

OCT 07 2015

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	OR-14-1145-FJuKi
	)		
SALLY JANE BRANDENFELS,	)	Bk. No.	13-32532-ELP7
	)		
Debtor.	)	Adv. No.	13-03159-ELP
	)		
_____	)		
SALLY JANE BRANDENFELS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
TICOR TITLE INSURANCE CO.,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on September 25, 2015  
at Seattle, Washington

Filed - October 7, 2015

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Appearances: James Huffman argued for Appellant Sally Jane Brandenfels; Jonathan Mark Radmacher of McEwen Gisvold LLP argued for Appellee Ticor Title Insurance Co.

Before: FARIS, JURY and KIRSCHER, Bankruptcy Judges.

\* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.



1 by Ms. Brandenfels or her husband and is engaged in the business  
2 of producing and selling holly wreaths. Oregon Holly was  
3 incorporated in Oregon in 1993.

4 In April 2008, Ms. Brandenfels or her husband incorporated  
5 Oregon Holly Wreaths Company ("Oregon Holly Wreaths") in Oregon.  
6 Appellee Ticor Title Insurance Co. ("Appellee" or "Ticor")  
7 alleges that Oregon Holly Wreaths "actually conducts no business,  
8 or simply conducts the business of Oregon Holly Company, under a  
9 new name."

10 On June 24, 2010, Ticor filed suit against Ms. Brandenfels  
11 and Oregon Holly for breach of a promissory note. In July 2012,  
12 the court entered a judgment in Ticor's favor for \$149,999  
13 against Ms. Brandenfels and Oregon Holly.

14 Beginning in or around December 2012, Ticor issued writs of  
15 garnishment for Oregon Holly's and Ms. Brandenfels's accounts at  
16 St. Helens Community Federal Credit Union ("St. Helens FCU"). At  
17 some point thereafter, Ms. Brandenfels opened an account at Wauna  
18 Federal Credit Union ("Wauna FCU") on behalf of Oregon Holly or  
19 Oregon Holly Wreaths. Ms. Brandenfels testified that she opened  
20 the account "so that Ticor wouldn't be able to go get money owned  
21 by Oregon Holly[.]" She deposited checks made out to Oregon  
22 Holly and her husband into the Wauna FCU account, thus  
23 commingling corporate and personal funds.

24 Around this same time, Ms. Brandenfels also began taking  
25 cash withdrawals from Oregon Holly's and Oregon Holly Wreath's  
26 bank accounts. She testified that she took these withdrawals to  
27 pay contract labor in cash. Ms. Brandenfels admitted that she  
28 often did not receive any receipts for those payments and that

1 her Quickbooks files did not always reflect those transactions.  
2 While Ms. Brandenfels's records prior to December 2012 documented  
3 cash payments for contract labor, there are no such records  
4 beginning in December 2012.

5 Ms. Brandenfels used credit cards for both business and  
6 personal expenses, without differentiating the expenses in her  
7 records and sometimes without even including such transactions in  
8 her records. Moreover, she sometimes withdrew cash from the  
9 corporate accounts for mixed business and personal purposes,  
10 without documenting the split in her records.

11 Ms. Brandenfels also used money from the business accounts  
12 for personal purposes or purposes that are not clearly business-  
13 related. For example, Ms. Brandenfels wrote a \$2,500 check to  
14 "Cash" that she paid to a neighbor out of Oregon Holly's Wauna  
15 FCU account. She stated that it was to repay a loan from November  
16 or December 2012,<sup>3</sup> but she did not record either the loan or the  
17 repayment in her Quickbooks files. Ms. Brandenfels also used  
18 Oregon Holly's funds to pay for legal services provided to the  
19 estate of her deceased father-in-law.<sup>4</sup> Ms. Brandenfels

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21 <sup>3</sup> The record is unclear as to whether the loan constituted a  
22 business or personal expense, as Ms. Brandenfels testified that  
23 the loan related to postage. However, she could not explain why  
24 she wrote the check out to "Cash" as opposed to the neighbor  
personally.

25 <sup>4</sup> The record is unclear as to the nature of the law firm's  
26 services. On the one hand, Ms. Brandenfels testified that her  
27 father-in-law's estate owed the law firm money, so it might be  
28 inferred that she was paying non-business debt out of company  
funds. On the other hand, she also implied that the payment may  
be related to the companies' use of holly and andromeda from the  
(continued...)

