Dated: January 26, 2022
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
STEPHEN DOUGLAS FRY,
Debtor.

Case No. 20-20641-L
Chapter 7

PAUL A. RANDOLPH,
ACTING UNITED STATES TRUSTEE, REGION 8,
Plaintiff,
v.
STEPHEN DOUGLAS FRY,
Defendant.

Adv. Proc. No. 20-00098

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANT

BEFORE THE COURT is the *United States Trustee's Motion for Partial Summary Judgment* (ECF No. 35) filed by the Plaintiff, Paul A. Randolph, Acting United States Trustee for Region 8, on August 27, 2021. The Plaintiff seeks summary judgment as to Counts 1 and 4 of his *Complaint to Deny Discharge*, filed July 17, 2020 (ECF No. 1), as amended in his *First Amended Complaint to Deny Discharge,* filed June 24, 2021, (ECF No. 27) (collectively, the "Complaint"). Counts 1 and 4 allege that the Defendant should be denied a discharge in bankruptcy pursuant to

11 U.S.C. § 727(a)(3) based upon the Defendant's fraudulent activities with respect to two of his clients. The Defendant has answered the Complaint (ECF Nos. 4 and 32) and has filed his *Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment* (ECF No. 49). The Defendant admits that his activities with respect to his clients were wrongful but points out that they are the subject of non-dischargeable restitution claims. He asserts that the law does not support denial of his general discharge based upon the admitted facts. The Plaintiff filed his *Reply to Defendant's Objection to Motion for Partial Summary Judgment* (ECF No. 56) on January 13, 2022. The court heard oral argument on January 20, 2022, and the parties submitted the motion to the court for decision.

JURISDICTION, AUTHORITY, AND VENUE

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of objections to discharge are core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(J). Accordingly, the bankruptcy court has authority to enter its judgment granting the Plaintiff's motion for partial summary judgment as to his objections to discharge subject only to appellate review under section 158 of title 28. 28 U.S.C. § 157(b)(1). Venue of this proceeding is proper to the Western District of Tennessee because it arises in a bankruptcy case pending in this district. *See* 28 U.S.C. § 1409(a).

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056 provides that summary judgment is appropriate if the movant can show that there is no genuine dispute as to any material fact and thus, the movant is entitled to judgment as a matter of law. Substantive law will identify which facts are material and a genuine issue of material fact exists only when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but to determine whether a genuine issue for trial exists. *Id.* In reaching its decision, the court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of proof that there are no genuine issues that might affect the outcome of the action under governing law. *In re Oliver*, 414 B.R. 361, 367 (Bankr. E.D. Tenn. 2009), citing, *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 126 S. Ct. 2505, 2510 (1986); Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056.

The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

> A genuine issue of material fact exists when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). However, to survive summary judgment, the [nonmoving party] must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson,* 477 U.S. at 249, 106 S. Ct. 2505. Therefore, "[i]f evidence is merely colorable, or

> is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment. *Id.* "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir.2007).

If the initial burden of showing entitlement to judgment as a matter of law is not met the opposing party is under no obligation to offer evidence in support of its opposition. See, *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997); *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, where no issues of material fact are in dispute, the court may grant summary judgment for the non-movant or may sua sponte grant summary judgment even if no party has moved for summary judgment "so long as the losing party [movant] was on notice that she had to come forward with all her evidence." *Jones v. Union Pacific R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002), quoting, *Celotex Corp. v. Catrett*, 477 U.S. at 326, 106 S. Ct. at 91. See also, *Grand Rapids Plastics, Inc. v. Lakian,* 188 F.3d 401, 407 (6th Cir. 1999), *cert. den*. 529 U.S. 1037, 120 S. Ct. 1531 (2000) (District court did not err in granting sua sponte summary judgment motion in favor of defendant on grounds that action was barred by applicable statute of limitations when other parties' motions for summary judgment put plaintiff on notice that, "it had to come forward with evidence showing that the statute of limitations did not bar its . . . claims.").

ISSUE PRESENTED

At oral argument the parties agreed that there are no material facts in dispute and the issue to be decided is one of law. The parties ask whether a debtor should be denied discharge under section 727(a)(3) if he or she has committed *any* act of the kinds described in the statute or only if those acts prevent the creditors and trustees from ascertaining his or her financial condition or business transactions.

