

Dated: June 16, 2025
The following is ORDERED:



Denise E. Barnett
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:

WINTER CRAIGEN,
Debtor.

Case No. 24-22321

Chapter 7

_____/

PAUL A. RANDOLPH
Acting United States Trustee, Region 8,
Plaintiff,

v.

WINTER CRAIGEN,
Defendant.

Adv. Pro. No. 24-00113

MEMORANDUM OPINION AND ORDER DENYING
MOTION FOR PARTIAL SUMMARY JUDGMENT

This adversary proceeding came before the Court on the *United States Trustee's Motion for Partial Summary Judgment and Memorandum of Law in Support Thereof* ("Motion for Summary Judgment"),¹ *Defendant's Response to the Motion for Partial Summary Judgment*

¹ Pl.'s Mot. for Partial Summ. J. (ECF No. 10).

(“Response”),² and *United States Trustee’s Reply to Defendant’s Response to Motion for Partial Summary Judgment* (“Reply”).³ After reviewing the record, filed documents, and considering the written arguments from the United States Trustee (“Plaintiff”) and Winter Craigen (“Ms. Craigen”), the Court denies the Plaintiff’s Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing a complaint, the Plaintiff examined Ms. Craigen pursuant to Bankruptcy Rule 2004.⁴ Ms. Craigen provided tax returns for her four businesses; her marital dissolution agreement from her divorce; her personal and business bank statements; and an affidavit attesting to documents she did not have.⁵

A. Factual Background

1. Ms. Craigen’s Businesses

Ms. Craigen graduated from the University of Memphis in 2003 or 2004 with a bachelor’s degree in education.⁶ In April 2015, she married Jerry Bobo (“Dr. Bobo”).⁷ She and Dr. Bobo started several unsuccessful businesses together:

Business Name⁸	Business	Formation Date	Administratively Dissolved⁹
D&C Holding Corporation	Holding company	February 25, 2014	August 8, 2023

² Def.’s Resp. (ECF No. 14).

³ Pl.’s Reply. (ECF No. 15).

⁴ Pl.’s Compl. ¶ 52 (ECF No. 1), Def.’s Answer ¶ 52 (ECF No. 5).

⁵ See Pl.’s Mot. for Partial Summ. J. (ECF No. 10) and Def.’s Resp. (ECF No. 14).

⁶ Pl.’s Mot. for Partial Summ. J., Ex. I, p. 43 (ECF No. 10).

⁷ Def.’s Resp., Ex. 1, Decl. of Winter Craigen (ECF No. 14).

⁸ Pl.’s Compl. ¶ 44 (ECF No. 1), Def.’s Answer ¶ 44 (ECF No. 5).

⁹ Pl.’s Compl., Exs. C-H (ECF No. 1).

Relax H2O Inc.	Spa	July 30, 2015	August 9, 2023
Relax & Shine Executive Hand Car Wash, Inc.	Car wash	April 3, 2017	August 11, 2021
Driven Global Logistics LLC	Trucking logistics	December 9, 2019	August 8, 2023

The following businesses had negative operating income in their final tax year:

Business Name¹⁰	Tax Year	Profit/(Loss)
Relax H2O Inc.	2021	(\$29,882.00)
Relax & Shine Executive Hand Car Wash Inc.	2022	(12,686.00)
Driven Global Logistics LLC	2022	(\$10,526.00)

In the tax returns Ms. Craigen provided, she signed as CFO for the tax returns of Relax H2O Inc. and Relax & Shine Executive Hand Car Wash Inc.¹¹

D&C Holding Corporation was the only company to not file a final tax return.¹² In its 2022 tax return it reported a \$45,164 loss.¹³ On March 24, 2022, D&C Holding Corporation opened a chiropractic clinic under The Joint Chiropractic Clinic franchise.¹⁴ On September 1, 2023, Ms. Craigen and Dr. Bobo, through D&C Holding Corporation, sold their rights to the chiropractic clinic under The Joint franchise.¹⁵ Besides the buyer's last name, Ms. Craigen could

¹⁰ Pl.'s Mot. for Partial Summ. J., Ex. A (Relax H2O, Inc.), Ex. B (Relax & Shine Executive Hand Car Wash Inc.), and Ex. D (Driven Global Logistics LLC) (ECF No. 10).

¹¹ *Id.* Ex. A, p. 1, and Ex. B, p.1 (ECF No. 10).

¹² Pl.'s Compl. ¶ 22 (ECF No. 1), Def.'s Answer ¶ 22 (ECF No. 5).

¹³ Def.'s Resp., p. 157 (ECF No. 14).

¹⁴ Pl.'s Mot. for Partial Summ. J., Ex. E, p. 2, ll. 13-22 (ECF No. 10).

