

ILENE J. LASHINSKY (AZ #3073)
United States Trustee
District of Arizona

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

| | |
|--|---------------------------------------|
| In re: |) Chapter 7 |
| |) |
| YOMTOV SCOTT MENAGED, |) Case No. 2:16-bk-04268-PS |
| |) |
| Debtor. |) Adversary Case No. 2-16-ap-00589-PS |
| |) |
| ILENE J. LASHINSKY, UNITED STATES TRUSTEE, |) UNITED STATES TRUSTEE'S |
| |) RESPONSE TO DEFENDANT'S MOTION |
| |) TO DISMISS COMPLAINT |
| Plaintiff, |) |
| v. |) |
| |) |
| YOMTOV SCOTT MENAGED, |) |
| |) |
| Defendant. |) |

Plaintiff, the United States Trustee ("UST" or "Plaintiff"), by and through the undersigned counsel, files this Response to Defendant's Motion to Dismiss Complaint and respectfully shows the following:

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant, Yomtov Scott Menaged ("Defendant"), filed his Chapter 7 bankruptcy petition on April 20, 2016. On December 14, 2016, the Plaintiff filed her complaint seeking to deny the Defendant a discharge in bankruptcy pursuant to 11

1 U.S.C. § 727(a)(2), (3), and (4) (hereinafter “the Complaint”). On January 17, 2017,
2 the Defendant filed a motion to dismiss the complaint. The Plaintiff submits that
3 the Defendant’s motion to dismiss must be denied for the reasons set forth below.

4
5 **I.**
6 **The Court May Not Make Fact Findings on this Motion**

7 The Defendant moves to dismiss the UST’s complaint for failure to state a
8 claim upon which relief may be granted. Rule 7012(b) of the Federal Rules of
9 Bankruptcy Procedure provides for the applicability in bankruptcy adversary
10 proceedings of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(6)
11 allows a defendant to file, in lieu of an answer to an adversary complaint, a motion
12 to dismiss the complaint for failure to state a claim upon which relief can be
13 granted. The sole issue on such a motion is whether the complaint alleges
14 “sufficient factual matter, accepted as true, to state a claim to relief that is plausible
15 on its face.” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010).
16

17 In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, a
18 court must accept all factual allegations in the complaint as true. *See Bell Atlantic*
19 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Factual disputes may not be
20 adjudicated, and extrinsic evidence beyond the complaint may not be considered.¹
21 *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Ace Arts, LLC v.*
22 *Sony/ATV Music Pub., LLC*, 56 F.Supp.3d 436, 441-42 (S.D.N.Y. 2014); *In re Dow*,
23 132 B.R. 853, 857 (Bankr. S.D.Ohio 1991). Hence, the Defendant’s motion must be
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26

27 ¹ There are two exceptions to this general rule. Neither exception applies to Defendant’s
28 exhibits here. The first exception involves the use of properly authenticated external evidence to
support the plaintiff’s allegations, and the second exception allows the court to take judicial notice of
matters of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

1 denied to the extent that it largely relies upon disputed factual assertions and facts
2 set forth in thirteen unauthenticated exhibits.

3 II.

4 **The Complaint Alleges Specific Facts that Support Denial of Discharge²**

5 **A. Fraudulent Transfer and Concealment Under 727(a)(2)**

6 In order to prevail on a claim to deny discharge under § 727(a)(2), the
7 plaintiff must plead and prove the following: (1) the debtor transferred, removed,
8 destroyed, mutilated, or concealed; (2) property of the debtor; (3) within one year of
9 the petition filing date; and (4) with the intent to hinder, delay, or defraud a
10 creditors. *See In re Neff*, 505 B.R. 255, 262 (9th Cir. BAP 2014), *aff'd* 824 F.2d 1181
11 (9th Cir. 2016). Here, the UST satisfied the pleading requirements with respect to
12 the first and third elements through the allegations in the Complaint at paragraphs
13 33, 49, 50, 55, 56, 64, 69, 70, and 74. Notably, as a matter of law, Defendant's
14 withdrawal of funds from a bank account constitutes a "transfer" for purposes of §
15 727(a)(2). *See In re Haag*, 584 Fed.Appx. 620, 621-22 (9th Cir. 2014) (*citing In re*
16 *Bernard*, 96 F.3d 1279, 1282-83) (9th Cir. 1996)).