1 acknowledged that taking money from the St. Helens FCU account  
2 and depositing it into the Wauna FCU account allowed her to avoid  
3 garnishment and repay such creditors.

4 Ms. Brandenfels admitted that, after Ticor's garnishment  
5 became effective, she used Oregon Holly Wreaths's accounts to  
6

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7 <sup>4</sup>(...continued)  
8 land held in trust by the estate, which may be a legitimate  
9 business expense. She testified:

10 Q. Who owed Mr. Vanden Bos money?

11 A. The estate.

12 Q. What estate?

13 A. The trust. The estate of Carl  
14 Brandenfels.

15 Q. Is that your husband's deceased  
16 father?

17 A. Yes.

18 Q. And why did your deceased father's  
19 estate owe Mr. Vanden Bos money?

20 A. Because we grow variegated holly and  
21 andromeda that we use from that estate. We  
22 have 500 trees of andromeda that we planted  
23 on that estate. And we use that.

24 . . . .  
25 Q. Did [Mr. Vanden Bos] provide legal  
26 services?

27 A. Yes. For the -- I'm not sure.

28 Q. You thought it was for the estate,  
but you're not sure?

A. No, I know that we owe -- that it is  
an estate bill, and that we paid that bill  
because we use variegated holly and andromeda  
from that estate, that trust.

Q. So Oregon Holly Company paid Mr.  
Vanden Bos for legal services he provided to  
your husband's father's estate?

A. Correct.

26 Trial Tr. (Day 1) at 69:4-70:14 (Jan. 22, 2014). In any event,  
27 she testified that she could not point to any documentation  
28 reflecting an agreement for Oregon Holly or Oregon Holly Wreath  
to pay the trust's debts.

1 conduct Oregon Holly's business, pay Oregon Holly's debts, and  
2 avoid garnishment. She stated that "Oregon Holly Company and  
3 Oregon Holly Wreaths worked jointly together to try to pay the  
4 debts [of Oregon Holly]." She decided as an officer and  
5 controller of Oregon Holly "to transfer these funds or to cash  
6 these funds not into Oregon Holly Company account but into an  
7 Oregon Holly Wreaths Company account[.]"

8 In April 2013, Ms. Brandenfels filed for chapter 7  
9 bankruptcy. Ticor timely initiated an adversary proceeding  
10 against Ms. Brandenfels and Oregon Holly. Among other things,  
11 Ticor objected to Ms. Brandenfels's discharge under § 727(a)(3).

12 The bankruptcy court held a trial on January 22-23, 2014.  
13 On February 12, 2014, the court issued its oral ruling in Ticor's  
14 favor regarding its § 727(a)(3) claim.<sup>5</sup> The court based its  
15 decision on three deficiencies in Ms. Brandenfels's records.

16 First, Ms. Brandenfels failed to document the use of cash  
17 withdrawn from the corporate accounts, particularly after Ticor

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18  
19 <sup>5</sup> Ticor also argued that the bankruptcy court should deny  
20 Ms. Brandenfels' discharge under §§ 727(a)(2)(A) and  
21 727(a)(4)(A), but the bankruptcy court rejected these claims.  
22 Regarding the § 727(a)(2)(A) claim for transferring or concealing  
23 the debtor's assets to hinder or delay creditors, the court  
24 stated that Ticor failed to allege and prove a piercing of the  
25 corporate veil theory in order to hold Ms. Brandenfels liable for  
26 the transfer of assets between Oregon Holly and Oregon Holly  
27 Wreaths. Furthermore, regarding Ms. Brandenfels's personal  
28 assets, the court held that Ms. Brandenfels likely did not intend  
to hinder or delay creditors, but rather just deposited personal  
money into whatever account was readily accessible. Regarding  
the § 727(a)(4)(A) claim for false oaths, the court found that  
Ms. Brandenfels did not knowingly, intentionally, or fraudulently  
make a false oath on her bankruptcy schedules regarding certain  
bank accounts, because she thought those accounts were her  
mother's accounts.