¹⁵ *Id.* Ex. E, p. 5, ll. 21-22.

not remember for how much or to whom she sold the franchise rights.¹⁶ On August 8, 2023, D&C Holding Corporation was administratively dissolved.¹⁷

2. The Divorce

On February 28, 2022, Ms. Craigen and Dr. Bobo filed for divorce.¹⁸ On March 3, 2022, Ms. Craigen and Dr. Bobo entered into a marital dissolution agreement.¹⁹ In the agreement, Ms. Craigen kept a 2006 Infinity and a 2019 Audi.²⁰ Sometime after the divorce, in 2022, Ms. Craigen sold the 2019 Audi in a private sale to someone in Florida.²¹ Ms. Craigen could not recall for how much or to whom she sold the 2019 Audi.²² Ms. Craigen stated that the divorce compromised her mental state and blurred her memory.²³ When asked what she did with the proceeds of the car, Ms. Craigen said she used the money for living expenses.²⁴

3. Ms. Craigen's Deposits and Withdrawals

Ms. Craigen holds an account with the Bank of Collierville.²⁵ Under Ms. Craigen's account, the following transactions occurred:

Transaction Date ²⁶	Transaction	Amount	Ending Balance
January 31, 2024	Deposit	\$10,560.78	\$12,483.78

¹⁶ Pl.'s Compl. ¶ 56 (ECF No. 1), Def.'s Answer ¶ 56 (ECF No. 5).

¹⁷ Pl.'s Compl. ¶ 22 (ECF No. 1), Def.'s Answer ¶ 22 (ECF No. 5).

¹⁸ Pl.'s Compl., Ex. F (ECF No. 1).

¹⁹ *Id.* Ex. G.

²⁰ Pl.'s Compl. ¶ 60 (ECF No. 1), Def.'s Answer ¶ 60 (ECF No. 5).

²¹ Pl.'s Compl. ¶ 60 (ECF No. 1), Def.'s Answer ¶ 60 (ECF No. 5).

²² Pl.'s Compl. ¶ 60 (ECF No. 1), Def.'s Answer ¶ 60 (ECF No. 5).

²³ Defendant's Resp., Ex. 1, Decl. of Winter Craigen, ¶ 9 (ECF No. 14).

²⁴ Pl.'s Mot. for Partial Summ. J., Ex. H, p. 3, l. 8 (ECF No. 10).

²⁵ Pl.'s Compl. ¶ 68 (ECF No. 1), Def.'s Answer ¶ 68 (ECF No. 5).

²⁶ Pl.'s Compl. ¶¶ 62-63 (ECF No. 1), Def.'s Answer ¶¶ 62-63 (ECF No. 5).

January 31, 2024	Withdrawal	(\$1,923.00)	\$10,560.78
February 16, 2024	Deposit	\$3,500.00	\$14,060.78
February 16, 2024	Withdrawal	(\$9,950.00)	\$4,110.78
February 20, 2024	Withdrawal	(\$4,000.00)	\$110.78

From January 31, 2024, through February 20, 2024, Ms. Craigen deposited \$14,060.78 and withdrew \$15,873.00. The Plaintiff asked Ms. Craigen for the deposits' source, and Ms. Craigen was unsure.²⁷ In her Response to the Plaintiff's Motion, Ms. Craigen signed an affidavit stating she believed the January 31 deposit was a certificate of deposit and the February 16 deposit was a gift from a family member.²⁸ The Plaintiff asked Ms. Craigen what she did with the money that she withdrew on February 16 and 20.²⁹ Ms. Craigen said she used the February 16 withdrawal for living expenses and the February 20 withdrawal either for repairs or to help someone out.³⁰

4. Both Dr. Bobo and Ms. Craigen filed for Chapter 7 Bankruptcy.

Later in 2024, both Dr. Bobo and Ms. Craigen filed their respective bankruptcy cases. Dr. Bobo filed for bankruptcy on April 18, 2024.³¹ He received his discharge on July 30, 2024.³² Ms. Craigen filed for bankruptcy on May 16, 2024.³³ On October 4, 2024, the Plaintiff filed this adversary proceeding against Ms. Craigen.³⁴

²⁷ Pl.'s Compl. ¶ 64 (ECF No. 1), Def.'s Answer ¶ 64 (ECF No. 5).

²⁸ Defendant's Resp., Ex. 1, Decl. of Winter Craigen, ¶ 11 (ECF No. 14).

²⁹ Pl.'s Mot. for Partial Summ. J., Ex. I, p. 3, ll. 12-18 (ECF No. 10).

³⁰ *Id.* Ex. I, p. 3, l. 13, and p. 4, ll. 15-17.

³¹ Case No. 24-21835, Chapter 7 Voluntary Pet. (ECF No. 1).

³² *Id.* Order Discharging Debtor (ECF No. 16).

³³ Case No. 24-22321, Chapter 7 Voluntary Pet. (ECF No. 1).

³⁴ Pl.'s Compl. (ECF No. 1).

