UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
JEROME P. JOHNSON,	)	Case No. 05-14164 (PJW)
	)	
Debtor.	)	
	)	
	)	
ROBERTA A. DeANGELIS, Acting United States Trustee for Region 3,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 06-50655(PJW)
	)	
JEROME P. JOHNSON,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: January 9, 2009

WALSH, J.

INTRODUCTION

These Findings of Fact and Conclusions of Law are with respect to Defendant Jerome P. Johnson's voluntary petition for chapter 7 bankruptcy relief, filed October 14, 2005. On May 12, 2006, the United States Trustee filed this adversary proceeding, requesting that the Court deny Johnson's discharge pursuant to 11 U.S.C. § 727(a)(3) for failure to keep or preserve recorded information from which the debtor's financial condition or business transactions might be ascertained (Count I), 11 U.S.C. § 727(a)(4) for knowingly and fraudulently making false oath or account (Count II), and/or 11 U.S.C. § 727(a)(5) for failure to explain satisfactorily any loss of assets or deficiency of assets in his estate to meet his liabilities (Count III). For the reasons set forth herein, the Court will deny Johnson's discharge.

The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any of the following findings of fact are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

FINDINGS OF FACT

Background

1. Defendant Jerome P. Johnson is an attorney licensed to practice law in the State of Maryland. (Adv. Doc. # 39, p. 2, ¶ 1.)

2. Between April 2001 and October 2005, Johnson represented debtors in 66 chapter 7 and chapter 13 bankruptcy cases, 30 of which were commenced in 2005. Johnson has never litigated an adversary proceeding to judgment and has not filed any bankruptcy cases since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective on October 17, 2005. (Id. at p. 2, ¶ 2.)

3. Johnson filed his voluntary petition for chapter 7 bankruptcy relief on October 14, 2005 (the "Petition Date"), filing therein his schedules and Statement of Financial Affairs ("SOFA"). (Id. at p. 3, ¶ 3.)

4. Johnson filed for relief under chapter 7 of the Bankruptcy Code in the District of Delaware once before, on July 20, 1999. Johnson received a discharge on October 30, 1999. (Case No. 99-2704 (PJW).)

5. Johnson filed with his schedules a declaration under penalty of perjury stating that he had read the schedules and that they were true and correct to the best of his knowledge,

information and belief. (Case No. 05-14164 (PJW) ("Main") Doc. # 1; Adv. Doc. # 47, 101:2-7.)

6. Johnson filed with his SOFA a declaration under penalty of perjury stating that he had read the answers contained in the SOFA and that they were true and correct. (Main Doc. # 1; Adv. Doc. # 47, 101:2-7.)

7. Johnson admitted at trial that he was familiar with the official forms comprising his bankruptcy petition, schedules and SOFA, as well as the instructions for completing those forms, having prepared such forms not only for himself in a previous bankruptcy case, but also for his clients in 66 bankruptcy chapter 7 and chapter 13 cases. Johnson also admitted that he understood the importance of following those instructions. (Adv. Doc. # 47, 47:4-48:16.)

8. By letter dated November 15, 2005, the United States Trustee requested that Johnson produce for review, among other things, current year business records from his law practice, including financial statements (i.e. balance sheet, income statements, accounts receivables, cash flow statements and footnotes, detailed trial balances as of September 30, 2005), check registers and copies of bank statements for all business accounts, and detailed statements to support the amounts listed as business income and expenses listed in Schedules I and J. (Adv. Doc. # 39, p. 5, ¶ 12; Adv. Doc. # 59, ex. UST-7.)

9. The meeting of creditors pursuant to Section 341 of the Bankruptcy Code commenced on February 15, 2006 and reconvened on March 15, 2006 and April 20, 2006. Johnson testified under oath at the meeting. He testified, among other things, that all of the information contained in his schedules and SOFA was true and correct to the best of his knowledge, information and belief. (Adv. Doc. # 39, p. 3, ¶ 5.)

10. At the commencement of the meeting of creditors, Chapter 7 Trustee George Miller asked Johnson if the information in his bankruptcy schedules was compete and accurate. Johnson responded in the affirmative. (Adv. Doc. # 45, 33:13-23; Adv. Doc. # 59, ex. UST-4, 6:8-16.) Miller next asked Johnson if he desired to make any changes to his bankruptcy schedules; Johnson responded in the negative. (Adv. Doc. # 45, 33:23-34:2; Adv. Doc. # 59, ex. UST-4, 7:5-7.)

11. Miller then asked Johnson direct questions about assets not disclosed in Johnson's bankruptcy schedules, thereby discovering some of Johnson's bank accounts and other assets. Johnson responded to the direct questions but volunteered no information. (Adv. Doc. # 45, 33:4-34:8; see generally Adv. Doc. # 59, ex. UST-4.)

Defendant's Assets

12. In item 2 of Schedule B, Johnson indicated that he owned a $10,000 Wilmington Trust Company certificate of deposit, which is

described in his Schedule D as collateral for a loan obligation to that institution. Johnson did not list any bank accounts on his Schedule B. (Adv. Doc. # 39, p. 3, ¶ 6.)

