"BUT JUDGE, THE DOG ATE MY BANK STATEMENTS WHILE I WAS BETTING ON THE PONIES AT THE TRACK": TOWARDS JUDICIAL CONSISTENCY IN THE DEBTOR'S JUDICIAL RECORDKEEPING REQUIREMENTS IN THE UNPREDICTABLE WORLD OF CHAPTER 7 BANKRUPTCY

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ABSTRACT

The debtor seeking a discharge in a chapter 7 proceeding must fulfill the condition precedent of preserving sufficient financial records from which the trustee and creditors can examine his recent financial history and the monies that have passed through his hands. Section 727(a)(3) of the Bankruptcy Code provides an exception to discharge based upon debtor's failure to produce adequate financial records. Admittedly, the sufficiency of records is within the bankruptcy judge's discretion. However, a survey of cases adjudicating § 727(a)(3) objections to discharge reflects wildly inconsistent decisions concerning the adequacy of the debtor's financial production. This Article examines the conflicting decisions and offers proposals to create greater consistency in determinations as to the sufficiency of the debtor's record production.

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INTRODUCTION

The ultimate goal of a chapter 7 bankruptcy is to provide the debtor a "fresh start" by discharging his or her previous debts.[1] Section 727(a) of the United States Bankruptcy Code (the "Code") enumerates twelve grounds for denial of the debtor's discharge, primarily based upon debtor's fraudulent conduct prior to, or in connection with, the bankruptcy proceeding.[2] Section 727(a)(3) of the Code provides grounds for denial of the chapter 7 debtor's discharge based upon a failure to make a financial disclosure in the bankruptcy proceeding that would allow the trustee and creditors to conduct a meaningful examination of his or her financial history and business transactions.[3]

Section 727(a)(3) is distinct from the various other exceptions to discharge under § 727, as § 727(a)(3) does not require proof of a debtor's intent to defraud or conceal financial documentation from the trustee and creditors.[4] Specifically, § 727(a)(3) states:

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[1] *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (citing Grogan v. Garner, 498 U.S. 279, 286–87 (1991) ("[I]n the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'")).

[2] *See* 11 U.S.C. § 727(a) (2012); *see also In re* Kandel, No. 11-62597, 2015 WL 1207014, at *5 (Bankr. N.D. Ohio Mar. 13, 2015); *In re* Michael, 433 B.R. 214, 220 (Bankr. N.D. Ohio 2010) (discussing the interrelationship between the concept of a fresh start and § 727's exceptions to discharge).

[3] *See* 11 U.S.C. § 727(a)(3); *see also* Peterson v. Scott (*In re* Scott), 172 F.3d 959, 969 (7th Cir. 1999) ("The purpose of § 727(a)(3) is 'to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs.'" (quoting Cox v. Lansdowne (*In re* Underhill), 82 F.2d 258, 260 (2d Cir. 1936))); Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992) (noting "[t]he purpose of section 727(a)(3) is to give creditors and the bankruptcy court complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge"); *In re* Underhill, 82 F.2d at 259–60 (elaborating on the purpose of § 727(a)(3)).

[4] *See In re* Juzwiak, 89 F.3d 424, 430 (7th Cir. 1996) ("[C]reditors do not need to prove that the debtor intended to defraud them in order to demonstrate a § 727(a)(3) violation."); *see also In re* Kinard, 518 B.R. 290, 303 (Bankr. E.D. Pa. 2014) (noting that § 727(a)(3) "does not require any showing of intent") (citing *In re* Adalian, 474 B.R. 150, 164 (Bankr. M.D. Pa. 2012) *and In re* Spitko, 357 B.R. 272, 305 (Bankr. E.D. Pa. 2006)). While a prima facie case under § 727(a)(3) does not require proof of intent in failing to keep or preserve

> (a) The court shall grant the debtor a discharge, unless—
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> . . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.][5]

Section 727(a)(3) notably provides that if a prima facie case is established by plaintiff, reflecting debtor's failure to maintain the required financial documentation as a prerequisite to discharge, the debtor may nevertheless secure a discharge by establishing the affirmative defense that such failure was justified under all of the circumstances.[6] Given the unique factual circumstances of each chapter 7 proceeding in terms of complexity of a debtor's financial dealings, debtor's business sophistication, and his educational and vocational background, bankruptcy courts are understandably afforded great discretion in determining whether the debtor's financial record production is sufficient to merit a discharge and whether there is justification for a failure to preserve financial records.[7] Nevertheless, this wide discretion afforded to the bankruptcy courts in these ultimate determinations has resulted in divergent and conflicting conclusions on what constitutes a sufficient

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records, the section does provide alternative grounds for denial of discharge based upon debtor's falsification, concealment, or mutilation of financial records. *See infra* note 5 and accompanying text of the statute.

[5] 11 U.S.C. § 727(a)(3).

[6] *See, e.g.*, D.A.N. Joint Venture v. Cacioli (*In re* Cacioli), 463 F.3d 229, 238 (2d Cir. 2006) (holding that debtor with no recordkeeping experience or training was justified in relying on partner who had significant training and experience in maintaining business records, given that there were no warning signs of inadequate recordkeeping). *But see In re* Keefe, 380 B.R. 116, 121 (Bankr. D. Mass. 2007) (deeming debtor's destruction of records, as a reaction to his depression and anxiety over the failure of the business, to be an insufficient justification).

[7] *See* Goff v. Russell Co. (*In re* Goff), 495 F.2d 199, 202 (5th Cir. 1974) ("Trial courts have wide discretion in determining whether books or records are adequate under the terms of the statute and the facts of each case."); *see also* Buckeye Ret. Co. v. Laux, No. 4:07-CV-181, 2008 WL 828060, at *10 (E.D. Tex.), *aff'd,* 303 F. App'x 181, 2008 WL 5210719, at *1 (5th Cir. 2008); *In re* Kandel, 2015 WL 1207014, at *10–11 (observing the discretion afforded to bankruptcy judges in § 727(a)(3) determinations).

financial disclosure by the debtor,[8] and what should be deemed justification for a failure to produce under all of the circumstances.[9]

This Article will focus upon three primary areas of disagreement among bankruptcy courts regarding specific categories of debtor's financial documentation in the chapter 7 proceeding. Initially, a review will be undertaken of a divergence on whether the debtor must customarily produce bank records and credit card statements.[10] Next, the Article will review judicial divisions concerning whether, and to what extent, the individual debtor filing a chapter 7 bankruptcy is required to preserve financial documentation concerning the activities of a closely held corporation as a portion of the required written record production.[11] Finally, a survey will be made of divergent judicial rulings on "justification" for failure to maintain sufficient financial documentation.[12] This third review of disparate judicial decisions on debtor's justification under § 727(a)(3) will primarily focus upon cases wherein the debtor contends she has been a profligate gambler or a drug addict, and produces little or no financial documentation reflecting her recent financial history or corroborating a significant loss of assets.[13]

