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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-13-1465-TaDKi
6	SYED SHAHZAD HUSSAIN,)	Bk. No.	SV 11-14331-VK
7	Debtor.)	Adv. No.	SV 11-01434-VK
8	_____)		
9	SYED SHAHZAD HUSSAIN,)		
10	Appellant,)		
11	v.)	OPINION	
12	PATRICIA MALIK; SHAFQAT)		
13	MALIK; DAVID SEROR, TRUSTEE,*)		
14	Appellees.)		
	_____)		

Argued and Submitted on March 20, 2014
at Pasadena, California

Filed - April 15, 2014

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable William V. Altenberger,** Bankruptcy Judge, Presiding

Appearances: John R. Habashy of the Habashy Law Firm for
appellant Syed Shahzad Hussain; Peter D. Gordon of
Peter D. Gordon & Associates for appellees
Patricia Malik and Shafqat Malik.

Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

* It appears that Mr. Seror was named solely in his
capacity as chapter 7 trustee; he did not file a brief, appear at
argument, or otherwise participate in this appeal.

** United States Bankruptcy Judge for the Central District
of Illinois, sitting by designation.

1 TAYLOR, Bankruptcy Judge:

2
3 Debtor Syed Shahzad Hussain appeals from the bankruptcy
4 court's judgment denying his chapter 7 discharge pursuant to
5 § 727(a)(3).¹ We AFFIRM.

6 **FACTS**

7 In 2006, appellees Patricia Malik and Shafqat Malik met with
8 real estate brokers Syed Zakir Hussain ("Zakir Hussain")² and
9 Raza Ali regarding potential investment opportunities. Zakir
10 Hussain and Ali owned and operated Real Realty.

11 The first investment proposal involved the purchase of a gas
12 station located in Simi Valley, California. Based on
13 representations made by Real Realty, the Maliks believed that, in
14 exchange for an initial investment, Mrs. Malik would hold a 25%
15 interest in a four-person partnership, SJPJ Partners, that, in
16 turn, would own and operate the gas station. The Debtor was
17 slated as another 25% partner. Amenable to the proposed venture,
18 the Maliks invested \$62,500.

19 The gas station sale closed eight months later. Just before
20 the closing, however, Zakir Hussain approached Mrs. Malik for
21 additional, "emergency" financing in order to complete the sale.
22 The Maliks agreed and tendered an additional \$100,000. The sale
23 apparently closed two days later.

24 Unbeknownst to the Maliks, however, SJPJ Partners neither

25 _____
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

28 ² Given the similarities between the names of the Debtor
and Syed Zakir Hussain, we so refer to the latter for the sake of
clarity. To our knowledge, the parties are unrelated.

1 purchased the gas station nor otherwise acquired title. Instead,
2 the Debtor purchased the gas station and was the sole owner.
3 Eventually the Maliks learned the details of the purchase and
4 demanded repayment directly from the Debtor. The Debtor later
5 provided Zakir Hussain with two signed, but otherwise blank,
6 checks payable from a personal bank account. Zakir Hussain
7 completed the checks, making both payable to Patricia Malik and
8 in the amounts of \$62,500 and \$100,000. He then transferred both
9 checks to the Maliks; both checks were returned for insufficient
10 funds by the Debtor's bank.

11 In 2010, the Maliks commenced an action in state court
12 against the Debtor, among others, relating to the purchase and
13 sale of the gas station. Facing that action and a failing gas
14 station business, the Debtor filed his bankruptcy case in April
15 2011. Not long after, he lost the gas station to foreclosure.

16 The Maliks objected to the Debtor's discharge pursuant to
17 § 727(a)(3), among other § 727(a) grounds, and also sought to
18 except the \$162,500 debt from discharge under various provisions
19 of § 523(a). The bankruptcy court, after a one-day trial, found
20 that the Debtor failed to maintain adequate records or to justify
21 his failure to do so and ruled in favor of the Maliks on the
22 § 727(a)(3) claim. It denied the remainder of their § 523 and
23 § 727 claims. A judgment confirming the § 727(a)(3) ruling was
24 entered thereafter.

25 The Debtor timely appealed from the judgment.

26 JURISDICTION

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
28

1 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
2 § 158.

3 **ISSUE**

4 Did the bankruptcy court err in denying the Debtor's
5 discharge under § 727(a)(3)?

6 **STANDARD OF REVIEW**

7 In an action for denial of discharge, we review: (1) the
8 bankruptcy court's determinations of the historical facts for
9 clear error; (2) its selection of the applicable legal rules
10 under § 727 de novo; and (3) its determinations of mixed
11 questions of law and fact de novo. Searles v. Riley (In re
12 Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd, 212 F.
13 App'x. 589 (9th Cir. 2006).

