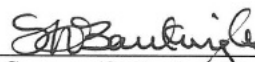




SO ORDERED.

SIGNED this 12th day of February, 2019

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

WILLIAM F. BELSER

Debtor

JEFFREY THOMPSON and
MINDY THOMPSON

Plaintiffs

v.

WILLIAM F. BELSER

Defendant

Case No. 3:17-bk-32141-SHB
Chapter 7

Adv. Proc. No. 3:18-ap-3015-SHB

**MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Jeffrey and Mindy Thompson (“Plaintiffs”) filed this action against Defendant William F. Belser (“Defendant” or “Debtor”) objecting to Defendant’s discharge under 11 U.S.C. § 727(a)(2) (concealment), (a)(3) (failure to maintain records), (a)(4) (false oaths), (a)(5)

(failure to explain), and (a)(6) (refusal to obey a lawful order of the court).¹ Plaintiffs hold an unliquidated claim in Debtor's Chapter 7 case relating to their state-court lawsuit against Debtor and two employees of Debtor's solely owned corporation, CastleRock Pools, Inc., for breach of contract, negligent construction, fraudulent misrepresentation, negligent misrepresentation, negligent hiring, negligent supervision, respondeat superior, conversion, and violation of the Tennessee Consumer Protection Act. [Claim No. 2-1.] Plaintiffs' state-court complaint sought to pierce the corporate veil, joint and several liability among the defendants, and punitive damages. [*Id.*]

Before the Court is Plaintiffs' Motion for Summary Judgment. [Doc. 19.] Although Plaintiffs' complaint asserts that the Court should find that Defendant is not entitled to a discharge under 11 U.S.C. § 727(a)(2), (3), (4), (5), and (6), Plaintiffs move for summary judgment only on their claims under § 727(a)(2), (3), and (4)(A).

I. FACTS

The following facts are undisputed for purposes of Plaintiffs' motion:²

1. Plaintiffs possess pending unliquidated claims against the debtor as set forth in their Proof of Claim filed on April 9, 2018 [Claim #2] in this bankruptcy estate.
2. The debtor filed for bankruptcy protection on July 11, 2017. Case Number 17-32171-SHB.
3. Debtor is the sole stockholder of CastleRock Pools, Inc. (hereinafter "CastleRock") and has owned and operated this business for approximately 20 years.

¹ Plaintiffs also filed a separate adversary proceeding (Adv. Proc. No. 3:18-ap-3027) seeking to liquidate Plaintiffs' claims against Defendant and for a determination that such claims are nondischargeable under 11 U.S.C. § 523(a)(2) and/or (a)(6). That action has been stayed pending the outcome of this adversary proceeding. [*See* Adv. Proc. No. 3:18-ap-3027, Doc. 8 (July 18, 2018).]

² The facts recited are quoted verbatim from Plaintiff's [*sic*] Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Plaintiffs' Statement of Facts") [Doc. 25] and Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts [Doc. 32] and reflect the numbering of the paragraphs used by the parties. Because Defendant did not dispute the recited facts, the citations to the record have been omitted.

4. CastleRock is a pool construction, service and maintenance business.
5. At all times pertinent hereto CastleRock has maintained an operating account with First Tennessee Bank, account number 7727. The debtor produced CastleRock bank statements for August 1, 2010 through January 31, 2018.
7. In response to the question of where he keeps the total of CastleRock's revenue, the debtor testified that he used to keep the total of his revenue "on QuickBooks but had a computer crash few months back."³
8. The debtor testified that he believes his computer crashed sometime in the summer of 2017, that he had no back-up and no printouts but that he would go back and check his contracts and a notebook where he has "tracked it since the computer went down"; that he keeps a running total of everything written down on a legal pad.
9. The debtor testified in November 2017 that he keeps contracts w/CastleRock clients in a filing cabinet in his office in the basement of his home.
10. The debtor testified in November 2017 that he keeps up with payments on contracts based upon the payment schedule listed on the contract.
11. The debtor was requested to provide as late filed exhibit 19, the name, address, and phone number of CastleRock customers for the last five years, including statement of work that was done. The debtor acknowledged having some of the files in his possession and the debtor was requested to produce "what is in the possession or constructive possession of Mr. Belser, his client files, whether electronic or otherwise."⁴
12. The debtor testified in January 2018 that the customer contracts were in files stored on the shelves and were destroyed by water damage and that his computer crashed earlier in 2017 and before he filed for bankruptcy.
13. In response to whether the client contracts are located in the filing cabinet, or were they located on a shelf, the debtor testified "Some of both. ... There might be one or two in the filing cabinet", and that there might be some in existence.
14. The debtor testified that in order to keep up with the cost of supplies at the end of every year he gets a copy of purchases from the same four or five suppliers he always uses and he gives these printouts to his accountant to calculate the cost of goods for his tax returns; that it is his standard practice to at the end of the year to furnish the accountant with total

³ Defendant did not dispute these facts but added that "when his computer crashed he didn't continue to keep his revenue on QuickBooks." [Doc. 32 at ¶ 7.]

⁴ Defendant did not dispute this fact but noted that the Court never ordered Defendant to provide any of the "late-filed" requests. [Doc. 32 at ¶ 11.] Defendant is correct. After the Court noted that late-filed requests were not enforceable absent a formal discovery request, Plaintiffs withdrew the motion to compel Debtor and CastleRock Pools, Inc. to produce late-filed exhibits to the 2004 examination. [See *In re Belser*, No. 3:17-bk-32141-SHB, Docs. 84, 99.]

revenue, total cost of goods, total labor; and that this would be part of the documentation supplied for the accountant to back up the tax returns.⁵

15. The debtor was requested to produce as late filed exhibit four (4) “the supplier totals from 2012 to 2016 that are used in the calculation of the sell of goods that are part and parcel of the tax returns to determine the overall revenue of the -- the company. Okay.”⁶
16. The debtor did not produce late filed exhibit four (4) showing list of supplies purchased for the last five years. The debtor produced the attached late filed list of suppliers.⁷
17. The debtor testified in November 2017 that he keeps a receipt book for service work, and that he keeps the current one in his truck but that he does not necessarily keep the older ones.
18. The receipt book was requested as a late-filed exhibit five (5).⁸
19. The receipt book was never produced.⁹
20. Debtor’s counsel’s March 20, 2018 Objection to Motion by Jeff and Mindy Thompson to Compel, paragraph 5, states “the debtor does not have the requested receipt book in his possession. Debtor testified at his 2004 examination he thought the receipt books was in his truck, however, when he later checked, he learned that it was no longer in his truck. The receipt books are not something the debtor routinely keeps therefore he believes that he had thrown it away. This is something the debtor routinely does and did not do this in any attempt to obstruct, prevent or defeat the Thompson’s as they stated.”
21. Ms. Hearn-Rushton asked as a late-filed exhibit six (6) for the notebook with his accounts receivable.