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[8] *Compare In re* Senese, 245 B.R. 565, 576 (Bankr. N.D. Ill. 2000), *In re* Sharp, 244 B.R. 889, 895 (Bankr. E.D. Mich. 2000), *In re* Hughes, 354 B.R. 801, 810–11 (Bankr. N.D. Tex. 2006), *aff'd*, 309 Fed. App'x 841, 2009 WL 290482, at *1 (5th Cir. 2009), *and In re* Terrell, No. 4:01-CV-0399-E, 2002 WL 22075, at *5 (N.D. Tex.), *aff'd*, 46 Fed. App'x 731, 2002 WL 1973217, at *1–2 (5th Cir. 2002) (exemplifying cases wherein discharge was denied based upon each debtor's failure to produce meaningful bank records and credit card statements), *with* Cadle Co. v. Duncan (*In re* Duncan), 562 F.3d 688, 697–98 (5th Cir. 2009) (granting discharge despite debtor's "failure to provide payee information from cancelled checks, credit card statements, and deposit slips"), *and In re* Sadler, 282 B.R. 254, 263 (Bankr. M.D. Fla. 2002) (holding that debtors were entitled to discharge even though they failed to produce cancelled checks for two checking accounts). *See generally* James L. Buchwalter, *What Constitutes Concealment, Destruction, Mutilation, Falsification, or Failure to Preserve Recorded Information from Which Debtor's Financial Condition or Business Transactions Might Be Ascertained for Purposes of Denying Discharge in Bankruptcy Under 11 U.S.C.A. § 727(a)(3), or Predecessor Statutes*, 31 A.L.R. Fed.2d 29 (2008 & 2017 Supp.) [hereinafter Buchwalter, *What Constitutes a Failure to Preserve*] (providing an exhaustive summary and itemization of the multitude of conflicting decisions on what is deemed a sufficient financial production by debtor as a necessary precursor to the granting of a discharge).

[9] *Compare* Dolin v. N. Petrochemical Co. (*In re* Dolin), 799 F.2d 251, 253 n.1 (6th Cir. 1986), *and In re* Bressler, 321 B.R. 412, 418–20 (Bankr. E.D. Mich. 2005) (finding failure to preserve and produce sufficient records attributed to narcotics abuse and compulsive gambling as insufficient justification), *with In re* Sauntry, 390 B.R. 848, 855–57 (Bankr. E.D. Tex. 2008), *and In re* Mitchell, 74 B.R. 457, 461–62, 462 n.3 (Bankr. D.N.H. 1987) (finding compulsive gambling as sufficient justification for debtor's failure to produce sufficient financial records). *See generally* James L. Buchwalter, *What Constitutes Sufficient Justification for Failing to Keep or Preserve Recorded Information Within Meaning of 11 U.S.C. § 727(a)(3) or Predecessor Statutes*, 32 A.L.R. Fed.2d 1 (2008 & 2017 Supp.) [hereinafter Buchwalter, *What Constitutes Justification*]. This A.L.R. article provides an exhaustive compendium of conflicting decisions on a myriad of justifications offered by debtors for failure to produce sufficient financial documentation, including justifications for health problems, a debtor's belief that record preservation was not required, a debtor's lack of sophistication, and the possession of records by third parties.

[10] *See infra* notes 41–80 and accompanying text.

[11] *See infra* notes 81–91 and accompanying text.

[12] *See infra* notes 92–116 and accompanying text.

[13] *See infra* notes 98–116 and accompanying text.

I. A BRIEF HISTORY OF THE DEBTOR'S DUTY TO MAINTAIN SUFFICIENT FINANCIAL RECORDS

Over time, amendments to the bankruptcy laws have resulted in § 727(a)(3)'s imposition of an obligation on the debtor to affirmatively maintain sufficient financial records to merit a discharge.[14] A series of successive bankruptcy acts and codes, and amendments thereto, ultimately clarified the debtor's affirmative obligation to preserve financial records as reflected in § 727(a)(3).[15] For example, under the 1800 Act, a discharge was denied when the debtor "refused to disclose fictitious or false debts made with the intent to defraud creditors."[16] Then, between 1811 and 1926, new enactments to the bankruptcy laws fashioned an exception to discharge based upon a debtor's "intent" to conceal into a more pragmatic approach that discarded intent as a necessary element of the recordkeeping exception to discharge.[17] Ultimately, the long series of amendments and implementation of revised bankruptcy acts imposed an affirmative duty on the debtor to preserve financial records with a corresponding defense of "reasonable justification" for the debtor's failure to preserve such records.[18] This justification defense was articulated in a 1938 amendment, and with it, the basic text of § 727(a)(3) was essentially created.[19]

Parenthetically, a transformation of the bankruptcy laws from the mid-nineteenth century through today reflects a movement from an unqualified, strict denial of discharge based upon loss or destruction of assets through gambling, to the present, more forgiving provision of § 727(a)(5) of the Code.[20] Specifically, § 727(a)(5), denying a discharge based upon the debtor's failure to adequately explain a loss or depletion of assets, has been interpreted by some bankruptcy courts to afford a discharge to the debtor who can produce only minimal corroborating documentation, or alternatively, only oral testimony supporting a depletion of assets based upon the debtor's gambling losses.[21]

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[14] *See* David S. Kennedy & James E. Bailey, *Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey*, 11 BANKR. DEV. J. 49, 56–58 (1994-1995) (tracing the evolution of § 727(a)(3) from the bankruptcy laws of the 1800s through its most current form).

[15] *See id.* (discussing the evolution and subsequent clarification of a debtor's obligation to preserve financial records under § 727(a)(3)).

[16] *See id.* at 56.

[17] *See id.* at 56–58 (discussing the history and development of the element of intent under § 727(a)(3)).

[18] *See id.* at 58 ("The current provisions of section 727(a)(3) represent an amalgamation of all preceding rules . . . .").

[19] *See id.* at 58, 70 (citing Act of 1938, ch. 575, § 14(b)(2), 52 Stat. 850 (superseded 1978)).