1 began garnishing Oregon Holly's primary bank account. The court  
2 calculated a discrepancy totaling \$41,000 between 2010 and 2012,  
3 with a \$28,000 discrepancy in 2012, when Ticor began its  
4 collection efforts. She testified that she used the cash to pay  
5 contract labor, but she produced no records to confirm her  
6 statements. The court also highlighted Ms. Brandenfels's  
7 testimony that she opened new bank accounts and moved assets from  
8 Oregon Holly to Oregon Holly Wreaths to avoid paying Oregon  
9 Holly's creditors. Considering these facts together, the court  
10 concluded that the missing records made it impossible to  
11 determine whether she had misused the funds: "Ms. Brandenfels was  
12 concealing the contract labor cash payments or [sic] under cover  
13 of a chaotic or incomplete set of records. Another possibility  
14 is she was doing something else with the cash. We'll just never  
15 know."

16 The second deficiency is "the lack of clarity between cash  
17 withdrawals and credit card payments that satisfy business  
18 obligations and those that satisfy Ms. Brandenfels's personal  
19 obligations." The bankruptcy court noted that Ms. Brandenfels  
20 used her various credit cards and withdrew cash indiscriminately  
21 for both business and personal uses, but seldom recorded those  
22 transactions or distinguished between personal and business use.  
23 For example, the court calculated that Ms. Brandenfels made  
24 credit card payments of approximately \$9,500 in 2012 from one of  
25 Oregon Holly Wreath's accounts, but her records fail to indicate  
26 whether and to what extent the payments were for business  
27 expenses, as opposed to personal expenses.

28 The third deficiency is the "string of payments to third

1 parties that were made with company money but do not appear to be  
2 company expenses." For example, Ms. Brandenfels paid law firms  
3 from Oregon Holly Wreath's account for undefined services related  
4 to her deceased father-in-law's estate. She testified that the  
5 records do not show that Oregon Holly or Oregon Holly Wreaths had  
6 been the beneficiaries of the legal services. She also issued a  
7 \$2,500 check to repay a loan from a neighbor, but did not keep a  
8 record of the loan or the repayment.

9 Based on these three deficiencies, the bankruptcy court  
10 denied Ms. Brandenfels's discharge pursuant to § 727(a)(3).  
11 Ms. Brandenfels timely filed her notice of appeal on March 30,  
12 2014.

### 13 JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
15 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.  
16 § 158.

### 17 ISSUE

18 Whether the bankruptcy court erred in denying Appellant's  
19 discharge for failure to maintain adequate records under  
20 § 727(a)(3).

### 21 STANDARDS OF REVIEW

22 In an action for denial of discharge, we review: (1) the  
23 bankruptcy court's determinations of the historical facts for  
24 clear error; (2) its selection of the applicable legal rules  
25 under § 727 de novo; and (3) its determinations of mixed  
26 questions of law and fact de novo. Searles v. Riley  
27 (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd,  
28 212 Fed. App'x 589 (9th Cir. 2006).



1 De novo review is independent and gives no deference to the  
2 trial court's conclusion. Roth v. Educ. Credit Mgmt. Agency  
3 (In re Roth), 490 B.R. 908, 915 (9th Cir. BAP 2013) (citing  
4 Warfield v. Salazar (In re Salazar), 465 B.R. 875, 878 (9th Cir.  
5 BAP 2012)). Conversely, review for clear error is "significantly  
6 deferential," and an appellate court should not reverse unless it  
7 is left with "a definite and firm conviction that a mistake has  
8 been committed." Id. (quoting Baker v. Mereshian  
9 (In re Mereshian), 200 B.R. 342, 345 (9th Cir. BAP 1996)). We  
10 give great deference to the bankruptcy court's findings that are  
11 based on its determinations of witness credibility. Retz v.  
12 Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

### 13 DISCUSSION

#### 14 A. Appellee did not waive its § 727(a) (3) argument.

15 Ms. Brandenfels first contends that Ticor waived its  
16 argument under § 727(a) (3) because Ticor did not reference  
17 § 727(a) (3) in its trial memorandum or its opening statement. We  
18 disagree.

19 First, we note that Ms. Brandenfels failed to include  
20 Ticor's trial memorandum in her excerpts of record. "The  
21 appellants bear the responsibility to file an adequate record,  
22 and the burden of showing that the bankruptcy court's findings of  
23 fact are clearly erroneous." Kritt, 190 B.R. at 387 (citing  
24 Burkhart v. FDIC (In re Burkhart), 84 B.R. 658, 660 (9th Cir. BAP  
25 1988)). "Appellants should know that an attempt to reverse the  
26 trial court's findings of fact will require the entire record  
27 relied upon by the trial court be supplied for review." Id.  
28 (quoting Burkhart, 84 B.R. at 661). We are not obligated to comb

1 through the lower court's docket in search of support for  
2 Ms. Brandenfels's arguments. Nevertheless, we will exercise our  
3 discretion to take judicial notice of the trial memorandum, which  
4 is available on the bankruptcy court's docket. See O'Rourke v.  
5 Seaboard Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-  
6 58 (9th Cir. 1989).