⁵ Debtor disputed these facts, even though the Court finds that the statements accurately reflect his deposition testimony, which was that he “get[s] a printout from the suppliers.” [Doc. 19-5 at p. 72.] Debtor’s affidavit supplied in opposition to the Motion for Summary Judgment states, “My standard practice is to contact my suppliers at the end of every year and either have them provide a total amount over the phone or get a statement on the amount I paid to that supplier during the year. Once I receive the accounts paid from my supplier, I supply this information to my accountant to use in preparing my tax returns.” [Doc. 30-3 at ¶ 5.] Although the Court does not find these facts material to the summary judgment determination, the Court also notes that Sixth Circuit courts have “long held that a ‘party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony.’” *Bush v. Compass Group USA, Inc.*, 683 F. App’x 440, 448 (6th Cir. 2017) (quoting *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986)).

⁶ *See supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

⁷ *See supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

⁸ *See supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

⁹ *See supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

22. The notebook was never produced.¹⁰
23. The debtor testified in November 2017 that he records the CastleRock checks and deposits in the checkbook register.
24. The debtor testified in January 2018 in response to a request for CastleRock checking account ledgers for the past five years: “after we check them off the bank statements, we don’t keep them”). “We threw them away”.
25. On January 31, 2018 the debtor was requested to produce any and all receipts organized by tax year for CastleRock Pools, Inc., tax returns from 2014 to 2017 and the 2017 tax return when available.
26. The debtor’s counsel filed a response stating “58. The debtor does not have any receipts to provide that were used to prepare tax returns for the years 2014 -2017.”¹¹
27. The debtor testified in January 2017 that he had typed the December 30, 2017 corporate minutes on the only computer he’s got; that he got another computer after the other one died.
28. The debtor testified that he doesn’t keep any business records on this new computer.¹²
30. The debtor was ordered to produce personal tax returns for 2015 and 2016 for his 2004 Examination.
31. The 2015 and 2016 tax returns for CastleRock Pools were subpoenaed in connection with the 2004 Examination of CastleRock Pools, Inc.
32. The debtor produced as late-filed exhibits personal income tax returns for 2014 through 2016 and CastleRock Pools, Inc. tax returns for 2013 through 2016.
33. The debtor was asked to produce as late filed exhibit 16 copies of all 1099s and W-2s issued by CastleRock Pools since 2012.¹³

¹⁰ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

¹¹ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

¹² Paragraph 29 of Plaintiffs’ Statement of Facts asserts that “[D]ebtor testified that he used the new computer for billing but doesn’t keep any of the records and throws them away.” Debtor disputes this assertion, and the Court’s review of Debtor’s testimony cited by Plaintiff reveals that Plaintiffs’ statement does not accurately paraphrase Debtor’s testimony, which was that he used the word processor for “letters or proposals” but not “billing.” [Doc. 19-7 at p. 73.]

¹³ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

34. In response, the debtor produced 1099's and W-2's for 2014, 2015 and 2016.¹⁴
36. The debtor testified that he is married to Tracy Ibson Belser.
37. The debtor testified that Tracy Belser and her sisters run Century Pools.
38. The debtor testified that he has no ownership interest in Century Pools.
39. The debtor testified that Tracy Belser is not an employee of Castlerock Pools; that "there than maybe helping me write some checks to pay bills or something," she has never been affiliated with CastleRock.
40. Since 2011, Tracy Belser has signed checks on the CastleRock Pools account payable to Tracy Belser and totaling \$6948.80.¹⁵ When asked why, the debtor states "maybe she is reimbursing herself for something I don't know."¹⁶
42. The debtor testified that CastleRock is the only business with which he is affiliated and that he owns no stock in any other business.
43. The debtor upon being shown the Tennessee Department of Commerce information for Alpha One Construction acknowledged being the sole shareholder of that entity.
44. The debtor testified that he set up Alpha One because "we were going to set up another business to do some roofing and build decks and things, and it -- that's why we registered the name and even started a website, but then we -- it didn't work out, so we've never done anything with it." When asked about why he had continued to file annual reports

¹⁴ Defendant disputed paragraph 35 of Plaintiffs' Statement of Facts because, although the "documents were requested [they] were never [o]rdered to be produced" [Doc. 32 at ¶ 35] so that it is inaccurate to state that the "tax return packages were . . . incomplete" [Doc. 25 at ¶ 35]. Debtor was ordered to produce supporting documents for his personal tax returns and schedules for the years 2010 through 2016 [*In re Belser*, No. 3:17-bk-32141-SHB, Doc. 41 at p. 5], but he was not ordered to provide such records for CastleRock. Plaintiffs asked for production of "[a]ny and all receipts organized by tax year, for [CastleRock] returns from 2014 to 2017 and the tax return for 2017 when available" as a late-filed exhibit to Defendant's January 31, 2018 Rule 2004 examination [*In re Belser*, No. 3:17-bk-32141-SHB, Doc. 84-3 at p. 3]; however, Plaintiffs failed to formally request such documents and withdrew the motion to compel Debtor and CastleRock to produce late-filed exhibits to the 2004 examination. [*See In re Belser*, No. 3:17-bk-32141-SHB, Docs. 84, 99.] Although it is possible that Defendant failed to produce complete *personal* tax returns, the Court is unable to determine the accuracy of Plaintiffs' assertion that the "tax return response packages were . . . incomplete" [Doc. 25 at ¶ 35] and, thus, deems it disputed.

¹⁵ Defendant responded that he cannot confirm the accuracy of the total because Plaintiffs failed to cite to the bank statement from which the information may be obtained. [Doc. 32 at ¶ 40.]

¹⁶ Defendant disputed paragraph 41 of Plaintiffs' Statement of Facts, disagreeing with the wording because the quoted response did not concern reconciliation of "the account" as asserted by Plaintiffs. The Court having reviewed the testimony cited by Plaintiffs, finds that Defendant is correct in his description of the question to which he responded so that the record does not support Plaintiffs' assertion. [*See Docs.* 19-7 at p. 241-42; 25 at ¶ 41; 32 at ¶ 41.]

with the Tennessee Secretary of State, Defendant responded: “We are letting it go after this year Not doing anything with it. It’s a name.”¹⁷

47. The debtor through counsel, on March 20, 2018, filed” Objection to Motion by Jeff and Mindy Thompson to Compel”, stating “There are no late filed requests for 22 to 33”.
48. The debtor was requested to provide any and all bank statements for Alpha One Construction. The debtor produced in December 2017 one statement for September 2017 and, on March 20, 2018, produced late filed exhibit 14 consisting of TVA Credit Union Bank account # 3738, statements for Alpha One Construction for the period of January 1, 2017 through May 31, 2017.
49. On June 30, 2017, CastleRock Pools, Inc. check number 913[6] in the amount of \$5000 payable to Alpha One Construction cleared CastleRock Pool’s account with First Tennessee Bank.¹⁸
50. The debtor’s bankruptcy schedules A/B, line 19, filed on July 11, 2017 do not reflect an ownership interest in CastleRock Pools, Inc.
51. The debtor’s bankruptcy schedules A/B, line 19, filed on July 11, 2017 do not reflect the existence of or any ownership interest in Alpha One Construction.
52. The debtor testified at his 341 meeting of creditors on August 15, 2017 that he owned a fifty percent interest in CastleRock Pools, Inc. with Tracy Belser.
53. The debtor amended his bankruptcy schedules A/B on August 22, 2017 to reflect a 50 percent ownership interest in CastleRock Pools.
54. The debtor testified in November 2017 that he had always owned a 100% interest in CastleRock Pools, Inc.¹⁹
55. The debtor amended his bankruptcy schedules A/B/C on December 13, 2017 to reflect a 100% ownership interest in CastleRock Pools, Inc.