13. On the Petition Date, Johnson had the following bank accounts:

A. Attorney business checking account at Bank of America, account number ending in digits 8779. Johnson disclosed the existence of this bank account and provided copies of bank statements in response to direct questions by the Chapter 7 Trustee and/or representative of the United States Trustee at the meeting of creditors. (Id. at p. 3, ¶ 7(a).) On the Petition Date, this account had a balance of $2,683.76. (Adv. Doc. # 59, ex. UST-12.)

B. Personal checking account at Bank of America, account number ending in digits 5453, in the name of Jerome P. Johnson. Johnson disclosed the existence of this bank account and provided copies of bank statements in response to direct questions by the Chapter 7 Trustee and/or representative of the United States Trustee at the meeting of creditors. (Adv. Doc. # 39, p. 4, ¶ 7(b).) On the Petition Date, this account has a balance of $291.92. (Adv. Doc. # 59, ex. UST-13.)

C. Personal savings account at Bank of America, account number ending in digits 9724. (Adv. Doc. # 39, p. 4, ¶ 7(c).) On the Petition Date, this account has a balance of $150.14. (Adv. Doc. # 59, ex. UST-14.)

D. Personal checking and savings accounts at Wilmington Trust Company, account numbers ending in digits 1366 and 1317, respectively, having balances on the Petition Date of $597.75 and $111.84, respectively. (Adv. Doc. # 59, ex. UST-16.) Johnson first disclosed the existence of these accounts in response to a discovery request by the United States Trustee after the commencement of his adversary proceeding. Johnson was unable to supply the United States Trustee with copies of bank statements on these accounts, but directed the United States Trustee to obtain same by serving a subpoena on the bank. (Adv. Doc. # 39, p. 4, ¶ 7(d).)

E. Personal savings account at Chestnut Run Federal Credit Union, account number ending in digits 8002, balance undisclosed. Johnson did not disclose the existence of this account at the meeting of creditors, but first admitted owning the account when questioned by the Court at trial on April 10, 2008. (Adv. Doc. # 47, 172:2-173:21.)

F. Attorney trust account at Mercantile County Bank, account number ending in 3355, with a closing balance on the Petition Date of $7,114.08. (Adv. Doc. # 14, ¶ 8; Adv. Doc. # 45, 40:20-43:10; Adv. Doc. # 59, ex. UST-15.)

(i) In response to direct questioning at the meeting of creditors, Johnson acknowledged that he had an attorney trust fund, but did not identify the bank account at which he held the

account. (Adv. Doc. # 45, 40:20:41:10; Adv. Doc. # 59, UST-4, 27:14-28:1.)

(ii) Johnson first identified the bank at which he maintained his attorney trust account and disclosed the number of that account in response to a discovery request by the United States Trustee after the commencement of this adversary proceeding. Johnson was unable to supply the United States Trustee with copies of bank statements on his attorney trust account, but directed the United States Trustee to obtain same by serving a subpoena on the bank. (Adv. Doc. # 39, p. 6, ¶ 14; Adv. Doc. # 59, ex. UST-11.)

(iii) Johnson testified at the meeting of creditors that on the Petition Date he was holding no money in trust and that his attorney account held only approximately $25 that he kept on deposit to keep the account active. (Adv. Doc. # 45, 40:20-25; Adv. Doc. # 59, ex. UST-6, 51:7-52:3.) Before the Petition Date, Johnson withdrew cash from his attorney trust fund at automated teller machines ("ATMs") and used a debit card on the account to pay both personal expenses and expenses of his law practice, as distinguished from payment of client expenses. (Adv. Doc. # 47, 65:18-68:1; Adv. Doc. # 59, ex. UST-15.)

14. Johnson produced copies of bank statements for his Bank of America attorney business checking account at the February 15, 2006 meeting of creditors and copies of bank statements from his Bank of

America personal checking account at the April 20, 2006 session of that meeting. (Adv. Doc. # 39, p. 6, ¶ 13.)

15. Johnson did not disclose the existence of or balance in his Bank of America savings account in Schedule B or at the meeting of creditors. (Adv. Doc. # 45, 48:22-25.)

16. Johnson did not disclose the existence of, balances in, or account numbers of his checking and savings accounts at Wilmington Trust Company in Schedule B or at the meeting of creditors. (Id. at 50:5-8.)

17. Johnson did not produce copies of bank statements for his personal checking and savings account at Wilmington Trust Company. The United States Trustee obtained copies of statements on those accounts by serving subpoenas on Wilmington Trust Company after Johnson identified an account there in response to the United States Trustee's discovery requests made during this adversary proceeding. (Adv. Doc. # 39, p. 6, ¶ 15.)

18. Johnson admitted at trial that he knew on the Petition Date that he had each of the bank accounts described above, despite his failure to list any of those accounts in his bankruptcy schedules. (Adv. Doc. # 47, 50:22-51:1.)

19. Johnson admitted at trial that he knew at the meeting of creditors that he had each of the bank accounts described above, despite his failure to disclose some of those accounts at the meeting of creditors. (Id. at 51:2-4.)

20. Johnson admitted at trial that in addition to all of the accounts enumerated above, he had other undisclosed bank accounts. (Id. at 173:11-21.)

21. Johnson testified at trial that when representing debtors in their bankruptcy cases, he counseled them on their rights and obligations as debtors. (Id. at 47:13-16.)

22. Johnson admitted at trial that despite counseling his clients on their obligations as debtors, it was his practice, as an attorney filing bankruptcy petitions for clients, and for himself, not to disclose bank accounts unless such accounts held "sufficient" funds that a bankruptcy trustee would administer. (Id. at 58:16-59:17.)