[20] *See* Kennedy & Bailey, *supra* note 14, at 53–55. Sections 727(a)(3) & (a)(5) bear a close relationship that will be examined in greater detail in the course of this Article. *See infra* notes 92–116 and accompanying text.

[21] *See infra* notes 110–13 and cases therein cited.

II. THE PURPOSE AND GOVERNING PRINCIPLES OF CONSTRUCTION OF § 727(A)(3)

The purpose underlying the § 727(a)(3) denial of discharge was well summarized in the Seventh Circuit Court of Appeals landmark decision in *Juzwiak*:

> Section 727(a)(3) requires as a precondition to discharge that debtors produce records which provide creditors "with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present." The provision ensures that trustees and creditors will receive sufficient information to enable them to "trace the debtor's financial history; to ascertain the debtor's financial condition; and to reconstruct the debtor's financial transactions." Records need not be kept in any special manner, nor is there any rigid standard of perfection in record-keeping mandated by § 727(a)(3). On the other hand, courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs.[22]

Section 727(a)(3), as a basis for denial of discharge, is construed strictly against the party prosecuting the denial of discharge and liberally in favor of the debtor.[23] Specific judicial descriptions vary concerning the actual information that should be available to the trustee and creditors from the debtor's financial documentation. Courts have generally defined the financial production requirement in terms of a written record sufficient for the trustee and creditors to ascertain what monies have passed though the debtor's hands and examine her business transactions for a reasonable period preceding bankruptcy.[24] This standard has been further clarified as requiring documentation providing "accurate signposts on the trail showing what property passed through the debtor's hands during the period prior to his bankruptcy."[25] Other courts have described the requisite production as having

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[22] *In re* Juzwiak, 89 F.3d 424, 427–28 (7th Cir. 1996) (citations omitted); *see also* Peterson v. Scott (*In re* Scott), 172 F.3d 959, 969 (7th Cir. 1999); *In re* Jahrling, 510 B.R. 820, 831 (Bankr. N.D. Ill. 2014) (providing similar articulations of the underlying purpose of § 727(a)(3)).

[23] *See In re* Juzwiak 429 F.3d at 427; *In re* Moore, 559 B.R. 243, 254 (Bankr. M.D. Fla. 2016); *In re* Lorber, No. CV-15-04852 MMM, 8–9 (C.D. Cal. Oct. 19, 2015); *In re* Pimpinella, 133 B.R. 694, 697 (Bankr. E.D.N.Y. 1991); *In re* Frommann, 153 B.R. 113, 116 (Bankr. E.D.N.Y. 1993); *In re* Rusnak, 110 B.R. 771, 776 (Bankr. W.D. Pa. 1990) (recognizing Congressional intent to provide debtors with a fresh start and therefore, holding that § 727(a)(3) must be strictly construed against the objector and in favor of the debtor).

[24] *See In re* Weldon, 184 B.R. 710, 714 (Bankr. D.S.C. 1995) (citing *In re* Esposito, 44 B.R. 817, 826 (Bankr. S.D.N.Y. 1984)) ("The purpose of section 727(a)(3) is to insure [sic] that the Trustee and creditors are supplied with dependable information on which they can rely in tracing a debtor's financial history.").

[25] *Id.* (quoting *In re* Dreyer, 127 B.R. 587, 594 (Bankr. N.D. Tex. 1991)).

"enough information on hand to effectively trace, evaluate, and reconstruct the financial history and present condition of the debtor's bankruptcy estate."[26]

The debtor's recordkeeping system need not be impeccable.[27] However, the debtor may not fulfill the financial documentation requirement by simply bringing tow sacks of random financial records to the court, and thereby imposing on the trustee and creditors the burden of assembling the documents and reconstructing the debtor's financial history.[28] Neither the trustee nor the creditors are required to rely upon the debtor's oral recitation of his financial history as a substitute for production of the required financial documentation.[29]

Given the myriad financial scenarios presented by chapter 7 proceedings in terms of the complexity and breadth of debtors' past financial histories, bankruptcy courts frequently apply a multifactor test in determining the sufficiency of the production:

> The "adequacy" of a debtor's record-keeping is measured by utilizing eight non-exhaustive factors: (1) whether the debtor was engaged in business, and if so, the complexity and volume of the business; (2) the dollar amount of the debtor's obligations; (3) whether the debtor's failure to keep or preserve books and records was due to the debtor's fault; (4) the debtor's education, business experience, and sophistication; (5) the customary business practices, for record keeping in the debtor's type of business; (6) the degree of accuracy disclosed by the debtor's existing books and records; (7) the extent of egregious conduct on the debtor's part; and (8) the debtor's courtroom demeanor.[30]

Judicial disagreements have arisen concerning what elements are included in plaintiff's prima facie case under § 727(a)(3) with regard to the inadequacy of a debtor's financial record production. Numerous courts conclude that the party prosecuting such a claim for denial of discharge must initially demonstrate that the inadequacy of the document production renders it "impossible" to ascertain the

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[26] *In re* Brenes, 261 B.R. 322, 329 (Bankr. D. Conn. 2001) (citing *In re* Blonder, 258 B.R. 534, 538 (Bankr. D. Conn. 2000)); *see also In re* Sethi, 250 B.R. 831, 837 (Bankr. E.D.N.Y. 2000); *In re* Frommann, 153 B.R. at 116 (quoting *In re* Goldstein, 123 B.R. 514, 522 (E.D. Pa. 1991)); *In re* Pimpinella, 133 B.R. at 697 (all explaining that the underlying purpose of § 727(a)(3) is to ensure that the trustee and creditors receive sufficient information from the debtor).

[27] *See In re* Buescher, 491 B.R. 419, 437 (Bankr. E.D. Tex. 2013), *aff'd*, 783 F.3d 302, 309 (5th Cir. 2015) (citing *In re* Wells, 426 B.R. 579, 594 (Bankr. N.D. Tex. 2006)).

[28] *See* Hughes v. Lieberman (*In re* Hughes), 873 F.2d 262, 264 (11th Cir. 1989); *see also In re* Liu, 288 B.R. 155, 161–62, 162 n.2 (Bankr. N.D. Ga. 2002).

[29] *See In re* Hughes, 353 B.R. 486, 500 (Bankr. N.D. Tex. 2006), *aff'd.*, 309 Fed. App'x 841, 2009 WL 290482, at *1 (5th Cir. 2009); *In re* Fink, 351 B.R. 511, 522 (Bankr. N. D. Ill. 2006); *In re* Self, 325 B.R. 224, 241 (Bankr. N.D. Ill. 2005).

