The relief described hereinbelow is SO ORDERED.

SIGNED this 12th day of April, 2022.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JUSTEN L. GREEN,

Debtor.

Case No. 20-21711
Chapter 7

ILENE J. LASHINSKY, UNITED STATES TRUSTEE,

Plaintiff,

v.

JUSTEN L. GREEN,

Defendant.

Adv. No. 21-6015

ORDER DENYING UST'S MOTION FOR SUMMARY JUDGMENT

The United States Trustee (the "**UST**") brought this adversary proceeding to deny debtor Justen Green a discharge under 11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A). This matter comes before the Court on the UST's motion for summary judgment.[1] The Court will deny the UST's motion, because although the motion establishes a number of undisputed facts, it does not show that such facts entitle the UST to judgment as a matter of law.

I. Undisputed Facts

The following were set forth in the UST's statement of material facts and not specifically controverted by Green.[2] These facts are therefore deemed admitted for the purpose of summary judgment. *See* D. Kan. Rule 56(a).

Green, who has worked in the automotive field since high school, began working for Dr. Dent, Inc., in Kansas City in 2006. Five years later, Green and two other employees bought the business and formed two new entities: Dr. Dent KC, Inc., for dent repair; and Dr. Dent KC Collision, LLC, d/b/a Roe Body Shop, a body shop. Green's wife, Karen, began working for the dent-repair entity in 2012 as its full-time office manager. Around 2016, she transitioned to doing QuickBooks and payroll part-time, from home. She was not involved with the body shop.

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[1] ECF 14 (motion for summary judgment); ECF 15 (supporting brief).

[2] *See* ECF 16 (objecting to UST's motion).

The partnership between Green and his two cofounders broke down in August 2019. Green immediately formed a third entity, Dr. Dent LLC,[3] to continue the dent-repair business on his own.

In January 2020, the assets of the body-shop business, Roe Body Shop, were sold to Carstar. As part of that sale, Green signed a covenant not to compete in which he agreed not to "directly or indirectly own or operate a collision repair service" in Johnson County or Wyandotte County, Kansas, for the next three years.[4] Green understood the non-compete agreement to prohibit him from owning or operating a business that did anything other than dent repair. However, Green wanted to expand his business beyond dent repair in order to make more money, and figured that "stay[ing] off the radar" was the best way to do so.[5]

Green's Dr. Dent LLC began doing business as Precision Dent Repair ("**Precision**") in February 2020. Green wanted to get away from the Dr. Dent name for two reasons: (1) the "multiple confusing companies" and (2) to avoid anyone coming after Dr. Dent LLC's assets.[6]

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[3] Dr. Dent LLC was registered with the Kansas Secretary of State on August 9, 2019.

[4] UST's Ex. 3, Cooperation & Non-Compete Agreement, ECF 15-1. Roe Body Shop had taken out an SBA loan from Core Bank in 2018; two years later, it surrendered its assets to the bank in lieu of foreclosure. *See id.* Core Bank then sold Roe Body Shop's assets to Carstar. *See id.*; UST's Stmt. of Mat. Facts ¶ 10, ECF 15.

[5] UST's Ex. 2, Justen Green 2004 Exam. Tr. 18:9-18, ECF 15-1.

[6] Core Bank would eventually sue Dr. Dent KC, Inc.; Dr. Dent KC Collision, LLC; and the Greens personally (among others) in Johnson County. *See* UST's Stmt. of Mat. Facts ¶ 8; *see also In re Green*, Case No. 21-21711, ECF 1 at 104 (disclosing litigation).

Green retained bankruptcy counsel in March 2020. Four months later, Green and Karen formed Xtreme Precision Dent Repair LLC ("**Xtreme**")[7] in Karen's name. Starting Xtreme was not Karen's idea; the issues were Green's non-compete agreement, the Dr. Dent name, and the fact that Green was preparing for bankruptcy. According to Green: "I was under [the non-compete agreement] that I could not do what I was doing so I had to become an employee instead of an owner. And that's how Xtreme . . . came around."[8]

After forming Xtreme in July 2020, Green "just switched everything over" from Precision to the new entity.[9] Checks for work performed by Precision were deposited into Xtreme's business account. Xtreme began paying for Precision's shop lease. Green considered ownership of vehicles titled in Precision's name to have transferred to Xtreme. He uses the same car hauler, trailer, and tools (which are listed on his Schedule A/B) for Xtreme that he used for Precision. He transferred Precision's accounts receivable, which had a total net balance of $8,720.03, to Xtreme. Green works 40 to 60 hours per week at Xtreme, but does not receive a salary or any wages.