23. On the Petition Date, Johnson owned a laptop computer, placed in service on April 10, 2003 at a cost of $2,000, that was not disclosed in Schedule B. Johnson first acknowledged that he owned the laptop computer in response to direct questions by representatives of the United States Trustee during the meeting of creditors. (Adv. Doc. # 39, p. 4, ¶ 8.)

24. On the Petition Date, Johnson owned an interest in a 1998 Ford Ranger pickup truck. (Adv. Doc. # 59, ex. UST-20.) Johnson's interest in the pickup truck was not disclosed in Schedule B. (Main Doc. # 1.)

25. After the Petition Date but before the meeting of creditors pursuant to Section 341, Johnson commenced a lawsuit

against Gail Thornton, co-owner and record title-holder of the pickup truck, in the Court of Common Pleas for New Castle County, Delaware, alleging that Thornton breached the parties' contract of mutual ownership and use of the pickup truck. (Adv. Doc. # 59, ex. UST-20.)

26. During the meeting of creditors under Section 341, Johnson did not disclose his interest in the pickup truck or his then-pending lawsuit against Thornton arising from that interest. The February 15, 2006, March 15, 2006 and April 20, 2006 transcripts of the meeting of creditors do not reflect any such disclosure by Johnson. (Id. at ex. UST-4, UST-5, and UST-6.)

27. In October 2006, the Court of Common Pleas of New Castle County, Delaware awarded Johnson judgment against Thornton in the amount of $4,800. (Id. at ex. UST-21 and UST-22.) After the entry of judgment, Johnson sought to execute the judgment in November 2006 and filed an updated interest calculation with the Court of Common Pleas in December 2007. (Adv. Doc. # 47, 85:23-86:10.)

28. At all relevant times during the pendency of his bankruptcy case and this adversary proceeding, Johnson knew he had an interest in the pickup truck or, after he was deprived of that interest post-petition, a cause of action or judgment arising from that interest. (Id. at 86:14-23.)

29. Johnson's failure to disclose his interests in assets precluded the Chapter 7 Trustee from administering those assets,

which would have been administrable unless claimed as exempt. (See, e.g., Adv. Doc. # 46, 55:23-56:15.) Johnson's failure to disclose all of his bank accounts also precluded the Chapter 7 Trustee from timely reviewing those accounts for avoidable preference payments or avoidable post-petition transfers. (See, e.g., id. at 53:21-54:15 and 56:21-57:25.)

Defendant's Income and Expenses

30. Johnson stated in Schedule I that his monthly regular income from the operation of his business or profession was $2,500, but did not attach a detailed statement of such income to Schedule I as called for in the official form and as requested by the United States Trustee in a November 15, 2005 letter to Johnson. (Adv. Doc. # 39, p. 4, ¶ 9.) Schedule I reflects no income other than from Johnson's business or profession. (Main Doc. # 1.)

31. Johnson stated in Schedule J that his regular expenses from the operation of his law practice were $1,455 a month, but did not attach a detailed statement of such expenses to Schedule J as called for in the official form and as requested by the United States Trustee in a November 15, 2005 letter to Johnson. (Adv. Doc. # 39, pp. 4-5, ¶ 10.)

32. At the meeting of creditors under Section 341, Johnson produced a letter from his landlord confirming the monthly rent expense for Johnson's office, and produced federal income tax

returns, including those for calendar years 2004 and 2005. (Adv. Doc. # 59, ex. UST-17 and UST-18.)

33. Although each of Johnson's tax returns contain an Internal Revenue Service ("IRS") Form 1040 Schedule C (Profit or Loss from a Business), tax returns without supporting documentation are not a reliable gauge of business expenses; they include expenses which are not necessarily cash-flow items but which are instead computed, such as automobile expense determined on a per-mile basis regardless of actual cost and depreciation determined according to an Internal Revenue Service-specified asset life regardless of the asset's actual economic life. (Adv. Doc. # 45, 69:4-28; Adv. Doc. # 47, 8:15-23.)

34. Johnson's tax returns also are not a reliable gauge of business expenses because, except for formula-based deductions for automobile expenses and depreciation, most of the business expenses reported in IRS Schedule C are in "round number" increments of $10 or $100. Extensive use of round numbers raises suspicion as to the accuracy of those numbers. (Adv. Doc. # 46, 88:3-92:9.)

35. At trial, Johnson produced a document purporting to set forth the average monthly gross receipts and business expenses for the Law Office of Jerome P. Johnson as of October 1, 2005. (Adv. Doc. # 59, ex. D-4.) Johnson admitted that he created this document for this adversary proceeding. (Adv. Doc. # 47, 21:2-4.)

36. Each of the monthly expense amounts set forth in this document appears to be approximately one-twelfth of the full-year expense amounts for both cash and non-cash expenses set forth in Schedule C of Johnson's 2005 federal income tax return. For example, this document lists car and truck expenses of $1,040 per month; Schedule C of Johnson's 2005 federal income tax return lists car and truck expenses of $12,478. (Adv. Doc. # 29, ex. D-4 and UST-18.)