B. Parties' Positions

1. Plaintiff's Motion for Partial Summary Judgment

The Plaintiff makes two arguments for partial summary judgment—the Court should deny Ms. Craigen discharge under (i) 11 U.S.C. § 727(a)(3) for failing to keep records; or (ii) 11 U.S.C. § 727(a)(5) for failing to explain the disposition of her assets.³⁵

First, the Plaintiff argues Ms. Craigen's discharge should be denied under subsection 727(a)(3) because Ms. Craigen failed to keep records for—

- D&C Holding Corporation, including financial statements, accounts receivable and payable ageing reports, tax returns, and sale documents for The Joint;
- The sale of the 2019 Audi; and
- The source of the deposits and disposition of the withdrawals.³⁶

The Plaintiff explained records are essential to understand Ms. Craigen's financial condition.³⁷

But because Ms. Craigen has none, the Plaintiff satisfied her burden, shifting it to Ms. Craigen.³⁸

Without any records, subsection 727(a)(3) is satisfied, and the Court should deny Ms. Craigen discharge.³⁹

Second, the Plaintiff argues Ms. Craigen's discharge should be denied under subsection 727(a)(5) because Ms. Craigen failed to satisfactorily explain the disposition of the—

- Proceeds from the sale of The Joint;
- Proceeds from the sale of her 2019 Audi; and

³⁵ Pl.'s Mot. for Partial Summ. J., pp. 12-18 (ECF No. 10).

³⁶ *Id.* p. 14.

³⁷ *Id.* p. 14.

³⁸ *Id.* p. 14.

³⁹ *Id.* pp. 14-15.

- January and February 2024 withdrawals.⁴⁰

The Plaintiff explained he bears the initial burden.⁴¹ He must show, (1) within a reasonable time before the petition date, the debtor disposed of assets; (2) on the petition date, the debtor did not own the assets; and (3) the debtor's schedules or pleadings do not adequately explain the disposition of the assets.⁴² Subsection 727(a)(5) has no intent element.⁴³

Once the initial burden is met, it shifts to the debtor.⁴⁴ The Plaintiff argued, under subsection 727(a)(5), the debtor must support her explanation with some documentation.⁴⁵ And, when the debtor makes only general statements to explain the disposition, it is appropriate to deny the debtor discharge.⁴⁶

The Plaintiff argued he met all three elements under subsection 727(a)(5).⁴⁷ Specifically, before filing, Ms. Craigen received funds from the sale of The Joint and her 2019 Audi.⁴⁸ She also made large withdrawals from her bank account.⁴⁹ When Ms. Craigen filed, she no longer

⁴⁰ *Id.* p. 18.

⁴¹ *Id.* p. 16.

⁴² *Id.* p. 16.

⁴³ *Id.* p. 16.

⁴⁴ *Id.* p. 17.

⁴⁵ *Id.* p. 17.

⁴⁶ *Id.* p. 17.

⁴⁷ *Id.* p. 17.

⁴⁸ *Id.* p. 17.

⁴⁹ *Id.* p. 17.

had these funds.⁵⁰ Ms. Craigen only offered vague explanations and no documentation.⁵¹ Accordingly, it is appropriate to deny her discharge under subsection 727(a)(5).⁵²

2. Ms. Craigen's Response

Ms. Craigen responded to the Plaintiff's Motion.⁵³ Ms. Craigen contended the Plaintiff's arguments under subsections 727(a)(3) and (5) failed and asserted the affirmative defense of judicial estoppel.⁵⁴

Under subsection 727(a)(3), Ms. Craigen argues either the records are irrelevant, or her explanations are adequate.⁵⁵ She argues D&C Holdings Corporation's records are irrelevant because they are unrelated to her financial condition.⁵⁶ Also the records are duplicative because she has already supplied the company's tax returns.⁵⁷

Ms. Craigen argues she adequately explained the sale of the 2019 Audi.⁵⁸ She sold the car and used the proceeds for living expenses.⁵⁹

Ms. Craigen argues she adequately explained the source of the deposits and disposition of the withdrawals.⁶⁰ The source of the deposit on January 31, 2024, was from the proceeds from

⁵⁰ *Id.* pp. 17-18.

⁵¹ *Id.* pp. 17-18.

⁵² *Id.* pp. 17-18.

⁵³ Defendant's Resp. (ECF No. 14).

⁵⁴ *See generally Id.*

⁵⁵ *Id.* pp. 10-11.

⁵⁶ *Id.* pp. 8-9.

⁵⁷ *Id.* p. 11.

⁵⁸ *Id.* p. 12.

⁵⁹ *Id.* p. 12.

⁶⁰ *Id.* p. 12.

the sale of The Joint.⁶¹ The source of the deposit on February 16, 2024, was a gift from a family member.⁶² She withdrew the money for living expenses.⁶³

Next, Ms. Craigen argued the Plaintiff's Motion under subsection 727(a)(5) fails because the debtor has adequately explained the disposition of the—

- Proceeds from the sale of The Joint;
- Proceeds from the sale of her 2019 Audi; and
- January and February 2024 withdrawals.⁶⁴

Ms. Craigen argued she adequately explained the loss of her assets in her 2004 examination and declaration.⁶⁵ During her 2004 examination, Ms. Craigen explained she used the proceeds from the sale of The Joint to pay investors and for living expenses.⁶⁶ In her declaration, Ms. Craigen explained she used the proceeds from the sale of the 2019 Audi for living expenses.⁶⁷

Ms. Craigen does not specifically address the disposition of the withdrawals from her bank account.⁶⁸ But she asserts she adequately explained the loss of all three assets.⁶⁹

Finally, Ms. Craigen asserts the affirmative defense of judicial estoppel.⁷⁰ On April 18, 2024, one month before Ms. Craigen filed for bankruptcy, Dr. Bobo filed for chapter 7

⁶¹ *Id.* p. 12 (ECF No. 14) (Ms. Craigen cites her declaration, but in her declaration, she says the money came from a certificate of deposit. *See id.* Decl. of Winter Craigen, ¶ 11).