7 Second, we are not persuaded that Ticor waived its  
8 § 727(a)(3) argument by omitting it from its trial memorandum.  
9 Ms. Brandenfels argues that a party's failure to include in its  
10 trial memorandum an argument based on a properly pleaded claim  
11 for relief precludes it from making that argument during the  
12 trial. Ms. Brandenfels cites no authority for the proposition,  
13 and we have found no such authority.

14 Third, both the bankruptcy court and the parties addressed  
15 § 727(a)(3) at trial. The bankruptcy court noted at the outset  
16 that Ticor's § 727(a)(3) argument was not included in its trial  
17 memorandum and specifically asked Ticor's counsel whether Ticor  
18 intended to abandon that argument. In response, Ticor's counsel  
19 affirmed that the argument was "an important part of it."<sup>6</sup>  
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21 <sup>6</sup> The bankruptcy court requested clarification as to Ticor's  
22 position on its § 727(a)(3) claim:

23 THE COURT: I did want to ask you one  
24 question.

25 MR. RADMACHER: Yes?

26 THE COURT: What about the 727(a)(3)  
27 claim? Is it abandoned or just not addressed  
28 in the trial memo? That was -- that's the  
records claim.

MR. RADMACHER: I think -- no, it isn't  
mentioned, perhaps -- but, no, that's an

(continued...)

1 During the course of trial, the court repeatedly addressed the  
2 issue of the adequacy of the "books and records."<sup>7</sup> Finally,  
3 Ticor raised its § 727(a)(3) argument in its closing statement.<sup>8</sup>

4 Lastly, Ms. Brandenfels has not identified any prejudice  
5 that she suffered as a result of the omission of Ticor's  
6 § 727(a)(3) argument from its trial memorandum. As discussed  
7 above, this issue was repeatedly addressed during trial,  
8 Ms. Brandenfels did not raise her waiver argument at the trial  
9 level, and Ms. Brandenfels's counsel even specifically addressed

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11 <sup>6</sup>(...continued)

12 important part of it.

13 THE COURT: Okay.

14 MR. RADMACHER: The corporate records  
15 are --

16 THE COURT: I just wanted clarification  
17 since it isn't separately talked about in the  
18 trial memo.

19 Trial Tr. (Day 1) at 7:8-17.

20 <sup>7</sup> For example, the bankruptcy court stated:

21 Here's the problem in this case. There's two  
22 problems in this case from the standpoint  
23 that we're applying 727 in this case. The  
24 first problem is the hinder and delay  
25 problem. The second problem is the books and  
26 records are awful.

27 Trial Tr. (Day 1) at 166:1-5.

28 <sup>8</sup> Among other things, Ticor argued: "With respect to books  
and records, . . . [t]here's no separate accounts for the  
companies of any kind. . . . [T]here's no documentation of  
inter-company transfers. . . . There's no . . . effort to have  
separate accounting. . . . Undocumented cash is withdrawn and  
expended. . . . And the final piece is her personal ability and  
knowledge, she clearly knows what she could do." Trial Tr.  
(Day 2) at 103:17-104:7 (Jan. 23, 2014).

1 the issues of cash payments and the adequacy of records in his  
2 opening and closing statements.

3 Thus, Ticor did not abandon its § 727(a)(3) argument.

4 **B. The bankruptcy court did not err in granting judgment in**  
5 **favor of Appellee pursuant to § 727(a)(3).**

6 Ms. Brandenfels argues that the bankruptcy court erred in  
7 finding her records inadequate under § 727(a)(3)'s two-part test.  
8 We find no error.

9 Section 727(a)(3) provides that the bankruptcy court must  
10 deny a discharge when:

11 the debtor has concealed, destroyed,  
12 mutilated, falsified, or failed to keep or  
13 preserve any recorded information, including  
14 books, documents, records, and papers, from  
15 which the debtor's financial condition or  
16 business transactions might be ascertained,  
17 unless such act or failure to act was  
18 justified under all of the circumstances of  
19 the case[.]

20 § 727(a)(3).