14 Factual findings are clearly erroneous if illogical,
15 implausible, or without support from inferences that may be drawn
16 from the facts in the record. Retz v. Samson (In re Retz), 606
17 F.3d 1189, 1196 (9th Cir. 2010). We give great deference to the
18 bankruptcy court's findings when they are based on its
19 determinations as to witness credibility. Id. (As the trier of
20 fact the bankruptcy court has "the opportunity to note variations
21 in demeanor and tone of voice that bear so heavily on the
22 listener's understanding of and belief in what is said.").

23 **DISCUSSION**

24 The Debtor assigns error to the bankruptcy court's denial of
25 his discharge as follows: (1) the Maliks lacked standing to
26 object to discharge as they were not his creditors; (2) the
27 Maliks failed to make a § 727(a)(3) prima facie case; and (3)
28 insofar as the burden of proof actually shifted, the bankruptcy

1 court incorrectly found that he failed to meet his statutory
2 burden of proof. We first address the standing issue.

3 **A. The Maliks were creditors of the Debtor and, thus, were**
4 **authorized to object to his chapter 7 bankruptcy discharge.**

5 Only a panel trustee, a creditor, or the U.S. Trustee may
6 object to a debtor's discharge under § 727(a). See 11 U.S.C.
7 § 727(c)(1). The Debtor argues that the Maliks were not
8 creditors and, thus, lacked standing to bring a § 727(a)(3)
9 claim. The Maliks, in response, contend that the Debtor raises
10 this issue too late, i.e., for the first time on appeal and argue
11 that, in any event, they are creditors of the Debtor based on the
12 two checks they received from the Debtor.

13 Standing is a threshold jurisdictional issue and, thus,
14 ordinarily "we bear an independent obligation to assure ourselves
15 that jurisdiction is proper before proceeding to the merits."
16 See Plains Commerce Bank v. Long Family Land & Cattle Co., 554
17 U.S. 316, 324 (2008). This obligation applies whether or not the
18 Debtor raises standing for the first time on appeal. See id.

19 A recent Supreme Court decision - Lexmark Int'l, Inc. v.
20 Static Control Components, Inc., 134 S.Ct. 1377, 2014 WL 1168967
21 (Mar. 25, 2014) - causes us pause, however. In Lexmark, the
22 Court examined the propriety of limiting adjudication of a
23 statutory claim, which otherwise presents a case or controversy,
24 based on prudential grounds. It held that such limits were
25 improper. Id. at *7. Instead, the Court stated that whether a
26 plaintiff falls within a class legislatively authorized to sue
27 under a federal statute is not a question of standing, but one of
28 statutory interpretation. See id. at *6-7. Such an inquiry, in

1 turn, is non-jurisdictional. See id. at *7 n.4.

2 Here, whether the issue is one of standing, as the parties
3 argue, or one of statutory interpretation, and thus subject to
4 waiver, is ultimately inconsequential. We may exercise our
5 discretion to entertain an issue, even if raised for the first
6 time on appeal, if it presents a pure legal issue and is central
7 to the case. See Sierra Switchboard Co. v. Westinghouse Elec.
8 Corp., 789 F.2d 705, 708 n.1 (9th Cir. 1986). Whether the Maliks
9 are creditors for the purposes of § 727 is a legal issue and
10 clearly central to the case as it involves the Debtor's
11 bankruptcy discharge. We therefore examine the creditor status
12 issue.³

13 A "creditor" is defined as an "entity that has a claim
14 against the debtor that arose at the time of or before the order
15 for relief concerning the debtor." 11 U.S.C. § 101(10)(A). And
16 a "claim" is broadly defined: it is either a right to payment or
17 an equitable remedy, "whether or not such right . . . is reduced
18 to judgment, fixed, contingent, matured, unmatured, disputed,
19 undisputed, secured, or unsecured." Id. § 101(5). Ultimately,
20 only creditors with claims affected by a debtor's discharge can
21

22 ³ Given our determination, we need not decide whether
23 waiver occurred. In any event, it appears to be a question open
24 to debate; we note, for example, that in his post-trial brief,
25 the Debtor asserted that the Maliks were not his creditors in
26 response to each claim except the § 727(a)(3) claim. While
27 reasonable minds may differ, it is not unreasonable to infer that
28 this failure was attributable to oversight rather than a
conscious decision on the Debtor's part. And, certainly, at the
time that the case was filed, the Maliks possessed the § 523
related tort claims against the Debtor, thereby establishing
their creditor status until the bankruptcy court decided against
them on those claims.