37. In responding to item 8 of his SOFA (information about losses from fire, theft or other casualty or gambling within one year immediately preceding the Petition Date), Johnson indicated "none." However, during the March 15, 2006 and April 20, 2006 sessions of the meeting of creditors, Johnson testified that a portion of his income was derived from gambling. (Adv. Doc. # 39, p. 5, ¶ 11.)

A. Johnson's 2004 federal income tax return indicates that he had $40,360 of gambling winnings and $34,000 of allowed gambling losses in 2004. (Id. at p. 5, ¶ 11(a); Adv. Doc. # 59, ex. UST-17.)

B. Johnson's 2005 federal income tax return indicates that he had $3,200 of gambling winnings and $3,200 of allowed gambling losses in 2005. (Adv. Doc. # 39, p. 5, ¶ 11(b); Adv. Doc. # 59, ex. UST-18.)

C. At the meeting of creditors under Section 341, Johnson produced a statement denominated as "Delaware Park Racetrack and Slots Player's Estimated Win/Loss for 2005," indicating that his net loss at Delaware Park, a race track and slot machine casino where Johnson gambled at slot machines, from January through October 2005 was $10,103.50, but testified at the 341 meeting that his actual gambling losses may have been greater. (Adv. Doc. # 39, p. 5, ¶ 11(b); Adv. Doc. # 59, ex. UST-10.)

38. Based on (i) deposits to Johnson's various bank accounts that are not facially traceable to the movement of funds between and among accounts, (ii) cash withdrawals from Johnson's attorney trust account, and (iii) personal and business purchases made using a debit card connected to Johnson's attorney trust account, all as discussed in greater detail below, Johnson's monthly gross income substantially exceeds the $2,500 per month listed in Johnson's Schedule I and appears to exceed the gross business revenue and other income reported in Johnson's federal income tax return for 2005. Johnson's annualized income as of the Petition Date may be as high as $107,000 per year rather than the $30,000 per year suggested by Schedule I. (Adv. Doc. # 59, appendix 1.)

39. During the 90 days before the Petition Date (between July 16, 2005 and October 13, 2005), Johnson deposited $19,385.68 in his attorney business account, exclusive of (i) inter-account transfers to Johnson's other Bank of America accounts, (ii) bank fee refunds,

(iii) other non-deposit credits issued to Johnson, and (iv) a $500 deposit credited on the Petition Date. (Id. at appendix 2.)

40. During the 12 calendar months of 2005, Johnson deposited a total of $17,037.09 into his attorney business account, again exclusive of (i) inter-account transfers from Johnson's other Bank of America accounts, (ii) bank fee refunds, and (iii) other non-deposit credits. (Id. at ex. D-6.)

A. On numerous occasions, Johnson made cash withdrawals from his attorney business checking account by using ATMs at Delaware Park. Johnson claimed that he sometimes deposited cash gambling winnings into his attorney business checking account. (Adv. Doc. # 39, p. 7, ¶ 17; Adv. Doc. # 59, ex. UST-12.)

B. Johnson asserts that a portion of the funds deposited in his attorney business account was not business income, but came from other sources, including but not necessarily limited to his personal checking account at Wilmington Trust Company. (Adv. Doc. # 59, ex. D-2.) For the three-month period July 1, 2005 through September 30, 2005, amounts characterized by Johnson as "business deposits" to his attorney business account were in the total amount of $14,160.68, amounts characterized by Johnson as "non-business deposits" were in the total amount of $2,210, online transfers from Johnson's other accounts at the same institution were in the total amount of $190, and fee refunds and other credits were in the total amount of $290.50. (Id.)

41. Between July 17, 2005 and October 17, 2005, Johnson made ATM deposits totaling $5,325 and counter deposits totaling $1,100 into his personal checking account at Bank of America, exclusive of inter-account transfers from Johnson's other Bank of America accounts and other credits. (Id. at ex. UST-13.)

42. Between July 14, 2005 and November 9, 2005, Johnson deposited at total of $12,460 into his personal checking account at Wilmington Trust Company. (Id. at ex. UST-16.) Of this sum, $6,100 was in the form of checks drawn on Johnson's business and personal checking accounts at Bank of America; the balance, $6,360, was not traced to any of Johnson's known bank accounts. (Id. at appendix 1.)

43. Johnson made cash withdrawals from his attorney trust account by using ATMs at Delaware Park. (Adv. Doc. # 47, 65:18-22; Adv. Doc. # 59, ex. UST-15.) Between July 1, 2005 and September 30, 2005, Johnson made ATM withdrawals from his attorney trust account in the amount of $1,870.50 and incurred $39 of automated teller fees in connection therewith. (Adv. Doc. #59, ex. UST-15.) Johnson also used a debit card on his attorney trust account to make purchases in the amount of $539.50 for personal expenses and expenses of his law practice, as distinguished from payment of client expenses. (Adv. Doc. # 47, 65:18-68:1; Adv. Doc. # 59, ex. UST-15.)

Books, Records, Documents and Papers From Which Defendant's Financial Condition or Business Transactions Might Be Ascertained

44. During the April 20, 2006 session of the meeting of creditors, Johnson advised the Chapter 7 Trustee and representatives of the United States Trustee that, except for the Bank of America business and personal checking account statements produced, he did not maintain the business books and records requested by the United States Trustee in her November 15, 2005 letter, including check registers. (Adv. Doc. # 39, p. 6, ¶ 16.)