21 The Ninth Circuit has stated "that the purpose of  
22 § 727(a)(3) is to make discharge dependent on the debtor's true  
23 presentation of his financial affairs." Caneva v. Sun Cmty.  
24 Ltd. P'ship (In re Caneva), 550 F.3d 755, 761 (9th Cir. 2008)  
25 (citing Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th  
26 Cir. 1994)). This "requirement removes the risk to creditors of  
27 'the withholding or concealment of assets by the bankrupt under  
28 cover of a chaotic or incomplete set of books or records.'" Id.  
(quoting Burchett v. Myers, 202 F.2d 920, 926 (9th Cir. 1953)).  
This exception to dischargeability "should be strictly construed  
in order to serve the Bankruptcy Act's purpose of giving debtors  
a fresh start." Id. (quoting Industrie Aeronautiche v. Kasler

1 (In re Kasler), 611 F.2d 308, 310 (9th Cir. 1979)).

2 The debtor must "present sufficient written evidence which  
3 will enable his creditors reasonably to ascertain his present  
4 financial condition and to follow his business transactions for a  
5 reasonable period in the past." Id. (quoting Rhoades v. Wikle,  
6 453 F.2d 51, 53 (9th Cir. 1971)). To assess the sufficiency of  
7 those records under § 727(a)(3), the court engages in a two-part  
8 analysis. First, a creditor makes a prima facie case by showing  
9 "(1) that the debtor failed to maintain and preserve adequate  
10 records, and (2) that such failure makes it impossible to  
11 ascertain the debtor's financial condition and material business  
12 transactions." Id. (quoting Cox, 41 F.3d at 1296). If the  
13 creditor meets his burden of showing inadequate or nonexistent  
14 records, "the burden of proof then shifts to the debtor to  
15 justify the inadequacy or nonexistence of the records." Id.  
16 (quoting Cox, 41 F.3d at 1296).

17 **1. The bankruptcy court correctly held that Appellee**  
18 **established a prima facie case under § 727(a)(3).**

19 The first step of the two-part test requires Ticor to  
20 establish that Ms. Brandenfels's records are inadequate and that  
21 it is impossible to ascertain her financial condition and  
22 material business transactions. Ms. Brandenfels had "an  
23 affirmative duty . . . to create books and records accurately  
24 documenting [her] business affairs." Id. at 762 (quoting  
25 Peterson v. Scott (In re Scott), 172 F.3d 959, 969 (7th Cir.  
26 1999)). "Complete disclosure is in every case a condition  
27 precedent to the granting of the discharge, and if such a  
28 disclosure is not possible without the keeping of books or

1 records, then the absence of such amounts to that failure to  
2 which the act applies." Id. at 762 (quoting Meridian Bank v.  
3 Alten, 958 F.2d 1226, 1230 (3d Cir. 1992)).

4 Ms. Brandenfels implies that the bankruptcy court should  
5 only be concerned with whether or not it can ascertain her  
6 ultimate financial situation. For example, she argues in her  
7 opening brief that the court could piece together an "adequate  
8 picture" of her finances, because it "was able to conclude that  
9 over the period of three calendar years, her family earned  
10 \$98,000 . . . ." She contends that her records are complete  
11 because she provided nearly 1,500 pages of her financial records,  
12 which "include all of the relevant bank accounts, tax returns,  
13 and profit and loss statements, and the Quickbooks detail for  
14 these accounts of her transactions . . . . Every material  
15 transaction is accounted for." She argues that Ticor was able to  
16 "fully scrutinize" her records, because it asked her to admit  
17 that "almost all of the deposits to the account were payable to  
18 'Oregon Holly' or to 'Oregon Holly Company.'" She states that  
19 "[t]he tax returns accounted for all of the money that the  
20 defendant had any access to." She relies on Caneva for the  
21 proposition that her records only need to demonstrate (1) the  
22 debtor's business entities' assets; (2) the assets that pass  
23 through the business entities; and (3) the present value of those  
24 assets.