[30] *In re* Mihalatos, 527 B.R. 55, 65–66 (Bankr. E.D.N.Y. 2015) (citations omitted); *see also In re* Adler, 494 B.R. 43, 67 (Bankr. E.D.N.Y. 2013); D.A.N. Joint Venture v. Cacioli (*In re* Cacioli), 463 F.3d 229, 235, 235 n.8 (2d Cir. 2006).

debtor's financial condition and material business transactions.[31] Other courts conclude the prosecuting party merely needs to establish that the debtor's failure to maintain sufficient financial documentation renders it "unduly burdensome" to ascertain the debtor's financial history, or that the missing records "might allow a more complete view into the debtor's financial condition."[32] Moreover, the prosecuting party must offer evidence to establish how the presence of the missing records would have permitted a more complete picture of the debtor's financial condition.[33]

Once a prima facie case has been established, the court continues to exercise wide discretion in determining the sufficiency of the debtor's evidence to support the defense of "justification" for the failure to preserve the required financial records.[34] The term "justification" in § 727(a)(3) encompasses all manner of debtor explanations ranging from whether the reasonable individual would have discarded particular documents in the ordinary course of life,[35] to the destruction of documentation as a result of natural disaster or other occurrences beyond the debtor's control.[36] In their determinations as to whether the debtor has met her burden of proof in establishing the defense of justification, bankruptcy courts frequently employ multifactor tests closely paralleling the factors tests used in the initial determination of the sufficiency of the debtor's record production:

> Determination of justification for inadequate documentation would include consideration of the following: (1) debtor's education; (2) debtor's sophistication; (3) volume of debtor's business; (4) complexity of debtor's business; (5) amount of credit extended to

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[31] *See In re* Maier, 498 B.R. 340, 347 (Bankr. M.D. Fla. 2013) (citing Meridian Bank v. Alten, 958 F.2d. 1226, 1232 (3d Cir. 1992)) ("[A] creditor objecting to the discharge must show (1) the debtor failed to maintain and preserve adequate records, and (2) such failure makes it impossible to ascertain the debtor's financial condition and material business transactions."); *In re* Seligman, 478 B.R. 497, 504 (Bankr. N.D. Ga. 2012) (citing *In re* Moore, 375 B.R. 696, 702 (Bankr. S.D. Fla. 2007)) ("To establish a prima facie action under § 727(a)(3), a plaintiff must show by a preponderance of the evidence that: (1) the debtor failed to keep or preserve adequate records, and; (2) that such failure makes it impossible to ascertain the debtor's financial condition.").

[32] *See In re* Kandel, No. 11-62597, 2015 WL 1207014, at *6 (Bankr. N.D. Ohio Mar. 13, 2015) (citing *In re* Devaul, 318 B.R. 824, 833 (Bankr. N.D. Ohio 2004)) (stating the standard as demonstrating how missing records "might allow a more complete view into the debtor's financial condition"); *In re* Wolfson, 139 B.R. 279, 286 (Bankr. S.D.N.Y. 1992) (upholding the "unduly burdensome" standard).

[33] *See In re* Neff, No. 14-33442, 2015 WL 9488240, at *2 (Bankr. N.D. Ohio Dec. 28, 2015) (citing *In re* Devaul, 318 B.R. at 833) (stating that the objecting party "must show how the missing recorded information 'might' enable [the debtor's] actual financial condition or business transactions to be ascertained under the circumstances of the case").

[34] 11 U.S.C. § 727(a)(3) (2012) (setting forth the "justification" standard).

[35] *See, e.g.*, Gullickson v. Brown (*In re* Brown), 108 F.3d 1290, 1295 (10th Cir. 1997) (deeming debtor's failure to keep records of purchase and sale of antique cars to be justifiable, as it was merely debtor's hobby). *See generally* Buchwalter, *What Constitutes Justification*, *supra* note 9.

[36] *See In re* Kandel, 2015 WL 1207014, at *11 (addressing a justification defense urged on the basis of flooding and roof collapse and finding that there was insufficient evidence produced to support the defense); *In re* Young, 346 B.R. 597, 613–14 (Bankr. E.D.N.Y. 2006) (citing *In re* Nemes, 323 B.R. 316, 327 (Bankr. E.D.N.Y. 2005)) (finding that a victim of domestic violence was justified in not preserving adequate financial records).

> debtor in his business; (6) any other circumstances that should be noted in the interest of justice.[37]

The bankruptcy court's ultimate factual findings in a § 727(a)(3) objection proceeding, concerning the sufficiency of financial documentation and the debtor's justification for any inadequate production, are subject to appellate review under a "clearly erroneous" standard.[38] Thus, the bankruptcy court's judgment, either granting or denying the discharge, will rarely be reversed given the overwhelming deference afforded the bankruptcy judge.[39]

III. A REVIEW OF THREE AREAS OF JUDICIAL DIVISION ON CONSTRUCTION AND APPLICATION OF § 727(A)(3)

It is inevitable that judicial divisions will arise as to the sufficiency of the debtor's financial documentation and evidence sufficient to establish justification. However, the three selected areas of judicial division herein reviewed reflect fundamental, philosophical disagreements concerning the essence of the debtor's recordkeeping requirement and the nature of the justification defense.[40]

A. Debtor's Duty to Produce Credit Card Statements and Bank Records

Initially noted is the great disparity in judicial interpretation of the commonly employed phrases defining the required debtor's financial documentation such as, "from which the debtor's financial condition or business transactions might be

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[37] *In re* Boyajian, 486 B.R. 306, 312 (Bankr. D.N.J. 2013) (citing Meridian Bank v. Alten, 958 F.2d. 1226, 1231 (3d Cir. 1992)); *see also* Home Indem. Co. v. Oesterle (*In re* Oesterle), 651 F.2d 401, 404 (5th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *In re* Wilson, 33 B.R. 689, 692 (Bankr. M.D. Ga. 1983) (all cases identifying a series of factors to be considered in analyzing the sufficiency of the debtor's justification).

[38] *See, e.g.*, Cadle Co. v. Duncan (*In re* Duncan), 562 F.3d 688, 694 (5th Cir. 2009). Critically, the bankruptcy court's determinations as to the adequacy of the records and the sufficiency of the debtor's justification are deemed factual findings, as opposed to conclusions of law, and thus, are not subject to an appellate de novo review. *See* Robertson v. Dennis (*In re* Dennis), 330 F.3d 696, 701–03 (5th Cir. 2003).

