).

In her post-trial Proposed Findings of Fact and Conclusions of Law, the defendant asserted that she, as an individual, even though admittedly “an insider” and one who “happens to be a part owner and shareholder of a corporation,” did not need to turn over the books and records of the Corporation. R. 43 at 27-28. She relied for support of that proposition upon *Fowler v. Shadel*, 400 F.3d 1016 (7th Cir. 2005). See R. 43 at 28. The court notes that Lisa Betzner is similar to the chapter 7 debtor Fowler, who was the sole stockholder and employee of his own trucking corporation. However, the issues differ. In *Fowler*, the court considered the trustee’s objection to the debtor’s claimed exemption in vehicles owned by the business. The bankruptcy court determined that the debtor’s interest in the corporation or its property did not give rise to an exemption of the corporate property. See *id.* at 1017. The district court and the court of appeals affirmed that decision.

In this case, in contrast, the issue is not exemptions or the distinction between corporate assets and assets of the debtor. The individual debtor herein is the President and 100% owner of Swingsets; ownership and management of the Corporation are substantially identical. *See First of America Bank, N.A., v. Norwest Bank, Indiana, N.A.*, 765 N.E.2d 149, 152 (Ind. App. 2002) (describing “closely held corporations”). In that capacity, she signed a Commercial Security Agreement with the Bank, securing the Bank’s loan to Swingsets. *See* Ex. 1, attached Exhibit C. The property securing the Bank’s loan, as described in the Agreement, included all assets of Swingsets, used for business and personal purposes. The debtor also is the guarantor of that loan. *See* Ex. 1, attached Exhibit D; *see also* Ex. 2, “Decree of Foreclosure” of Wabash Superior Court, ¶ 10 (“Defendant Lisa A. Betzner personally guaranteed payment of every debt, liability and obligation owed plaintiff [the Bank] by defendant Swingsets, Inc.”). As guarantor, she has “promise[d] to answer for the debt” of Swingsets. *S-Mart, Inc. v. Sweetwater Coffee Co., Ltd.*, 744 N.E. 2d 580, 585 (Ind. App. 2001) (discussing liability under guaranty contracts). There is no question that the debtor is obligated to pay Swingsets’s debt.

The court determines that the defendant, as president, CEO, and sole shareholder of the Corporation, and as a business woman holding a university degree in business, was responsible for the Corporation’s assets, including the financial and business data on its computers. “Where debtors are sophisticated in business, and carry on a business involving significant assets, creditors have an expectation of greater and better record keeping.” *Union Planters Bank*, 283 F.3d at 900 (quoting *In re Scott*, 172 F.3d at 970). The defendant’s many excuses compelled the Bank to reconstruct the debtor’s financial records by hiring a computer data recovery expert. However, § 727(a)(3) does not make such a demand on creditors. *See In re Juzwiak*, 89 F.3d at 428 (“[C]ourts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor’s affairs.”) (citations omitted). The plaintiff’s request to deny the debtor’s discharge pursuant to 11 U.S.C. § 727(a)(3) is granted.

The Bank also claimed in its Complaint that the defendant’s discharge should be denied under § 727(a)(4)(A) because the defendant “knowingly and fraudulently, in or in connection with the case, made a false

oath or account.” Under this section, the plaintiff has the burden of proving that “(1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with intent to defraud; and (5) the statement related to the bankruptcy case in a material way.” *In re Tauber*, 349 B.R. at 558. Once the plaintiff makes such a proof, the burden shifts to the defendant to offer credible evidence to explain her statements. *See In re Hensley*, 381 B.R. at 703. “Although the burden of proof rests on the creditor at all times, the debtor cannot prevail if he is unable to offer credible evidence after the plaintiff has established a prima facie case.” *In re Stamat*, 395 B.R. at 73. “The purpose of § 727(a)(4) is to ‘enforce the debtor’s duty of disclosure and to ensure that the debtors provide reliable information to those who have an interest in the administration of the estate.’” *Id.* (quoting *In re Broholm*, 310 B.R. 864, 879 (Bankr. N.D. Ill. 2004)).

