SO ORDERED.

SIGNED this 1st day of November, 2016.

Janice Miller Karlin
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:
Rick Wasinger,

Debtor.

Case No. 15-22401-7

Samuel K. Crocker,
United States Trustee,

Plaintiff,

vs.

Rick Wasinger,

Defendant.

Adversary No. 16-6054

Order Denying Motion for Judgment on the Pleadings

This adversary proceeding is before the Court on the motion for judgment on the pleadings of the United States Trustee, seeking judgment on two of his four claims—under 11 U.S.C. § 727(a)(3) and (a)(5)—against Defendant/Debtor Rick

Wasinger.[1] Section 727(a)(3) and (a)(5) generally deny debtors a discharge if they have concealed information or failed to explain a loss of assets. Although Debtor filed a general response to the U.S. Trustee's complaint explaining his failure to provide certain information to the U.S. Trustee, because he failed to expressly deny each allegation made against him in a line-by-line response, the U.S. Trustee has moved for judgment on the pleadings, claiming Debtor has admitted to failing to provide documents and explain his loss of assets.

But there is more to § 727(a)(3) and (a)(5) than the pure failure to turn over documents, however. And because at this point in the proceeding there remains a factual dispute as to whether Debtor's behavior is justified or, alternatively, should result in the denial of discharge under § 727, this case is not in a posture for the Court to grant judgment on the pleadings. The U.S. Trustee's motion seeking judgment on his claims under § 727(a)(3) and (a)(5) is not appropriate at this point, and it must therefore be denied.

I. Background and Findings of Fact

The U.S. Trustee alleges the following facts in his complaint.[2] In 2003, Debtor and two of his brothers started a business: Wasinger Tech, LLC ("Wasinger Tech"). At all times, and continuing to present, Debtor and his brothers each held a

---

[1] Doc. 17.

[2] *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1200–01 (10th Cir. 2016) (stating that facts alleged in the complaint must be accepted as true when assessing motions for judgment on the pleadings).

one-third membership in Wasinger Tech. In 2005, Debtor left his public school teaching employment to work full time for Wasinger Tech. In 2006, Debtor and his then wife built a home located at 6021 West 142nd Street, in Overland Park, KS (the "142nd Street property").

In 2008, Wasinger Tech purchased a home located at 12428 Lamar, also in Overland Park, Kansas (the "Lamar property"), and Debtor's parents moved into the Lamar property. Debtor's father has since passed away, but his mother continues to live in the Lamar property.

In March 2012, Debtor's then wife filed a divorce petition, and nearly two full years' later, on February 24, 2014, she and Debtor finalized a marital settlement agreement. The marital settlement agreement required the 142nd Street property to be sold, and required that certain baseball cards and related sports memorabilia be delivered to Debtor. Regarding the sale of the 142nd Street property, the agreement required that Debtor's ex-wife would receive the first $52,000 from the net sale proceeds to satisfy her premarital interest, and the next $40,000 to satisfy her interest in Wasinger Tech, with the remaining net proceeds to be divided equally between Debtor and his ex-wife.

On February 26, 2014, Debtor used an American Express credit card to buy a $15,510 engagement ring for his then-girlfriend. Two months later, on April 29, 2014, Debtor used the same credit card to buy a matching wedding band, costing an additional $17,459. Both rings were given to Debtor's girlfriend, and they remain in her possession. At some point, the baseball cards and sports memorabilia were also

delivered to Debtor, and Debtor sold the items for an unspecified amount. Debtor then gave the money from the sale to his ex-wife.

The 142nd Street property ultimately sold in May, 2014. After Debtor's ex-wife received the amounts required by the marital settlement agreement, Debtor netted a significant amount of money. Debtor used some of that money, between $48,000 and $60,000, but not all, to make a down payment on a home at 5840 W. 145th Street, in Overland Park, Kansas (the "145th Street property"), in May 2014. The 145th Street property then became Debtor's residence. At various times, Debtor had a friend living in the 145th Street property, and he collected $700 per month in rent. At times, Debtor's girlfriend also lived in the 145th Street property.[3] At about the same time that Debtor bought the 145th Street property in May 2014, Wasinger Tech transferred the Lamar property—where Debtor's mother lived—into the names of Debtor's bother and sister-in-law.