[39] One court has described the mountain to be climbed by an appellant in seeking a reversal of a court's findings of fact under the clearly erroneous standard in the following terms: "On matters of credibility . . . we will rarely overturn the factual findings of a district court." U.S. v. Attson, 900 F.2d 1427, 1433 (9th Cir. 1990), *cert. denied*, 498 U.S. 961 (1990). Bankruptcy courts, within the context of § 727(a)(3) proceedings, can readily create a record virtually ensuring the judge's factual findings will not be overturned with inclusion of succinct phrases concerning the credibility of primary witnesses such as "her testimony was not particularly credible or helpful" or "including the credible testimony." *See, e.g., In re* Sauntry, 390 B.R. 848, 851, 854–56 (Bankr. E.D. Tex. 2008).

[40] While chapter 7 cases will always be characterized by some material facts unique to the particular denial of discharge proceeding, the distinctiveness of factual settings cannot account for the disparate judicial opinions on what is deemed a financial record production sufficient to merit a discharge or the adequacy of the debtor's justification for not preserving financial records. *See generally* Buchwalter, *What Constitutes a Failure to Preserve, supra* note 8; Buchwalter, *What Constitutes Justification, supra* note 9 (providing a comprehensive compendium of the myriad, and frequently conflicting decisions on the adequacy of the financial production and the sufficiency of the justification for failing to preserve financial records).

ascertained"[41] or "complete and accurate information showing what property has passed through the deserving debtor's hands prior to his bankruptcy."[42] Courts have described the debtor's income tax returns as the "quintessential documents" to be produced by the debtor in a personal bankruptcy.[43] However, numerous other courts have readily concluded that the debtor's income tax statements and any accompanying W-2's, standing alone, are frequently insufficient to fulfill the debtor's requisite financial production.[44] Specifically, these courts conclude that tax statements and W-2's are deficient in failing to provide itemization of the debtor's particular business transactions.[45] For example, the court in *Juzwiak* described the insufficiency of the debtor's financial records in that the tax returns, even with accompanying bank records, did not itemize the source of funds deposited nor specify the names of the recipients who had received payment from the debtor.[46]

Juzwiak's identification of the need for recordkeeping that provides some itemization of particular transactions is corroborated by decisions in which the debtor, who has operated on a purely cash basis with no preserved financial documentation other than income tax statements, is denied discharge under § 727(a)(3).[47] The sufficiency of financial documentation fulfilling this "itemization of transactions" approach, that requires more than generalized yearly statements of income and deductions, has spawned a plethora of judicial pronouncements that cannot be

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[41] *See, e.g., In re* Devani, 535 B.R. 26, 32 (Bankr. E.D.N.Y. 2015) (citation omitted).

[42] *In re* Esposito, 44 B.R. 817, 826 (Bankr. S.D.N.Y. 1984) (defining the nature of required financial record disclosure); *see also supra* notes 24–26 and accompanying text for various judicial descriptions of the general nature of the financial documentation to be produced by the debtor as a condition precedent to securing a discharge.

[43] *See* Chemoil, Inc. v. Pfeifle (*In re* Pfeifle), No. 05-20335, 154 Fed. App'x 432, 2005 WL 3091249, at *3 (5th Cir. 2005) (quoting Robertson v. Dennis (*In re* Dennis), 330 F.3d 696, 703 (5th Cir. 2003)).

[44] *See In re* Spitko, 357 B.R. 272, 310 (Bankr. E.D. Pa. 2006) (citing *In re* Pfeifle, 2005 WL 3091249, at *3, and then quoting *In re* Dennis, 330 F.3d at 703) ("Although some courts suggest that the failure to file income tax returns, without cause, is alone sufficient to deny a debtor discharge . . . Congress most likely intended that such failure is a factor under section 727(a)(3), but not determinative.").

[45] *See In re* Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996). The court in *Juzwiak* summarized the position of many courts concluding that tax returns, even when coupled with other financial documentation, simply may be an insufficient financial production: "Many courts faced with checking account records, canceled checks, deposit slips, bank statements, and tax returns as the sole documentation of a debtor's financial history and condition have determined that such records are inadequate under § 727(a)(3)." *See id.* (describing cases in which bankruptcy records produced were random, unorganized or failed to identify the source of debtor's deposited funds or his payees).

[46] *See id.*

[47] *See, e.g.*, Meridian Bank v. Alten, 958 F.2d 1226, 1228–29 (3d Cir. 1992) (affirming the district court's decision to vacate the debtor's discharge based on the debtor's failure to keep or preserve any financial records, both business and personal); *see also In re* Ibarra, No. 08-27257, 2010 WL 1388996, at *2 (Bankr. D. Utah Apr. 7, 2010) ("Because . . . Ibarra failed to offer any evidence that justified his failure to keep or preserve any recorded information, including books, documents, records and papers, from which . . . Ibarra's financial condition or business transactions might be ascertained, the Court finds that . . . Ibarra's Chapter 7 discharge must be denied under § 727(a)(3)."); *In re* Hughes, 354 B.R. 801, 810–11 (Bankr. N.D. Tex. 2006), *aff'd*, 309 Fed. App'x 841, 2009 WL 290482, at *1 (5th Cir. 2009) (reinforcing the requirement for debtors to keep some records of their financial conditions).

harmonized merely by reference to the complexity of the debtor's business transactions.[48]

While *Juzwiak* admittedly concerned a more financially complex bankruptcy, other courts have adhered to the itemization principle of *Juzwiak* even in simple consumer bankruptcy cases unadorned by a debtor's operation of a complex business.[49] The conclusion that the simplicity of the bankrupt's financial history does not necessarily justify mere production of income tax statements is illustrated in the 2014 decision of *Agai v. Antoniou*.[50] In *Antoniou*, the debtor was a self-described "unsophisticated business person with limited formal education and computer skills."[51] While at one time he had owned one-third of a construction company, the debtor's recent financial history was not marked by the ownership of a business or his entry into complex financial transactions.[52] Nevertheless, the debtor's production of financial documentation was deemed insufficient to merit a discharge:

> Only in response to Plaintiffs' discovery of checks written by Centex to the Debtor's wife and the instant summary judgment motion did the Debtor eventually come forward with tax returns for 2008, 2009, 2011, 2012, and 2013; W-2 statements for 2008 through 2013; and banking records for 2008 through 2014.
>
> However, these records are insufficient to ascertain the Debtor's true financial condition. Tax returns and W-2 statements by themselves "are wholly insufficient for . . . a creditor to ascertain the debtor's financial condition." These records do not show the disposition of the Debtor's assets. The bank statements that the Debtor produced are also insufficient. . . . These records show only the amounts deposited and withdrawn, without providing any information about the source or use of the funds. . . . It is impossible to get a complete picture of the Debtor's financial condition without this information.[53]

Similarly, numerous courts have concluded that along with banking records, the debtor's production of credit card records should customarily be required as a part of

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[48] *See infra* notes 57–80 and accompanying text.