⁶² *Id.* p. 12.

⁶³ *Id.* p. 12.

⁶⁴ *Id.* p. 14.

⁶⁵ *Id.* p. 14.

⁶⁶ *Id.* pp. 13-14.

⁶⁷ *Id.* p. 13.

⁶⁸ *Id.* pp. 13-14.

⁶⁹ *Id.* p. 14.

⁷⁰ *Id.* p. 15.

bankruptcy.⁷¹ The Plaintiff never questioned Dr. Bobo about The Joint or D&C Holdings Corporation.⁷² Ms. Craigen explains judicial estoppel applies when a party prevails on a theory in one stage of the case and then relies on a contradictory theory in another stage of the case.⁷³ She further explains judicial estoppel is meant to prevent gamesmanship.⁷⁴ Ms. Craigen contends that because the Plaintiff did not litigate Dr. Bobo's discharge and is litigating her discharge, the Plaintiff is guilty of gamesmanship.⁷⁵

3. The Plaintiff's Reply

The Plaintiff made five points in her reply: (1) there is no genuine dispute of material fact; (2) Ms. Craigen's arguments against subsection 727(a)(3) are unpersuasive; (3) Ms. Craigen's failure to keep records is unjustified; (4) the Court should deny Ms. Craigen discharge under subsection 727(a)(5) because she failed to provide records; and (5) Ms. Craigen's judicial estoppel argument has no merit.⁷⁶

First, the Plaintiff makes a short argument. In her Response, Ms. Craigen does not dispute any material facts.⁷⁷ Without a genuine material fact at issue, summary judgment is proper.⁷⁸

Second, the Plaintiff argues Ms. Craigen's transactions at issue occurred within a reasonable time before she filed for bankruptcy under subsection 727(a)(3).⁷⁹ The Plaintiff

⁷¹ *Id.* p. 15.

⁷² *Id.* p. 15.

⁷³ *Id.* p. 15.

⁷⁴ *Id.* p. 15.

⁷⁵ *Id.* p. 15.

⁷⁶ Pl.'s Reply (ECF No. 15).

⁷⁷ *Id.* p. 1.

⁷⁸ *Id.* p. 1.

⁷⁹ *Id.* p. 2.

explained most courts use a minimum two-year look-back period under subsection 727(a)(3).⁸⁰

In May 2024, Ms. Craigen filed for bankruptcy.⁸¹ Ms. Craigen sold her 2019 Audi sometime after her divorce in May 2022.⁸² In September 2023, D&C Holding Corporation sold The Joint.⁸³ And the deposits and withdrawals from Ms. Craigen's bank account occurred in January and February 2024. All transactions occurred within the two-year look-back period.⁸⁴

Third, the Plaintiff argues Ms. Craigen either provided inadequate documents or did not adequately justify her failure to maintain documents for these transactions.⁸⁵ Ms. Craigen provided D&C Holding Corporation's 2022 tax return. But the tax return is inadequate because (i) it is a summary document; (ii) it fails to provide relevant information for the sale of The Joint in September 2023; and (iii) Ms. Craigen must have provided the requested financial statements to the accountant who prepared the return.⁸⁶

Next, the Plaintiff argues Ms. Craigen's explanations are inadequate.⁸⁷ First, although Ms. Craigen did not have full control over the businesses' records or operations, there is no dispute she had access to these documents.⁸⁸ Second, Ms. Craigen alleges the documents of the sale of The Joint were left with the new owners, who shredded them.⁸⁹ Still, Ms. Craigen should

⁸⁰ *Id.* p. 2.

⁸¹ *Id.* p. 3.

⁸² *Id.* p. 3.

⁸³ *Id.* p. 3.

⁸⁴ *Id.* p. 3.

⁸⁵ *Id.* p. 4.

⁸⁶ *Id.* p. 5.

⁸⁷ *Id.* p. 5.

⁸⁸ *Id.* p. 5.

⁸⁹ *Id.* p. 5.

have had documentation of the proceeds of the sale and how she disposed of the proceeds.⁹⁰

Finally, in her affidavit, Ms. Craigen blames her divorce for her inability to recall specific facts for the sale of the 2019 Audi.⁹¹ But vehicle sales require documentation, like Tennessee's one-age Certificate of Title.⁹²

Fourth, Ms. Craigen has not adequately explained the loss of her assets under subsection 727(a)(5). Ms. Craigen said she used the sale proceeds from The Joint to pay investors and for living expenses and the proceeds from the 2019 Audi for living expenses.⁹³ She further explained the source of the deposits were proceeds from the sale of The Joint, a certificate of deposit, and a gift from family.⁹⁴ And she used the withdrawals for living expenses.⁹⁵ But because Ms. Craigen has no proof to corroborate her statements, her explanations are inadequate.⁹⁶

Fifth, Ms. Craigen's judicial estoppel argument has no merit for two reasons.⁹⁷ First, Federal Rule of Bankruptcy Procedure 7008 requires the defendant to raise affirmative defenses in their answer.⁹⁸ Ms. Craigen failed to raise the defense in her answer. Second, judicial estoppel

⁹⁰ *Id.* p. 5.