17 Insofar as the second element is concerned, the UST alleged that some of the
18 assets that were held in the name of Defendant's corporate entities constituted
19 Defendant's property as a result of nominee/alter ego and equitable interest
20 principles (Complaint ¶31, ¶32, ¶50). The legal propriety of those theories is
21 discussed in Sections III and IV below. The allegations in paragraphs 62, 63, and
22

23 ² In lieu of repeating the specific lengthy Complaint allegations that set forth specific facts
24 establishing claims for relief, the UST cites herein only to the paragraph numbers of such
25 allegations. For the Court's convenience, attached hereto as Exhibit A is a summary of the
26 complaint allegations pertaining to each cause of action.

69 also set forth sufficient facts to allege that property of the Debtor was transferred and concealed.

Finally, with respect to the fourth element, there are numerous factual allegations that support an inference of fraudulent intent in the transfer and concealment of the assets, including the allegations in Complaint paragraphs 33, 45-47, 48, 49, 52, 53, 55, 56, 57-61, 65, 67, 69-70, 71, 78, 79, 82, and 84-89. *See In re Hansen*, 368 B.R. 868, 877 (9th Cir. BAP 2007) (intent under § 727(a)(2) may be inferred and established by circumstantial evidence).

Based on the foregoing, the UST states a claim for relief under § 727(a)(2).

B. False Oaths Under § 727(a)(4)

In order to prevail on a claim to deny debtor a discharge under § 727(a)(4) based on false oath, the plaintiff must plead and prove the following: (1) the debtor made a statement under oath; (2) the statement was false; (3) the statement materially related to the case; (4) the debtor knew the statement was false, and (5) the defendant made the statement with fraudulent intent. *See In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010). Evidence of recklessness in may be combined with other circumstantial evidence to prove fraudulent intent. *See In re Khalil*, 578 F.3d 1167, 1168 (9th Cir. 2009).

At paragraph 74 of the Complaint, the UST lists twelve different false statements made under oath by the Defendant in this case. Knowledge and intent may be circumstantially inferred by the facts supporting intent in the § 727(a)(2) context discussed above. Knowledge and intent may also be inferred from the

1 factual allegations set forth in Complaint paragraphs 14, 38, 33, 49, 50, 20, 21, 23,
2 24, 25, 55, 57-61, 64, 67, 74.

3 All of the false oaths and omissions alleged in the Complaint and discussed
4 above obviously relate to the Defendant's financial condition, assets, income, and
5 liabilities. As such, the statements are clearly material. *See In re Willis*, 243 B.R.
6 58, 63 (9th Cir. BAP 1999) (false oath is material if it aids in understanding the
7 debtor's financial affairs or transactions).
8

9 Based on the foregoing, the UST states a claim for relief under § 727(a)(4).
10

11 **C. Lack of Documentation Under § 727(a)(3)**

12 In order to prevail on a claim to deny discharge under § 727(a)(3), the
13 plaintiff must plead and prove that “(1) that the debtor failed to maintain and
14 preserve adequate records, and (2) that such failure makes it impossible to
15 ascertain the debtor's financial condition and material business transactions.” *In re*
16 *Caneva*, 550 F.3d 755, 761 (9th Cir. 2008) (citations omitted). “After showing
17 inadequate or nonexistent records, ‘the burden of proof then shifts to the debtor to
18 justify the inadequacy or nonexistence of the records.’” *Id.* (quoting *In re Cox*, 41
19 F.3d 1294, 1296-97 (9th Cir. 1994)).
20
21

22 In this case, the specific facts alleged in Complaint paragraphs 29, 45, and 54
23 support the § 727(a)(3) claim at. Paragraphs 77 through 83 of the Complaint
24 itemizes the documents that were not produced and the specific information that
25 could not be determined from the produced documents. The Complaint further
26 alleges that the Defendant refused to answer questions pertaining to documentation
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28

1 regarding properties being purchased, the pricing of such properties, the payoff
2 amounts of such loans and the amount of funds being obtained from Densco. *See*
3 Complaint ¶ 86.