¹⁷ This sentence is slightly different than paragraph 44 of Plaintiffs’ Statement of Facts to clarify the exact testimony. Defendant disputed that he had testified that he was letting Alpha One go after this year [Doc. 32 at ¶ 44], but he did so testify. [Doc. 19-5 at pp. 126-27.]

¹⁸ Plaintiffs filed Corrections to Plaintiffs’ Statement of Facts on January 2, 2019, correcting the check number after Defendant disputed the fact because the originally recited check number (9134) was payable to Roseberry Baptist Church, not Alpha One Construction. [Docs. 32 at ¶ 49; 33 at ¶ 49.] Defendant did not file any response to Corrections to Plaintiffs’ Statement of Facts; thus, the Court treats the corrected statement as undisputed.

¹⁹ Inexplicably, Defendant disputed this statement [Doc. 32 at ¶ 54] even though his testimony was that, although he had at one time testified that he could not remember but thought that he owned CastleRock “50, 50,” he later corrected that testimony to verify that he owned CastleRock 100%. [Doc. 19-5 at p. 101.]

56. The debtor amended his bankruptcy schedules A/B/C on December 13, 2017 to reflect a 100% ownership interest in Alpha One Construction.
57. Since 2014 the debtor has \$27,600.00 paid out of the CastleRock Pools account to Roseberry, where he testified he goes to Church. The debtor and Tracy Belser signed CastleRock checks payable to Roseberry in 2017.²⁰
58. The debtor's July 11, 2017 bankruptcy schedules, Statement of Financial Affairs, question four (4), do not list any income for employment or from operating a business during the current or two previous calendar years.
59. The debtor was questioned [sic] about his income from CastleRock Pools, Inc. at his meeting of creditors.
60. On August 22, 2017, the debtor amended his response to question four (4) of his Statement of Financial Affairs to list employment or operation of business income for the last three years.
61. The Debtor's bankruptcy schedules A/B filed on July 11, 2017 and amended on August 22, 2017 reflect an ownership interest in two vehicles - a 2010 Toyota pickup and a 2013 Polaris ATV.
62. The debtor upon being shown title information issued by the Tennessee Department of Revenue during his 2004 examination acknowledged an ownership interest in a 2008 GMC Denali.
63. The Debtor amended his bankruptcy schedules A/B/C on December 13, 2017 reflect ownership of a 2008 GMC Denali.
64. The bankruptcy schedules A/B filed on July 11, 2017 and amended on August 22, 2017, reflect no ownership interest in firearms.
65. The debtor was questioned about gun ownership on November 28, 2017 and asked to provide as late filed exhibit 18, a list of all of his guns.
66. The Debtor amended his bankruptcy schedules A/B/C on December 13, 2017 to reflect in question 10 an ownership of guns and gun safe with a value of \$500.00.
67. The debtor provided as late filed exhibit 18 a list of his guns.²¹

²⁰ Defendant failed to specifically dispute this statement [Doc. 32 at ¶ 57]; thus, the Court finds that the statement is undisputed. *See* E.D. Tenn. LBR 7056-1(b).

²¹ Although not material, the parties dispute the date that the late-filed exhibit was provided by Defendant. [Docs. 25 at ¶ 67; 32 at ¶ 67.]

68. The Debtor scheduled in his July 11, 2017 Bankruptcy Schedules E/F, four credit cards and the last four digits of each card's account number:

American Express, account number: 3008, Bal.: \$27,499.23;
Bank of America, account number: 0059, Bal.: \$21,816.59;
Bank of America, account number 1545, Bal.: \$14,393.31; and
Chase, account number: 8468, Bal.: \$5114.13.²²

69. The debtor's July 11, 2017 bankruptcy schedules, Statement of Financial Affairs, question six (6), discloses payments to unsecured creditors Bank of America of \$930.17, and America Express of \$1260.00 within 90 days of the bankruptcy filing.

70. The debtor's personal bank statements on the First Tennessee Bank account do not reflect any payments to American Express or Bank of America within 90 days of filing for bankruptcy protection.

71. CastleRock Pools, Inc. First Tennessee bank statements for April 13 – July 11, 2017 reflect electronic payments to American Express totaling \$2808.50.

72. CastleRock Pools, Inc. First Tennessee bank statements for April 13 – July 11, 2017 reflect electronic payments to Bank of America totaling \$2901.17.

73. CastleRock Pools, Inc. First Tennessee bank statements for January 1, 2017 – January 31, 2018 reflect electronic payments to Kohls, Discover, Sam's Club Mastercard, Wex, AMZ Storecard, Chase, Capital One, WF Business Card, Cabela's Visa, Comenity and others.

74. The debtor testified that he does not have a CastleRock Pools credit card but has had a CastleRock Pools credit card; it was probably listed as CastleRock/William Belser "Because they'd have to be a guarantor on it"; that the card was with American Express but was no longer open; and that it had been closed last spring he believes.

75. The debtor was asked, "Was there any other CastleRock Pools Credit Cards?" The debtor answered, "None that I remember."²³

76. In November 2017, the debtor was requested to provide as a late-filed exhibit 21, the American Express statements for the account listed in the bankruptcy, account 3008.

77. The debtor's counsel stated that it would probably be difficult to obtain the American Express statements since the account had been closed.

²² Defendant does not dispute that he scheduled these four credit cards but notes that he also scheduled a fifth Wells Fargo credit card, with account number 1643 and a balance of \$2,205.34. [Doc. 32 at ¶ 68.]

²³ Debtor disputed Plaintiffs' characterization of the testimony and, instead, quoted from the deposition transcript, which the Court accepts as undisputed.