45. Johnson claimed at the meeting of creditors that he tracked his business income and expenses by reviewing his attorney business checking account bank statements online in "real time," and further claimed that such review enabled him to ascertain the uses of funds withdrawn, whether by check, debit card or cash withdrawals. (Id.)

46. At trial, Johnson produced copies of monthly bank statements on his attorney business checking account for the months of July, August, and September 2005, containing hand-written annotations and symbols indicating sources of funds (e.g., business deposits, other deposits) and uses of funds (e.g., expenses for hotel, gas, supplies) (collectively, the "Annotations") next to the various entries on the bank statements. (Adv. Doc. # 59, ex. D-2.)

47. Johnson admitted at trial that he created the Annotations on Exhibit D-2 in preparation for trial of this adversary proceeding. (Adv. Doc. # 47, 132:9-133:7.)

48. Johnson testified at trial that he compiled Annotations on his bank statements such as those in Exhibit D-2 "all the time" and "[e]very time" he had a statement. However, he admitted that he did not supply annotated bank statements to the United States Trustee or the Chapter 7 Trustee. (Id. at 132:20-23 and 133:7-11.)

49. Johnson further testified at trial that he turned the annotated bank statements over to his accountants for use in preparing his tax returns in February or March 2006. (Id. at 138:6-18.) Nonetheless, Johnson admitted that at the time when he allegedly turned his annotated bank statements over to his accountants in February or March 2006, he had not complied with the United States Trustee's November 15, 2005 request that he produce his business records. (Id. 137:11-138:24.)

50. During the February 15, 2006, March 15, 2006, or April 20, 2006 meetings of creditors under Section 341, Johnson did not assert that he compiled or maintained annotated bank statements, nor did he assert that he had turned any such annotated bank statements over to his accountants at any time. (Adv. Doc. # 59, ex. UST-4, UST-5, and UST-6.)

51. In the weeks before trial, Johnson asserted for the very first time that the Chapter 7 Trustee's contact with Johnson's

accountants "led to the possible destruction of Debtor's Documents." (Id. at ex. D-1, p. 1.) During the February 15, 2006, March 15, 2006, or April 20, 2006 meetings of creditors under Section 341, Johnson did not assert that his accountants had failed to return any of his documents, despite claiming during the April 20, 2006 meeting that the Chapter 7 Trustee had inappropriately contacted Johnson's accountants and caused the accountants to terminate their relationship with Johnson. (Id. at ex. UST-4, UST-5, and UST-6.)

52. Although the complaint for denial of discharge herein pleads with particularity that Johnson failed to keep or preserve adequate records from which his financial condition and transactions, including without limitation his income, expenses and other uses of funds might be ascertained, Johnson did not plead, as an affirmative defense or otherwise, that his accountants failed or even might have failed to return all of his documents. (Main Doc. # 13; Adv. Doc. # 14.)

53. During trial, Johnson testified at length regarding the ATM withdrawals from his attorney trust account: Johnson testified that client funds were deposited in his attorney trust account to pay unearned fees and that as he performed work, he withdrew funds from the account, often in cash at ATMs, in payment of his fees. (Adv. Doc. # 47, 112:13-114:7.)

54. During trial, the Court directed Johnson to produce monthly statements on his attorney trust account through the date Johnson made a final disbursement of funds from that account to his client, a Mr. Barner, and, if no disbursement was made to Barner, the final payment of fees to himself from the attorney trust account. (Id. at 114:15-116:2, 177:15-178:24.) When Johnson expressed uncertainty about his ability to obtain account statements from his bank, the Court directed counsel for the United States Trustee to obtain the documents by subpoena directed to Johnson's bank. (Id. at 179:21-180:10.)

55. The United States Trustee obtained copies of account statements through June 2006 and supplied them to the Court and Johnson. However, those statements did not show a final disbursement of funds to Barner or a final payment of fees to Johnson. Johnson has not provided the Court with monthly account statements showing either a final disbursement of funds to Barner or a final payment of fees to himself despite several letters from the Court directing him to do so. (Adv. Doc. # 48; Adv. Doc. # 49; Adv. Doc. # 51; Adv. Doc. # 52.)

56. Miller testified that Johnson's schedules and SOFA are inadequate to determine Johnson's financial condition and his business transactions: Miller was unable to reconcile Johnson's income and expenses; among other things, deposits into Johnson's attorney business bank account exceeded the amounts Johnson

reported to the Internal Revenue Service (Adv. Doc. # 45, 122:25-123:13), and items listed as expenses on Johnson's tax returns were all either in round increments or were non-cash computed amounts that did not necessarily reflect actual cash costs. (Id. at 69:4-23; Adv. Doc. # 46, 88:3-92:9.)

57. Johnson claims to have won and lost thousands of dollars playing slot machines at Delaware Park, including making numerous ATM withdrawals from his attorney business account and attorney trust account to play those slot machines, but has not provided dependable evidence either of his winnings and losses or of what portion of the ATM withdrawals was used for gambling: Johnson claimed during the 341 meeting to have maintained a log of his gambling wins and losses, but did not produce it to Miller when requested to do so, claiming at various times that he did not have it, that it was illegible, or that Miller would not understand it. (Adv. Doc. # 45, 67:18-20, 112:17-113:1, 114:19-116:14, 117:1-25.) Johnson produced a statement entitled "Delaware Park Racetrack and Slots Player's Estimated Win/Loss for 2005" indicating a net loss at Delaware Park from January through October 2005 of $10,103.50; however, Johnson testified at the meeting of creditors that his actual gambling losses may have been greater. (Adv. Doc. # 39, p. 5, ¶ 11(b); Adv. Doc. # 59, ex. UST-10.)