Wasinger Tech stopped operating in November, 2012, but it had assets that exceeded its liabilities, including the Lamar property. Debtor has not been able to say with certainty what the residual value of Wasinger Tech was after it stopped doing business, or what assets and liabilities remained. Since Wasinger Tech stopped operating, Debtor has continued operating various businesses on his own,

[3] At some point, according to the Complaint, Debtor's then-girlfriend made complaints to the police about Debtor, which lead, on September 26, 2015, to charges against Debtor in state court for theft and criminal deprivation of property. Debtor's then girlfriend moved out of the 145th Street property. The criminal charges were still pending when Debtor filed his bankruptcy petition, although Debtor did not disclose the criminal case in his petition.

including a business called RJ Holdings, LLC. It is an active business producing a small source of income to Debtor. Debtor also controls an entity called TCM Tickets.

Debtor filed a Chapter 7 bankruptcy petition on November 16, 2015. According to his bankruptcy petition and schedules, Debtor lived at the 145th Street property on the petition date. At some point postpetition but before his meeting of creditors, Debtor moved out of the 145th Street property and in with his mother at the Lamar property. Debtor's Statement of Financial Affairs did not include the $700 per month rental income Debtor received for the 145th Street property. Debtor did not disclose the engagement ring or wedding band that he purchased as gifts, and did not disclose the sale of the 142nd Street property or the sale of baseball cards and sports memorabilia. Debtor also did not disclose any interests in incorporated or unincorporated businesses or in any trusts or estates of decedents. Debtor signed his petition, statement of financial affairs, and schedules under penalty of perjury.

On December 9, 2015 the U.S. Trustee sent a letter to Debtor's bankruptcy counsel asking for, among other things, copies of all bank statements from October 1, 2013 through Debtor's petition date in November 2015. Debtor has not yet produced statements for the UMB checking account he disclosed in his schedules. The U.S. Trustee then filed an adversary proceeding against Debtor, stating four claims under 11 U.S.C. § 727: under (a)(3) for failure to keep records, under (a)(4)(A) for giving a false oath, under (a)(4)(D) for withholding information, and under (a)(5) for failure to explain loss of assets. Debtor filed a "response" to the

complaint, but he did not respond separately to each paragraph therein. Instead, he addressed each of the U.S. Trustee's claims in narrative paragraph form. The gist of his response is that he admits certain documents have not been turned over, but he is working on obtaining requested documents. The U.S. Trustee has now moved for judgment on the pleadings on its claims under § 727(a)(3) and § 727(a)(5), and Debtor's response reiterated that he is working on obtaining bank records for the U.S. Trustee, and that he will use these records, in part, to explain the alleged loss of assets.

II. Conclusions of Law

An adversary proceeding objecting to discharge is a core proceeding under 28 U.S.C. § 157(b)(2)(J), over which this Court may exercise subject matter jurisdiction.[4]

A. Legal Standard for Assessing a Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c), incorporated into bankruptcy proceedings via Federal Rule of Bankruptcy Procedure 7012(b), permits a party, after pleadings are closed, to move for judgment on the pleadings. A motion for judgment on the pleadings under Rule 12(c) is assessed using the same standard as a motion to dismiss under Rule 12(b)(6).[5] The Court must "accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to

---

[4] 28 U.S.C. § 157(b)(1) and § 1334(b).

[5] *BV Jordanelle, LLC*, 830 F.3d at 1200.

the non-moving party."[6] The "resulting question is whether the complaint states a valid claim."[7] Applying this standard requires that "[j]udgment on the pleadings should not be granted 'unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law.'"[8] "A partial motion for judgment on the pleadings may be granted pursuant to Rule 12(c) in the same way that partial summary judgment may be granted pursuant to Rule 56."[9]

B. Objection to Discharge Generally, and Burden of Proof

"[T]he Bankruptcy Code must be construed liberally in favor of the debtor and strictly against the creditor" when assessing a claim for denial of a discharge,[10] because denial of discharge is "an extreme penalty."[11] "The reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural."[12] On the other hand, "[w]hile the law favors discharges in bankruptcy,

---

[6] *A. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000) (internal quotation omitted).

[7] *BV Jordanelle, LLC*, 830 F.3d at 1200–01.

[8] *Park U. Enters., Inc. v. Am. Cas. Co. of Reading, PA*, 442 F.3d 1239, 1244 (10th Cir. 2006)

[9] *Sprint Nextel Corp. v. Middle Man, Inc.*, 989 F. Supp. 2d 1186, 1188–89 (D. Kan. 2013), on reconsideration, (Feb. 25, 2014), aff'd in part, rev'd in part, 822 F.3d 524 (10th Cir. 2016).