25 However, Ms. Brandenfels ignores Caneva's mandate that a  
26 debtor must "present sufficient written evidence which will  
27 enable his creditors reasonably to ascertain his present  
28 financial condition **and to follow his business transactions for a**

1 **reasonable period in the past.”** Caneva, 550 F.3d at 761 (quoting  
2 Rhoades, 453 F.2d at 53) (emphasis added). As we have stated  
3 recently, “where a business is involved, simply producing a  
4 bottom line number as to income earned, expenses incurred, or  
5 losses suffered during a calendar year may be insufficient. . . .  
6 This is particularly true in the context of a cash intensive  
7 business where creditors cannot easily identify possible  
8 preferences or fraudulent transfers without more detail.”  
9 Hussain v. Malik (In re Hussain), 508 B.R. 417, 425 (9th Cir. BAP  
10 2014). It is not enough for Ms. Brandenfels to provide records  
11 about her overall financial situation; she must also provide  
12 records adequate to allow creditors to trace all of her  
13 transactions.

14 The bankruptcy court enumerated three areas in which it  
15 found Ms. Brandenfels’s records to be deficient: (1) lack of  
16 documentation of cash payments to contract labor; (2) lack of  
17 clarity between business and personal credit card payments and  
18 cash withdrawals; and (3) payments to third parties that were  
19 made with company money for non-business expenses. We address  
20 each in turn.

21 **a. Cash payments to contract workers**

22 First, the bankruptcy court’s foremost concern was the  
23 undocumented cash withdrawals and claimed cash payments to  
24 contract workers. The bankruptcy court calculated a discrepancy  
25 of over \$41,000 between 2010 and 2014. The court noted that the  
26 unaccounted funds amount to 22.5 percent of Ms. Brandenfels’s  
27 total contract labor costs. In 2012, around the time Ticor began  
28 its collection actions, the discrepancy more than quadrupled, to

1 \$28,000 from \$6,200 the previous year. After Ticor's garnishment  
2 became effective, Ms. Brandenfels's records do not reflect a  
3 single payment by check to contract labor, even though records  
4 from the three previous years show dozens of checks for that  
5 purpose during the same season. Furthermore, Ms. Brandenfels  
6 admitted that she opened new bank accounts and moved assets from  
7 Oregon Holly to Oregon Holly Wreaths to avoid paying creditors.  
8 Based on these facts, the bankruptcy court concluded that she  
9 "was concealing the contract labor cash payments . . . under  
10 cover of a chaotic or incomplete set of records[,] " or "doing  
11 something else with the cash."

12 On appeal, Ms. Brandenfels argues that her records  
13 adequately account for all of the cash payments to contract  
14 labor. She contends that "[t]here was no shortage of records or  
15 missing transactions," although she quickly admits that she  
16 failed to include one of her accounts and does not have records  
17 for November and December 2012.<sup>9</sup> She claims that payments to  
18 contract labor during this time are recorded in her bank  
19 statements, which reflect multiple "round number" checks.  
20 Finally, she argues generally that she "could explain each and  
21 every one of her transactions."

22 The bankruptcy court did not commit clear error in its  
23 consideration of Ms. Brandenfels's cash transactions. Her  
24 records do not allow a creditor to "determine the details of that

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25  
26 <sup>9</sup> Ms. Brandenfels argues that "she had failed to include one  
27 of her accounts in the Quickbooks exhibit D, but she provided  
28 6 years of back records, and missed only November and December of  
Opening Br. at 12.



1 transaction or verify that it actually took place." Caneva,  
2 550 F.3d at 762. There is no indication whom Ms. Brandenfels  
3 paid, or how much she paid a particular person. The bankruptcy  
4 court meticulously combed through 1,500 pages of  
5 Ms. Brandenfels's records and calculated a \$41,000 deficiency,  
6 which Ms. Brandenfels does not challenge on appeal. Rather,  
7 Ms. Brandenfels argues that her payments to contract labor, while  
8 not recorded in her business records, are reflected in her bank  
9 statements, which the bankruptcy court "did not notice."<sup>10</sup>  
10 However, the bank statements fail to identify the payee or the  
11 purpose of the transaction, and we cannot assume that the checks  
12 and cash withdrawals were all used to pay contract labor. The  
13 bankruptcy court was in the best position to evaluate the facts  
14 before it, and we find no clear error in its findings. See Retz,  
15 606 F.3d at 1196.

16 At oral argument, Ms. Brandenfels argued that, even if her  
17 records were insufficient, her oral explanation at trial was  
18 sufficient to cure the deficiency. Ms. Brandenfels did not offer  
19 any authority in support of this proposition, other than to claim  
20 that "jury instructions" permitted such an interpretation. This  
21 contention is unpersuasive, not least because there is no right  
22 to a jury trial in a § 727 action. More importantly,  
23 Ms. Brandenfels's argument ignores the fact that § 727(a)(3)

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24  
25 <sup>10</sup> Ms. Brandenfels does not provide us with any citation to  
26 the record evidencing that she directed the bankruptcy court to  
27 the St. Helens FCU bank statements as the source of the cash to  
28 pay contract labor. Given that she admittedly inundated the  
court with approximately 1,500 pages of documents and apparently  
could not explain the discrepancies at the time of trial, we  
cannot say the bankruptcy court erred.