⁹¹ *Id.* p. 6.

⁹² *Id.* p. 6.

⁹³ *Id.* p. 7.

⁹⁴ *Id.* pp. 7-8.

⁹⁵ *Id.* p. 8.

⁹⁶ *Id.* p. 8.

⁹⁷ *Id.* p. 9.

⁹⁸ *Id.* p. 9.

is inapplicable in this case.⁹⁹ The Plaintiff took no position in Dr. Bobo’s case.¹⁰⁰ So there was no position for a court or Ms. Craigen to rely on.¹⁰¹

II. DISCUSSION¹⁰²

The Plaintiff moved for partial summary judgment to deny Ms. Craigen discharge under 11 U.S.C. §§ 727(a)(3) and (5). Under section 727, the Plaintiff must prove by a preponderance of the evidence that the Bankruptcy Code disallows discharge.¹⁰³

A. Summary Judgment Standard

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, which governs summary judgment.¹⁰⁴ Under Rule 56(a), after a movant shows there is “no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law,” the court must grant summary judgment.¹⁰⁵ The court must view all evidence in the “light most favorable” to the non-moving party.¹⁰⁶

B. The Plaintiff failed to show there are no disputed material facts to determine denial of discharge under subsection 727(a)(3).

Under subsection 727(a)(3), a debtor is not entitled to discharge if the debtor “concealed, destroyed, mutilated, falsified, or *failed to keep or preserve any recorded information* ... from

⁹⁹ *Id.* p. 9.

¹⁰⁰ *Id.* p. 9.

¹⁰¹ *Id.* p. 9.

¹⁰² The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1334. Venue is proper in this District. 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). This is an adversary proceeding under Fed. R. Bankr. P. 7001(d).

¹⁰³ Fed. R. Bankr. P. 4005. *See also Barclays/American Business Credit v. Adams (In re Adams)*, 31 F.3d 389 (6th Cir. 1994).

¹⁰⁴ *Id.* 7056.

¹⁰⁵ Fed. R. Civ. P. 56(a).

¹⁰⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)) (discussing summary judgment standard).

which the debtor’s financial condition or business transactions might be ascertained.”¹⁰⁷ Once the moving party shows that the debtor failed to keep or preserve adequate records, the burden shifts to the debtor to justify why the records are not inadequate.¹⁰⁸ Subsection 727(a)(3)’s purpose is to provide the creditors and the trustee with “enough information to ascertain the debtor’s financial condition” and business transactions during a reasonable period before the petition date.¹⁰⁹ Courts generally use two years as a minimum reference point.¹¹⁰

Courts in the Sixth Circuit disagree on when a movant has met its burden under subsection 727(a)(3).¹¹¹ The majority follow the test developed by the Third Circuit Court of Appeals, the *Alten* test.¹¹² Under the *Alten* test, the plaintiff must show two elements to establish a prima facie case.¹¹³ First, “the debtor failed to maintain and preserve adequate records.”¹¹⁴ Second, the debtor’s failure to keep and preserve adequate records makes it impossible for the

¹⁰⁷ 11 U.S.C. § 727(a)(3) (2025) (emphasis added).

¹⁰⁸ 11 U.S.C. § 727(a)(3) (2025); see also *Randolph v. Joseph (In re Joseph)*, 665 B.R. 783, 790 (Bankr. E.D. Ky. 2024) (“[i]f the [movant] succeed[s], the burden on the motion shifts to the debtor to establish any justification for the inadequacy”) (citing *CM Temp. Servs., Inc. v. Bailey (In re Bailey)*, 375 B.R. 410, 415-16 (Bankr. S.D. Ohio 2007)).

¹⁰⁹ *U.S. Trs. v. Zhang (In re Zhang)*, 463 B.R. 66, 91 (Bankr. S.D. Ohio 2012) (explaining that Plaintiff is not entitled to perfect or complete records, but enough information to ascertain the debtor’s financial condition) (quoting *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999)).

¹¹⁰ *Peters v. Michael (In re Michael)*, 433 B.R. 214, 221 (Bankr. N.D. Ohio 2010) (“[Subsection § 727(a)(3) does not impose upon a debtor an obligation to keep and preserve financial records forever. Instead, § 727(a)(3) only imposes upon a debtor a duty to keep and preserve financial records for a reasonable period of time, with two years having been used as a minimum point of reference.”). (citing *Menotte v. Hahn (In re Hahn)*, 362 B.R. 542, 548 (Bankr. S.D. Fla. 2007)).

¹¹¹ *Crocker v. Stiff (In re Stiff)*, 512 B.R. 893, 901 n.2 (Bankr. E.D. Ky. 2014) (declining to address the issue of exactly what records subsection 727(a)(3) requires).

¹¹² *Id.* (“Many courts, following a case of the Third Circuit, hold that a creditor must show that the debtor has failed to keep records the absence of which “makes it impossible to ascertain the debtor’s financial condition and material business transactions.”) (citing *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir.1992)).

¹¹³ *Randolph v. Fry (In re Fry)*, 2022 Bankr. LEXIS 251 *15-16 (Bankr. W.D. Tenn. Jan. 26, 2022) (citing *Alten*, 958 F.2d at 1232).