4 The Defendant argues that he produced volumes of documents from which
5 his financial condition may be ascertained. Absent from the documents produced by
6 the Defendant, as alleged in the Complaint, are documents delineating the
7 following:
8

- 9
- 10 i) Defendant's personal expenditures from corporate accounts,
 - 11 ii) the amount of income Defendant took in the form of distributions from
12 his entities,
 - 13 iii) the nature and purpose of transfers between Defendant's various
14 financial accounts,
 - 15 iv) the nature and purpose of payments to Defendant's family members,
16 including purported repayments of the alleged loan from Defendant's
17 father,
 - 18 v) the assets and liabilities of Defendant's corporate entities,
 - 19 vi) contributions by the Defendant to his corporate entities, and
 - 20 vii) the nature and purpose of business expenses paid through various
21 accounts.

22 Similar allegations warranted denial of discharge under § 727(a)(3) in the
23 *Caneva* case. The *Caneva* debtor, like the Defendant here, owned and controlled
24 numerous business entities. *See id.* at 759. There, as here, after multiple
25 amendments to the Schedules and SOFA, the debtor listed unknown values for his
26 business entities. *See id.* There, as here, the debtor admitted that he maintained
27 no financial records of his companies and that there was no documentation
28 regarding significant loan repayments. *See id.*

The Defendant's production of bank statements and tax returns does not
satisfy § 727(a)(3). *See, e.g., In re Steffensen*, 534 B.R. 180, 202-03 (Bankr. D. Utah

1 2015), *aff'd* 2016 WL 5874972 (D. Utah 2016). Bank statements fail to identify all
2 payees and the purposes of transactions and offer no explanation on their face of
3 checks and cash withdrawals. *See In re Frommann*, 153 B.R. 113, 118 (Bankr.
4 E.D.N.Y. 1993); *see also In re Morando*, 116 B.R. 14, 15 (Bankr. D.Mass. 1990).

5
6 In *Frommann*, as in this case, the debtor provided the trustee with a morass
7 of records consisting mostly of bank statements. *See id.* at 115. No books of account
8 were furnished. *See id.* The *Frommann* court held that “a debtor cannot simply
9 place sacks of records before the bankruptcy judge and trustee and request the
10 judge or trustee to sift through the documents and attempt to reconstruct the flow
11 of the debtor’s assets.” *Id.* at 118.

12
13 In support of dismissal of the UST’s § 727(a)(3) claim, Defendant cites *In re*
14 *Wright*, 364 B.R. 51, 68 (Bankr. D.Mont. 2007). That decision was issued after trial,
15 however. Thus, that opinion offers no support for a Rule 12(b)(6) motion to dismiss.

16
17 **III.**
18 **“Property of the Debtor” Includes Property of Alter Egos**

19 Under 11 U.S.C. § 541(a), “property of the debtor” includes all property in
20 which the debtor possesses a legal or equitable interest. The question of whether a
21 particular interest constitutes “property of the debtor” under § 727 is a federal
22 question to be decided by federal law, but bankruptcy courts often look to state law
23 to determine whether and to what extent the debtor has legal or equitable interests
24 in property. *See In re Pettit*, 217 F.3d 1072, 1078 (9th Cir. 2000).