UNDISPUTED FACTS

The parties agree to the following material facts:

1. Mr. Fry assisted his cousin and client, Brenda Parker Street, after the death of her husband by preparing her tax returns and managing and investing her funds.
2. Ms. Street had two bank accounts at the same bank at which Mr. Fry maintained personal and business accounts. Ms. Street gave Mr. Fry co-signatory authority over her accounts in December 2018 or January 2019.
3. Beginning January 14, 2019, Mr. Fry made eleven withdrawals from Ms. Street's accounts and deposited those funds into his own accounts.
4. Between January and May 2019, Mr. Fry transferred $16,000.00 from Ms. Street's accounts.
5. In May 2019, Mr. Fry transferred $25,700.00 into Ms. Street's accounts in three transactions.
6. Mr. Fry withdrew an additional $3,500 from Ms. Street's account in June and July 2019 and returned $1,000 to the account in July.
7. Mr. Fry filed a voluntary petition under Chapter 7 of the Bankruptcy Code on February 19, 2020.
8. At his Rule 2004 examination, Mr. Fry agreed that he would make additional production of documents, including a list of expenses that Mr. Fry paid on behalf of Ms. Street in 2019.

9. Mr. Fry produced check registers for his business account that recorded two transfers from Ms. Street's accounts as "Personal: PERSONAL I," and four transfers from Ms. Street's accounts with her name. One transfer from Ms. Street's account has no corresponding entry in his check register.
10. Mr. Fry failed to produce the check register for his joint account with his wife. Two transfers from Ms. Street's accounts were made to this account.
11. On January 3, 2019, Mr. Fry forged Ms. Street's signature on a letter to Genworth Life changing the address to which benefit checks from Ms. Street's long-term care insurance agreement were sent from Ms. Street's address to his business address.
12. As a consequence of this letter, four Genworth checks were mailed to Mr. Fry's office.
13. Mr. Fry did not negotiate the Genworth checks.
14. Mr. Fry served as executor for the probate estate of Vlasta Fedinec, who died on January 4, 2016.
15. The assets of the Fedinec estate consisted of a house and funds in a Merrill Lynch account.
16. Mr. Fry liquidated these assets and deposited $393,305.42 to an account in the name of the estate at the same bank where he maintained his business and personal accounts.
17. From April 4, 2016, to January 20, 2018, Mr. Fry wrote multiple checks to himself from the estate account in the aggregate amount of $421,654.00.
18. In the check register for the estate account, Mr. Fry labeled eleven of the transfers "withdrawal," and one of them "executor fee."
19. On three of the checks, Mr. Fry wrote notes on the memo line consisting of "Reimbursement," "Executor fee," and "Fee."

20. On February 9, 2017, Mr. Fry wrote a $72,000.00 check on his business account to Ms. Street. Mr. Fry designated this check in the check register as "Personal:GIFTS."
21. On April 18, 2018, Mr. Fry obtained a loan under false pretenses in the amount of $410,000.00. He deposited the loan proceeds to his business account. The check register reflects "VLASTA FEDINEC E[STATE]." Mr. Fry used the funds to pay the inheritances owed to the two Fedinec heirs.
22. On January 30, 2018, Mr. Fry wrote a check to his business from the estate account in the amount of $60,000.00. Mr. Fry repaid $60,000.00 to the estate account in 2018.
23. Mr. Fry did not include this $60,000.00 as income in his 2018 tax return.
24. Mr. Fry did not include this $60,000.00 as income in his original Statement of Financial Affairs filed in his bankruptcy case or in either of two subsequent amendments.
25. Mr. Fry did not disclose the payments made to the Fedinac heirs in his Statement of Financial Affairs.
26. When Mr. Fry filed a petition to close the Fedinac estate, he did not report that he had taken more than $350,000.00 from the estate or that the source of the payments to the Fedinac heirs was a loan he had obtained. Although he indicated that the heirs received their inheritances prior to his petition to close in December 2017, in fact they were not paid until after he received the loan in April 2018.
27. Mr. Fry admits the facts set out above, but states that all of the transactions described by the United States Trustee are set out in his bank records. With respect to the $60,000 taken from the Fedinac estate, Mr. Fry states that he intended to and did repay it in the same year in which it was taken, and thus did not consider it to be income. Likewise, Mr. Fry states that because he replenished Ms. Street's accounts for funds taken in 2019, he did not consider those funds

to be reportable as income. Mr. Fry emphasizes that his records were sufficient to enable his creditors to ascertain his financial condition and business transactions as of the date of his bankruptcy petition.