78. The debtor provided as late filed exhibit 21 American Express Statement – acct. 13008, William F Belser/CastleRock Pools for the period of 5/26/2017 – 6/26/2017, pg. 1 of 9, 3 of 9, 5 of 9, 7 of 9, 9 of 9.²⁴
79. The debtor testified in January 2017, in response to a request for American Express statements that other than the current one we don't keep them, we "threw it away after it'd been paid"; that he did not try and contract American Express to obtain statements.²⁵
80. The debtor was requested to provide as late filed exhibit 34, Chase credit card statements from 2014 to date.²⁶
81. In response, the debtor supplied one page of two for Chase card account #8468, statement dated May 6, 2017 through June 6, 2017, in the name of William F Belser.²⁷
82. The debtor was requested to produce as late filed exhibit 38, any and all info for Amazon Store card.
83. In response the debtor produced one William Belser Chase card account #8468, statement for the period of February 7, 2017 through March 6, 2017.²⁸
84. The debtor was requested to produce as late filed exhibit 39, any and all information relating to the card and/or transaction from the May 31st, 2017, statement on May 25th of 2017 for \$477.35 that says withdrawal, dash, Bank of America, underneath, QRMT PMYT, space, CastleRock, and that's all together, CastleRock.
85. In response, the debtor produced one Bank of America Visa Signature card statement, acct. 1545, in the name of Bill Belser for the period of 7/27/2017 – 8/26/2017.²⁹
86. On January 30, 2018 the debtor stated that he did not know whether he had a Citibank Card account or any Citi bank cards.³⁰

²⁴ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

²⁵ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

²⁶ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

²⁷ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

²⁸ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

²⁹ See *supra* n.4 (concerning the fact that the Court did not order production of any "late-filed" exhibits).

³⁰ Defendant denied Plaintiffs' characterization of his testimony because, as he testified, he could not read the exhibit about which he was asked. [Doc. 32 at ¶ 86.]

87. The debtor submitted as late filed Exhibit 40 regarding check number 1307 for \$4319.19 a Citi Costco Credit Card statement, for March 9 through April 10, 2017, account ending 3312, addressed to William Belser/Castlerock Pools with a balance of \$4319.19.³¹
88. CastleRock Pools, Inc. bank statements reflect the following electronic payments to Citi Costo [*sic*] Card account ending in 3312 between April 1, 2017 and July 11, 2017.
- 5/2 Citicard \$4319.19
6/7 Citicard \$. 897.17
7/7 Citicard \$3456.00
89. CastleRock Pools, Inc. bank statements reflect the following electronic payments to Citi Costco Card account ending in 3312 between July 11, 2017 and January 31, 2018.
- 1/11/18 Citicard \$1200.90 (1/31/18 statement)
12/11/17 Citicard \$ 622.14 (12/29/17 statement)
11/11/17 Citicard \$4423.97 (11/30/17 statement)
9/7/17 Citicard. \$1082.55 (9/29/17 statement)
9/22/17 Citicard. \$2286.86 (9/29/17 statement)
90. On January 30, 2018 the debtor was asked to provide as late filed exhibit 41 any and all information regarding check 3230 that appears to be a Tracy Belser check, drafting from the CastleRock account on May 23, 2017, in the amount of \$35.00.³²
91. In response, the debtor submitted as late filed Exhibit 41 a Bank of America – CastleRock Pools credit card statement account number 0059, for the period 11/27/2016 – 12/26/2016.³³
92. On January 30, 2018 the debtor was asked what an electronic payment of \$200 to Comenity Bank was for. The debtor testified “I don’t know what it is”.
93. The debtor was asked to provide as late filed exhibit 43A any and all information relating to the payment to Comenity Bank and any and all statements dealing with that credit card.
94. The debtor’s counsel filed a response to Plaintiff’s [*sic*] Motion to Compel stating: “58. “The Debtor is not sure which account was paid \$200.00 and withdrawn by Comenity

³¹ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

³² Defendant disputed this fact, indicating that the statement is unclear, but Defendant also acknowledged that check 3230, in the amount of \$35.00, was signed by Tracy Belser and made payable to Bank of America. [Doc. 32 at ¶ 90.] The Court accepts this fact as undisputed, as well as the fact that Debtor was asked to provide information about the check as a late-filed exhibit, but the Court never ordered production of any late-filed exhibits. See *supra* n.4.

³³ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

Bank therefore the debtor is unable to furnish this document. The Debtor has checked with his Wife also and she is unable to recall This account or this payment.”

95. The debtor was asked to provide as late filed exhibit 47 [credit card] statements for the Sam’s Club Mastercard.
96. In response, the debtor provided Tracy Belser Sam’s Club card statements for account number 9190, for the payment due dates of March 18, 2017, April 18, 2018, May 18, 2017, July 2017, November 18, 2017 and January 18, 2018.³⁴
97. CastleRock Pools, Inc. bank statement for June 2017 reflects two electronic payments to KnoxCtyCourt on June 26, 2017 totaling \$4387.44.³⁵
98. An electronic payment on the CastleRock Pools, Inc. checking on June 26, 2017 in the amount of \$2887.44 matches the amount of county property taxes due for the debtor’s residence at 8925 Millertown Pike Knoxville, Tennessee.
99. On July 5, 2017 CastleRock Pools, Inc. check number 9152 in the amount of \$5000 payable to Century Pools, Inc. cleared the CastleRock Pool’s account with First Tennessee.
100. The debtor testified that he is not a signator on any other personal checking accounts other than the ones already disclosed.
101. The debtor, in his July 11, 2017 bankruptcy schedule A/B, disclosed an interest in two checking accounts, both with First Tennessee Bank.
102. The debtor amended bankruptcy schedules A/B on August 22, 2017 to reflect an interest in one checking account and one savings account, both with First Tennessee Bank.
103. A check dated May 20, 2017, written on ORNL account 5700, with the account holders identified as William and Tracy Belser, was deposited into the CastleRock Pools, Inc. First Tennessee account on May 20, 2017.³⁶
104. The debtor’s December 13, 2017 amended bankruptcy schedules A/B/C reflect a zero value in his interest in CastleRock Pools, Inc.

³⁴ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

³⁵ Defendant disputed the payee, and Plaintiffs corrected the payee name. [Docs. 32 at ¶ 97, 33 at ¶ 97.]

³⁶ Debtor submitted an affidavit for explanation concerning this undisputed fact, stating “that he was on his Wife’s ORNL Federal Credit Union checking account but he wrote only a few checks on this account over the past few years, therefore, it slipped his mind that he was on this account. The debtor’s wife was the only one with a debit card or checks for this account. Further a box of checks was stolen on this account, therefore his Wife closed the account on September 11, 2017.” [Doc. 32 at ¶ 103; see Doc. 30-3 at ¶ 24.]