¹¹⁴ *Id.* at *17.

creditors or the trustee to ascertain the debtor’s financial condition or business transactions.¹¹⁵

Courts determine whether the debtor’s records are adequate on a case-by-case basis.¹¹⁶

After the plaintiff shows it cannot ascertain the debtor’s financial condition or business transactions, the debtor must justify the failure to keep or preserve adequate business records.¹¹⁷

Courts consider several factors to determine whether the debtor’s failure was justified under the circumstances, including the debtor’s—

- Education, experience, and sophistication;
- Business’s size and complexity;
- Business’s indebtedness; and
- Any other relevant circumstances.¹¹⁸

The First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted the *Alten* test, requiring the plaintiff to show it is impossible to ascertain the debtor’s financial condition (the “impossibility” test).¹¹⁹

¹¹⁵ *Id.* (Bankr. W.D. Tenn. Jan. 26, 2022) (citing *Alten*, 958 F.2d at 1232).

¹¹⁶ *Alten*, 958 F.2d at 1230 (explaining *In re Underhill*, 82 F.2d 258 (2d Cir. 1936)) (concluding that there were no facts in dispute and analyzing two alternative interpretation of subsection 723(a)(3) – “whether the statute prevents discharge to any debtor who concealed, destroyed, mutilated, falsified, or failed to keep or preserve *any* recorded information ... from which the debtor’s financial condition or business transactions might be ascertained unless the debtor’s act was justified [versus] whether statute prevents discharge only when, on a cumulative basis, the debtor’s recorded information is insufficient to permit the creditors or trustee in bankruptcy to ascertain his or her financial condition or business transactions unless the absence of sufficient information is justified under all the circumstances of the case.”) (emphasis in the original).

¹¹⁷ *Solomon v. Barman (In re Barman)*, 244 B.R. 896, 900 (Bankr. E.D. Mich. 2000) (quoting *Strbac*, 235 B.R. at 883).

¹¹⁸ *Alten*, 958 F.2d at 1231.

¹¹⁹ See *F/D/B/A Rick’s Complete Lawn Care v. Shove (In re Shove)*, 83 F.4th 102, 109 (1st Cir. 2023) (“To prevail ... [a plaintiff] must prove that the debtor (1) ‘unreasonably failed to maintain sufficient records’ and (2) that this failure makes it impossible ‘to adequately ascertain [their] financial situation.’”) (quoting *Razzaboni v. Schifano (In re Schifano)*, 378 F.3d 60, 70 (1st Cir. 2004)); *Berger & Assocs. Attys., P.C. v. Kran (In re Kran)*, 760 F.3d 206, 211 (2d Cir. 2014) (reasoning that the plaintiff’s argument was insufficient because the plaintiff admitted it was possible to ascertain the debtor’s financial condition); *Mercantile Peninsula Bank v. French (In re French)*, 499 F.3d 345, 354 (4th Cir. 2007) (“a party objecting [to discharge under subsection 727(a)(3)] must make an initial showing that (1)

In the Sixth Circuit, some bankruptcy courts criticize the *Alten* test.¹²⁰ Those courts argue that because the statute does not require the plaintiff to show impossibility, the *Alten* test does not follow the statute’s plain language.¹²¹ Instead, the plaintiff only needs to show that the debtor did not keep recorded information that might help ascertain the debtor’s financial condition.¹²² Accordingly, these courts have developed a three prong test where the plaintiff must (1) offer evidence about the general nature of the debtor’s business or personal financial circumstances; (2) present evidence on what recorded information is missing; and (3) show how the missing information might help the movant ascertain the debtor’s financial condition.¹²³ This alternate test shifts *Alten*’s “impossibility” requirement to the debtor.¹²⁴ After the plaintiff establishes the

the debtor failed to keep and preserve adequate financial records, and (2) such a failure makes it impossible to ascertain the debtor’s financial condition”) (citation omitted); *Cadle Co. v. Duncan (In re Duncan)*, 562 F.3d 688, 697-698 (5th Cir. 2009)(“If the plaintiff satisfies this initial burden of production--that the debtor’s failure to produce adequate records makes it impossible to discern his financial status--the debtor must prove the inadequacy is ‘justified under all the circumstances’”) (quoting *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 703 (5th Cir. 2003)); *In re Agnew*, 818 F.2d 1284, 1290 (7th Cir. 1987) (Even if [the debtor] had [failed to keep or preserve records, the plaintiff] presented no evidence ... from which it could be concluded that any such failure ... made it impossible to ascertain [the debtor’s] financial condition”) (citation omitted); *Dykes v. Dykes (In re Dykes)*, 954 F.3d 1157, 1163 (8th Cir. 2020) (“the objecting party ... must show ‘(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor’s financial condition and material business transactions’”) (quoting *Alten*, 958 F.2d at 1232); *Caneva v. Sun Cmtys. Operating Ltd. P’ship (In re Caneva)*, 550 F.3d 755, 761 (9th Cir. 2008) (“A creditor states a prima facie case ... by showing “‘the objecting party ... must show ‘(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor’s financial condition and material business transactions’”)(quoting *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994) (quoting *Alten*, 958 F.2d at 1232)); *In re Brown*, 108 F.3d 1290, 1295 (10th Cir. 1997) (“to state a prima facie case, [the plaintiff] had to demonstrate that [the debtor] had failed to maintain and preserve adequate records and that the failure made it impossible to ascertain his financial condition and *material business transactions*”) (emphasis in original) (citations omitted).

