Dated: May 26, 2023
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
RICARDO RANDOLPH,
Debtor.

Case No. 22-24894-L
Chapter 7

Paul A. Randolph,
Acting United States Trustee,
Region Eight,
Plaintiff
v.
Ricardo Randolph,
Debtor-Defendant.

Adv. Proc. No. 23-00012

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT
AND
DENYING MOTION TO SET ASIDE DEFAULT

Before the Court is the Plaintiff's *Motion for Default Judgment* [ECF No. 6] and the Defendant's *Motion to Set Aside Default Judgment* (sic)[1] [ECF No 15]. The underlying *Complaint*

[1] As discussed below, judgment has not been entered in this proceeding. Rather, the Clerk has entered default as the result of the Defendant's failure to timely respond to the *Complaint.*

seeks the denial of the Defendant's discharge under several theories as the result of his alleged failure to properly disclose and account for two Paycheck Protection Program ("PPP") loans obtained before the filing of his petition. The *Motion for Default Judgment* is supported by the sworn declarations of counsel for the Plaintiff and the Chapter 7 trustee. The Court heard the arguments of counsel on May 11, 2023. The Defendant did not testify or present opposing declarations. After carefully reviewing the pleadings, declarations, and record in this cause, the Court has determined that the *Motion for Default Judgment* should be granted and the *Motion to Set Aside Default* should be denied.

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 default 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).

BACKGROUND FACTS

The *Complaint to Deny Discharge Pursuant to 11 U.S.C. § 727* was filed by Plaintiff Paul A. Randolph, Acting United States Trustee for Region 8, commencing this adversary proceeding

on February 3, 2023 [ECF No. 1]. The *Complaint* alleges, in essence, that the Defendant fraudulently obtained two ("PPP") loans, which were forgiven, and that the Defendant made false statements concerning his business dealings and these loans in connection with his bankruptcy case. The *Complaint* asks that the Defendant's discharge be denied pursuant to 11 U.S.C. §§ 727(a)(2)(B); 727(a)(3); 727(a)(4)(A); and 727(a)(5). The *Summons in an Adversary Proceeding* was issued the same day the *Complaint* was filed giving the defendant, the Debtor in the related chapter 7 bankruptcy case, thirty days to file a motion or answer [ECF No. 2]. The Plaintiff filed his certificate of service on February 3, 2023 [ECF No. 3] and *Motion for Entry of Default Against Defendant* on March 7, 2023 [ECF No. 4]. The Clerk entered the default on March 8, 2023 [ECF No. 5] and the Plaintiff filed his *Motion for Default Judgment* on March 9, 2023 [ECF No. 6]. No objections to the motion were timely filed. At the initial hearing, April 13, 2023, the Plaintiff did not have affidavits or other proof to support the allegations of the Complaint, so the motion was continued to May 11, 2023, to permit the Plaintiff to obtain the required support for his motion. The Plaintiff filed two affidavits in support of his motion on May 3 and May 8 [ECF Nos. 12 and 13].

On May 11, the date of the rescheduled hearing, attorney Curtis D. Johnson made his first appearance for the Defendant in this proceeding when he filed a *Motion to Set Aside Default Judgment* [ECF No. 15] and an *Answer* [ECF No. 16]. [2] The relief sought in the *Motion to Set Aside Default Judgment* is "[T]hat this Court set aside the Clerk's default and allow this matter to proceed on the merits." [ECF No. 15, p. 3]. Although the *Motion to Set Aside Default Judgment* was not filed in time to be added to the Court's calendar for May 11, Mr. Johnson orally advanced

[2] Mr. Johnson successfully uploaded the *Motion to Set Aside Default Judgment* and attempted to upload the *Answer* prior to the scheduled hearing. The *Answer* was rejected for filing by the Clerk. Mr. Johnson successfully filed the corrected *Answer* after the hearing was concluded. The Court and the Plaintiff were aware of the Defendant's attempt to answer at the time of the hearing.

arguments for the Court's consideration. According to the statements of counsel, at some point after the complaint was filed, the Defendant determined that his attorney in the related bankruptcy case was not going to represent him in this adversary proceeding and contacted Mr. Johnson who ultimately agreed to represent him. Ms. Carrie Ann Rohrscheib, Trial Attorney for the Plaintiff, stated at the hearing on May 11 that she was first contacted by Mr. Johnson concerning this proceeding on March 16. Mr. Johnson acknowledged this contact. Mr. Johnson stated that the reason for the delay in filing a response to the Complaint or default motions was his uncertainty about whether Defendant's bankruptcy counsel intended to represent the Defendant in this proceeding. It is clear from the statements of Ms. Rohrscheib and Mr. Johnson that the Defendant was aware of the need to respond to the *Motion for Default Judgment* as early as March 16, and that he knew that he should engage counsel to represent him. Any confusion concerning who would represent him did not excuse the Defendant from the requirement to timely respond to the complaint and motion.

In support of his *Motion for Default Judgment*, the Plaintiff offered the Declaration of Ms. Rohrscheib, which states in pertinent part:

> 15. On June 6, 2020, the SBA approved the Defendant's application for a PPP loan for a business categorized as "Other Services (except Public Administration)" detailed as "All Other Personal Services" (the "First PPP Loan"). *See* Exhibit A. [SBA PPP Loan Information.]
>
> 16. On January 28, 2021, the SBA approved the Defendant's application for a second PPP loan for a business categorized as "Other Services (except Public Administration)" detailed as "All Other Personal Services" (the "Second PPP Loan"). *See* Exhibit A. [SBA PPP Loan Information.]

17. To secure the First PPP Loan and Second PPP Loan, the Defendant was required to certify on official SBA Form 2482 and SBA FORM 2483-SD that he owned and operated a business, that the PPP Loans would help retain at least one job, and that the business was existing or more than two years old at the time of the PPP Loans.

18. Based on the approval of the Defendant's First PPP Loan application, Celtic Bank Corporation released $22,363.00 of PPP funds to the Defendant. *See* Exhibit A. [SBA PPP Loan Information.]

19. Based on the approval of the Defendant's Second PPP Loan application Itria Ventures, LLC released $20,831.00 of PPP funds to the Defendant. *See* Exhibit A. [SBA PPP Loan Information.]

20. To obtain forgiveness of the First PPP Loan and Second PPP Loan, the Defendant was required to certify on official SBA Form 3508 that all amounts for which forgiveness is requested were used to pay business costs that are eligible for forgiveness.

21. On July 26, 2020, the First PPP Loan subsequently was forgiven based on the Defendant's assertion that $22,115.00 of the loan funds were used for payroll. *See* Exhibit A. [SBA PPP Loan Information.]

22. On August 16, 2021, the Second PPP Loan subsequently was forgiven based on the Defendant's assertion that $20,831.00 of the loan funds were used for payroll. *See* Exhibit A. [SBA PPP Loan Information.]

23. On November 6, 2022, the Defendant filed a voluntary petition for relief (the "Petition") from his debts under chapter 7 of the Code in the Bankruptcy Case (the "Petition Date"). Bankr. Case No. 22-24894, Docket No. 1. The Defendant

signed the Petition under penalty of perjury. Bankr. Case No. 22-24894, Docket No. 1 at 6. A copy of the Defendant's Petition is attached hereto as **Exhibit B** and incorporated herein by reference.

24. On November 22, 2022, the Defendant filed bankruptcy schedules, statements, and forms that he signed under penalty of perjury (collectively, the "Schedules"). Bankr. Case No. 22-24894, Docket No. 11 at 31, 38 and 40. A copy of the Defendant's Schedules is attached hereto as **Exhibit C** and incorporated herein by reference.

25. On his Petition, the Defendant answered the question requiring disclosure of "Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years [Include trade names and doing business as names]" by checking the box indicating "I have not used any business names or EINs." *See* Exhibit B, Bankr. Case No. 22-24894, Docket No. 1 at 2 (question no. 4).

26. On his Petition, the Defendant answered the question "Are you a sole proprietor of any full- or part-time business?" by checking the box indicating "No." *See* Exhibit B, Bankr. Case No. 22-24894, Docket No. 1 at 4 (question no. 12).

27. On Schedule A/B: Property ("Schedule A/B"), the Defendant answered the question "Do you own or have any legal or equitable interest in […] Non-publicly traded stock and interest in incorporated and unincorporated businesses, including an interest in an LLC, partnership, or joint venture" by checking the box "No." *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 5 (question no. 19).

28. On Schedule A/B, the Defendant answered the question "Do you own or have any legal or equitable interest in any business-related property" by checking the box "No." *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 7 (question no. 37).

29. On Schedule A/B, the Defendant answered the question "Do you have any other property of any kind you did not already list?" by checking the box "No." *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 7 (question no. 53).

30. On Schedule I: Your Income ("Schedule I"), the Defendant answered he had $0.00 in income in the month of the filing on Line 8a. for "Net income from rental property and from operating a business, profession or farm." *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 28.

31. On Official Form 107: Statement of Financial Affairs for Individuals Filing for Bankruptcy ("SOFA"), the Defendant listed 7848 Autumn Hollow Dr Cordova, TN 38016 as his address from 2015 to 2021. *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 32 (question no. 2). The Defendant listed 7848 Autumn Hollow Dr as his address in his application to the SBA for the First PPP Loan and Second PPP Loan. *See* Exhibit A. [SBA PPP Loan Information.]

32. On Official Form 107: Statement of Financial Affairs for Individuals Filing for Bankruptcy ("SOFA"), the Defendant answered the question "Did you have any income from employment or from operating a business during this year or the two previous calendar years?" by checking the box "No." *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 32 (question no. 4).

33. On SOFA, the Defendant answered the question "Did you receive any other income during this year or the two previous calendar years? [Include income

regardless of whether that income is taxable. Examples of other income are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings…]" by listing only "VA Benefits" for the current year and each of the prior two years. *See* Exhibit C, Bankr. Case No. 22-24894, Docket No. 11 at 33 (question no. 5).

34. The Defendant made a material misrepresentation and a false oath by failing to list the forgiven First PPP Loan and Second PPP Loan as income on SOFA. Alternatively, the First PPP Loan and Second PPP Loan were not forgiven in which case the Defendant failed to schedule it as a claim on Schedule E/F: Creditor Who Have Unsecured Claims. *See* Exhibit C Bankr. Case No. 22 24894, Docket No. 11 at 12–24.

35. On SOFA, the Defendant answered the question "Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?" by checking the box "No. None of the above applies." *See* Exhibit C, Bankr. Case No. 22 24894, Docket No. 11 at 37 (question no. 27).

36. By failing to disclose his interest in a business that he owned in 2020 and/or 2021 and/or by failing to disclose income from the operation of the business and/or the forgiven PPP Loans the Defendant knowingly and fraudulently made a false oath or account in connection with the Bankruptcy Case, or else did so with a reckless disregard for the truth.

37. By failing to disclose income from the operation of the business and/or the forgiven PPP Loans the Defendant has failed to explain satisfactorily the loss

of the $42,948.00 total of funds he obtained from the First PPP Loan and Second PPP Loan to meet his labilities.

Declaration of Carrie Ann Rohrscheib [ECF No. 12].

In addition to the statements made by the Defendant in his bankruptcy schedules and statements, which are in direct conflict with statements made by him in obtaining the PPP loans, the Affidavit of Lynda Teems, the trustee, states that the Defendant was given an opportunity to testify concerning his income and business dealings at the first meeting of creditors. She declares the following:

6. During the 341 Meeting, I placed the Debtor, Ricardo Randolph under oath and all of Mr. Randolph's testimony at the 341 Meeting was under oath.

7. During the 341 Meeting, I asked Mr. Randolph whether he signed the bankruptcy documents and whether the bankruptcy documents were true and correct; Mr. Randolph averred that he signed the documents, and the documents and information were true and correct.

8. During the 341 Meeting, I asked Mr. Randolph whether he operated a business in 2020, 2021 or in any of the 4 years prior to the Petition Date; Mr. Randolph denied that he operated any business in the specified times.

9. During the 341 Meeting, Mr. Randolph denied that he had any other sources of income besides VA disability.

10. During the 341 Meeting, Mr. Randolph testified he had not worked since over two and a half years before the bankruptcy filing.

11. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Declaration of Lynda F. Teems [ECF No. 13].

The *Answer* filed by the Defendant on the day of the hearing on the *Motion for Default Judgment* admits the omission of information concerning the PPP loans and his business dealings from his bankruptcy schedules and statement of financial affairs [ECF No. 16, paras. 1-23]. With respect to each admission, however, the Defendant states "However, since that time [the filing of his preparation of his statements and schedules], the Defendant has obtained new counsel and will correct those answers and include information which was not included." Despite these statements, no corrections have been filed.

DISCUSSION

Rule 55 of the Federal Rules of Civil Procedure applies in adversary proceedings. Fed. R. Bankr. P. 7055. Rule 55 provides for entry of default by the Clerk "[w]hen a party against whom judgment is sought has failed to plead or otherwise defend." As noted, the Bankruptcy Clerk entered default on March 8, 2023. Fed. R. Civ. P. 55(a). Rule 55 then provides for two possibilities for entry of default judgment: by the clerk "[i]f the plaintiff's claim is for a sum certain or a sum that can be made certain by computation" or, in all other cases, by the court. Fed. R. Civ. P. 55(b). Rule 55(b)(2) permits the court to conduct hearings when necessary to establish the truth of any allegation by evidence. The *Complaint* was not verified, and the *Motion for Default Judgment* was not originally supported by evidence of the truth of the factual allegations of the complaint, which the Plaintiff asserts support the denial of the Defendant's discharge. The denial of discharge is a serious matter requiring specific proof of acts by a debtor. *Kenney v. Smith (In re Kenney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/American Bus. Credit Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994). As noted above, the *Complaint* alleges that the Defendant fraudulently obtained two Paycheck Protection Program ("PPP") loans, which were forgiven, and that the Defendant made false statements concerning his business dealings and these loans in

connection with his bankruptcy case. The *Complaint* asks that the Defendant's discharge be denied pursuant to 11 U.S.C. §§ 727(a)(2)(B); 727(a)(3); 727(a)(4)(A); and 727(a)(5).

It was appropriate and necessary that the Court inquire into the foundational support for the allegations of the *Complaint* before denying the discharge of the Defendant by default. *Seaver v. Burwell Family Ltd. P'nership (In re Burwell)*, 391 B.R. 831, 834 (B.A.P. 8th Cir. 2008)(A party is not entitled to a default judgment as a matter of right.); *In re Ranciato*, 638 B.R. 275, 285 (Bankr. D. Conn. 2022)("Despite a defendant's default, a plaintiff bears the burden to establish the allegations made are true."); *In re Webster*, 287 B.R. 703, 709 (Bankr. N.D. Ohio 2002)("A motion for default judgment is not granted as matter of right." In its discretion the court can require the moving party to provide evidence in support of its motion for relief.).

The Plaintiff has presented evidence to support the truth of each of the factual allegations of the *Complaint*. The Defendant nevertheless opposes entry of judgment in this proceeding and asks the Court to set aside the Clerk's *Entry of Default* because he wants an opportunity to amend the schedules and statements filed in his bankruptcy case. No explanation of his failure to timely answer was provided other than the assertion by Mr. Johnson that he (Mr. Johnson) was confused about who was going to represent the Defendant. The Court understood this statement to relate to the Defendant's failure to respond to the *Motion for Default Judgment*. It did not address the failure of the Defendant to timely answer or otherwise respond to the *Complaint*.

Rule 55(c) provides: "The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)." Under Rule 55(c), a stricter standard should be applied for setting aside a default once it has ripened into judgment than when there has simply been an entry of default by the Clerk. *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). Although the standards are different, in either case the Court is guided by three well-established factors, which assess "'whether (1) the default was willful, (2) a

set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Dassault Systemes,* 663 F.3d at 838-839, quoting *United Coin Meter Co. v. Seaboard Coastline Railroad*, 705 F.2d 839, 844 (6th Cir. 1983). "[P]rejudice to the plaintiff and the presence of a meritorious defense are the two most important considerations." *U.S. v. $22,050,000 U.S. Currency*, 595 F.3d 318, 324-25 (6th Cir. 2010). There is a strong preference for trials on the merits as opposed to default judgments. *Dassault Systemes*, 663 F.3d at 841. Under the "good cause" standard, courts are given considerable latitude. Generally, courts are "extremely forgiving to the defaulted party and favor a policy of resolving cases on the merits instead of on the basis of procedural missteps." *$22,050.00*, 595 F.3d at 322. It has been suggested that "[d]oubts should be resolved in the non-movant's favor to increase the likelihood that the case may be resolved on the merits." *Sikhs for Justice v. Nath*, 893 F.Supp.2d 598, 612 (S.D.N.Y. 2012). As the Court considers each of these factors, it will bear in mind whether there are doubts that may be resolved in the Defendant's favor.

Was the default willful? A defendant's "mere negligence or failure to act reasonably is not sufficient cause to sustain a default." *$22,050,000*, 595 F.3d at 327. To be willful or culpable, "the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Dassault Systemes*, 663 F.3d at 841, quoting *Shepherd Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 194 (6th Cir. 1986).

The Defendant has given no explanation for his failure to timely answer the *Complaint*. The *Motion to Set Aside Default Judgment* states that the excuse for the Defendant failing to act was "that his counsel in the underlying bankruptcy case has withdrawn from his representation and altogether, and he has been without counsel as to the adversary proceeding at the time of the entry of the default." [ECF No. 15, p. 2.] The docket in the underlying bankruptcy does not reflect a withdrawal by counsel for the Defendant, however. It is true that no appearance was made on

behalf of the Defendant in this adversary proceeding until May 11, 2023, when Mr. Johnson filed the *Motion to Set Aside Default Judgment*, but Mr. Johnson did not deny Ms. Rohrscheib's statement that she was first contacted by him about this case on March 16, well in advance of the April 6 deadline for filing a response to the *Motion for Default Judgment*. The Defendant has simply failed to timely respond to the *Complaint*. His conduct clearly was negligent, but there is no evidence that his conduct was willful.

Does the Defendant have a meritorious defense to the Plaintiff's claims? A defense is meritorious if it is "good at law." *Dassault Systemes*, 663 F.3d at 843, citing *$22,050,000*, 595 F.3d at 326; *United Coin*, 705 F.2d at 845. "[T]he test is not whether a defense is likely to succeed on the merits; rather the criterion is merely whether 'there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default'" *Dassault Systemes*, 663 F.3d at 843 (citations omitted).

As stated, the Defendant has not responded to the *Motion for Default Judgment* except in his *Motion to Set Aside Default*. He has not provided a declaration or affidavit, nor did he testify at the hearing on the motions. The Defendant's *Answer* admits all the factual allegations of the *Complaint*, but states that he will correct the deficiencies in his schedules and statements. The Defendant also denies that he understood that the failure to list a forgiven loan as income was a material misrepresentation in connection with his bankruptcy case. The Debtor repeated the false statements from his schedules and statements in response to the Trustee's questions at his meeting of creditors.

The Defendant has admitted that his schedules and statement of financial affairs is inaccurate, has made false oaths concerning his financial affairs in his statement and schedules and during his examination by the trustee, and failed to voluntarily correct the false statements in his

bankruptcy papers before he was found out. A debtor is expected to ensure that his schedules and statement of financial affairs are answered carefully and accurately:

> A debtor has "a paramount duty to carefully consider all questions included in the Schedules and Statement [of Financial Affairs] and see that each is answered accurately and completely." *In re Colvin*, 288 B.R. at 480 [(Bankr. E.D. Mich. 2003)] (quoting *Casey v. Kasal (In re Kasal*), 217 B.R. 727, 734 (Bankr. E.D. Pa. 1998), aff'd, 223 B.R. 879 (E.D. Pa. 1998)). "The burden is on the debtors to complete their schedules accurately." *Rion v. Spivey (In re Springer)*, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991).

Church Joint Venture v. Blasingame (In re Blasingame), 559 B.R. 692, 699 (B.A.P. 6th Cir. 2016), quoting *In re Rice*, 452 B.R. 623, 626 (Bankr. E.D. Mich. 2011) (alterations in original) (emphasis added), aff'd, 478 B.R. 275 (E.D. Mich. 2012). Whether or not the Defendant made false oaths in order to obtain the PPP loans, there is no doubt that he made false statements in connection with his bankruptcy case when he failed to disclose the forgiven loans as income for the years 2020 and 2021 or, in the alternative, if the loans were not forgiven, failed to list the lenders among his creditors. *See* 11 U.S.C. § 727(a)(4)(A) (The court shall grant the debtor a discharge unless the debtor knowingly and fraudulently, in connection with a case, made a false oath or account.). Moreover, the Defendant failed to satisfactorily explain the loss of or account for the proceeds of the two PPP loans. *See* 11 U.S.C. § 727(a)(5) (The court shall grant the debtor a discharge unless the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.). The *Answer* fails to address the disposition of the proceeds of the PPP loans, which the Defendant admits he received. These omissions, amounting to $42,948.00, are clearly material in light of the Defendant's other statements to the effect that he had no sources of income other than VA benefits during the two calendar years preceding the bankruptcy filing.