25
26 The Defendant contends that under Arizona law, ownership of the corporate
27 assets cannot be attributed to the Defendant under a “reverse piercing theory.”
28

1 Standard piercing of the corporate veil entitles a party to hold an individual
2 personally liable for corporate debts. *See, e.g., Keg Restaurants Arizona, Inc. v.*
3 *Jones*, 375 P.3d 1173, 1182 (Ariz. Ct. App. 2016). “Reverse piercing of the corporate
4 veil” entails holding the corporation liable for an individual’s debts. *See Barba v.*
5 *Seung Heun Lee*, 2009 WL 8747368 *6 (D. Ariz. Nov. 4, 2009). The concepts of
6 piercing the corporate veil and alter ego are distinct analyses.
7

8 As the court in the case of *In re Zhang*, 463 B.R. 66, 81 (Bankr S.D. Ohio
9 2012) recognized, veil piercing theory “asks a court to hold A vicariously liable for
10 B’s debts,” while [alter ego theory] asserts that A and B are the same entity and
11 therefore liability is direct.” *Id.* (quoting *In re Fisher*, 296 Fed. Appx. 494 (6th Cir.
12 2008)). When alter ego theory is applied and the debtor and his entity are
13 considered the same, the property of the entity belongs to the debtor such that a
14 transfer of such property constitutes a transfer of property of the debtor. *See id.*
15

16 In this case, the UST’s claim does not present a true piercing issue, as the
17 UST is not seeking to hold one party liable for another party’s debts.³ Rather, the
18 UST is utilizing alter ego theory for the purpose of establishing that Debtor’s
19 property included property of his alter ego companies. Recent decisions from this
20 Court confirm that both Arizona law and federal bankruptcy law permit the use of
21 alter ego theory in this context. *See SMS Financial XIX, LLC et al. v. Alexander*
22 *Papakyriakou, et al.*, Adversary No. 2:11-ap-00668-BMW (District of Arizona),
23
24
25

26
27 ³ Even if the UST’s claim relies upon a “reverse piercing” theory as Defendant contends,
28 Arizona federal courts, including the Honorable Sarah Sharer Curley and the Honorable Charles G.
Case II, have recognized the availability of that doctrine under Arizona law. *See Barba v. Seung*
Heun Lee, 2009 WL 8747368 *6 (D. Ariz. Nov. 4, 2009).

1 Docket #115 (Judge Brenda M. Whinery); *Gun Bo, LLC v. John E. Cork*, Adversary
2 No. 2:12-ap-01675-DPC (District of Arizona), Docket Entry #115 (Judge Daniel P.
3 Collins); *see also David M. Reaves, Chapter 7 Trustee v. Jack D. Rose, et al.*,
4 Adversary No. 2:12-ap-00996-GBN (District of Arizona), Docket Entry #123 (Judge
5 George B. Nielsen) (holding that a bank account held in the name of a third party
6 constituted property of the debtor for purposes of § 727).

8 Appellate courts also sanction the use of alter ego theory in the § 727 context.
9 In *In re Hoffman*, 2007 WL 7540947 (9th Cir. BAP 2007), the court affirmed a §
10 727(a)(2) denial of discharge for the transfer of property titled in the name of the
11 debtor's corporation. *Accord In re Pisculli*, 426 B.R. 52, 60-61 (E.D.N.Y. 2010), *aff'd*
12 408 Fed. Appx. 477 (2nd Cir. 2011); *In re DiLoreto*, 2006 WL 2974156 *2-3 (E.D.Pa.
13 Oct. 13, 2006), *aff'd* 266 Fed. Appx. 140 (3rd Cir. 2008).

16 Alter ego may even serve as the basis for criminal liability for bankruptcy
17 fraud. *See United States v. Everett*, 2008 WL 3843831 (D. Ariz. Aug. 14, 2008) *aff'd*
18 375 Fed. Appx. 748 (9th Cir. 2010); *United States v. Edward*, 905 F.Supp. 45, 48-49
19 (D. Mass. 1995). Since *criminal* bankruptcy fraud convictions may be based on alter
20 ego theory, it would be incongruous to disallow alter ego theory to support a mere
21 denial of discharge under § 727.