1 object to discharge. See Stanley v. Vahlsing (In re Vahlsing),
2 829 F.2d 565, 567 (5th Cir. 1987).

3 The Maliks asserted numerous claims against the Debtor,
4 including the various § 523 tort claims. But, concurrent with
5 the judgment on the § 727(a)(3) claim, the bankruptcy court found
6 that their § 523 tort related claims lacked merit. It did not
7 address what claim remained, and without a claim that supported
8 continuing creditor status, the Maliks lacked the ability to
9 object to the Debtor's discharge.

10 As stated, the Maliks contend that the return of two checks
11 without payment established their creditor status. Before the
12 bankruptcy court (and somewhat on appeal), the Debtor disputed
13 that he gave any checks to the Maliks, testifying that he gave
14 Zakir Hussain two signed but otherwise "blank" checks. The
15 bankruptcy court, however, found that "[a]t one point in 2008 the
16 debtor gave the [Maliks] two postdated checks, one for [\$]62,500
17 and one for [\$]100,000, which were both returned for non
18 sufficient funds" Oral Op. Tr. (June 17, 2013) at 11:5-
19 7. This finding was clearly erroneous as there is no dispute
20 that the Maliks obtained the checks from Zakir Hussain, not
21 directly from the Debtor. Even so, the error is harmless as the
22 Debtor's own actions concerning the checks independently gave
23 rise to the Maliks' claim.

24 First, the Debtor essentially negotiated the checks to the
25 Maliks. The checks were negotiable instruments. See Cal. Com.
26 Code § 3104; Spencer v. Sterling Bank, 63 Cal. App. 4th 1055,
27 1058 (1998). As the checks were signed by the Debtor without a
28

1 payee,⁴ they were payable to bearer and, thus, enforceable by any
2 person in possession of the checks. See Cal. Com. Code §§ 3109;
3 3205; 3301.

4 The Debtor cannot disclaim the checks on the basis that
5 Zakir Hussain altered the checks. It was reasonable to assume
6 that Zakir Hussain would fill in the blank spaces. See Cassetta
7 v. Baima, 106 Cal. App. 196, 199 (1930) ("The general rule is
8 that, if one signs an instrument containing blanks, he must
9 intend it to be filled in by the person to whom it is
10 delivered."). And, by endorsing the checks in blank and simply
11 handing them over to Zakir Hussain, the Debtor subjected himself
12 to possible liability against a drawee or obligee. See Cal. Com.
13 Code § 3406(a) (person who is negligent and contributes to
14 alteration of instrument is precluded from asserting the
15 alteration or forgery against a person who, in good faith, takes
16 an instrument for value or for collection).

17 Second, under California law, the returned checks created a
18 quasi-contractual relationship between the Debtor and the Maliks,

19
20 ⁴ At oral argument, the Debtor attempted to argue that he
21 did not provide the checks to Zakir Hussain, let alone endorse
22 the checks in blank. His own testimony, however - both in his
23 deposition and at trial - provides to the contrary. Trial Tr.
(Dec. 20, 2012) at 69:5-19; Syed Shahzad Hussain Dep. (Mar. 13,
2012) at 73:13-22; 74:9-10; 75:17-18.

24 In addition, the Maliks' counsel pointed out at oral
25 argument that the declaration of Hakeem Bharwani established that
26 the Debtor, in fact, was present when Zakir Hussain delivered the
27 checks to the Maliks. See Adv. ECF No. 31, Pt. 5. The
28 bankruptcy court's decision does not reference the Bharwani
declaration and, thus, neither do we. In any event, whether the
Debtor was physically present when Zakir Hussein presented the
checks to the Maliks is ultimately irrelevant. If true, it only
serves to strengthen our conclusion as to the Maliks' creditor
status.

1 even if one did not previously exist. See Roff v. Crenshaw, 69
2 Cal. App. 2d 536, 541 (1945) (noting that “[t]here seems to be no
3 doubt as to the right of the payee of a check, upon its
4 nonpayment, to sue the drawer either upon the check itself or on
5 the original consideration.”) (citation omitted); see also
6 Gambord Meat Co. v. Corbari, 109 Cal. App. 2d 161, 162 (1952)
7 (party may create a payment liability to a payee by providing a
8 personal check even if on the obligation of another).