105. The debtor supplied financial statements for CastleRock Pools, Inc.; one dated for February 2016 and one dated for February 28, 2018. The 2016 statement shows a net value of \$336,500.00 and the 2018 statement a net value of \$179,500.00.
106. The debtor testified that CastleRock has no ownership interest in real property.
107. The debtor failed to disclose in his originally-filed Statement of Financial Affairs (SOFA) and amended SOFA filed August 22, 2017 a lawsuit in Sumner County Circuit Court, Christopher P. Costello and Cristy L. Costello v. CastleRock Pools, Inc, Brian Belser, and William Belser, case number 2015-CV-1080, the case being filed September 24, 2015 and dismissed on April 20, 2017.³⁷
108. The debtor signed bankruptcy schedules on July 11, 2017 stating on page 6: “I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct. If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7. If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b). I request relief in accordance with the chapter of title 11, United States Code, specified in this petition. I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both.
109. And stating on Official Form 106Dec: “Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct.”
110. The debtor signed Declaration Concerning Debtor’s Schedules on August 21, 2017 stating “I declare under penalty of perjury that I have read the foregoing Amended Statement of Financial Affairs and Amended Schedule A/B - Property, and they are true and correct to the best of my knowledge, information, and belief.”
111. The debtor-signed Declaration of Schedules on December 13, 2017 stating “I declare under penalty of perjury that I have read the foregoing Schedule A/B – Property and Schedule C and they are true and correct to the best of my knowledge, information, and belief.
112. Tracy Belser testified regarding Susie Baxter’s preparation of the tax returns for Century Pools and that Ms. Baxter “just comes to pick up the totals of, of the -- the

³⁷ Debtor submitted an affidavit for explanation concerning this undisputed fact, stating, “I did have a lawsuit in the year before filing my bankruptcy with Christopher and Cristy Costello. This lawsuit was dismissed before the filing of my bankruptcy, therefore, again it was an oversight that it was left off my Statement of Financial Affairs. The case was over and dismissed, therefore I assumed that I didn't need to list the lawsuit.” [Docs. 32 at ¶ 107; 30-3 at ¶ 17.]

totals that she needs, and they're – and I have added them up and given them to her on a piece of paper.” These are totals of sales, expenses and beginning and ending inventory. She does not take the bank statements with her.³⁸

113. Tracy Belser was asked how long she will keeps [sic] the 2017, 2016 and 2015 records used to compile the information given to Susie Baxter in order to prepare the Century Pool tax returns. She testified that she still has the 2017 information and maybe has the 2016 and 2015 information and explained that “she’s [Susie Baxter] told me before of things that have to be kept and not to -- that don't have to keep. I'm assuming that, you know, maybe some were for seven years, some were for three years, some were for a year, so I'm not a hundred percent sure which one is which.”
114. Ms. Belser testified regarding hearing of William Belser’s plans to file for bankruptcy and their conversations.
115. Tracy Belser was an authorized signatory for CastleRock Pools, Inc. When asked what she did for CastleRock she testified “just pay some bills when he asks me to”; maybe once a month maybe twice a month; just depends. She was doing some bookkeeping in 2017 and in 2016. She testified that when the debtor asked her to pay a bill she would get the check book off the mudroom counter top or out of the truck. When asked what else she did “bookkeeping wise” she testified that “that’s about ... that’s it”. She knew what bill to pay because it was on the mudroom counter.
116. Tracy Belser testified with regard to CastleRock check number 9006 dated [sic] 30, 2016 in the amount of \$375.00 written to her, that she had no idea what it was for, that CastleRock did not owe her any money, and that she did not receive payment from CastleRock for bookkeeping. There is at least one other check written to Tracy Belser in 2017 on the CastleRock account.³⁹
117. In March 2017 Tracy Belser signed checks to Century Pool - one dated March 1st, one dated March 6th, a check to Bobby Belser dated March 17th, a check to Roseberry Church dated March 12th, a check dated March 19th, and a check to Harrison’s on March 22nd. In April 2017 Tracy Belser dated checks on more than one or two days that month.⁴⁰

³⁸ Defendant disagreed with the “wording of the response as it attempts to distort the answer.” [Doc. 32 at ¶ 112.] The Court finds from a review of Mrs. Belser’s testimony, however, that the description of it is accurate. The Court also finds that Defendant’s statement that the accountant requests “sales for the year, the expenses for the year, the beginning and ending balance in the checkbook” is also an accurate statement of Mrs. Belser’s testimony. [Doc. 32 at ¶ 112.]

³⁹ Defendant disputed Plaintiffs’ statement that there were several other checks written to Mrs. Belser in 2017 on the CastleRock account and stated that the Defendant had located only one other check made payable to Mrs. Belser. [Doc. 32 ¶ 116.]

⁴⁰ Defendant disputed the last sentence concerning checks written in April 2017 because it is “unclear.” Defendant stated that Mrs. “Belser wrote ten checks on the CastleRock Pools Account in the month of April, 2017.” The Court does not find the last sentence to be unclear concerning the frequency with which Mrs. Belser wrote checks in April

118. Tracy Belser discussed the use of the CastleRock checking account to make their personal donations to Roseberry Baptist Church.⁴¹
119. Tracy Belser testified that after she paid a CastleRock bill she put the bill in a box, a banker's box probably located downstairs Bill has an office downstairs.
120. Tracy Belser testified that she would write a check from the CastleRock account for the entire KUB bill for their residence and did not write a separate check for their personal.
121. Tracy Belser testified that when she paid a bill it would be because Bill asked her to; she would either put the bill in the box, give it to Bill, or throw it away.
122. The debtor supplied as late filed exhibit 46 - 47, one page of a BOA card account #1634, and Discover Card statements, acct. 9592 for February 2017 through June 2017, both in the name of Tracy Belser.
123. Tracy Belser testified that the debtor probably would have used her Discover or Sam's cards to pay a CastleRock expense and then used the CastleRock checking account to make an electronic payment. The records of what were paid were probably just "thrown in a box with the other paid receipts" the same box referred to earlier. She could have picked up the phone to make the Sam's Club and Discover payments but doesn't know that she did.
124. Tracy Belser testified regarding what Susie Baxter does for CastleRock.⁴²
125. CastleRock wrote a \$5000 check 9152 to Century Pool dated July 2, 2017. [Tracy Belser] testified she doesn't know where the records would be stored to document the reason for that check. If it were in Castlerock's records it might be in a box, probably at their house in the basement.⁴³

2017 – i.e., she wrote ten checks (as Defendant notes), and such checks were dated “on more than one or two days that month.” [Docs. 25 at ¶ 117, 32 at ¶ 117.]

⁴¹ Defendant did not dispute this statement but cited to Mrs. Belser's testimony, characterizing it as explaining “the reasons for the payments to be made from the CastleRock Pools Account was to assist the accountant with the taxes, since it was a tax deduction.” [Doc. 32 at ¶ 118.] Mrs. Belser testified that the payments to the church were from “Bill and Tracy Belser. It would just be a Castlerock check, which I'm assuming that he would take – he would – on his taxes, that she [i.e., the accountant] would know where to put that because that's actually not from Castlerock Pools.” [Doc. 19-26 at p. 52.]

⁴² Defendant failed to specifically dispute this statement but, instead, quoted Mrs. Belser's testimony. [Doc. 32 at ¶ 124.] The Court does not find that the actual testimony conflicts with the undisputed statement of fact. *See also* E.D. Tenn. LBR 7056-1(b).

⁴³ Defendant disputed part of ¶ 125. [Doc. 32 at ¶ 125.] After reading the cited deposition testimony, the Court finds that only this quoted portion of ¶ 125 is undisputed.

126. Tracy Belser described Bill Belser's office in their basement, and where the records might be stored - in the basement or in the garage.⁴⁴

128. Tracy Belser testified that they had a water leak a few years ago in the basement where his office is located. "There were quite a few of those boxes that we're talking about setting there at the time.... I'm going to say probably 2014 or '15. I'm not a hundred percent sure on that."