[10] *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997).

[11] *Martinez v. Los Alamos Nat'l Bank (In re Martinez)*, 126 Fed. App'x 890, 897 (10th Cir. 2005) (unpublished).

[12] *Dilworth v. Boothe*, 69 F.2d 621, 624 (5th Cir. 1934).

it will not ordinarily tolerate the bankrupt's intentional departure from honest business practices where there is a reasonable likelihood of prejudice."[13]

The U.S. Trustee bears the initial burden of proof on his claims: "[i]n a denial of discharge action the party objecting to discharge must prove a preponderance of evidence that the discharge should be denied."[14] If the U.S. Trustee establishes a prima facie case, then "the burden shifts to the bankrupt to clear himself of the charge established by such prima facie case."[15]

C. The U.S. Trustee's § 727(a)(3) Claim

Section 727(a)(3) states that a "court shall grant the debtor a discharge, unless" the court finds that "the debtor has . . . 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 the circumstances of the case." To state a claim under § 727(a)(3), the U.S. Trustee must "demonstrate that [the debtor] failed to maintain and preserve adequate records and that the failure made it impossible to ascertain his financial condition and material business transactions."[16] To emphasize, the records must be material to the debtor's financial

---

[13] *Kentile Floors, Inc. v. Winham*, 440 F.2d 1128, 1131 (9th Cir. 1971).

[14] *Kirtland Fed. Credit Union v. Mesibov (In re Mesibov)*, No. 13-10864, 2014 WL 2625159, at *3 (Bankr. D.N.M. June 12, 2014) (citing *Grogan v. Garner*, 498 U.S. 279, 289 (1991)).

[15] *Johnson v. Bockman*, 282 F.2d 544, 545 (10th Cir. 1960).

[16] *In re Brown*, 108 F.3d at 1295.

condition.[17]

A debtor need not keep "an impeccable system of bookkeeping which would meet the approval of a skilled accountant or records so complete that they would satisfy an expert in business."[18] Rather, "[t]he statute is satisfied if the books of account or records sufficiently identify the transactions that intelligent inquiry can be made of them," taking into consideration "the kind, character, and complexity of the business."[19] A showing of intent to defraud is not necessary under § 727(a)(3).[20]

The U.S. Trustee argues that because Debtor has not provided copies of bank statements for his UMB Bank account, he should be denied a discharge under § 727(a)(3). And on first glance, this is a tempting way to resolve this adversary proceeding. The U.S. Trustee has asked for records, Debtor has not provided them, and the U.S. Trustee argues that without the bank records it is impossible for creditors to ascertain what Debtor did with the more than $48,000 he received from the sale of his home. But the U.S. Trustee has glossed over an important piece of a § 727(a)(3) claim: that the failure to provide the requested business records was not

---

[17] *Cobra Well Testers, LLC v. Carlson (In re Carlson)*, 356 B.R. 787, at *4 (10th Cir. BAP 2006).

[18] *Johnson*, 282 F.2d at 546.

[19] *Id.*

[20] *See, e.g.*, *Quicken Loans, Inc. v. Splawn (In re Splawn)*, 376 B.R. 747, 758 (Bankr. D.N.M. 2007) ("There is no intent to defraud requirement contained within" § 727(a)(3)); *McVay v. Phouminh (In re Phouminh)*, 339 B.R. 231, 246 (Bankr. D. Colo. 2005) ("The provisions contained in §§ 727(a)(3) and (5), for example, require no intent to deceive or any actual wrongdoing on the part of a debtor.").

justified under all the circumstances.

Debtor's response to both the U.S. Trustee's complaint and the U.S. Trustee's motion for judgment on the pleadings argues that he has made multiple attempts to obtain the requested information. Debtor also states that he was under the (apparently mistaken) assumption that the U.S. Trustee was going to subpoena the bank records. Debtor also states that despite repeated telephone inquiries and in-person attempts to obtain the records from the bank, he has received conflicting information about how and when those records would be available. The U.S. Trustee addresses the "justification" prong of his § 727(a)(3) claim in one sentence in his motion for judgment on the pleadings, simply stating that "the failure is not justified,"[21] but he does not elaborate on this statement in any way, and he does not address Debtor's factual response other than to point out that Debtor admits he has not turned over the requested bank records. Simple delay in turning over requested information is not enough,[22] however, and the question of whether Debtor can show he is *justified* in not turning over the records is a factual question this Court will have to resolve. As a result, the Court concludes that the U.S. Trustee has not met his burden to "clearly establish[] that no material issue of fact remains to be

[21] Doc. 18 p.11.