59. Having reliable information concerning Johnson's gambling would have assisted the Chapter 7 Trustee in determining whether

Johnson's gambling produced sufficient income to support a chapter 13 plan or, conversely, whether amounts lost gambling were indicative of income that could be made available to creditors in a chapter 13 plan. (Adv. Doc. # 45, 119:24-120:12; Adv. Doc. # 46, 97:2-14.)

60. Despite ample opportunity to do so, Johnson did not amend his schedules and/or SOFA. (Adv. Doc. # 48, 70:18-22, 72:21-24, 95:10-16.)

CONCLUSIONS OF LAW

1. This Court has jurisdiction to determine the complaint herein pursuant to 28 U.S.C. § 157(b)(2)(J).

2. Venue of this proceeding is in the United States District Court for the District of Delaware pursuant to 28 U.S.C. § 1409(a).

3. The United States Trustee has authority to prosecute the complaint herein pursuant to 11 U.S.C. § 727(c)(1).

4. The United States Trustee timely commenced this adversary proceeding on May 12, 2006.

5. The United States Trustee, as the party seeking denial of discharge, must prove the elements of each objection by a preponderance of the evidence. In re Strickland, 350 B.R. 158, 163 (Bankr. D. Del. 2006) (citing Grogan v. Garner, 498 U.S. 279 (1991)).

Failure To Keep Or Preserve Adequate Records

6. Count I of the United States Trustee's Complaint seeks denial of discharge for failure to keep or preserve adequate records from which Johnson's financial condition and transactions can be ascertained and evaluated, without justification under the circumstances of this case, pursuant to 11 U.S.C. § 727(a)(3).

7. "The purpose of section 727(a)(3) is to give creditors and the bankruptcy court complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992) (citing 4 Collier on Bankruptcy ¶ 727.03[1] (15th ed. 1979)). "Creditors are not required to risk having the debtor withhold or conceal assets under cover of a chaotic or incomplete set of books or records." Id. (quoting Burchett v. Myers, 202 F.2d 920, 926 (9th Cir. 1953) (internal quotations omitted)). "[A] discharge may be granted only if the debtor presents an accurate and complete account of [her or] his financial affairs." Id.

8. Creditors, trustees, and courts are not required to sift through documents and attempt to reconstruct the debtor's financial affairs, nor are they required to speculate as to debtor's financial history or condition. In re Spitko, 357 B.R. 272, 305 (Bankr. E.D. Pa. 2006) (citing In re Scott, 172 F.3d 959, 969-70 (7th Cir. 1999), In re Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996)).

9. A debtor's "[o]ral testimony is not a valid substitute or supplement for concrete written records." In re Juzwiak, 89 F.3d at 429; see also In re Shapiro, 59 B.R. 844, 848 (Bankr. E.D.N.Y. 1986) ("The trustee and creditors are therefore not required to take the debtor's word as to [her or] his financial situation."). A debtor may not merely recite from records kept "in [her or] his head" regarding transactions and how funds were expended; instead, complete and accurate records are required in order to allow verification of the debtor's oral statements. In re Juzwiak, 89 F.3d at 429-30.

10. To prevail on a claim for denial of discharge under Section 727(a)(3), the plaintiff "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, 958 F.2d at 1232. Once the plaintiff meets that burden, the burden shifts to the debtor to show that the deficiency is justified. Id. at 1233. The Court need not find that the debtor intended to defraud creditors or to conceal her or his financial condition, only that "the debtor has unjustifiably failed to keep records of [her or] his financial condition." Id. at 1234.

11. The standard applied to a debtor who is involved in business may be more stringent than the standard imposed on a debtor who is an unsophisticated wage earner: "Attorneys and other

professionals may be held to the standard of care ordinarily exercised by members of their profession." Id. at 1231-32 (applying a more stringent standard to "[a]n experienced attorney"). See also In re Tipler, 360 B.R. 333, 349 (Bankr. N.D. Fla. 2005) (finding that an attorney with over 25 years of experience was unjustified in not maintaining records); In re Hoffmann, 81 B.R. 699, 702 (Bankr. S.D. Fla. 1987) (finding that an attorney with annual income of $50,000 had requisite sophistication such that failure to keep records constituted a deliberate evasion tactic). Johnson is an experienced attorney. As such, he either knew or should have known of his obligation to keep records which accurately reflect his financial condition.

12. Maryland Rule of Professional Conduct 1.15(a) provides:

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules . . . . Other property shall be identified as such and appropriately safeguarded . . . . Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of at least five years after the date the record was created.

This is but one example of the standard of care ordinarily exercised by members of Johnson's profession.

13. Johnson's inability to produce statements on his attorney trust account (records that he was ethically obligated to maintain

under the Maryland Rules of Professional Conduct) as requested by the United States Trustee before the creditors' meeting under Section 341, as requested by the United States Trustee during pre-trial discovery, and as directed by the Court at trial, reflects Johnson's failure to maintain and preserve adequate financial records. Johnson's failure to maintain and preserve adequate financial records is further reflected in his failure to produce rudimentary business records requested by the United States Trustee before the commencement of the Section 341 meeting and in his failure to produce documents concerning his charges against the funds entrusted to him by Barner as directed by the Court at trial.