¹²⁰ *Bavely v. Daniels (In re Daniels)*, 641 B.R. 165, 197 f.12 (Bankr. S.D. Ohio 2022) (“some courts place an improperly high initial burden on creditors [by requiring them to show it is ‘impossible’ to ascertain the debtor’s financial condition with the records provided]”) (quoting *Strzesynski v. Devaul (In re Devaul)*, 318 B.R. 824, 830-32 (Bankr. N.D. Ohio 2004)).

¹²¹ *Devaul*, 318 B.R. at 831-832 (Bankr. N.D. Ohio 2004) (citing *PNC Bank v. Buzzelli (In re Buzzelli)*, 246 B.R. 75, 97 (Bankr. W.D. Penn. 2000)).

¹²² *Id.* at 833.

¹²³ *Id.* at 833-834.

¹²⁴ *Id.* at 834.

three elements, the debtor can justify the missing documents by showing that it is possible to ascertain her financial condition from the existing documents.¹²⁵

Without the Court deciding which test to use, here the Plaintiff's argument under subsection 727(a)(3) fails. The Plaintiff requested documents from a reasonable period before the petition date. But he failed to show there are no disputed material facts. First, the requested records are from within the two-year period before the petition date. Ms. Craigen filed for bankruptcy on May 16, 2024. Sometime after her divorce in May 2022, Ms. Craigen sold her 2019 Audi. D&C Holding Corporation sold its franchise rights of The Joint Chiropractic Clinic in September 2023. Further, Ms. Craigen's deposits and withdrawals occurred in January and February 2024.

Next, the Plaintiff failed to establish that there are no disputed material facts. Both tests require a fact intensive analysis of the debtor's sophistication. The parties dispute the level of Ms. Craigen's financial sophistication. The Plaintiff points to Ms. Craigen's college education. Ms. Craigen emphasized that her bachelor's degree is in education, and she does not have an accounting or financial background. She was involved in several businesses with her husband, but her role in those businesses is unclear. Further, Ms. Craigen contends that she provided documents and information from which the Plaintiff can ascertain her financial condition and business transactions.

Because there are disputed material facts, the Court cannot determine if Ms. Craigen kept adequate records or if her failure to do so is justified under the circumstances. Specifically, it is unclear whether it would be reasonable to expect Ms. Craigen to keep the records requested for D&C Holding Corporation (a company in which her role remains unclear); the sale record (the

¹²⁵ *Id.*

location or disposition) of the 2019 Audi; and documentation for the source of her deposits and disposition of her withdrawals in January and February 2024. Further, neither party has established whether it is possible or impossible to determine Ms. Craigen’s financial condition from over 200 pages of documents filed with the Motion for Summary Judgment and Response.

C. The Plaintiff failed to show there are no disputed material facts to determine denial of discharge under subsection 727(a)(5).

Next, the Court must decide whether the Plaintiff proved by a preponderance of the evidence that Ms. Craigen failed to satisfactorily explain the loss of her assets under subsection 727(a)(5).¹²⁶ Similar to subsection 727(a)(3), subsection 727(a)(5) follows a burden shifting framework.¹²⁷ First, the movant must identify assets that the debtor had but no longer possesses.¹²⁸ Afterwards, the burden shifts to the debtor, who must satisfactorily explain the loss of the assets.¹²⁹ A satisfactory explanation depends on whether it is “reasonable under the circumstances.”¹³⁰ But at a minimum, the explanation must “contain more than vague guesses and conclusory statements.”¹³¹ The Court may also consider the debtor’s sophistication.¹³²

The Plaintiff alleges Ms. Craigen unsatisfactorily explained the loss of (1) the proceeds from the sale of the 2019 Audi; (2) the proceeds from the sale of the franchise with The Joint Chiropractic Clinic; and (3) the disposition of the January and February 2024 withdrawals.

¹²⁶ *McDonald v. McDonald*, 29 F.4th 817, 823 (6th Cir. 2022) (citing *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994)).

¹²⁷ *Id.*

¹²⁸ *Id.* (citing *Devaul*, 318 B.R. at 840).

¹²⁹ *Id.* (citing *Devaul*, 318 B.R. at 840).

¹³⁰ *Clippard v. Jarrett (In re Jarrett)*, 417 B.R. 896, 905 (Bankr. W.D. Tenn. 2009) (quoting *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1994)).

¹³¹ *McDonald*, 29 F.4th at 823 (citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984)).

¹³² *See Id.* (considering the debtor’s financial sophistication to determine his explanations were unsatisfactory) (citing *Miller v. Bauer (In re Bauer)*, 128 F. App’x 467 (6th Cir. 2005)).

Ms. Craigen contends she used the proceeds from all three transactions for living expenses and possibly to repair a vehicle or help a friend. From the record, the Court cannot determine whether the debtor satisfactorily explained the loss of the assets. The Court must deny the Plaintiff's Motion for Summary Judgment to allow the parties to introduce evidence and hear the debtor's testimony.