[22] *In re Phouminh*, 339 B.R. at 241 (stating that "tardiness in producing documents and information does not amount to a failure to keep the recorded information" under § 727(a)(3)).

resolved and [that he] is entitled to judgment as a matter of law'"[23] on the § 727(a)(3) claim.

D. The U.S. Trustee's § 727(a)(5) Claim

Section 727(a)(5) states that a "court shall grant the debtor a discharge, unless" the court finds that "the debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities." To state a claim under § 727(a)(5), the U.S. Trustee must show "that the debtor, at a time not remote in time to the filing of the bankruptcy, had assets that would have belonged to the bankruptcy estate but did not possess those assets as of the petition date."[24] The U.S. Trustee must show that Debtor is "responsible for any loss of assets."[25] A satisfactory explanation as to the loss of assets "must consist of more than vague, indefinite, and uncorroborated assertions by the debtor."[26]

Again, fraudulent intent is not a required element for a § 727(a)(5) claim.[27] To the contrary, "[a] cause of action advanced under § 727(a)(5) is not a substitute for one based upon alleged prepetition fraud, conversion or other malfeasance. Rather,

---

[23] *Park U. Enterprises, Inc. v. Am. Cas. Co. of Reading, PA*, 442 F.3d 1239, 1244 (10th Cir. 2006)

[24] *May v. Shepherd (In re Shepherd)*, No. 04-41627, 2005 WL 4147868, at *2 (Bankr. D. Kan. Oct. 7, 2005).

[25] *In re Carlson*, 356 B.R. 787, at *6.

[26] *In re Shepherd*, 2005 WL 4147868, at *2 (internal quotations and alterations omitted)

[27] *Id.*

its purpose is to deny a discharge to a debtor who refuses to cooperate with the trustee or creditors in their effort to trace property that should have been part of the estate."[28]

The U.S. Trustee argues that because Debtor had "substantial assets" in the two years before filing for bankruptcy (the $48,000 from the sale of his home and his interest in Wasinger Tech), and he has not explained what happened to those assets, he should be denied a discharge under § 727(a)(5). But again, Debtor's response to the U.S. Trustee's complaint and his response to the motion for judgment on the pleadings argue that he can explain the dissipation of assets once he is able to obtain bank statements, and that he is working to obtain relevant documents. Again, there is a factual dispute: is this a situation where Debtor "refuses to cooperate with the trustee or creditors," or is this a situation where Debtor is diligently working to obtain information requested by the U.S. Trustee but has been frustrated by the actions or delay of others? The Court will have to resolve that question, but a motion for judgment on the pleadings in not an appropriate place to do so.[29] On the U.S. Trustee's § 727(a)(5) claim, the Court also concludes that the U.S. Trustee has not met his burden to "clearly establish[] that no material issue of fact remains to be resolved and [that he] is entitled to judgment

---

[28] *Turner v. Keck (In re Keck)*, 363 B.R. 193, 206 (Bankr. D. Kan. 2007) (internal quotation omitted).

[29] Especially considering that all inferences at this point in the proceeding are to be drawn in favor of the nonmoving party. *A. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1139, 1160 (10th Cir. 2000).

as a matter of law.'"[30]

III. Conclusion

The U.S. Trustee's motion for judgment on the pleadings[31] is denied. The dates set out in the Scheduling Order entered August 18, 2016[32] will control the further proceedings in this case.[33]

It is so Ordered.

###

[30] *Park U. Enters., Inc.*, 442 F.3d at 1244.

[31] Doc. 17.

[32] Doc. 13.

[33] Because discovery in this case is nearly complete (to be completed by November 11, 2016), the Court will not require Debtor to amend his "answer" to the U.S. Trustee's complaint, as the Court assumes the parties have already narrowed the facts in dispute through discovery. That said, the Court admonishes Debtor's Counsel that Rule 8 of the Federal Rules of Civil Procedure requires responsive pleadings to "admit or deny the allegations asserted" and "fairly respond to the substance of the allegation[s]." By filing his "response" as a paragraph narrative, rather than addressing line by line each allegation made, Debtor's Counsel made the U.S. Trustee's and this Court's work more difficult. In the future, Debtor's Counsel should take greater care to meet the requirements of the Federal Rules of Civil Procedure, as well as all Bankruptcy Rules and Local Rules.