1 requires the debtor to keep and maintain "books, documents,  
2 records, and papers," not merely oral explanations or  
3 recollections. Section § 727(a)(3) requires "sufficient written  
4 evidence," Caneva, 550 F.3d at 761, because a debtor's post-  
5 bankruptcy oral statements can be unreliable or subject to  
6 manipulation.

7 Ms. Brandenfels also claimed at oral argument that Ticor had  
8 copies of the checks evidencing payment to contract labor and  
9 should have offered them at trial. However, Ticor did not bear  
10 the burden of supplementing her deficient books and records. If  
11 Ms. Brandenfels had other documents that would have completed her  
12 records, she could and should have offered them at trial. She  
13 provides no convincing explanation of her failure to do so.

14 Ms. Brandenfels also does not dispute her earlier testimony  
15 that she transferred assets between bank accounts to avoid  
16 garnishment. Coupling this testimony with the large cash  
17 discrepancy suspiciously coinciding with Ticor's collection  
18 actions, we share the bankruptcy court's concern that  
19 Ms. Brandenfels intended to engage in "withholding or concealment  
20 of assets . . . under cover of a chaotic or incomplete set of  
21 books or records." Caneva, 550 F.3d at 761 (quoting Burchett,  
22 202 F.2d at 926). The bankruptcy court did not err in finding  
23 Ms. Brandenfels's records inadequate to explain the cash  
24 transactions under § 727(a)(3).

25 **b. Mixed personal and business expenses**

26 Second, the bankruptcy court stated that Ms. Brandenfels  
27 would mingle business and personal expenses, but would rarely  
28 differentiate the expenses in her records. The court totaled

1 \$9,500 in credit card payments in 2012, but the records do not  
2 reflect the extent the payments concerned personal expenses or  
3 business expenses. The court also noted that Ms. Brandenfels  
4 obtained cash back of approximately \$5,000 between November 2012  
5 and January 2013, but did not maintain any records regarding  
6 those funds. Similarly, Ms. Brandenfels's ATM withdrawals that  
7 were split between business and personal expenses were not  
8 adequately recorded in her financial records.

9 We find no error in the bankruptcy court's findings that  
10 Ms. Brandenfels failed to produce adequate records regarding her  
11 co-mingled personal and business expenses. She does not attempt  
12 to explain the credit card charges of \$9,500 or the cash  
13 withdrawals of \$5,000, other than to state--without any citation  
14 to the record--that she was able to account for all of her  
15 transactions.

16 Ms. Brandenfels's only other argument is that "both personal  
17 and small business records were considered together in order to  
18 determine the status of the defendant's financial affairs. It is  
19 incongruous to consolidate the finances for this analysis, and  
20 then to insist on segregating them to critique her records."  
21 Opening Br. at 14. Ms. Brandenfels misses the point. Reviewing  
22 the personal and business records together is necessary to  
23 ascertain Ms. Brandenfels's overall financial condition, but  
24 Ms. Brandenfels was also obligated to keep adequate records of  
25 her businesses' finances such that a creditor could follow the  
26 individual transactions. See Caneva, 550 F.3d at 761 (the  
27 debtor's records must allow a creditor "to follow his business  
28 transactions for a reasonable period in the past" (citation

1 omitted)). The bankruptcy court did not err in finding that  
2 Ms. Brandenfels's failure to do so renders her records incomplete  
3 and inadequate.

4 **c. Non-business expenses**

5 Third, the bankruptcy court found that Ms. Brandenfels's  
6 records did not adequately explain payments to third parties that  
7 were made with company money for non-business expenses.

8 Ms. Brandenfels states generally that she had offered "a valid  
9 explanation" and notes that the "unidentified neighbor" to whom  
10 she paid \$2,500 of company funds was identified by name at trial.  
11 In fact, Ms. Brandenfels utterly failed at trial to provide any  
12 written records explaining these transactions. Therefore, we  
13 find no error in the bankruptcy court's findings.