[49] *See infra* note 60 and cases therein cited.

[50] *See In re* Antoniou, 515 B.R. 9, 21 (Bankr. E.D.N.Y. 2014) (finding tax returns and W-2 statements alone wholly insufficient for a creditor to ascertain a debtor's financial condition).

[51] *Id.*

[52] *See id.* at 13–14. Debtor, Antoniou, had, for an extended period preceding the bankruptcy filing, served only as an employee of another company and thus received W-2 statements, in his wife's name, reflecting his income. *Id.* at 14–15.

[53] *Id.* at 21 (citations omitted). This Article does not advocate that a chapter 7 debtor should necessarily be required to produce every deposit slip and cancelled check for two years prior to the bankruptcy. However, the bank statements or other records should reflect the specific source of deposits and identify to whom debtor has made payments. Frequently, the sources of funds received by the debtor can be identified without production of each deposit slip. For example, if the debtor exclusively receives income from his employment, such income can be corroborated by W-2 statements.

the record production.[54] Even in a simple consumer bankruptcy, the oft-repeated justification for requiring credit card statements is that "[w]hile credit card receipts or monthly statements may be simple records, they 'form the core' of what [is necessary] to ascertain [the Debtor's] financial condition, primarily his use of cash assets."[55] Thus, one reasonable interpretation of the debtor's minimal required financial production is that creditors and trustees must customarily have records that independently substantiate and identify the debtor's particularized financial transactions as opposed to a mere generalized overview of profits and losses.[56]

In contrast to the foregoing line of decisions, which reflect a general requirement for production of bank records and credit card statements, there are a myriad of cases that reject such a minimal standard of production in favor of an ad hoc approach with respect to a full production of the banking records and credit card statements for a reasonable period preceding the bankruptcy filing.[57] In an even farther departure from the debtor's financial recordkeeping requirement are those courts that have concluded a discharge is merited, even if the debtor simply chose to maintain no financial

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[54] *See, e.g., In re* Mahfouz, 529 B.R. 431, 452–53 (Bankr. D. Mass. 2015) (finding "[t]he Debtors' failure to keep and/or preserve meaningful records was not justified or reasonable under all the circumstances of this case"); *In re* Morgan, No. 09-17172, 2011 BL 64264, at *5, 6–7 (Bankr. E.D. Tenn. Mar. 11, 2011) (denying defendant's discharge based on failure to maintain adequate records); *In re* Yanni, 354 B.R. 708, 712–13 (Bankr. E.D. Pa. 2006) (discussing the debtor's credit card records); *In re* Dubovoy, 377 B.R. 705, 713 (Bankr. M.D. Fla. 2006) (finding the debtors failed to account for funds and were unable to substantiate major and minor purchases); *In re* Hobbs, 333 B.R. 751, 757 (Bankr. N.D. Tex. 2005) (determining "Defendant retained and produced such meager information that she is not entitled to a discharge"); *In re* Nemes, 323 B.R. 316, 325, 330 (Bankr. E.D.N.Y. 2005) (holding "that the Debtor did not maintain adequate documents and information to permit the Trustee to ascertain the Debtor's financial condition or business transactions"); *In re* Craig, 252 B.R. 822, 828 (Bankr. S.D. Fla. 2000) (finding "the Debtor failed to produce any credit card statements or credit card or loan applications requested"); *In re* Senese, 245 B.R. 565, 576–77 (Bankr. N.D. Ill. 2000) (denying discharge due to debtor's failure to maintain records of financial transactions, including credit card statements).

[55] *In re* Nemes, 316 B.R. at 325, 330 (citing *In re* Terrell, No. 4:01-CV-0399-E, 2002 WL 22075, at *5 (N.D. Tex.), *aff'd*, 46 Fed. App'x 731, 2002 WL 1973217, at *1–2 (5th Cir. 2002)) (denying debtor discharge based on failure to maintain adequate records); *In re* Senese, 245 B.R. at 576 ("In retaining only those nominal documents . . . Debtor made it impossible for his creditors to determine the use of the Debtor's cash assets through his bank accounts and credit card transactions . . . .").

[56] Though production of bank statements and credit card statements should customarily be made, there will nevertheless be circumstances wherein the discharge should be granted, despite the failure to produce such documents. For example, the debtor's failure to produce a complete set of bank records or credit card statements may not prevent the creditor from conducting a meaningful review of his or her financial history if such omissions are preempted by the production of a "massive amount" of other financial documentation that permit examination of the debtor's financial history and business transactions. *See, e.g., In re* Guenther, 333 B.R. 759, 766 (Bankr. N.D. Tex. 2005) ("[N]o justification is required as to why the financial records were withheld, and the Court will not deny the Debtors' discharge under § 727(a)(3)."). However, several cases eliminate any requirement for the debtor's production of financial records that would reflect, to any extent, the debtor's particularized sources of funds or any itemization of disposition of the debtor's funds. *See infra* note 58 and cases therein cited.

[57] *See In re* Hobbs, 333 B.R. at 758 ("Not every time will the failure to maintain credit card and bank records bar a discharge. . . . However, a Debtor in a bankruptcy case has some responsibility to make some efforts to retain minimal records and produce them to the Trustee and requesting creditors.").

records.[58] These courts, in concluding that the debtor's failure to preserve financial records should not bar a discharge, frequently resort to a characterization of the case as being a "simple consumer bankruptcy" wherein the debtor did not operate a business.[59] While § 727(a)(3)'s justification defense recognizes a failure of recordkeeping as excusable when attributable to extenuating circumstances, cases that simply do not require the production of any financial records, defy the maxim that debtor's financial record production is a condition precedent to discharge.[60] Such decisions are particularly indefensible given that the failure to preserve records is the product of the debtor's conscious choice. Thus, even in the simple consumer bankruptcy case, some courts urge that a guiding principle should be that the debtor's recordkeeping requirement be imposed for roughly a two-year period prior to the bankruptcy filing.[61]

In other decisions, characterized by a debtor's minimal record production, discharges are granted despite the absence of a complete set of bank records or credit card statements based exclusively upon the particularized facts of the case.[62] Recurring justifications in these cases include the debtor's lack of sophistication and the purported sufficiency of debtor's oral recounting of transactions absent corroborating documentation.[63] The case of *Bustos v. Muller* exemplifies such