The Plaintiff argues that Ms. Craigen must provide corroborating documentation to support her explanation. But subsection 727(a)(5) has no documentation requirement.¹³³ If Congress wanted to include a documentation requirement, it would have done so—as it did in subsection 727(a)(3).¹³⁴ While courts in the other circuits have imposed a documentation requirement under subsection 727(a)(5), most bankruptcy courts in the Sixth Circuit have not adopted such a strict standard.¹³⁵

Instead, whether a debtor's explanation is satisfactory is within the Court's broad discretion.¹³⁶ Courts may consider financial documents, the debtor's schedules, or corroborative testimony.¹³⁷ Accordingly, the Court denies the Plaintiff's Motion for Summary Judgment so the parties can put on evidence regarding the sufficiency of Ms. Craigen's explanation and her level of sophistication.

¹³³ See 11 U.S.C. § 727(a)(5) (2025).

¹³⁴ Cf. *McDonald*, 29 F.4th at 822-823 (Rejecting the defendant's argument that subsection 727(a)(5) had a strict lookback period because other subsections under section 727 had explicitly listed lookback periods).

¹³⁵ Compare *Bostrom v. Sathopoulous (In re Bostrom)*, 286 B.R. 352, 364 (Bankr. N.D. Ill. 2002) (imposing a documentation requirement under subsection 727(a)(5) (citing *Bannder Oil Co. v. Bryson (In re Bryson)*, 187 B.R. 939, 956 (Bankr. N.D. Ill. 1995)); with *Crocker v. Stiff (In re Stiff)*, 512 B.R. 893, 900 ("a debtor can defeat a § 727(a)(5) action by offering persuasive [testimony] ... while [testimony] will not defeat § 727(a)(3) action").

¹³⁶ *Buckeye Retirement Co., L.L.C., Ltd. V. Hake (In re Hake)*, 387 B.R. 490, 512 (Bankr. N.D. Ohio 2008) (citing *Westerfield v. World Investment Corp.*, 2006 U.S. Dist. LEXIS 25772, *10 (E.D. Ky. May 2, 2006)).

¹³⁷ *Id.*

***D. The Court will not rule on
Ms. Craigen’s judicial estoppel argument.***

Finally, in Ms. Craigen’s Response, she argued judicial estoppel bars the Plaintiff from opposing her discharge. Federal Rule of Bankruptcy Procedure 7008 adopts the Federal Rule of Civil Procedure 8.¹³⁸ Rule 8 governs complaints and answers.¹³⁹ Under Rule 8(c), when responding to a pleading, the party “must affirmatively state any ... affirmative defense, including: ... estoppel ... [and] res judicata.”¹⁴⁰ The Plaintiff argues that because Ms. Craigen failed to raise her affirmative defense in her answer to the complaint, she is precluded from raising it now. Failure to raise an affirmative defense in a response “does not always result in waiver.”¹⁴¹ The purpose of Rule 8(c) is to give the plaintiff notice of the affirmative defense and time to rebut it.¹⁴² So long as the defendant’s failure to comply with Rule 8(c) does not cause the plaintiff prejudice, a court may “allow a defendant to raise an affirmative defense for the first time in a motion for summary judgment.”¹⁴³ To determine if the plaintiff will be prejudiced, courts consider: (1) the additional resources needed to prepare for trial; (2) the delay to a resolution; and (3) the effect on other actions in other jurisdictions.¹⁴⁴

Although Ms. Craigen failed to comply with Rule 8(c), the Plaintiff will not be prejudiced. Ms. Craigen’s affirmative defense will not cause the Plaintiff to expend significantly

¹³⁸ Fed. R. Bankr. P. 7008.

¹³⁹ *Id.*

¹⁴⁰ Fed. R. Civ. P. 8(c).

¹⁴¹ *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) (citing *Charpentier v. Godsil*, 937 F.2d 859, 863 (3d Cir. 1991)).

¹⁴² *Id.* (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971)).

¹⁴³ *Rogers v. IRS*, 822 F.3d 854, 856 (6th Cir. 2016) (quoting *Lauderdale v. Wells Fargo Home Mortg.*, 552 F.App’x 566, 573 (6th Cir. 2014)).

¹⁴⁴ *Id.* at 857 (quoting *Phelps v. McClellan*, 30 F.3d 658, 662-63 (6th Cir. 1994)).

more resources, delay a resolution, or affect an action in another jurisdiction. Accordingly, Ms. Craigen's affirmative defense of judicial estoppel is not waived. Because summary judgment is not proper, the Court need not address the affirmative defense at this time.

III. CONCLUSION AND ORDER

For the reasons stated above, the Court finds and concludes the Plaintiff's Motion for Summary Judgment is denied. Because there are disputed material facts, the Court cannot grant Plaintiff's summary judgment motion denying Ms. Craigen discharge pursuant to subsections 727(a)(3) or (a)(5) of the Bankruptcy Code. Accordingly, it is **ORDERED**:

The Plaintiff's *Motion for Summary Judgment* is **DENIED**.

Copies to be served on:

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