14 Thus, the bankruptcy court correctly determined that Ticor  
15 made a prima facie showing of the incompleteness and inadequacy  
16 of Ms. Brandenfels's records.

17 **2. The bankruptcy court correctly held that Appellant**  
18 **failed to justify her inadequate records.**

19 Since the bankruptcy court did not err in finding that  
20 Ms. Brandenfels failed to maintain and preserve adequate records,  
21 the burden then shifts to Ms. Brandenfels to justify the  
22 inadequacy of her records. The bankruptcy court stated that Ms.  
23 Brandenfels argued at trial that her records "were justified  
24 under all the circumstances of this case. . . . She's had two  
25 bouts of cancer; her husband is not well after his stroke; the  
26 economic downturn in 2008 hit her business particularly hard, and  
27 as a result [she] has been struggling to keep her business afloat  
28 almost singlehandedly." The court concluded, however, that,

1 "[n]otwithstanding [Ms. Brandenfels's situation], these records  
2 are still not adequate under 727(a)(3)."

3 On appeal, Ms. Brandenfels does not assign any error to this  
4 finding.<sup>11</sup> The only mention of her burden is a passing statement  
5 that, "[e]ven if the plaintiff may have met its burden of proof,  
6 the missing records for November and December have been  
7 adequately explained under the burden shifting analysis of  
8 Caneva." The record, however, contains no such explanation.  
9 Ms. Brandenfels also conceded at oral argument that she did not  
10 assign error to the second prong on appeal, because she felt that  
11 the burden never shifted from Ticor to her. Therefore, the  
12 bankruptcy court correctly found that Ms. Brandenfels failed to  
13 carry her burden to justify the inadequacy of her records.

14 **C. The bankruptcy court did not err in selecting the**  
15 **appropriate legal standard.**

16 For her second point of error, Ms. Brandenfels contends that  
17 the bankruptcy court applied an erroneous standard in determining  
18 the adequacy of the records at issue. However, Ms. Brandenfels  
19 fails to present any argument on this matter in her opening  
20 brief.<sup>12</sup>

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21  
22 <sup>11</sup> Ms. Brandenfels's first question on appeal asks only,  
23 "Did the plaintiff meet its burden of proof to demonstrate that  
24 the debtor's records were not adequate under 11 USC  
§ 727(a)(3) [?]"

25 <sup>12</sup> We note that Ms. Brandenfels includes a subsection  
26 entitled "Standard for adequacy" toward the end of her opening  
27 brief. However, even construing Ms. Brandenfels's arguments  
28 liberally, we cannot discern any proper assignment of error by  
the bankruptcy court. Ms. Brandenfels cites Caneva and a number  
of other Ninth Circuit cases for the general test to determine

(continued...)

1 As the Ninth Circuit has stated, "we cannot 'manufacture  
2 arguments for an appellant' and therefore we will not consider  
3 any claims that were not actually argued in appellant's opening  
4 brief. Rather, we 'review only issues which are argued  
5 specifically and distinctly in a party's opening brief.'" Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir.  
6 2003) (quoting Greenwood v. Fed. Aviation Admin., 28 F.3d 971,  
7 977 (9th Cir. 1994)). "Significantly, '[a] bare assertion of an  
8 issue does not preserve a claim.'" Id. (quoting D.A.R.E. Am. v.  
9 Rolling Stone Magazine, 270 F.3d 793, 793 (9th Cir. 2001)).  
10 Ms. Brandenfels identifies the bankruptcy court's application of  
11 an "erroneous legal standard to the adequacy of the defendant's  
12 records" as one of her points of error, yet fails to  
13 "specifically and distinctly" argue that point anywhere in her  
14 opening brief. See id.; Rule 8014(a)(8) (2014) (an appellant's  
15 brief must include "the argument, which must contain the  
16 appellant's contentions and the reasons for them, with citations  
17 to the authorities and parts of the record on which the appellant  
18 relies").

19  
20 Moreover, in response to the Panel's questions at oral  
21 argument, Ms. Brandenfels's counsel said that he was not  
22 challenging the bankruptcy court's articulation of the legal  
23 standard, but rather was arguing that the bankruptcy court erred  
24 in its application of the relevant standard to the facts.

25  
26 <sup>12</sup> (...continued)  
27 the adequacy of records, but does not identify any way in which  
28 the bankruptcy court applied an erroneous standard, especially  
given that the court also relied primarily on Caneva.