Defendant generally denies that Plaintiffs have met their burden of proof on their claims under 11 U.S.C. §§ 727(a)(2), (3), and (4) based on the facts stipulated by the parties and the documents submitted into the court record. In addition to the undisputed facts recited above, Plaintiffs also submitted with their summary judgment motion the Affidavit of George T. Prosser, a licensed private investigator who possesses an accounting degree and who has experience in financial investigations and audits in civil and criminal matters. [Doc. 26-14.] Defendant has not opposed Mr. Prosser's testimony by affidavit, nor has Defendant countered it with expert opinion of his own.

Mr. Prosser's opinion is based on a limited review of bank records for the calendar year 2017, credit card records, and tax records for the tax year 2016. [Doc. 26-14 at p. 2.] Mr. Prosser concludes that Defendant "has not supplied 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." [*Id.* at p. 3.] The conclusion is based on the expectation that Defendant would have business "records such as accounts payable, accounts receivable, contracts, billing and invoicing, bank reconciliation, purchase orders, project cost accounting, payroll, fixed asset management, etc." [*Id.*] Also, Mr. Prosser notes that Defendant/CastleRock's "extensive use of credit cards without providing statements itemizing purchases or cash advances

⁴⁴ Defendant disputed paragraph 127 of Plaintiffs' Statement of Facts concerning whether exhibits 3 and 4 to Tracy Belser's deposition are the same documents as exhibit 2 to Plaintiffs' summary judgment motion. [Doc. 32 at ¶ 127.] Whether such exhibits are identical is not a material fact.

seriously impairs attempts to reasonably determine [Defendant]’s financial condition.” *Id.* Ultimately, Mr. Prosser asserts that “[t]he records [Defendant] provided to [Plaintiffs’ counsel] are totally inadequate to determine his financial condition.” *Id.*

II. ANALYSIS

Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings by virtue of Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law[,]” utilizing the procedures defined in subparts (c)(1) through (c)(4). When deciding a summary judgment motion, the Court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As movants, Plaintiffs bear the burden of proving that, based on the record presented to the Court, there is no genuine dispute concerning any material fact and that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Owens Corning v. Nat’l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). “A genuine dispute of material fact exists when ‘there is sufficient evidence favoring the nonmoving party for a [fact-finder] to return a verdict for that party.’” *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014) (quoting *Anderson*, 477 U.S. at 249).

Once the initial burden of proof is met, the burden shifts to the nonmoving party to prove that there are genuine disputes of material fact for trial, but reliance solely on allegations or denials contained in the pleadings is insufficient because a “mere scintilla of evidence in support

of the nonmoving party will not be sufficient.” *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “[Any] party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]” Fed. R. Civ. P. 56(c)(1)(A). The Court must view the facts and all resulting inferences in a light most favorable to the respondent and decide whether “the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 243. Summary judgment is appropriate only if the fact-finder could not find for the non-moving party based on the “the record taken as a whole.” *Matsushita*, 475 U.S. at 587.

Plaintiffs’ complaint asks the Court to find that Defendant is not entitled to a discharge under 11 U.S.C. § 727(a)(2) (concealment), (a)(3) (failure to maintain records), (a)(4) (false oaths), (a)(5) (failure to explain), and (a)(6) (refusal to obey a lawful order of the court). Plaintiffs’ summary judgment motion argues that they are entitled to judgment as a matter of law on their claims under § 727(a)(2), (3), and (4)(A), which provide:

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

- (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; [and]
- (4) the debtor knowingly and fraudulently, or in connection with the case—
 - (A) made a false oath or account[.]

11 U.S.C. § 727(a). Because “[d]enial of a debtor’s discharge is an extreme remedy that should not be taken lightly . . . , the [statutory] provisions [for] denying a discharge are liberally construed in favor of the debtor.” *McDermott v. Bruce (In re Bruce)*, Adv. No. 15-1117, 2018 WL 6989980, at *4 (Bankr. S.D. Ohio Oct. 18, 2018). Nevertheless, the courts are vested with broad discretion when faced with determining, under § 727(a)(3), whether “books or records are adequate under the terms of the statute and facts of each case.” *Smith v. Morse (In re Morse)*, 535 B.R. 268, 284 (Bankr. E.D. Tenn. 2015) (citing *Dolin v. N. Petrochemical Co. (In re Dolin)*, 799 F.2d 251, 253 (6th Cir. 1986) (citations omitted)).

A. § 727(a)(2)

To prevail under § 727(a)(2), Plaintiffs “must prove two elements: (1) a disposition of property, such as a transfer or concealment; and (2) a subjective intent by the debtor to hinder, delay, or defraud a creditor through the act of disposing of the property.” *Id.* (citing *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000)). As the *Bruce* court explained:

Significantly, both Sections 727(a)(2)(A) and (a)(4)(A) require the United States Trustee to prove that the Debtor made the property transfers or the allegedly false statements, with fraudulent intent. To determine intent, “the trier of fact is necessarily required to make a subjective inquiry into the debtor’s state of mind. Such an inquiry normally requires explanatory testimony by the debtor and an assessment by the trier of fact of the debtor’s demeanor and credibility.” *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 159 (Bankr. N.D. Ohio 1998). Because determining a debtor’s fraudulent intent is such a fact-intensive inquiry, it generally

is not amenable to disposition by summary judgment. *Buckeye Retirement Co., LLC v. Swegan (In re Swegan)*, 383 B.R. 646, 655-56 (B.A.P. 6th Cir. 2008) (citing *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002)); *Schaumburg Bank & Trust Co., N.A. v. Hartford (In re Hartford)*, 525 B.R. 895, 903 (Bankr. N.D. Ill. 2015) (“As to section 727(a)(2), the element of intent on the part of the Debtor is a factual issue that is almost never appropriate for summary judgment.”). While there is no per se rule against summary judgment where a debtor’s state of mind is at issue, it should be granted only where “the evidence is so one sided that reasonable minds could not differ as to the only rational outcome.” *Carter-Jones Lumber Co. v. Beatty (In re Beatty)*, 583 B.R. 128, 138 (Bankr. N.D. Ohio 2018); *see also Swegan*, 383 B.R. at 656 (finding that summary judgment was not appropriate where “‘all reasonable inferences’ do not necessarily ‘defeat the claims of one side’”); *Sowers*, 229 B.R. at 159 (noting that summary judgment may be appropriate on claims requiring fraudulent intent “as long as there is no possibility that the facts presented at trial would demonstrate a lack of fraud or intent”).

In re Bruce, 2018 WL 6989980, at *4.

Here, Plaintiffs’ brief filed in support of their Motion for Summary Judgment fails to include any actual argument under § 727(a)(2). They merely recite the text of the subsection; state facts about the value of Defendant’s solely owned corporation in 2016 (\$336,500.00) and 2018 (\$179,000.00); note that Defendant testified that his solely owned business owned no real property; and state the following: “See plaintiffs’ discussion in Sections II and III herein below of the additional facts in support of their claim under 727(a)(2) that debtor has destroyed, removed, mutilated or concealed property of the debtor within one year of the bankruptcy filing.” [Doc. 19-3 at 2.]