23 The UST has alleged that the Defendant exercised sole dominion and control
24 over his corporate entities and their financial affairs (Complaint ¶ 23- ¶26), that he
25 treated the corporate funds as his own (Complaint ¶ 28, ¶ 33, ¶ 49-¶ 50), that he
26 commingled personal funds with the corporate funds (Complaint ¶ 28, ¶ 33, ¶ 49-¶
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1 50), that the corporate entities were undercapitalized (Complaint, ¶30), and that
2 the Defendant disregarded corporate formalities and failed to maintain adequate
3 records with respect to corporate and personal funds (Complaint, ¶28- ¶29, ¶ 54).
4 Similarly, the UST has alleged that the Defendant held a disclosable equitable
5 interest in the bank accounts held in the name of his corporate entities by virtue of
6 his treatment of those accounts as his own personal accounts (Complaint ¶27 and
7 74(a)). The numerous cases cited herein demonstrate that such allegations, if true,
8 establish that the Defendant's property included the assets of his corporate entities.
9

10
11 In support of his argument against application of alter ego/piercing the
12 corporate veil theories to § 727, Defendant cites *Jones v. Teilborg*, 727 P.2d 18 (Ariz.
13 Ct. App. 1986). In that case, the Arizona Court of Appeals held that corporate
14 shareholders cannot seek to pierce the corporate veil in order to hold other
15 shareholders liable to the corporation. *See id.* at 25. The court expressly noted,
16 however, that the doctrine is "available to third parties who deal with the
17 corporation." *Id.* The UST does not qualify as a shareholder, but is asserting a
18 claim more analogous to a creditor's claim insofar as the UST is seeking a denial of
19 discharge for the benefit of all creditors, not for the benefit of the Defendant's
20 corporations.
21

22
23 Defendant also cites *In re Elegant Custom Homes, Inc.*, 2007 WL 1412456 (D.
24 Ariz. May 14, 2007). In that case, the district court held that a corporation itself
25 could not pierce its own corporate veil. Consequently, a 'piercing the veil' claim is
26 not an asset of the estate as to which only the trustee has standing. Rather, it was
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28

1 appropriate for the third party plaintiff to assert such a claim in her adversary
2 proceeding against the corporate debtor and its individual principals.

3 Here, the UST is not seeking to pierce the corporate veil for the benefit of the
4 corporate entities or its members; rather, the § 727 claim is being asserted for the
5 benefit of all third party creditors. As such, the UST's alter ego theory
6 appropriately applies to this case.
7

8 IV.

9 **Policy Considerations Mandate Use of Alter Ego Theory in § 727 Actions**

10 Defendant would like this Court to conclude that, as a matter of law, funds
11 transferred from an account held in the name of one of his corporations cannot
12 constitute property of the debtor for fraudulent transfer, concealment, and false
13 oath purposes under § 727. Not only does that conclusion contravene the numerous
14 § 727 cases applying nominee/alter ego theory in the context of a § 727 action, but it
15 would thwart the legislative intent behind § 727.
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18 The Defendant cites only one decision to support his assertion that property
19 of a corporation may not be deemed property of the debtor for purposes of a § 727
20 denial of discharge action. That case, *Trivedi v. Levine*, 2014 WL 7187007 (Bankr.
21 N.D.Ill. Dec. 16, 2014), is both distinguishable and unpersuasive.
22

23 In *Trivedi*, a creditor filed a § 727 action against the debtor, alleging that the
24 debtor transferred assets of his wholly-owned corporation to another corporation in
25 order to defraud the creditor. *See id.* at *1. The debtor moved to dismiss for failure
26 to state a claim because the creditor failed to allege that the debtor transferred or
27 concealed property “belonging to the debtor.” *See id.* The court granted the motion
28