The Greens freely transfer money between their personal and business accounts in order to pay bills. The UST's adversary complaint highlights three such transfers made by Green in September 2020:

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[7] Xtreme Precision Dent Repair LLC was registered with the Kansas Secretary of State on July 30, 2020.

[8] UST's Ex. 2, Justen Green 2004 Exam. Tr. 17:10-13, ECF 15-1.

[9] UST's Stmt. of Mat. Facts ¶ 23, ECF 15.

- $2,257.09 from Precision's business account to Xtreme's business account;
- $5,000 from the Greens' joint checking account to Xtreme's business account; and
- $6,488.64 from the Greens' joint checking account to the Greens' joint savings account, $6,110 of which was transferred to Karen's individual checking account less than a week later.

Green closed Precision's business account and the Greens' joint checking account later that month. He explained: "I didn't want any creditors or anybody coming after me, so I completely went off the radar."[10] Green's purpose in closing the accounts was to get more things out of his name and to avoid the Dr. Dent name.[11]

Three months later, on December 18, 2020, Green filed his Chapter 7 petition.[12] His largest debt (by far) is his $1.19 million personal guarantee of an SBA note from Core Bank, which Karen guaranteed as well. Green signed his petition, schedules, and statement of financial affairs under penalty of perjury.

Green's SOFA did not disclose any of the transactions challenged by the UST (which the UST characterizes as "transfers from [Green] or Dr. Dent LLC to his wife

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[10] UST's Stmt. of Mat. Facts ¶ 37, ECF 15; UST's Ex. 2, Justen Green 2004 Exam Tr. 54:11-15, ECF 15-1.

[11] Precision's bank account was in the name of Dr. Dent LLC d/b/a Precision Dent Repair. *See* UST's Ex. 6 (bank records), ECF 15-1.

[12] Karen, who had received a discharge in a different Chapter 7 case filed on February 28, 2013, was not yet eligible for a second discharge under § 727. *See* 11 U.S.C. § 727(a)(8) (providing for 8 years between Chapter 7 petitions).

or Xtreme"[13]). As to whether he had "[sold], trade[d], or otherwise transfer[red] any property to anyone, other than property transferred in the ordinary course of your business or financial affairs" within two years of filing for bankruptcy,[14] Green's only response was that he had sold two boats to a neighbor for $3,000, which he then used to make a mortgage payment on his house.[15] As to whether he had "give[n] any gifts with a total value of more than $600 per person" within two years of filing for bankruptcy, Green answered, "No."[16] He provided the same answer at his § 341 meeting of creditors.

On his Schedule I, Green listed his employment status as "Not employed" and stated that he "anticipates beginning a new business after bankruptcy," by which he meant "growing and expanding" Xtreme.[17] At the § 341 meeting, Green testified that he had listed all of his assets and all of his creditors in his petition, schedules, and SOFA, and that there were no errors or omissions.

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[13] UST's Stmt. of Mat. Facts ¶ 60, ECF 15.

[14] *Id.*

[15] *Id.*; *see In re Green*, Case No. 20-21711, ECF 1 at 107. The UST points out that the boat sales occurred a week after the date of Green's signature on his SOFA. *See* UST's Stmt. of Mat. Facts ¶ 60, ECF 15.

[16] UST's Stmt. of Mat. Facts ¶ 61, ECF 15.

[17] *In re Green*, Case No. 20-21711, ECF 1 at 95-96; UST's Ex. 2, Justen Green 2004 Exam. Tr. 73:24-74:8, ECF 15-1.

II. Additional Facts

The following additional facts are reflected in the exhibits attached to the UST's motion for summary judgment and in Green's Chapter 7 petition, schedules, and SOFA.