“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.” *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997). Accordingly, given the skeletal argument and because Plaintiffs have failed to meet their burden to show that there was

indisputably a disposition of property with an intent to hinder, delay, or defraud a creditor, the Court will deny Plaintiffs' motion for summary judgment on their § 727(a)(2) claim.

B. § 727(a)(3)

Plaintiffs next assert that the Court should enter summary judgment in their favor under § 727(a)(3), which requires that a plaintiff:

(1) offer evidence of the general nature of [the debtor's] business or personal financial position and the types of transactions about which recorded information is sought, (2) present evidence identifying the recorded information he alleges has been concealed, destroyed, mutilated, falsified or not kept or preserved by [the debtor], and (3) show how the missing recorded information 'might' enable [the debtor's] actual financial condition or business transactions to be ascertained under the circumstances of the case.

McDermott v. Neff (In re Neff), Adv. Pro. No. 15-3026, 2015 WL 9488240, at *2 (Bankr. N.D. Ohio Dec. 28, 2015). Proof of fraudulent intent is not required under § 727(a)(3). *In re Morse*, 535 B.R. at 284; *see also Farm Credit Mid-Am., PCA v. Tingle (In re Tingle)*, 594 B.R. 396, 403 (Bankr. E.D. Ky. 2018).

The *Tingle* court recently explained the policy behind § 727(a)(3):

The goal of § 727(a)(3) is to provide creditors "with 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." *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999)). The required compliance "removes the risk to creditors of 'the withholding or concealment of assets by the bankrupt.'" *Caneva v. Sun Communities Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 761 (9th Cir. 2008) (quoting *Burchett v. Myers*, 202 F.2d 920, 926 (9th Cir. 1953)).

In re Tingle, 594 B.R. at 402; *see also DeWine v. Scott (In re Scott)*, 566 B.R. 471, 479 (Bankr. N.D. Ohio 2017) ("The purpose of this provision 'is to require a debtor to produce sufficient records so that creditors are not required to risk the concealment of assets under the guise of chaotic or incomplete records.'" (quoting *Noland v. Johnson (In re Johnson)*, 387 B.R. 728, 736 (Bankr. S.D. Ohio 2008))).

Importantly, courts in this circuit apply a shifting burden of proof for § 727(a)(3) claims.

The Plaintiff must establish a *prima facie* case showing the Debtor failed to keep adequate records. For purposes of § 727(a)(3), the Plaintiff is not entitled to perfect, or even necessarily complete, records. Instead, the Debtor must provide the Plaintiff “with 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.” In determining the adequacy of records, the court can consider the Debtor's education, business experience, sophistication, or any other relevant factor.

If the Plaintiff has established this *prima facie* case, the burden then shifts to the Debtor to explain why the failure to keep records, under the circumstances of the case, is justified. In considering an explanation, the court should consider both the Debtor's credibility and the reasonableness of the explanation, considering the debtor's sophistication and the materiality of the records. The requirement for keeping recorded information is not an unqualified one and complete disclosure is not always required, but instead it is a question of reasonableness under the circumstances. However, if disclosure cannot be made without the keeping of recorded information, the failure to supply the records is relevant to the policy underlying § 727(a)(3).

The ultimate burden of persuasion, of course, rests with the Plaintiff. The standard of proof for discharge objections under § 727(a) is by a preponderance of the evidence.

Jahn v. Morgan (In re Morgan), No. 10-1332, 2011 WL 864963, at *4-5 (Bankr. E.D. Tenn. Mar. 11, 2011) (quoting *CM Temporary Servs. v. Bailey (In re Bailey)*, 375 B.R. 410, 415-16 (Bankr. S.D. Ohio 2007)); *see also In re Morse*, 535 B.R. at 284-85 (“Bankruptcy courts in this Circuit have created a standard for assessing the adequacy of recordkeeping that recommends that ‘the Debtor’s records should be measured “against the type of books and records kept by a reasonably prudent debtor with the same occupation, financial structure, education, and experience.”’” (quoting *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 354 (Bankr. E.D. Tenn. 2006) (quoting *Wazeter v. Mich. Nat’l Bank (In re Wazeter)*, 209 B.R. 222, 227 (W.D. Mich. 1997) (internal quotation omitted)))).

Defendant’s assertion, however, that “[t]he Plaintiffs are unable to make a prima facie case that it is ‘impossible’ to ascertain the Defendant’s financial condition based upon all the hundreds of pages of documents produced and hours of testimony by the Defendant” [Doc. 31 at p. 6], does not appropriately define the burden. As explained by the *Wazeter* court,

[The debtor] suggests, however, that his position is supported by those courts adopting the two-part test for adequacy, which requires a showing that the lack of records “makes it *impossible* to ascertain the debtor's financial condition” *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992) (emphasis added). In stating the “impossibility” test, however, no court has suggested that it means that a debtor is relieved from the burden of providing records unless the creditor can show the impossibility of discovering each piece of necessary financial information. The debtor’s obligation to produce records remains a prerequisite to discharge under the statute.

Wazeter, 209 B.R. at 229.

Plaintiffs’ submission of unopposed expert opinion would appear at first glance to be enough to meet Plaintiffs’ initial burden, and Defendant’s only argument in response is that Plaintiffs are unable to meet their prima facie burden. [Doc. 31 at pp. 4-6.] Still, because Plaintiffs failed to follow the Federal Rules of Bankruptcy Procedure to discover business records from CastleRock,⁴⁵ the Court must examine Mr. Prosser’s Affidavit to determine whether the “missing records” are records that were required to be produced by Defendant.

Mr. Prosser identifies the following “incomplete” records:

- “individual and corporate 2016 tax returns [with] little backup documentation;
- “contracts, invoices, and remittances”;
- “ledger or chart of accounts”;
- “only one complete credit card statement.”

[Doc. 26-14 at pp. 2-3.] He also identifies the following missing records:

⁴⁵ See *supra* n.4 (concerning the fact that the Court did not order production of any “late-filed” exhibits).

- “accounts payable, accounts receivable, contracts, billing and invoicing, bank reconciliation, purchase orders, project cost accounting, payroll, fixed asset management, etc.”;
- credit card “statements itemizing purchases or cash advances”; and
- documentation supplied to Defendant’s “accountant at every year end.”

[*Id.* at p. 3.]

Of the inadequate records identified by Mr. Prosser, the following were the subject of late-filed document requests (for documents the existence of which Defendant did not deny) that were unenforceable because the requests did not comply with the Federal Rules of Bankruptcy

Procedure:

- “list of [CastleRock] suppliers 2012-2016;
- “copy of return showing revenue of Alpha One Construction”;
- “any and all banking records for Alpha One Construction”;
- “copies of all 1099s and W-2s issued by CastleRock Pools since 2012”;
- “name, address, and phone number of CastleRock clients for the last five years, including statement of work that was done”;
- “copies of the CRP American Express account”;
- “Chase credit card statements 2014 to date”;
- various information relating to identified checks and transactions from CastleRock’s bank statements;
- records related to various credit and department store accounts; and
- “any and all receipts organized by tax year, for CRP, Inc. returns from 2014 to 2017 and the tax return for 2017 when available.”