DISCUSSION

Discharge is favored by the bankruptcy laws so the initial burden of proof under section 727(a) rests with the party objecting to discharge. FED. R. BANKR. P. 4005. The United States Trustee asserts that he has carried that burden by demonstrating that Mr. Fry falsified documents and failed to keep or preserve documents from which his financial affairs or business transactions might be ascertained. That is, the United States Trustee believes that what section 727(a)(3) requires is a showing that the debtor committed one or more of the acts set forth in that section. Mr. Fry counters that regardless of what he did, which he admits was wrong, it was possible to ascertain his financial affairs and business transactions from the records that were available when his bankruptcy petition was filed. Thus, Mr. Fry asserts that the United States Trustee has failed to carry his initial burden of proof.

Bankruptcy Code section 727(a)(3) provides:

(a) The court shall grant the debtor a discharge, unless—

> (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 the circumstances of the case.

11 U.S.C. § 727(a)(3). As became clear during oral argument, the parties believe that section 727(a)(3) is capable of two distinct readings. The United States Trustee asserts that 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. Mr. Fry asserts that the 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. The court agrees that the statute is capable of either interpretation, especially in light of the evolution in electronic recordkeeping since the statute was originally enacted. It is now fairly easy to determine a person's financial transactions from readily available electronic bank and investment records. When section 727(a)(3) and its predecessors were originally enacted, this was not the case.

History of Section 727(a)(3)

When interpreting a statute, the Supreme Court directs that the court seek "to discern and apply the ordinary meaning of its terms at the time of their adoption." *BP P.L.C. v. Mayor and City of Baltimore*, 593 U.S. ___, ___, 141 S. Ct. 1532, 1537, 209 L.Ed.2d 631 (2021); citing *Niz-Chavez v. Garland,* 593 U.S. ___, ___, 141 S. Ct. 1474, 1480, 209 L.Ed.2d 433 (2021). Section 727(a)(3) and its predecessors have gone through a number of revisions. A brief review of that history, provided by *Collier on Bankruptcy*, may prove helpful in ascertaining the intent of Congress when section 727(a)(3) became part of the Bankruptcy Code in 1978. *See* 6 COLLIER ON BANKRUPTCY ¶ 727.LH (16th ed., rev'd 2021); *see also In re Miller*, 5 F. Supp. 913 (D. Maryland 1934), which describes the amendments through 1926.

Section 727(a)(3) is derived from Section 14c(2) of the Bankruptcy Act of 1938, which provided:

> The court shall grant the discharge unless satisfied that the bankrupt has … (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions

> might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case.

The Act of 1938 resulted from a number of prior amendments to the Bankruptcy Act of 1898. Prior to 1903, the Act prevented discharge to a bankrupt who "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." In 1903, the terms "fraudulent," "in contemplation of bankruptcy," and "true" were omitted. Thus, discharge was denied when the bankrupt "(2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." In 1926, the section was changed again. Proof of "intent to conceal" was deleted and the clause "unless the court deem such failure or acts to have been justified under all the circumstances of the case" was added. In 1938, the phrase "or preserve" was added.

Interestingly, the 1898 Act represented a significant departure from the Act of 1867, which "made the mere failure to keep records or books of account a ground for refusing discharge." *In re Miller,* 5 F. Supp. 913, 914 (1934); see also *In re Brown,* 199 F. 356 (N.D.N.Y. 1912) ("The Bankruptcy Act of 1867…, as does the English law, made the mere failure to keep books ground for refusing discharge, but the Bankruptcy Act of 1898 …, explicitly states that the omission must have been accompanied by the specific intent to conceal the true financial condition …."). The 1898 Act focused on the debtor's efforts to conceal his true financial condition in anticipation of bankruptcy. After a series of amendments, the 1938 Act focused upon the debtors acts or failure to act with respect to records from which his financial condition and business transactions might be ascertained. By 1938, the Act no longer required proof of "intent to conceal" and imposed a positive obligation upon debtors to keep and preserve financial records while nevertheless permitting the debtor to obtain discharge if the inadequacy of his or her records was justified.