The Bank successfully proved, through the defendant’s testimony, that the defendant knew she had signed her petition, schedules, and SFA under oath; she also acknowledged that she was testifying under oath at the 341 meeting, the Rule 2004 examination, and the trial. “Filing of false schedules with material omissions or representations with an intent to mislead creditors as to the debtor’s financial condition constitutes a false oath under § 727(a)(4).” *Id.* (citing *Broholm*, 310 B.R. at 879). “The offense of making a false oath is complete when a knowingly false schedule is sworn to and filed and the offense is not expunged by recanting.” *In re Chadwick*, 335 B.R. at 702 (citing *United States v. Young*, 339 F.2d 1003, 1004 (7th Cir. 1964)). The Bank demonstrated that the debtor failed to include on her schedules her ownership of a 1986 Camaro, a \$90,000 loan owed to the defendant by Swingsets, and an Edward Jones life insurance policy. She omitted, as well, a debt to her father of more than \$355,000 (for her purchase of stock in the Corporation) and the judgment debt owed to the Bank. *See Clean Cut Tree Serv., Inc., v. Costello (In re Costello)*, 299 B.R. 882, 899 (Bankr. N.D. Ill. 2003) (requiring a debtor to disclose all ownership interests).

The Bank also proved that the debtor’s sworn statements contradicted each other and thus that some statements had to be false. For example, the defendant misstated her ownership interest in Swingsets Realty,

LLC. The Articles of Organization, filed with the State of Indiana, reported that the debtor and her husband each owned 50% of the LLC. (*See* Ex. 19.) On Schedule B, however, the debtor stated that she had a 15% interest in the company; on her SFA, she did not disclose any interest in the company. Testifying at the 341 meeting, she said she held a 15% interest and her husband owned 85%; at the 2004 examination and at trial, she testified that she did not know how much of the company she really owned. She also misstated the value of the LLC: On Schedule B, she stated that her 15% interest was worth \$500,000; at the 341 meeting, she testified that the entire Corporation was worth \$500,000. She later testified, at the 2004 examination, that there were two appraisals, in 2002 and 2006, and that the value of the LLC had increased to \$670,000.

The defendant's testimony about other assets changed from one "sworn" statement to another. For example, on her SFA, she stated that she had made no transfers outside the ordinary course of business within the last two years. However, at her 341 meeting, she testified that she sold a John Deere tractor for \$10,000 within two months of filing bankruptcy, and that she paid the IRS \$4,000 of it and kept the rest for living expenses. Then, at the 2004 examination, she testified that she sold the tractor to her father-in-law for \$6,900, the balance owed on the tractor, and that she had not paid the IRS anything from those proceeds. These reports conflict with the defendant's personal financial statement given to the Bank in March 2006 (*see* Ex. 20), which listed the John Deere tractor at \$15,000 and included other assets that were not included on the defendant's Schedule B. Moreover, later in the 2004 examination, the debtor testified that she did not know when or to whom she gave away or sold those assets.

The court recognizes that a debtor may not remember to include every asset she owns on her bankruptcy schedules, and the omissions may be mere ministerial mistakes. *See, e.g., In re Stamat*, 395 B.R. at 73-74 (excusing defendants' omission of two handguns and debtor's part-time salary from schedules because explanations were given and because omission was neither material nor made fraudulently). "However, although not every single item of assets need be schedule[d] and valued, 'there comes a point when the aggregate errors and omissions cross the line past which a debtor's discharge should be denied.'" *Id.* at 74 (quoting *In re Costello*,

299 B.R. at 899)). The court finds that the large number of undeclared or misstated assets has passed that point. The debtor, it appears, had no recognition of her duty to disclose and to provide reliable information.

When considering whether the debtor made the false statements with intent to defraud, the court follows this circuit's precedent, as succinctly set forth recently by Bankruptcy Judge Schmetterer:

Fraudulent intent may be inferred from circumstantial evidence or by inferences based on a course of conduct. Moreover, if a debtor's bankruptcy schedules and statements indicate that the debtor is recklessly indifferent to the truth, the objecting creditor does not have to offer any additional evidence of fraud. The cumulative effect of a number of false oaths by the debtor with respect to a variety of matters establishes a pattern of reckless and cavalier disregard for the truth by the debtor.

*In re Stamat*, 395 B.R. at 74 (citations omitted). The final element of § 727(a)(4)(A) is materiality: The false statements must relate in a material way to the bankruptcy estate by involving the discovery of assets, the disposition of the debtor's property, or her entitlement to discharge. *See id.*

In the court's view, the Bank established all five elements of § 727(a)(4)(A) when presenting evidence of the debtor's multiple sworn statements concerning the closing date of the Corporation. She stated in her SFA and at the 341 meeting that the business ceased on January 1, 2007; however, in her Rule 2004 examination, she testified that the Corporation continued to operate until February 28, 2007. She also testified that she was doing nothing during those two months; she did not recall conducting any sales, keeping any employees, or paying creditors during those months. She stated that she did not have any idea when she last was on the business premises and that she did not know where the 2006 or 2007 payroll records were located. However, after the 2004 examination, the Bank discovered that over \$103,000 had been paid out of the Corporation's accounts at Wells Fargo and First Farmers between January 1 and March 1, 2007.