9 Based on the foregoing, the Maliks held a claim against the
10 Debtor which, in turn, sufficiently conferred creditor status for
11 the purposes of § 727(a). See 11 U.S.C. §§ 101(5); 101(10)(A);
12 727(c)(1). The Maliks, thus, were authorized to object to the
13 Debtor’s discharge.

14 **B. The bankruptcy court did not err in granting judgment in**
15 **favor of the Maliks on their § 727(a)(3) claim.**

16 Section 727(a)(3) provides for denial of discharge where,
17 among other things, a debtor failed to keep or preserve any
18 recorded information from which his financial condition or
19 business transactions might be ascertained. The underlying
20 purpose of this subsection is “to make discharge dependent on the
21 debtor’s true presentation of his financial affairs.” Caneva v.
22 Sun Communities Operating Ltd. P’ship (In re Caneva), 550 F.3d
23 755, 761 (9th Cir. 2008).

24 Even so, § 727(a)(3) “does not require absolute completeness
25 in making or keeping records.” Id. Instead, a debtor must only
26 “present sufficient written evidence which will enable his
27 creditors reasonably to ascertain his present financial condition
28 and to follow his business transactions for a reasonable period

1 in the past." Id. A debtor's "duty to keep records is measured
2 by what is necessary to ascertain [his] financial status."
3 Moffett v. Union Bank, 378 F.2d 10, 11 (9th Cir. 1967); see also
4 U.S. Trustee v. Hong Minh Tran (In re Hong Minh Tran), 464 B.R.
5 885, 893 (Bankr. S.D. Cal. 2012)(type of debtor, as well as
6 debtor's sophistication, informs the bankruptcy court's
7 determination).

8 **1. The bankruptcy court did not err in determining that**
9 **the Maliks established a prima face case under**
10 **§ 727(a)(3).**

11 An objector establishes a § 727(a)(3) prima facie case by
12 showing that: (1) the debtor failed to maintain and preserve
13 adequate records; and (2) this failure rendered it impossible to
14 ascertain the debtor's financial condition and material business
15 transactions. In re Caneva, 550 F.3d at 761. Once the objector
16 makes this showing, the burden shifts to the debtor to justify
17 the inadequacy or nonexistence of records. Id. Whether a debtor
18 failed to maintain and preserve adequate records is a finding of
19 fact, which we review for clear error. Cox v. Lansdowne (In re
20 Cox), 904 F.2d 1399, 1401-02 (9th Cir. 1990).

21 Here, the Debtor argues that he provided all of the
22 information relating to the gas station's gross revenues to his
23 accountant,⁵ who, in turn, used that information to prepare the
24 Debtor's personal income tax returns. He also points out that
25 the Schedule C tax statements, detailing the business's profits

27 ⁵ The Debtor testified that the same firm handled his
28 bookkeeping and accounting. Trial Tr. (Dec. 20, 2012) at 33:23-
25; 34:1. The record shows that he used the terms
interchangeably.

1 and losses, were attached to the returns.

2 The bankruptcy court agreed that the only relevant records
3 produced by the Debtor relating to the gas station's transactions
4 were his personal income tax returns. It acknowledged the
5 Debtor's testimony that he kept a log of the business's gross
6 sales and reported all activities to his accountant and that all
7 gas station income was reported on the income tax returns,
8 including monthly rental income from an independent auto body
9 shop tenant on the premises. It ultimately found, however, that
10 the Debtor's records were inadequate as the income tax returns,
11 with nothing more, failed to reasonably present the Debtor's
12 financial condition and his business transactions relating to the
13 gas station. It thus determined that the Maliks established a
14 prima facie § 727(a)(3) case. On this record, we agree.

15 The Debtor operated the gas station for approximately four
16 years, during which time he purchased and sold gasoline, rented a
17 space on the premises to an auto body shop for \$5,000 a month,
18 and presumably purchased and sold goods at the convenience store
19 also located on the premises. It appears that he operated the
20 business through one general business account. Yet the record
21 reflects that as to the gas station's transactions during the
22 pertinent four-year period, the Debtor only produced his personal
23 income tax returns. He, for example, did not produce the revenue
24 log, general account statements, or credit card statements
25 relating to payment of the gasoline "jobber" invoices. And
26 although the Debtor asserts that he reported all financial
27 information to his accountant, he never clearly explains what
28 this other information was.