The 1978 Bankruptcy Code essentially took over the language of the 1938 Act while broadening the categories of information that are covered. The statute now refers to "*any recorded information* … from which the debtor's financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3). See, e.g., *In re Scott*, 172 F.3d 959 (7th Cir. 1999) (A computer database maintained by the debtors of their various transactions would perhaps have allowed the trustee to ascertain their financial condition and business transactions.)

Prima Facie Case

Even with the relaxations in the required elements of proof that occurred over the years, the movant carries the initial burden of proving the applicability of the objection. What is it that the movant must prove? The test adopted by many courts to determine whether section 727(a)(3) has been violated is one established by the Third Circuit:

> In order to establish a prima facie case under section 727(a)(3), a creditor objecting to discharge 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.

Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3d Cir. 1992), citing *In re Decker*, 595 F.2d 185, 187 (3d Cir. 1979). *See also In re Brown*, 108 F.3d 1290, 1295 (10th Cir. 1997); *In re Cox*, 41 F.3d 1294 (9th Cir. 1994). Another court has suggested that section 727(a)(3) requires that the 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.

Farm Credit Mid-America PCA v. Tingle (In re Tingle), 594 B.R. 396, 402 (Bankr. E.D. Ky. 2018), quoting *McDermott v. Neff (In re Neff)*, Case No. 14-33442, Chapter 7, Adv. Pro. No. 15-3026,

2015 WL 9488240, at *2, 2015 Bankr. LEXIS 4361, at *5 (Bankr. N.D. Ohio Dec. 28, 2015). Significantly, "[t]he 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.'" *Tingle*, 394 B.R. at 402, quoting *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (6th Cir. BAP 1999). The risk to be avoided is the risk to creditors that the debtor has withheld or concealed assets. *Tingle*, 394 B.R. at 402, citing *Caneva v. Sun Communities Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 761 (9th Cir. 2008). "Once a debtor's records are determined to be inadequate, the burden is on the debtor to establish any justification therefor." *In re Trogdon*, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990) (citation omitted). Each of these cases emphasizes that the starting point of inquiry is the adequacy or inadequacy of the debtor's financial and business records. In determining the adequacy of a debtor's recordkeeping, the courts focus upon the ability of the creditors and trustee to ascertain the debtor's financial condition rather than upon every act or omission of the debtor with respect to his or her financial records. Indeed, some requirement that the acts or omissions of the debtor be material was imposed as early as 1901. *Bauman v. Feist*, 107 F. 83 (8th Cir. 1901) (Debtor who mutilated books of account by cutting out pages related to another business granted discharge.).

In order to establish a prima facie case according to the *Alten* test, the objecting creditor or trustee 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. The third prong of the *Tingle* test is similar to the second requirement of the *Alten* test and reinforces the conclusion that the initial inquiry must be the adequacy or inadequacy of the debtor's records. *Tingle* requires the objecting creditor to 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*. The court believes that these cases correctly interpret the intention of section 727(a)(3) to protect creditors when it is impossible to ascertain the financial condition or material business transactions of a debtor. The materiality of the debtor's acts or omissions with respect to his or her financial records is measured against this standard.

The United States Trustee fails to make out a prima facie case under section 727(a)(3) because he fails to allege or prove that Mr. Fry's financial condition or business transactions could not be accurately ascertained when his bankruptcy case was filed. Instead, the United States Trustee emphasizes that Mr. Fry falsified his financial records by: (1) inaccurately describing transactions in various check registers; (2) forging Mr. Street's signature upon a letter used to change the address to which her disability income checks would be sent; (3) filing false tax returns by not describing funds taken from the accounts of Ms. Street and the Fedinec estate as "income," and (4) by filing a report with the probate court that falsely described the date and source of funds paid to the Fedinec heirs. These are not insubstantial matters in their own context, and the court does not in any way excuse the acts of Mr. Fry, but most of these activities came to light before the bankruptcy petition was filed, and all are reflected in the banking and other records produced by Mr. Fry. The Plaintiff suggests that the Defendant elides language from section 727(a)(3) by failing to justify the false statements in his business records. To the contrary, the Plaintiff has glossed over the essential descriptive phrase from section 727(a)(3): "from which the debtor's financial condition or business transactions might be ascertained." Section 727(a)(3) is not a general prohibition of bankruptcy discharge for persons who have falsified records at any time or in any context, but rather prohibits discharge of debtors in bankruptcy who have falsified records such that it is impossible to ascertain their financial condition or material business transaction *now*,