[Doc. 84-1.]

The Court must accept Mr. Prosser’s affidavit as a whole or not at all. That is, given that his opinion is based on Defendant’s failure to provide records, at least some of which were not

properly requested in discovery, his opinion does not satisfy Plaintiffs' prima facie burden on summary judgment. It may well be that an ultimate finding in favor of Plaintiffs under § 727(a)(3) will be appropriate given Defendant's admission that he failed to keep and maintain many of the types of records that Mr. Prosser identified as records that he would expect to be kept and maintained by a business such as Defendant's. Plaintiffs, however, have not established for purposes of summary judgment that Defendant failed to keep and maintain adequate records considering Defendant's "education, business experience, sophistication, or any other relevant factor." *In re Morgan*, No. 10-1332, 2011 WL 864963, at *4 (quoting *In re Bailey*, 375 B.R. at 415). Although the Court believes it is a close call, because reasonable inferences must be construed in favor of Defendant at this stage, summary judgment is not appropriate on Plaintiffs' claim under § 727(a)(3).

C. 727(a)(4)(A)

Finally, Plaintiffs argue that the Court should enter summary judgment in their favor under § 727(a)(4)(A), the purpose of which "is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs." *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999) (citation omitted).

"A party objecting to a debtor's discharge pursuant to § 727(a)(4)(A) must establish that, (1) the debtor made a statement while under oath, (2) the statement was false, (3) the statement related materially to the bankruptcy case, (4) the debtor knew the statement was false, and (5) the debtor made the statement with fraudulent intent." *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998) . . . Statements in bankruptcy schedules are given under oath, and "a fact is material if it 'concerns discovery of assets, business dealings or [the] existence or disposition of property.'" *Id.* (citations omitted). "Knowledge may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information." *Id.*

Id.

Discharge is not a right but a privilege, and as explained by the Sixth Circuit:

Complete financial disclosure is a prerequisite to the privilege of discharge. . . . [I]ntent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression. A reckless disregard as to whether a representation is true will also satisfy the intent requirement. [C]ourts may deduce fraudulent intent from all the facts and circumstances of a case. However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. The subject of a false oath is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.

In re Keeney, 227 F.3d at 685-86 (citations omitted) (internal quotation marks omitted).

Here, Plaintiffs assert that Defendant failed to disclose numerous assets in his original schedules, amending them twice only after inaccuracies came to light during questioning under oath at his meeting of creditors and a Rule 2004 examination. [Doc. 24 at p. 5.] More important, Defendant still failed to disclose a bank account that was discovered from a review of deposits in a disclosed bank account. [*Id.*] Defendant also failed to disclose the existence of a business, Alpha One Construction. [*Id.*] When confronted with Plaintiffs' discovery of the existence of the undisclosed business, Defendant testified that he "never did anything with it." [*Id.*] On the eve of his bankruptcy filing, however, Debtor transferred \$5,000.00 to the undisclosed business and notably failed to produce the one bank statement that would have reflected the \$5,000.00 deposit into the bank account of the undisclosed business. [*Id.*] Plaintiffs also complain that Defendant failed to disclose payments made to creditors within 90 days of his bankruptcy petition filing, and Defendant failed to disclose a lawsuit to which he was a party in the year before he sought bankruptcy protection. [*Id.* at pp. 5-6.]

Defendant responded to Plaintiffs' § 727(a)(4)(A) arguments as follows:

14. I started Alpha One in 2015 because I wanted another business for roofing work and decking. I never actually did any business under the name Alpha One. The value of Alpha One is \$0.00, therefore when I prepared my Voluntary Petition the ownership of Alpha One slipped my mind.
15. At my meeting of creditors, I mistakenly stated that my wife, Tracy Belser, was a 50% owner of CastleRock Pools, Inc. Once I discovered this mistake, I amended my bankruptcy schedules to show that I was a 100% owner of CastleRock, Pools.
16. It was an oversight that my income from my business was left off my original filing of Statement of Financial Affairs. Once this oversight was discovered, the Statement of Financial Affairs was amended to correct the oversight.
17. I did have a lawsuit in the year before filing my bankruptcy with Christopher and Cristy Costello. This lawsuit was dismissed before the filing of my bankruptcy, therefore, again it was an oversight that it was left off my Statement of Financial Affairs. The case was over and dismissed, therefore I assumed that I didn't need to list the lawsuit.
22. I listed payments to creditors on my Statement of Financial Affairs. The payments were listed were the only payments that I believed to be personal payments to creditors. Other payments to creditors in the 90 days before the filing of my bankruptcy were payments on Corporate Accounts, therefore, I did not believe it was necessary to list these payments on my personal bankruptcy.
24. I was on my Wife's ORNL Federal Credit Union checking account but I wrote only a few checks on this account over the past few years, therefore, it slipped my mind that I was on her account. My Wife was the only one who had a debit card or checks for this account. A box of checks was stolen on this ORNL checking account, therefore my Wife closed the account on September 11, 2017.

[Doc. 30-3.]

Thus, the only fact the Defendant did not dispute or explain is the payment of \$5,000.00 from CastleRock to Alpha One Construction on June 30, 2017. Although the

undisclosed payment might be material standing alone, Plaintiffs have not so argued, nor is the Court willing to go that far at the summary judgment stage.⁴⁶

Like § 727(a)(2), under § 727(a)(4)(A), determination of a defendant's subjective intent ordinarily precludes summary judgment because the fact-finder must assess credibility. See *In re Sowers*, 229 B.R. at 159; see also *In re Bruce*, 2018 WL 6989980, at *4 (“Because determining a debtor’s fraudulent intent is such a fact-intensive inquiry, it generally is not amenable to disposition by summary judgment.”). Simply, “[t]he veracity of [Defendant’s] statements and his credibility cannot be determined on the documents submitted by the parties.” *Id.* at *5. Accordingly, summary judgment is not appropriate on Plaintiffs’ § 727(a)(4)(A) claim.

ORDER

Because the summary-judgment record, viewed in favor of Defendant as required by Rule 56, establishes genuine disputes of material facts concerning whether Defendant should be denied his discharge pursuant to 11 U.S.C. § 727(a)(2), (3), and/or (4)(A), and that Plaintiffs have not shown that they are entitled to judgment as a matter of law on any of their claims, the Court directs that Plaintiffs’ Motion for Summary Judgment filed on December 7, 2018, is DENIED.

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⁴⁶ A material fact for purposes of a denial of a Chapter 7 discharge for making a false oath is “one that affects the substance of the case, rather than merely going to the form of the case.” *In re Sowers*, 229 B.R. at 158. The Court needs additional context concerning Defendant’s businesses to determine that the undisclosed \$5,000.00 transfer is substantive and, thus, material for purposes of Defendant’s individual bankruptcy case.