14. Johnson's failure to keep or preserve adequate financial records is clearly evident. Johnson has not offered persuasive justification for his failure to keep or preserve adequate financial records, especially in light the fact that he is an attorney. Thus, the Court finds that Johnson was unjustified in failing to keep adequate records, and, therefore, Johnson's discharge must be denied pursuant to 11 U.S.C. § 727(a)(3).

False Oaths

15. Count II of the United States Trustee's Complaint seeks denial of discharge pursuant to 11 U.S.C. § 727(a)(4) because Johnson knowingly and fraudulently made false oaths in or in connection with his chapter 7 bankruptcy case. The United States Trustee specifically asserts that Johnson knowingly and

fraudulently made false oaths in his schedules and SOFA, as well as in the meeting of creditors held pursuant to 11 U.S.C. § 341.

16. The purpose of 11 U.S.C. § 727(a)(4) is to ensure that chapter 7 debtors make honest and accurate disclosure of their financial circumstances so that bankruptcy trustees and other parties in interest have sufficient information for proper administration of their cases without having to uncover pertinent facts through their own examinations or investigations and without having to "engage in a laborious tug-of-war to drag the simple truth into the glare of daylight." In re Hatton, 204 B.R. 477, 482-83 (E.D. Va. 1997) (quoting In re Tully, 818 F.2d 106, 110 (1st Cir. 1987)).

17. "The bankruptcy process depends upon the complete and candid disclosure of assets, income, expenses and liabilities of the debtor." In re Spitko, 357 B.R. at 313 (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir. 1988)). Debtors must completely disclose their financial affairs; a debtor "does not get partial credit for giving only some of the information." In re Hensley, 381 B.R. 699, 705 (Bankr. N.D. Ind. 2007). "If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive. The omission of assets may be a good reason to deny or revoke a discharge." In re

Spitko, 357 B.R. at 313 (quoting Payne v. Wood, 775 F.2d 202, 205 (7th Cir. 1985)).

18. To prevail on a claim for denial of discharge under Section 727(a)(4), "the [p]laintiff must establish 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) the statement related materially to the bankruptcy case." In re Strickland, 350 B.R. at 163 (quoting In re Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992) (internal quotations omitted).

19. A debtor's schedules and SOFA are statements made under oath. Accordingly, failure to list all assets owned in bankruptcy schedules and the SOFA "can constitute a false oath or account," resulting in denial of discharge under Section 727(a)(4). Cadle Co. v. Zofko, 380 B.R. 375, 382 (W.D. Pa. 2007); see also In re Strickland, 350 B.R. at 163 ("Bankruptcy schedules are statements made under oath."). Section 727(a)4) also applies to false oaths made elsewhere in the administration of the bankruptcy case, such as during court proceedings or the meeting of creditors under Section 341. See e.g., In re Beaubouef, 966 F.2d at 174 ("False oaths sufficient to justify the denial of discharge include '(1) a false statement or omission in the debtor's schedules or (2) a false statement by the debtor at the examination during the course of the proceedings.'" (quoting 4 Collier on Bankruptcy ¶ 727.04[1],

at 727-59 (15th ed. 1992))); In re Spitko, 357 B.R. at 312 (quoting In re Beaubouef, 966 F.2d at 174).

20. "The requirement that a false statement be knowingly and fraudulently made is satisfied for purposes of 11 U.S.C. § 727(a)(4)(A) if the debtor knows the truth and nonetheless willfully and intentionally swears to what is false, or if the debtor exhibits reckless indifference to the truth." Cadle, 380 B.R. at 382 (quoting In re Dolata, 306 B.R. 97, 148-49 (Bankr. W.D. Pa. 2007) (internal quotations and internal citations omitted). In contrast, an omission or false statement that was caused by an honest mistake or oversight by the debtor is not enough to support a denial of discharge. In re Spitko, 357 B.R. at 312.

21. "Reckless indifferent to the truth will fall within the scope of § 727(a)(4)(A) if the subject matter is material to the administration of the bankruptcy case." Cadle, 380 B.R. at 382 (citing In re Spitko, 357 B.R. at 312). The subject matter is "material," and thus grounds to deny a discharge, if it relates to the debtor's "business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of [debtor's] property." In re Spitko, 357 B.R. at 312 (quoting In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)).

22. Actual harm to creditors need not be proved and the debtor cannot excuse the failure to disclose assets by asserting that the undisclosed property was insignificant value to the bankruptcy

trustee. In re Spitko, 357 B.R. at 313; see also In re Hatton, 204 B.R. at 485 ("The Bankruptcy Code's disclosure requirements do not contain a 'no-harm, no-foul' exception for small estates."); In re Kearns, 149 B.R. 189, 192 (Bankr. Kan. 1992) ("D]etriment to a creditor need not be shown in order to establish fraudulent concealment or a false oath barring discharge. A recalcitrant debtor may not escape a section 727(a)(4)(A) denial of discharge by asserting that the admittedly omitted . . . information concerned a worthless business relationship or holding; such a defense is specious" (internal quotations and internal citations omitted)).

23. Johnson admitted that on the Petition Date, he had, and knew he had, all of the bank accounts described above. He also admitted that he did not list any bank accounts in his schedules.