in connection with their bankruptcy case. *Alten*, 958 F.2d at 1231. The exceptions to discharge only speak upon the filing of a bankruptcy case. It is in that context that the bankruptcy court must ascertain whether the bankruptcy debtor's records are adequate to permit the debtor's creditors to ascertain his or her financial condition or business transactions.

The court simply is not convinced that the acts complained of by the United States Trustee should result in denial of discharge under section 727(a)(3). They do not prevent the creditors or trustee in bankruptcy from ascertaining Mr. Fry's financial condition, and neither the creditors nor the trustee in bankruptcy have joined in the United States Trustee's complaint. *See In re Dennis*, 330 F.696, 703 (5th Cir. 2003) (It is notable that the chapter 7 trustee did not join in the creditor's complaint.); *In re Kran*, 760 F.3d 206, 210 (2nd Cir. 2014) (Where the debtor provided the bankruptcy court with sufficient documentation to permit the trustee in the case to file a Report of No Distribution, creditor failed to show that the facts of the case fell within the scope of section 727(a)(3)).

As the Defendant points out in his memorandum, section 523(a) of the Bankruptcy Code is available to protect the individual creditors who were harmed by his fraudulent acts. Indeed, as part of his Plea Agreement, Mr. Fry was ordered to pay restitution to the various persons harmed by his activities, and these obligations will survive his discharge. *See* ECF No. 37, Ex. 9. If the court were to deny the Defendant's discharge for the same acts that resulted in these nondischargeable obligations, it could disadvantage the creditors directly harmed by the Defendant by all other creditors to pursue payment from the Defendant's postpetition income and assets. I do not believe this is the result intended by Congress.

It is Not Necessary for the Court to Determine the Intent of the Defendant

The parties have devoted part of their arguments to the question of whether the court should permit Counts 1 and 4 to go to trial to determine the Defendant's intent with respect to the transactions that the Plaintiff claims were falsely or inadequately characterized. Mr. Fry insists, for example, that he did not intend to file false tax returns because he did not believe that the funds that he "borrowed" from the Fedinac estate should be treated as income. The United States Trustee insists that the Defendant is mistaken. In the context of this Plaintiff's motion for summary judgment, however, the court is directed to view the evidence in the light most favorable to the nonmoving party, the Defendant. This means that the court should take Mr. Fry at his word that his intent was always to replace the funds that he withdrew from his cousin and from the probate estate. For the reasons stated above, however, the court has found that it is unnecessary to reach any question concerning the Defendant's intent because the Plaintiff has failed to establish a prima facie case under section 727(a)(3). Interestingly, the removal by Congress of any inquiry into the debtor's intent under the statute seems to bolster the court's conclusion that the focus now is upon the adequacy of the debtor's records when the bankruptcy petition is filed rather than upon the reasons a debtor recorded or did not record any particular transaction in any particular way.

CONCLUSION

The court in no way condones the activities of the Defendant with respect to his cousin and his duties as executor. Rather, for the reasons set forth above, the court concludes that the Plaintiff has failed to establish a prima facie case for denial of discharge under section 727(a)(3). The Plaintiff has failed to show that, at the time that the bankruptcy petition was filed, the records of the Defendant were inadequate to establish his financial condition or business transactions. There are no material factual disputes with respect to Counts 1 and 4 of the Complaint as amended. Thus,

the Plaintiff's *Motion for Partial Summary Judgment* is DENIED and partial summary judgment on these counts is GRANTED to the Defendant. The court will enter its final judgment after disposition of Counts 2, 3, and 5.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Chapter 7 Trustee