A bank statement for the Greens' joint checking account shows two overdraft charges and two returned item fees between August 28, 2020, and September 1, 2020.[18] The statement also shows a $14,000 deposit on September 1, 2020, just two days before the $5,000 transfer to Xtreme and the $6,488.64 transfer to the Greens' joint savings[19] (most of which then went to Karen's checking account, *see supra* p. 5). During his testimony, Green agreed that he transferred the $5,000 to Xtreme "to start the Xtreme business."[20] Karen testified that the $14,000 deposit was a gift from her father to her:

> We've been -- we're in a cash flow crunch, and so my dad helps us with that. So any money that comes in, that would just be the wholesale, you know, money that we did for the previous month. And then all the other money, seriously, I mean, there's -- you know, from my dad, 14,000 a month, 13,000 . . . .
>
> Q. Okay. Is he giving that money to you or to the business?
>
> A. He's giving it to me.
>
> Q. Okay. And you've just been using some of it for the business?

[18] UST's Ex. 6, ECF 15-1.

[19] *Id.*

[20] UST's Ex. 2, Justen Green 2004 Exam. Tr. 53:5-12, ECF 15-1.

> A. I -- it's -- I know we transfer back and forth. . . .
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> You know, we have a new CFO that's helping us, and he's like, these transfers have got to stop, you know, 'cause -- but we're just like -- if we transfer, it's like, oh, we have a bill for the dent business, we got to transfer money to pay for that. You know, and then you go back, oh, the mortgage is due, so if there's money -- whatever account has more money, it's just paying, constantly paying bills trying to just keep it afloat.
>
> Q. Okay. And so these -- this money from your dad is a gift, not a loan; is that right?
>
> A. Yeah. . . .
>
> And, I mean, if you look at it, that 6,000 is -- probably came from my dad because there's probably a deposit of -- well, there's one of 10,000 that my dad paid us and then previous, you know, he had paid us money. So the 6,000 was just -- it's just extra money from when my dad paid us a check of 10 or $14,000, or whatever.[21]

According to Karen, most of the money in the Greens' accounts "came from loans or gifts from [her] family to allow [the Greens] to keep paying our mortgage and bills."[22]

Green's Chapter 7 petition states that he is the sole proprietor of Precision.[23] His Schedule I provides that Karen is employed as the owner of Xtreme; that she receives monthly "draws from business" of $6,000; and that she receives monthly

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[21] UST's Ex. 4, Karen Green 2004 Exam Tr. 19:1-20:12, 26:10-17, ECF 15-1. A bank statement for Karen's checking account shows that she incurred three NSF charges between September 18 and October 2, 2020, and that another $10,000 was deposited into the account on October 2, 2020. *See* UST's Ex. 6, ECF 15-1.

[22] Karen Green Aff. ¶ 3, ECF 16.

[23] *In re Green*, Case No. 20-21711, ECF 1 at 4.

"contributions from family as needed to support household" of $7,000.[24] Green's SOFA discloses that in the year before he filed for bankruptcy, he was a party to seven lawsuits, all involving Dr. Dent KC, Inc., and/or Roe Body Shop (i.e., Dr. Dent KC Collision, LLC).[25]

III. Analysis

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The burden of establishing the nonexistence of a genuine dispute is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). A dispute of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In ruling on a motion for summary judgment, the court must draw all reasonable inferences from the record in favor of the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, the UST argues that "[t]he material facts undergirding the complaint to deny discharge . . . are not subject to any genuine dispute."[26]

[24] *In re Green*, Case No. 20-21711, ECF 1 at 95-96.

[25] *Id.* at 104-05.

[26] ECF 15 at 32.

The UST bears the burden of proving each element of her claims under § 727(a) by a preponderance of the evidence.[27] Under §§ 727(a)(2)(A) and (a)(4)(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
>
> . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account . . . .

The UST's motion frames the issue before the Court thus:

> Under 11 U.S.C. § 727(a)(2)(A) and (a)(4)(A), bankruptcy courts should deny discharges to debtors who transfer property with an intent to hinder, delay, or defraud; or who knowingly make false oaths in connection with their bankruptcy. Before bankruptcy, Green transferred his business to a new company he started in his wife's name, and then didn't disclose the transfer in his sworn bankruptcy schedules. Should the Court deny him a discharge?[28]

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[27] *See* Fed. R. Bankr. P. 4005 (placing burden of proof on party objecting to discharge); *First Nat'l Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991) (holding that "preponderance of the evidence" standard applies to action under § 727(a)(2)).