1 because the creditor “ha[d] not alleged any facts in the complaint that support his
2 alter ego theory.” *Id.* at *3. Here, the UST alleges numerous specific facts that,
3 accepted as true, support a finding that funds held by the corporate entities
4 constituted Defendant’s property for purposes of § 727.
5

6 Despite the missing allegations to support an alter ego claim, the *Trivedi*
7 court further held, in what can only be deemed *dictum*, that § 727 does not permit
8 an alter ego exception to the “property of the debtor” requirement under § 727(a)(2).
9 *See id.* The court acknowledged the many cases in which alter ego principles were
10 applied in the § 727(a)(2) context, but summarily found such cases “unpersuasive.”
11 *Id.* at *3-4. The UST submits that the *Trivedi* opinion is wrong and should not be
12 followed by this Court.
13

14 Not only does *Trivedi* contradict the bulk of cases from the District of Arizona
15 and within the Ninth Circuit, which were cited above, but it unjustifiably
16 disregards the sound reasoning of the majority of courts that have prevented
17 debtors who transfer and conceal assets that are treated as the debtor’s own from
18 obtaining a discharge simply because the debtor had the forethought of transferring
19 title to such assets to a corporate entity. A far greater number of courts have fully
20 endorsed the use of alter ego theory concepts to hold a debtor accountable when the
21 facts warrant.
22

23 Here the facts, as alleged and accepted as true on this motion, clearly
24 warrant application of the alter ego theory to deem the Defendant’s corporate bank
25 accounts and funds “property of the debtor” for purposes of § 727. Similar facts
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28

1 were presented in the *Zhang* case to justify a denial of discharge under §§ 727(a)(2)
2 and (4) based on debtor's use and concealment of a corporate account over which the
3 individual debtor maintained dominion and control. *See Zhang*, 463 B.R. at 92.
4 The *Zhang* court agreed with the majority of courts that "corporate distinctions may
5 be disregarded under alter ego and reverse veil piercing theories and the assets of
6 those entities, particularly bank accounts, be treated as the assets of the debtor
7 when the facts warrant the application of those theories."⁴ *Id.* at 79.

8
9 In *Zhang*, the court pointed out that "[a]pplication of alter ego principles to §
10 727(a) jurisprudence is simply an extension of the age old maxim of law that 'equity
11 regards substance rather than form.'" *Id.* at 82. Allowing a debtor to control assets
12 as his own and then avoid § 727 consequences after transferring and concealing
13 those assets with the intent to hinder creditors in bankruptcy simply because the
14 assets were titled in the name of the debtor's corporation would be the epitome of
15 endorsing form over substance. The implications of such a policy on the bankruptcy
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19 ⁴ In so holding, the *Zhang* court relied upon the following holdings: *Doubet, LLC v. Palermo*
20 (*In re Palermo*), 370 B.R. 599, 613–14 (Bankr.S.D.N.Y.2007) ("By orchestrating complex fee
21 arrangements between his various alter ego entities, Palermo acted with the requisite intent to
22 hinder creditors by taking cash advances on his future earnings, assigning his payments to those
23 lenders in repayment, transferring his property between accounts, and squandering the balances.");
24 *Neary v. Mosher (In re Mosher)*, 417 B.R. 772, 780 (Bankr.N.D.Ill.2009) (corporate entity disregarded
25 using alter ego or reverse veil piercing "based on the way the debtor used the entity"—considering
26 such factors as the debtor being the sole shareholder, using his home address for the entity,
27 regularly commingling his own funds with those of the entity, regularly using funds of the entity for
28 his own personal use, using the entity for his own personal benefit rather than acting in the best
interest of the entity, and failure to follow corporate formalities); and *Freelife Int'l, LLC v. Butler (In*
re Butler), 377 B.R. 895, 918–19 (Bankr.D.Utah 2006), *aff'd* 359 B.R. 356, 2007 WL 866660 (10th Cir.
BAP March 19, 2007) (corporate entity disregarded when the sole shareholder of the entity was the
daughter of the debtors and was the owner of the entity in name only, debtors controlled the entity,
the entity was established nine days after the debtors were sued in state court, the debtors used the
entity "as their own personal pocketbook," the debtors and the entity engaged in extensive
commingling of personal and business funds, and substantially all of the entity's income "ended up in
various other bank accounts"). *See also Compton v. Bonham (In re Bonham)*, 224 B.R. 114, 115–17
(Bankr.D.Alaska 1998); and *In re Gherman*, 103 B.R. 326, 331(Bankr.S.D.Fla.1989).