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[58] *See* Home Indem. Co. v. Oesterle (*In re* Oesterle), 651 F.2d 401, 404 (5th Cir. 1981) (finding self-employed tax consultant's failure to keep any records over a four-year period to be justified); *In re* More, 138 B.R. 102, 105–06 (Bankr. M.D. Fla. 1992) (holding that debtor, who was a senior clerk at the local community college, was not engaged in an occupation that required keeping financial records); *In re* Dorman, 98 B.R. 560, 571 (Bankr. D. Kan. 1987) ("Lack of records does not by itself require denial of discharge."); *In re* Redfearn, 29 B.R. 739, 740–41 (Bankr. E.D. Tex. 1983) (holding small farmer and rancher not required to keep books and records); Spunt v. Wells, 11 B.R. 438, 440 (Bankr. D. R.I. 1981) (holding debtor's failure to keep books and records did not require denial of discharge).

[59] *See In re* Sobol, 545 B.R. 477, 497 (Bankr. M.D. Pa. 2016) (citing *In re* Dizinno, 532 B.R. 231, 239 (Bankr. M.D. Pa. 2015)) ("Generally, § 727(a)(3) is not implicated when a consumer debtor does not operate a business.").

[60] Courts that impose a stricter recordkeeping requirement, even in the relatively simple consumer bankruptcy case, implicitly reject the notion that financial records do not need to be produced. *See, e.g.*, *In re* Hughes, 354 B.R. 801, 805, 810–11 (Bankr. N.D. Tex. 2006), *aff'd*, 309 Fed. App'x 841, 2009 WL 290482, at *1 (5th Cir. 2009) (denying discharge to a debtor, who operated on a cash basis for at least the preceding fifteen years, for failure to provide adequate financial records); *In re* Terrell, 2002 WL 22075, at *4–5 (denying discharge to debtor who failed to produce credit card and bank statements and was unable to justify such failure). In both *Hughes* and *Terrell*, the respective debtors, while sophisticated businessmen, had not been owners of a business for many years preceding bankruptcy. *See In re* Hughes, 354 B.R. at 806; *In re* Terrell, 2002 WL 22075, at *1. Rather they had simply received paychecks in the years immediately preceding the bankruptcy filing, and thus, presented relatively simple financial histories. *See In re* Hughes, 354 B.R. at 805–06; *In re* Terrell, 2002 WL 22075, at *1.

[61] *See In re* Michael, 433 B.R. 214, 221 (Bankr. N.D. Ohio 2010) (describing two years as a "minimal point of reference" prior to filing for bankruptcy); *In re* Losinski, 80 B.R. 464, 474 (Bankr. D. Minn. 1987) (suggesting a two-year waiting period in the "ordinary consumer bankruptcy case").

[62] *See infra* notes 74–80 and accompanying text.

[63] *See, e.g., In re* Muller, No. 15-10055 ta7, 2016 WL 3034754, at *7 (Bankr. D. N.M. May 19, 2016) (holding the debtor was justified in failing to keep adequate records because she had a sporadic business, did not make much money, and was not sophisticated). These justifications for minimal recordkeeping mirror the judicial rationale in cases where discharge is granted without recordkeeping. *See supra* note 58 and cases therein cited.

decisions that result in a discharge despite the absence of debtor's production of a complete set of bank records and credit card statements for a reasonable period preceding the bankruptcy.[64] Debtor Muller, a business woman, presented minimal records as a result of what the court described as an "abysmal" recordkeeping system:

> Courts have generally allowed consumer debtors to satisfy the keep or preserve requirement of § 727(a)(3) if they contacted their banks or credit card companies to get copies of the records, and provided them to the creditor requesting the records. Thus, while it would have been much preferable for Defendant to have produced *all* of the requested bank and credit card statements, the Court finds that Defendant's financial condition and material business transactions can be ascertained from the documents that were produced.[65]

Thus, Muller was granted a discharge despite plaintiffs' unchallenged contention that in response to a 2004 Order for production of documents, the debtor produced: (1) incomplete monthly bank statements for the two-year period prior to the bankruptcy filing with numerous missing pages; (2) no complete set of credit card statements for that period; (3) an incomplete production of paychecks for her employment with a home health care agency in the two years preceding bankruptcy; and (4) no income tax return for 2014 despite the filing of bankruptcy in 2015.[66] It is perplexing how the court could conclude that the trustee and creditors could conduct examinations of what had passed through Debtor Muller's hands and her business transactions given the paucity of records produced.

A number of decisions forthcoming from the United States Fifth Circuit Court of Appeals further reflect the rationale frequently underlying those cases granting a discharge despite the debtor's failure to produce a complete set of credit card statements and bank records for a reasonable period preceding bankruptcy. The Fifth Circuit's *In re Dennis* decision, identifying income tax returns as the "quintessential" financial documents in a personal bankruptcy, has become a repeated refrain in subsequent decisions concluding that the debtors' failure to produce a complete set of bank records and credit card statements did not justify denial of a discharge.[67] For example, in the wake of the *Dennis* decision, the Fifth Circuit in *Chemoil v. Pfeifle*

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[64] *See In re* Muller, 2016 WL 3034754, at *7, 9.

[65] *Id.* at *7 (internal citations omitted). One can only understand the court's rejection of the recordkeeping requirement in *Bustos* by considering that the debtor, who, to some extent, prepared inaccurate tax returns from memory, and failed to retrieve all bank records and credit card statements, despite their availability, was nonetheless granted a discharge because the court determined her failure to produce "was not caused by a desire to hide information." *See id.* at *2, 7.

[66] *See id.* at *1, 3 nn.6–7 (suggesting the information provided by the debtor sufficiently established the debtor's "financial condition," thus rendering the debt dischargeable).