1 At oral argument, the Debtor represented that he produced
2 other financial documents. Our review of the record shows that
3 not to be the case. The Debtor provided other documents relating
4 to the gas station purchase, such as the deed of trust, loan
5 agreement, escrow instructions, and SBA authorization. These
6 documents are not records relating to the gas station's business
7 transactions during the pertinent four-year operating period.

8 What the Debtor fails to grasp is that, where a business is
9 involved, simply producing a bottom line number as to income
10 earned, expenses incurred, or losses suffered during a calendar
11 year may be insufficient. Under these circumstances, the income
12 tax returns or Schedule C tax statements could not meaningfully
13 inform a creditor as to the nature and quality of the gas
14 station's profits and expenditures. This is particularly true in
15 the context of a cash intensive business where creditors cannot
16 easily identify possible preferences or fraudulent transfers
17 without more detail.

18 While the record may contain facts supportive of alternate
19 inferences, the bankruptcy court was in the best position to
20 evaluate the documentary and testimonial evidence. See In re
21 Retz, 606 F.3d at 1196. Viewed through the deferential lens
22 required on appellate review, the bankruptcy court's findings
23 were not clearly erroneous. See id.; see also Palmdale Hills
24 Prop., LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills
25 Prop., LLC), 457 B.R. 29, 40 (9th Cir. BAP 2011) (when there are
26 two permissible views of the evidence, the bankruptcy court's
27 choice between them cannot be clearly erroneous). It thus did
28 not err in determining that the Maliks established a prima facie

1 case under § 727(a)(3).

2 The Maliks having made a prima facie showing, the burden
3 shifted to the Debtor to justify the inadequacy or nonexistence
4 of records. See In re Caneva, 550 F.3d at 761.

5 **2. The bankruptcy court did not err in determining that**
6 **the Debtor failed to justify the inadequacy or**
7 **nonexistence of records.**

8 The Debtor explicitly argues, for the first time on appeal,
9 that his lack of business sophistication, as well as his limited
10 English proficiency, explain any inadequacy or nonexistence of
11 records. We do not consider arguments not raised before the
12 bankruptcy court. The cases cited by the Debtor in support of
13 his position, thus, are unavailing, as those cases involved
14 matters where the bankruptcy court expressly made findings as to
15 the debtor's level of business sophistication and education.⁶

16 Here, the bankruptcy court found that the Debtor failed to
17 offer a reasonable justification for the inadequacy or
18 nonexistence of records. Acknowledging that he ran a "mom and
19

20 ⁶ See Floret, LLC v. Sendecky (In re Sendecky), 283 B.R.
21 760, 764 (8th Cir. BAP 2002) (no clear error as to bankruptcy
22 court's finding that debtor's lack of education, sophistication,
23 and business experience explained his inadequate business
24 records); Strzesynski v. Devaul (In re Devaul), 318 B.R. 824, 838
25 (Bankr. N.D. Ohio 2004) (justification for debtor's missing
26 recorded information included limited education and dependence on
27 others for assistance); G & J Invs. v. Zell (In re Zell), 108
28 B.R. 615, 627 (Bankr. S.D. Ohio 1989) (that debtor did not keep
"most fastidious and precise business records" was excusable when
debtor was relatively unsophisticated businesswoman); Energy
Mktg. Corp. v. Sutton (In re Sutton), 39 B.R. 390, 398 (Bankr.
M.D. Tenn. 1984) (while records were not a "paragon of clarity,"
debtor was self-employed and had very little formal education,
which justified inadequate records).

1 pop" gas station and, thus, was not required to maintain
2 sophisticated records, it nonetheless found that the Debtor had a
3 duty to maintain something more than personal income tax returns.

4 In so finding, the bankruptcy court implicitly rejected the
5 Debtor's only proffered explanation, namely, that he turned over
6 all financial information to his accountant. As previously
7 noted, the Debtor never clearly explained the particulars of the
8 financial information provided to his accountant. Nor did he
9 offer declaratory evidence from the accountant in support of his
10 argument. Based on the foregoing, we cannot say that the
11 bankruptcy court's findings were clearly erroneous. See In re
12 Retz, 606 F.3d at 1196; In re Palmdale Hills Prop., LLC, 457 B.R.
13 at 40. Therefore, it did not err in determining that the
14 Debtor's explanations failed to justify the inadequate or
15 nonexistent records.

16 In sum, the Debtor has shown no error in the bankruptcy
17 court's judgment denying his discharge under § 727(a)(3).

18 **CONCLUSION**

19 We AFFIRM the bankruptcy court's denial of the Debtor's
20 discharge under § 727(a)(3).