The plaintiff established, by a preponderance of the evidence, that the defendant falsified her SFA when she stated that the Corporation ceased operations on January 1, 2007. She also testified falsely at the 341 meeting when she confirmed the closing date of January 1, 2007, and at the 2004 examination when she testified that nothing was going on between January 1 and March 1, 2007. At trial, she testified that she did not "really think that . . . it was that big a deal . . . . And who cares if . . . we were out there for two months twiddling our

thumbs.” Tr. at 39. The Bank’s evidence of continuing financial transactions for those two months – including the many checks written to the debtor herself, to family members, and to vendors – clearly proves that the debtor knew, when she filed her petition and schedules on March 1, 2007, that Swingsets did not close on January 1, 2007, and that no thumb-twiddling was going on in the ensuing months. In addition, the Bank’s evidence of the attempted destruction of the debtor’s computer records is proof that the debtor intended to defraud the Bank by concealing two months of continuing personal and business transactions that clearly involved the disposition of the debtor’s property in a material way.

One last course of deceptive conduct must be discussed. The court finds that the defendant falsified information concerning her interest in Premier, the gym set company established on February 26, 2007, three days before the defendant filed bankruptcy. The defendant testified, at the 341 meeting and 2004 examination, that she had nothing to do with its organization and knew nothing about any efforts to divert the Corporation’s business to Premier. However, the company’s Articles of Organization show the defendant’s home address as Premier’s principal office and James Betzner (her husband or father-in-law) as its resident agent. Both she and her husband worked for the Corporation until it closed and began working for Premier one month later.<sup>7</sup> The Corporation’s and Premier’s product lines are virtually identical. For example, the “Kidz Klubhouse” was made first by the Corporation and now by Premier. (*See* Ex. 23, 24, 25.) They sell to many of the same buyers and buy from many of the same suppliers. At her 2004 examination, the defendant repeatedly denied being instrumental or involved in a plan to change the Corporation’s name to Premier or to transfer assets, customers, or business to Premier. However, the Bank recovered from the Corporation’s computers a letter written with a “Premier” letterhead, and with Lisa Betzner’s name on the signature line, which told its recipients that “Swingsets, Inc. has

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<sup>7</sup> The court notes that, on Schedule I of her bankruptcy petition, the debtor stated that she and her husband were unemployed and that her income was anticipated to decrease “when unemployment runs out.” Shortly after she filed bankruptcy, however, she and her husband began working for Premier. The court therefore continues to question the debtor’s credibility and honesty in the filing of all her schedules.

changed its name” and that “Lisa and Jim Betzner are forming a new company that will be known as Premier Play Systems, LLC.” Ex. 30.

After a review of the entire record in this case, the court finds that the defendant’s testimony throughout the bankruptcy proceeding was unreliable and incredible. Her false statements and omissions were so numerous and egregious that they established “a pattern of reckless and cavalier disregard for the truth.” *In re Stamat*, 395 B.R. at 74; *see also In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (explaining that “reckless disregard” is “the equivalent of knowing that the representation is false and material”). The court finds, therefore, that the plaintiff successfully presented evidence at trial justifying the denial of the defendant’s discharge under §§ 727(a)(3) and (a)(4)(A), and that the defendant failed to present credible evidence in response to the plaintiff’s establishment of a prima facie case.

The plaintiff raised alternate grounds for denying the debtor’s discharge or for excepting its debt from her discharge, but the court finds that two grounds are sufficient in this case. The relief sought in the plaintiff’s Complaint is granted, and the debtor’s discharge is denied under §§ 727(a)(3) and 727(a)(4)(A).

#### CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the relief sought in the Complaint Objecting to Discharge and to Determine Dischargeability of Debt, brought by the plaintiff First Federal Savings Bank against the defendant Lisa Ann Betzner. The court grants judgment in favor of the plaintiff and sustains the plaintiff’s objections to discharge. The discharge of the defendant Lisa Ann Betzner is denied pursuant to 11 U.S.C. § 727(a)(3) and § 727(a)(4)(A).

SO ORDERED.

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/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT