Dated: December 13, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JEFFREY HINES FARMER, JR.

Case No. 14-25856
Chapter 7

Debtor.

THE ESTATE OF PHILLIP BITTKER and THE PHILLIP L. BITTKER TRUST by ALLAN M. BITTKER as Executor, et al.

Plaintiffs

v.

Adv. Proc. No. 15-00370
(Jointly Administered)

JEFFREY HINES FARMER, JR.

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS UNDER FED. R. CIV. P. 52(C) AND FED. R. BANKR. P. 7052

This matter came before the Court for trial on the Complaint of fifteen separate plaintiffs including the Estate of Phillip Bittker and The Phillip L. Bittker Trust by Allan M. Bittker, as Executor ("Plaintiffs") to Object to Debtor's Discharge pursuant to 11 U.S.C. §§ 727(a)(3), (a)(4)(A) and (B) and (a)(5). The Court considered the testimony of Fred Harris (one of the named Plaintiffs in this action), expert witness testimony of David Morris ("Mr. Morris"), the exhibits submitted at trial and the arguments of counsel. At the close of the Plaintiffs' case, Debtor made an Oral Motion for Directed Verdict. Because this was a bench trial, the Motion is treated as a motion for a judgment on partial findings under FED. R. CIV. P. 52(c), made applicable herein by FED. R. BANKR. P. 7052. Under subsection (c) of Rule 52, the Court "may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." After considering the evidence and testimony, as well as the arguments of counsel, the Court grants the Debtor's Motion for judgment on partial findings pursuant to FED. R. BANKR. P. 7052. The following constitutes the Court's Findings of Fact and Conclusions of Law in support of the entry of the judgment.

The Court has subject matter jurisdiction under 28 U.S.C. §§ 1334(a)-(b) and 157(a). By virtue of 28 U.S.C. § 157(b)(2)(A) and (J), this is a core proceeding.

FINDINGS OF FACT

The relevant background facts may be briefly summarized as follows. Debtor was an engineer, homebuilder, developer of approximately thirty-six shopping centers and owner of Spectra Management and Spectra Group. He was also part owner of numerous shopping center developments and solicited investors for the shopping centers.

On June 6, 2014, Debtor filed his Voluntary Petition seeking relief under Chapter 7 of the United States Bankruptcy Code. Debtor scheduled secured debts totaling $44,177,242 and unsecured debts totaling $43,176,786.74.

Plaintiffs focused their efforts during trial on their 727(a)(3) claim. The Court heard from Plaintiffs' expert who testified as to the Shopping Centers' accounting practices. Plaintiffs' claims of nondischargeability under 11 U.S.C. §§ 727(a)(3)-(5) can be distilled down to Debtor's alleged inadequacy of record keeping, primarily due to Debtor's failure to record individual cash transactions in a general ledger and then to reconcile the transactions with the Debtor's bank statements.

Plaintiffs also take issue with Debtor's use of credit cards, payments to Debtor's wife, and payments to caregivers for Debtor's parents. Plaintiffs failed to prove there was anything nefarious about these transactions and there were supporting documents produced that disclosed and accounted for such payments.

LEGAL ANALYSIS

The Court grants Debtor's Motion stating there was no evidence presented to establish that Debtor's actions met any of the requirements needed to deny Debtor a discharge under 11 U.S.C. §§ 727(a)(3)-(5). In a nondischargeability proceeding, the burden of proof in seeking to deny the Debtor's discharge is on the Plaintiffs. FED. R. BANKR. P. 4005. The Plaintiffs failed to carry their burden of proof. The Sixth Circuit has stated that "the provisions of § 727(a) are to be construed liberally in favor of granting debtors the fresh financial start contemplated by the Bankruptcy Code and the Supreme Court, and construed strictly against parties seeking to deny the granting of a debtor's discharge." *Clippard v. Jarrett (In re Jarrett)*, 417 B.R. 896, 901 (Bankr. W.D. Tenn. 2009), citing *Meyers v. Internal Revenue Service (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999).

Denial of discharge is only for the most egregious cases and not where acts or omission may have been inadvertent or excusable. *Id.*

<u>11 U.S.C. § 727(a)(3)</u>

In Count I of the Complaint, Plaintiffs allege Debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, records and papers from which his financial condition or business transactions might be ascertained in violation of 11 U.S.C. § 727(a)(3). Under this subsection, the debtor will be denied a discharge where:

> 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). This subsection does not require absolute perfection in making or keeping records. *Rhoades v. Wikle,* 453 F.2d 51, 53 (9th Cir.1971). Rather, the debtor must "present sufficient written evidence" which will enable creditors (or a trustee) to reasonably ascertain the debtor's present financial condition and to track the debtor's financial dealings with substantial completeness and accuracy for a reasonable period, past to present. *Id.; Turoczy Bonding Co. v. Strbac (In re Strbac),* 235 B.R. 880, 882 (6th Cir. BAP 1999)(citing *In re Martin*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)). Plaintiffs bear the initial burden of proving that a debtor's financial records are inadequate and that this failure prevented the plaintiffs from ascertaining the debtor's financial condition. *Turoczy* at 882-83 (citing *Wazeter v. Michigan Nat'l Bank (In re Wazeter),* 209 B.R. 222, 227 (W.D.Mich.1997)). The adequacy of records is determined on a case-by-case basis, considering the totality of the particular facts and circumstances (e.g., "debtor's occupation, financial structure, education, experience, sophistication, and any other circumstances that should be considered in the interest of justice."). *Id.* at 882 (citation omitted). If the records

are determined to be inadequate, the burden shifts to the debtor to show the inadequacy is justified under all of the circumstances of the case. *Id.* at 883 (citation omitted).

Many of the records that Plaintiffs' expert received may not have been perfect records (or records to which the expert believed needed to comport to GAAP). However, the record reflects that the Debtor, upon request of the Plaintiffs, produced *31,000* of pages of documents, including bank statements, balance sheets, credit card information, accountant workpapers, and tax records. Moreover, Debtor and the business bookkeeper were made available to the expert. Plaintiffs' expert also testified that if Plaintiffs requested documents spanning a broader scope of years, he believed he "could go back to day one to see what happened" with each of the shopping centers. The Court notes that Plaintiffs' expert said this not once, but two or three times, which solidifies the fact that sufficient and adequate records and documents were kept. The records apparently, therefore, provided sufficient information for a creditor to reconstruct the Debtor's financial history. This was not a so-called "cooperate as a last resort" case evidencing bad faith. Actually, the Debtor's cooperation here was evidence of good faith. Plaintiffs presented no evidence as to which, if any, records were missing, or how Debtor's failure to maintain or to produce any records affected Plaintiffs' ability to evaluate Debtor's financial condition.

It is the Court's finding that the Debtor produced thousands of pages of financial records for review by the Plaintiffs' expert and that these documents formed a sufficient picture of the Debtor's financial condition. Accordingly, the Court finds that the totality of the circumstances and applicable case law do not support a denial of discharge under § 727(a)(3), as the Plaintiffs have failed to carry the burden of proof by a preponderance of the evidence.

11 U.S.C. § 727(a)(4)

In Count VI of the Complaint, Plaintiffs also object to the Debtor's discharge under 11 U.S.C. § 727(a)(4)(A) and (B), which bars discharge if a debtor knowingly and fraudulently made a false oath or account in connection with a bankruptcy case by failing to disclose personal income— which, in this case, Debtor claimed on his 2013 tax return in the amount of $650,000. The Court finds after listening to the evidence, that Plaintiffs failed to set forth evidence to sustain this claim at trial. A knowingly and fraudulently-made false oath or account bars discharge in bankruptcy if it is both material and made with an intent to defraud. *See, e.g., In re Steiker,* 380 F.2d 765, 767 (3rd Cir. 1967). To prevail, a plaintiff must prove by a preponderance of the evidence that: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) that the statement related materially to the bankruptcy case. *Keeney v. Smith (In re Keeney),* 227 F.3d 679, 685 (6th Cir. 2000). Whether a debtor has made a false oath or account under § 727(a)(4)(A) is a question of fact. *Id.*

In all bankruptcy cases, the petitions, schedules, lists, statements, and any subsequent amendments thereto are signed under penalty of perjury. FED. R. BANKR. P. 1008 and 1009; Official Forms B–1 (Petition), B–6 (Declaration), and B–7(Statement of Financial Affairs); *see also Hamo v. Wilson (In re Hamo),* 233 B.R. 718, 725 (6th Cir. BAP 1999). The debtor's intent may be inferred from circumstantial evidence or from the debtor's course of conduct. *Hamo,* 233 B.R. at 724. Statements are material for the purposes of § 727(a)(4) if they "bear[ ] a relationship to the [debtor's] business transactions or estate, or concern[ ] the discovery of assets, business dealings, or the existence and disposition of his property." *In re Keeney,* 227 F.3d at 686 (quoting *In re Beaubouef,* 966 F.2d 174, 178 (5th Cir. 1992)). "Knowledge may be shown by

demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information." *Hamo,* 233 B.R. at 725 (quoting *Hunter v. Sowers (In re Sowers),* 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998).

Plaintiffs' primary objection here centers on asserted omissions in the Debtor's statements and schedules. Plaintiffs assert that the Debtor's failure to adequately disclose income of $650,000 as outlined in his 2013 tax return was a material omission and misrepresentation. However, it is clear to the Court that the tax return was later amended to remove the so-called income (something Mr. Morris did not dispute). The Court is therefore led to conclude that, prior to the filing of the bankruptcy petition, the information in the Debtor's schedules was not fraudulent nor misrepresented.

The Court also heard testimony that personal property was undervalued in the bankruptcy schedules when compared to Debtor's insurance policies, which provide personal property coverage based on the value of the residence and not on property within a residence. Mr. Morris, while pointing this out, did agree that insured value does not mean the same as appraised value, and that there was no indication that any appraisal was done (and sometimes, the insured value of personal property is based on a percentage of the value of the real property itself).

Based on the evidence presented, the Court finds that the Plaintiffs did not prove that the Debtor knowingly and fraudulently made a false oath or account to warrant the denial of a general discharge.

As to the Plaintiffs' contention that the Debtor misrepresented his income in his statements and schedules, the evidence shows Debtor actually overestimated his expected income. However, overestimating income, standing alone, does not demonstrate that the Debtor, with knowledge as to its falsity, acted with the requisite intent to deceive.

Other deficiencies raised by the Plaintiffs do not reflect an intent of the Debtors to defraud. The Court finds there was no evidence presented that there were any omissions that were made knowingly or fraudulently.[1]

11 U.S.C. § 727(a)(5)

In Count II, Plaintiffs contend that § 727(a)(5) bars discharge because the Debtor did not satisfactorily explain the loss or deficiency of assets. More specifically, Plaintiffs aver Debtor failed to explain cash balances evidenced by account transactions and financial statements as demonstrated through expert testimony and the expert's report submitted to the Court. Under § 727(a)(5), a court shall grant a debtor a discharge unless "the debtor has failed to explain satisfactorily ... any loss of assets or deficiency of assets to meet the debtor's liabilities[.]" 11 U.S.C. § 727(a)(5). "The question of whether a debtor satisfactorily explains a loss of assets is a question of fact." *In re Chalik,* 748 F.2d 616, 619 (11th Cir. 1984) (citing *Shapiro & Ornish v. Holliday,* 37 F.2d 407, 407 (5th Cir. 1930)).

In order to obtain a denial of discharge under § 727(a)(5), the Plaintiffs must first establish by a preponderance of the evidence a loss or deficiency of prepetition assets that could have been used to pay creditors. *In re Reed,* 310 B.R. 363, 369 (Bankr. N.D. Ohio 2004). If such a showing is made, then the debtor has an opportunity to explain the whereabouts of the assets. *Id.*

Here, the Plaintiffs have failed to establish by a preponderance of the evidence any loss or deficiency of prepetition assets. The Court did not actually hear any evidence of assets that Plaintiffs believed to have existed on the day of the bankruptcy that were not identified in the schedules. Plaintiffs' expert testified on cross examination that during a deposition prior to trial, Debtor had explained the discrepancies between the schedules and his personal financial

[1] The Court also notes that Plaintiffs' counsel conceded this count during oral argument.

statements, and that the cash positions on the financial statements were overstated, giving Plaintiffs no basis to identify that there was actually cash that had not been accounted for.[2] The Court need not hear further testimony on this count.

The Plaintiffs had to prove each of the claims asserted in the Complaint by a preponderance of the evidence. As the above analysis of the evidence presented by the Plaintiffs establishes, the Plaintiffs failed to carry their burden of proof under 11 U.S.C. § 727. Therefore, the Court grants the Debtor's Motion for judgment on partial findings.

CONCLUSION

For all of the above reasons, the Court **GRANTS** the Debtor's Motion for judgment on partial findings as to Counts I, II and VI. A final order as to Counts I, II and VI, incorporating the findings herein and dismissing these counts, with prejudice, will accompany this Memorandum Opinion. There is no just reason to delay entering this Order. *See* FED. R. BANKR. P. 7054; FED. R. CIV. P. 54(b). There is no risk of inconsistent judgments or duplicative appeals. This Memorandum Opinion does not adjudicate any claims or issues arising out of Counts III, IV and V of the Complaint. The claims and issues arising out of Counts I, II and VI of the Complaint are finally adjudicated and Counts III, IV and V of the Complaint are hereby severed from this proceeding.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

Steven N. Douglass
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[2] Plaintiffs did not call the Debtor as a witness to testify about any financial matters.

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