1 system are alarming. Debtors would effectively be allowed to transfer any and all
2 personal assets to corporate entities in order to avoid creditors in personal
3 bankruptcy while continuing to control, maintain, and enjoy such assets as their
4 own. Absolute recognition of the corporate entity as distinct from the individual
5 debtor, despite the debtor's treatment of the corporate assets as his own, would
6 sanction abuse of the corporate fiction and the corporate immunity that it carries.
7 This Court should refuse to endorse such a policy and follow the majority of well-
8 reasoned decisions which apply alter ego principles to determine whether assets
9 constitute property of the debtor for purposes of § 727(a)(2) and (4).
10
11

12 **V.**
13 **CONCLUSION**

14 Based on the foregoing, the Defendant's motion to dismiss must be denied.

15 RESPECTFULLY SUBMITTED this 31st day of January, 2017.
16

17 ILENE J. LASHINSKY
18 United States Trustee
19 District of Arizona

20 /s/ JAG (NY #2520005)

21 _____
22 JENNIFER A. GIAIMO
23 Trial Attorney
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Copies of the foregoing served
via electronic mail on the 31st day
of January, 2017, on the Debtor's
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Summary of Complaint Allegations Stating Claims for Relief

Fraudulent Transfer and Concealment - § 727(a)(2)

- (1) Within 1 year, Debtor transferred or concealed:
 - Use of corporate funds for personal expenditures, ¶ 33
 - Misappropriated corporate loan funds by using funds for lavish personal expenditures and transfers to family, ¶ 49-50
 - Transferred \$747,000 to father within one year of bankruptcy filing, ¶ 55
 - Purchased luxury residence in Peoria, Arizona, ¶56
 - Transferred Bentley in which he held leasehold interest to father within six months before bankruptcy, ¶ 64
 - Continued making monthly payments on Bentley after transfer to father, ¶ 65
 - Transferred \$35,000 of net proceeds from sale of a 1965 Mustang into a corporate account that was not disclosed in the bankruptcy filings, ¶69-70
- (2) Property of the Debtor/Alter Ego
 - Sole ownership and exclusive control ¶ 18, ¶ 20, ¶21, ¶ 23
 - Exclusive decision maker re financial management ¶ 24, ¶ 25
 - Total control and access to accounts ¶26, ¶ 27
 - Disregarded formalities, ¶ 28
 - Commingling personal and business funds, ¶ 28, ¶33, ¶ 49
 - Failed to maintain regular corporate books and records, ¶ 29, ¶54
 - Grossly undercapitalized, ¶ 30
 - Treated entities as one and same and freely transferred money between accounts, ¶ 33, 38
 - Commingled corporate loan funds intended to purchase properties with personal and other corporate funds, ¶ 50
 - Leasehold interest in Bentley, ¶ 62
 - 1965 Mustang was titled in Defendant's name, ¶ 69
- (3) Intent to Hinder, Delay, or Defraud Creditor(s)
 - Transfers and use of funds are for personal use and family members, ¶ 33
 - Experienced businessman, ¶ 37
 - Aware that he owed over \$35 million to Densco by at least April 2014, ¶ 41, ¶ 52
 - Aware since at least February 2015 that Densco was having trouble repaying its investors, ¶ 54
 - Made false statements to creditor about use of loan funds, ¶ 45-46
 - Sent forged receipts to creditor, ¶ 47