24. Johnson admitted that on the Petition Date, he had, and knew he had, an interest in the 2004 Ford pickup truck that he purchased jointly with Thornton. However, he did not disclose his interest in the truck in his schedules.

25. Johnson admitted that he was familiar with the instructions for the official bankruptcy forms, understood the importance of following those instructions, and, in representing over sixty chapter 7 debtors between 2001 and 2005, counseled those debtors on their rights and obligations as debtors. As such, Johnson's omission of certain assets from his schedules -- specifically, all of his bank accounts, a laptop computer, and his

interest in the 2004 Ford pickup truck -- reflects at minimum a reckless indifference to the truth, including a pattern of nondisclosure of material assets.

26. Johnson's pattern of omission and misrepresentation continued at the meeting of creditors: despite being afforded the opportunity to do so, Johnson failed to make corrections to his schedules and SOFA by disclosing omitted assets before being confronted with such omissions by the Chapter 7 Trustee and the United States Trustee. Moreover, even after being confronted with omitted assets, Johnson admitted to having certain assets only when asked direct questions about them, and he still failed to disclose his checking and savings accounts at Wilmington Trust Company, his account at Chestnut Run Federal Credit Union, his interest in the 2004 Ford pickup truck, and his lawsuit against Thornton to recover the value of his interest in the truck (a lawsuit he filed less than ten days before the February 15, 2006 commencement of the meeting of creditors).

27. Johnson's omissions and misrepresentations extend to his income and expenses. Johnson's exhibit D-4, created expressly for this adversary proceeding, purports to set forth the average monthly gross receipts and business expenses of the Law Office of Jerome P. Johnson as of October 1, 2005. However, D-4 shows greater monthly revenue than is reported in Johnson's Schedule I or in Schedule C of his federal income tax return for 2005. At the

same time, it shows less revenue than the amounts deposited in Johnson's attorney business account during 2005. Exhibit D-4 also shows greater monthly business expenses than Johnson's Schedule J and appears simply to divide by 12 the business expenses listed in Schedule C of Johnson's 2005 federal income tax return. Nonetheless, as the Chapter 7 Trustee testified, the expenses listed in Schedule C of Johnson's 2005 federal income tax return are not a reliable statement of actual expenses: many of those expenses are stated in round increments of $10 or $100, raising red flags about their accuracy, and those business expenses that are not stated in such round increments appear to be "computed" amounts that may not reflect actual cash costs and non-cash expenses such as depreciation.

28. Johnson's omissions and misrepresentations in this case are not justified or excused by his "practice" of not disclosing assets that he believed a trustee would not administer. Instead, they evidence Johnson's reckless indifference to the truth and a reckless disregard for his obligation to make complete and accurate disclosures.

29. Moreover, Johnson made false oaths in his schedules and SOFA -- such as in Schedule B regarding bank accounts, office equipment and his interest in the pickup truck that he shared with Thornton, in Schedules I and J regarding his monthly income and expenses, and in the SOFA regarding property held for others and

his gambling losses -- either with knowledge of the falsity of the information he provided or with reckless disregard for the truth thereof.

30. Johnson also made false oaths at the meeting of creditors, concerning both the truthfulness of his testimony at the meeting of creditors and the truthfulness, correctness, accuracy and completeness of his schedules and SOFA. Johnson made those false oaths with knowledge of the falsity of his testimony or, at minimum, with reckless disregard for the truth.

31. Johnson's false oaths related materially to this bankruptcy case. Full and accurate disclosure of Johnson's assets, income, and expenses would have enabled the Chapter 7 Trustee to determine which, if any, of Johnson's assets were subject to administration for the benefit of creditors, would have allowed the Chapter 7 Trustee to examine pre and post-petition transfers for potential avoidance, and would have assisted the Chapter 7 Trustee in determining whether Johnson had disposable income sufficient to support a plan under Chapter 13. Johnson's false oaths precluded such examination and assessment.

32. Johnson is an experienced attorney. He represented the debtors in over 60 chapter 7 bankruptcy cases between April 2001 and October 2005. As a bankruptcy practitioner, Johnson "is fully aware that those who seek the shelter of the bankruptcy code must provide complete and reliable information to the Trustee." In re

Slocombe, 344 B.R. 529, 536 (Bankr. W.D. Mich. 2006). Johnson knew what was required of him and knew that denial of discharge is a consequence of failure to provide complete and reliable information. Accordingly, pursuant to 11 U.S.C. § 727(a)(4), I will deny the Debtor discharge.

CONCLUSION

For the reasons set forth above, the Court will deny Defendant Jerome P. Johnson a discharge pursuant to 11 U.S.C. §§ 727(a)(3) and 727(a)(4).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
JEROME P. JOHNSON,	)	Case No. 05-14164 (PJW)
	)	
Debtor.	)	
	)	
	)	
ROBERTA A. DeANGELIS, Acting United States Trustee for Region 3,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 06-50655(PJW)
	)	
JEROME P. JOHNSON,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the Court's Findings of Fact and Conclusions of Law of this date, pursuant to 11 U.S.C. §§ 727(a)(3)and 727(a)(4), Defendant Jerome P. Johnson is denied a discharge.

Peter J. Walsh
United States Bankruptcy Judge

Dated: January 9, 2009