[28] ECF 15 at 1.

A. The UST's motion does not show that she is entitled to judgment as a matter of law under § 727(a)(2)(A).

As to subsection (a)(2)(A), the UST's argument omits key words from the statute. Section 727(a)(2)(A) does not apply every time a debtor "transfer[s] property"—rather, it applies when a debtor transfers property *of the debtor*. But here, the UST mostly argues that Green transferred property belonging to *Precision*. And under Kansas law, Green has no interest in such property. *See* Kan. Stat. Ann. § 17-76,111 ("A limited liability company interest is personal property. A member has no interest in specific limited liability company property."). Because Precision's property is not "property of the debtor" in this case, Green's transfers of such property are not material facts[29] for purposes of § 727(a)(2)(A).

The UST's motion does identify two transfers that could involve property of the debtor. In September 2020, Green made two transfers out of the Greens' joint checking account: $6,488.64 to the Greens' shared savings account ($6,110 of which then went into Karen's checking account) and $5,000 to Xtreme. However, while the UST includes these transfers in her statement of material facts, she does not include them in her argument under § 727(a)(2)(A). Thus, while it is undisputed that the transfers occurred, the UST's motion does not establish that such transfers entitle her to judgment as a matter of law on her § 727(a)(2)(A) claim.[30]

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[29] A fact is material if it is essential to the proper disposition of the claim. *See Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson*, 477 U.S. at 248).

[30] The Court notes that (1) the only money in the Greens' checking account at the time of the transfers was the $14,000 gift to Karen from her father, and that (2) the

B. The UST's motion does not show that she is entitled to judgment as a matter of law under § 727(a)(4)(A).

As to subsection (a)(4)(A), the UST argues that Green:

- testified at his § 341 meeting of creditors that he had not provided equipment or funding to Xtreme;[31]
- answered "no" on his SOFA as to whether he had given any gifts worth $600 or more in the last two years; and
- did not list the transfers to his wife on his SOFA in responding to whether he had transferred any property other than in the ordinary course of business or his financial affairs in the last two years.[32]

According to the UST, these statements "hid the gratuitous transfer of [Green's] only substantial non-exempt asset."[33] But as before, the UST's argument overlooks the distinction between an LLC and its assets. Green did not transfer his interest in Precision (which he owned); he transferred Precision's assets (which he did not own).[34] And the money transferred from the Greens' joint checking account appears

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Greens (who transfer money freely between accounts) appear to have spent the money on household expenses and their new business.

[31] While the UST also points out that Green testified that there were no assets in Precision other than his tools as of July 2020, *see* ECF 15 at 29, the UST does not point out any evidence to the contrary, nor does she point out any evidence that Green's testimony was knowingly false.

[32] ECF 15 at 28-29.

[33] *Id.* at 29.

[34] The UST describes Precision itself as a "substantial" and "valuable" asset, *see id.* at 29-30, but the Court is unable to agree. Although Precision owned assets, it had value only if, and to the extent, its assets *exceeded its liabilities*. Because there is no evidence of Precision's liabilities, the Court cannot determine whether Green's

to have been a gift to Karen from her father. *See supra* pp. 7-8 and note 30. The UST's motion does not explain why Green should have included transfers of Precision's assets, or of Karen's money, on his individual SOFA. Nor does it explain why Green's failure to do so amounted to "knowing" provision of a "false oath." Thus, while it is undisputed that the transfers occurred, the UST's motion does not establish that such transfers entitle her to judgment as a matter of law on her claim under § 727(a)(4)(A).

IV. Conclusion

Material distinctions exist in this case: between Green and Precision; between Green and Karen; between intent to evade creditors and intent to evade a non-compete agreement; between intent to evade one's own creditors and intent to evade those of a separate entity. While the UST's motion establishes that perhaps Green made a number of suspicious transfers with questionable intent, section 727(a) does not penalize all such transfers. Because the UST has not met her burden of showing that Green's actions entitle her to judgment as a matter of law under §§ 727(a)(2)(A) and (a)(4)(A), her motion for summary judgment is hereby denied.

IT IS SO ORDERED.

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interest in Precision was worth anything before he transferred Precision's assets to Xtreme.