- Misrepresented to creditor that properties to be purchased at auction were being auctioned, ¶48
- Making payments to family despite knowledge of outstanding debts remaining unpaid to Densco and other creditors, ¶ 55
- Purchased a luxury residence despite knowledge of outstanding debts, ¶56
- Made numerous specific false statements to principal of primary creditor after bankruptcy filed to mislead the creditor into thinking the debt would be repaid despite the bankruptcy, ¶57-61.
- Transferred \$150,000 Bentley to father at a time when he knew he was unable to pay all debts as they became due, ¶ 66.
- Continued making monthly lease payments on Bentley despite transfer to father, ¶ 67
- Despite receiving proceeds of \$35,000 from sale of asset held in his personal name, instead of paying those funds to creditors, Defendant deposited funds in corporate account, ¶69-70
- Had virtually no cash on hand at bankruptcy filing, ¶ 71
- Maintained no records to keep track of purported loans from father, ¶ 78
- Claimed that some transfers from corporations were for repayments of short-term loans even though no documents to prove that, ¶ 82
- Refusal to answer questions based on privilege against self incrimination, ¶ 84-89
- Eight amendments to pleadings, ¶ 14
- Was reckless in preparing bankruptcy pleadings, ¶ 73

False Oath - § 727(a)4)

- Failed to disclose corporate bank accounts in pleadings, ¶ 74(a)
- Claimed to have no knowledge of the value of his corporate entities on Schedule A/B, ¶ 74(b)
- Failed to disclose on Schedule F a purported debt owed to his father in the amount of \$2.6 million as of the bankruptcy filing, ¶ 74(c)
- Claimed on Schedule F to have no knowledge of the outstanding balance of the debt to Densco as of the bankruptcy filing, ¶ 74(d)
- Failed to disclose on Schedule G or Statement of Financial Affairs ("SOFA") that Defendant agreed to transfer title to his 2016 Mustang, which became an estate asset, to a "friend" in exchange for the friend's payment of the monthly payments on that Mustang, ¶ 74(e) and (l)
- Failed to set out the calculation of net income of \$25,000 on Schedule I, Item #8a, ¶ 74(f)
- Failed to disclose on Schedule J that he was making monthly payments on the purportedly transferred Bentley and that such

payments were made within 90 days before the bankruptcy, ¶ 74(g) and (j)

- Failed to disclose on SOFA and claimed to have no knowledge of the amount of income he received from corporate draws, distributions, and payment of personal expenses from corporate accounts in the two years before bankruptcy, ¶ 74(h)
- Claimed on SOFA to have no knowledge of his gross income from employment or operating a business for the two years before bankruptcy, ¶ 74(i)
- Failing to disclose on SOFA that he transferred \$35,000 of proceeds from the sale of the 1965 Mustang into a corporate account, ¶ 74(k)
- Knowledge and intent (same as 727(a)(2); see also Complaint paragraphs 14, 38, 33, 49, 50, 20, 21, 23, 24, 25, 55, 57-61, 64, 67, 74).

Documents - § 727(a)(3)

- Fail to maintain regular corporate financial statements and records, ¶ 29
- Fail to maintain documents of Densco loan balance, ¶ 54
- Cannot ascertain amount of loan balance due to Densco, ¶ 54
- No documents to track the source, amount, nature, and purpose of payments and transfers between the Defendant and his father, ¶ 78
- No documents to track the source, amount, nature, and purpose of corporate draws or distributions to Defendant, ¶ 79
- No documents to ascertain the amount and frequency of payments of personal bills from corporate accounts for the Defendant's personal benefit, ¶ 80
- No documents to track the amount, nature, and purpose of transfers between Defendant and the corporations, ¶ 81, 82
- Forged receipts provided to creditor, ¶ 45
- No documents regarding representations to Densco regarding loans, pricing of properties, and payoff amounts, ¶ 86