It is not enough to amend (or promise to amend) bankruptcy schedules once one has been caught in making a false oath. *Church Joint Venture v. Blasingame (In re Blasingame)*, 2015 WL

13106325, *24 (Bankr. W.D. Tenn. 2015), citing, *Clean Cut Tree Service v. Costello (In re Costello)*, 299 B.R. 882, 890 (Bankr. N.D. Ill. 2003). Discharge in bankruptcy is not a right but a privilege extended to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 287 (1991), citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."). A debtor's schedules and statement of financial affairs are executed under oath and penalty of perjury. *Montgomery v. Montgomery (In re Montgomery)*, 2007 WL 625196, slip op. at *3 (Bankr. E.D. Tenn. 2007), citing *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). Likewise, statements made at a section 341 meeting of creditors or in the course of depositions or 2004 examinations are made under oath. *Id*., citing 11 U.S.C.A. § 343, and *Brumley v. Wingard*, 269 F.3d 629, 642 (6th Cir. 2001). Moreover, "omitting information in a debtor's bankruptcy schedules may also constitute concealment occurring after the bankruptcy petition is filed for purposes of § 727(a)(2)(B)." *In re Sowers*, 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998). Intent to defraud may be established by a continuing pattern of wrongful behavior. *Id.* The Defendant has had multiple opportunities to correct the false statements made in connection with his bankruptcy case. Even after these were pointed out to him with the filing of the *Complaint* on February 3, 2023, more than three months ago, he has failed or refused to correct his false statements. In fact, he has admitted that they were false.

The Court has not found it necessary to determine whether the Defendant has a meritorious defense to each of the claims made by the Plaintiff because proof of any one of them should result in denial of the Defendant's discharge. Moreover, the Defendant's false statements were not simply "mistakes" resulting from a lapse in memory. Even if he initially misunderstood the gravity of failing to disclose the forgiveness of the PPP loans in his bankruptcy schedules and statements,

he has had ample time to correct those errors. The Defendant has left no doubt that he has no meritorious defense to the Plaintiff's claim that he made false oaths in connection with his bankruptcy case and that he has failed to satisfactorily account for the proceeds of those loans. Even if he were permitted to proceed, there is no possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.

Will the Defendant suffer prejudice as the result of the denial of the motion to set aside the default? It does not appear that the Defendant will suffer prejudice as the result of the denial of the *Motion to Set Aside Default* because the Defendant has failed to raise a meritorious defense to the *Complaint.* While it is true that the Defendant will not be permitted to present his arguments at trial, there is no jury available to him in connection with adversary proceeding, and the Court has carefully considered the proposed defenses offered in the Defendant's late-filed *Answer*. They are inadequate even when all factual inferences are drawn in the Defendant's favor.

Will the Plaintiff suffer prejudice as the result of the denial of the motion for default judgment? Setting aside the Clerk's *Entry of Default* and denying the *Motion for Default Judgment* would require the Plaintiff to litigate his claim on the merits which typically does not constitute undue prejudice under the *United Coin Meter* analysis. *Dassault Systemes,* 663 F.3d at 842; *United Coin Meter Co.*, 705 F.2d at 845. But in this case, the Plaintiff, Acting United States Trustee for Region 8, will suffer prejudice in the form of the continued devotion of resources in pursuit of his claims against the Defendant. *See, e.g., U.S. v. Goist*, 378 Fed. Appx. 517, 519 (6th Cir. 2010) (The need to defend against "additional frivolous filings" can constitute prejudice.). This is not insignificant. The United States Trustee is charged with oversight of the administration of the bankruptcy system in the United States. The resources of the United States Trustee program are not unlimited and should be put to the best possible use. Because the Defendant has failed to raise even the possibility of a meritorious defense in connection with this proceeding, it would be

prejudicial to the Plaintiff to allow the proceeding to continue. Although the Defendant's failure to answer does not rise to the level of willfulness, where he has failed to raise even the possibility of a meritorious defense, judgment should be rendered for the Plaintiff now.

For the foregoing reasons, the *Motion for Default Judgment* is **GRANTED**. The Defendant's discharge is **DENIED** pursuant to 11 U.S.C. § 727(a)(4)(A) and 727(a)(5). The Clerk is directed to enter a separate judgment consistent with this order. The *Motion to Set Aside Default* is **DENIED**.

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