[67] *See* Robertson v. Dennis (*In re* Dennis), 330 F.3d 696, 703 (5th Cir. 2003) (citing *In re* Wolfson, 152 B.R. 830, 833 (Bankr. S.D.N.Y. 1993)).

considered the sufficiency of the debtors' financial documentation production.[68] In *Pfeifle*, a commodities trader and his spouse did not produce records that would permit an examination of how they used their credit card cash advances or how they used cash withdrawn from depositing checks.[69] Debtors acknowledged that they did not keep records of cash expenditures made in connection with their living expenses, entertainment, and mortgage payments.[70] At least fifteen to twenty percent of debtors' personal expenditures were admittedly paid in cash.[71] Despite the absence of documentation from which the trustee or creditors could corroborate or examine debtors' multitude of cash transactions, the Fifth Circuit affirmed the lower court's judgment that denial of discharge was not warranted under § 727(a)(3), relying heavily on the *Dennis* decision:

> First, Chemoil contends that because no records exist to account for the use of credit card cash advances or cash withdrawals made when depositing checks, an accurate picture of the Pfeifles' financial condition cannot be ascertained. This Circuit has not delineated a precise threshold beyond which a debtor becomes accountable for further recordkeeping. However, we have required only "written evidence" of the debtor's financial condition, not "full detail" of all of the debtor's financial records. *In re Dennis*, 330 F.3d at 703 (citing *In re Goff*, 495 F.2d at 201). The bankruptcy court found that the absence of records as to these cash expenditures did not impede Chemoil from ascertaining the Pfeifles' financial condition. Using the above standard as a guide, we cannot say that the bankruptcy court clearly erred in this regard.[72]

The Fifth Circuit thereafter reached similar decisions in *Cadle Company v. Orsini*[73] and *Cadle Company v. Duncan*.[74] Both *Orsini* and *Duncan* constituted chapter 7 bankruptcies that were not simple consumer bankruptcy proceedings. Debtor Duncan was a longtime builder of luxury homes and the Orsinis were owners of a corporation specializing in high-end shopping and dining.[75] Moreover, the Orsinis were not financially unsophisticated, as Rebecca Orsini was a former stockbroker, and Anthony Orsini held a finance degree and had been employed as a

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[68] *See* Chemoil v. Pfeifle (*In re* Pfeifle), 154 Fed. App'x 432, 2005 WL 3091249, at *2–3 (5th Cir. 2003) (holding debtor's financial condition could be ascertained through incomplete documentation, entitling debtor to discharge).

[69] *Id.* at *1–2.

[70] *Id.* at *2.

[71] *Id.*

[72] *Id.* at *2–3.

[73] Cadle Co. v. Orsini (*In re* Orsini), No. 07-40450, 289 Fed. App'x 714, 2008 WL 3342017, at *5 (5th Cir. 2008).

[74] Cadle Co. v. Duncan (*In re* Duncan), 562 F.3d 688, 697–98 (5th Cir. 2009).

[75] *Id.* at 692; *see also In re* Orsini, 2008 WL 3342017, at *1.

technical manager for a credit rating service.[76] In its review of the bankruptcy courts' respective decisions in denying § 727(a)(3) objections, the Fifth Circuit affirmed, despite the failure of the debtors to produce complete credit card statements and banking records.[77] It is also noteworthy that, in *Orsini*, the district court had justified affirming the bankruptcy court decision by stating that the Cadle Company, as plaintiff, had failed to demonstrate how production of the missing credit card statements and banking records was necessary to understand the debtors' financial condition.[78]

Taken collectively, the decisions as exemplified by *Dennis* and its progeny reflect a tension with those numerous decisions that apply a de facto presumption that a denial of discharge under § 727(a)(3) is warranted when the debtor fails to produce a complete set of credit card statements and banking statements for a reasonable period preceding the bankruptcy filing.[79] Additionally, decisions such as *Orsini* and *Duncan* are illustrative of the tremendous power wielded by bankruptcy judges in determining

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[76] *See In re* Orsini, 2008 WL 3342017, at *5. The *Orsini* decision, in particular, reflects how malleable the various factors are in a court's determinations concerning the sufficiency of the debtor's production of its financial records. Courts repeatedly focus upon the business sophistication of the debtor in determining the adequacy of the financial record production. *See, e.g.*, Meridian Bank v. Alten, 958 F.2d 1226, 1231 (3d Cir. 1992) (suggesting that the inquiry into the justification for maintaining inadequate records should include the sophistication of the debtor); Chusid v. First Union Nat'l Bank, No. Civ.A. 97-4134, 1998 WL 42292, at *6 (E.D. Pa. Jan 21, 1998) ("Sophisticated businesspeople, especially those involved in complex financial affairs, are held to a higher standard of recordkeeping."); *In re* Spitko, 357 B.R. 272, 306 (Bankr. E.D. Pa. 2006) (finding that "[w]here the debtor is engaged in numerous business transactions . . . the failure to keep or produce any records regarding those transactions may be treated as a violation of § 727(a)(3)"). Despite the Orsinis' business background and education, the Fifth Circuit affirmed the district court's conclusion that "though the Orsinis might be somewhat more sophisticated than many debtors, [the bankruptcy judge] was not obligated to impose an extraordinary standard of recordkeeping upon them." Cadle Co. v. Orsini, No. 4:06-CV-21486, 2007 WL 1006919, at *14 (E.D. Tex. Mar. 30, 2007). Moreover, the district court, in affirming the bankruptcy court's decision, justified not holding the Orsinis to a higher recordkeeping standard of sophisticated business people because of "the dismal outcome of their personal and business financial decisions." *Id.* Such reasoning could readily be employed to eviscerate any higher standard of recordkeeping for sophisticated business persons given the fact that their business careers have resulted in bankruptcy.

[77] *See In re* Orsini, 2008 WL 3342017, at *4–5 (observing that the Orsinis had produced "bank statements and credit card information"). The objecting creditor, in describing more specifically the "bank statements and credit card information" produced by the Orsinis, delineated: "The balance [of debtors' financial documentation production] consisted of spotty bank statements (half without checks or other payee information) and credit card statements for selected months scattered among the Orsinis' *some thirty bank and credit accounts*." Brief of Appellant at 17, Cadle Company v. Orsini, No. 4:06-cv-00203, 2006 U.S. Dist. Ct. Briefs LEXIS 1892 (Jun. 26, 2006) (emphasis added).

[78] *See* Cadle Co. v. Orsini, 2007 WL 1006919, at *13. The conclusion that the objecting party must independently establish how the absence of a complete set of credit card statements and bank records prevents a meaningful examination of the debtor's recent financial history, is at odds with the principle that such records "'*form the core' of what [is necessary] to ascertain [the Debtor's] financial condition*, primarily his use of cash assets." *In re* Nemes, 323 B.R. 316, 325 (Bankr. E.D.N.Y. 2005) (quoting *In re* Terrell, No. 4:01-CV-0399-E, 2002 WL 22075, at *5 (N.D. Tex.), *aff'd*, 46 Fed. App'x 731, 2002 WL 1973217, at *1–2 (5th Cir. 2002)) (emphasis added). One court has observed that with decisions such as *Pfeifle* and *Dennis*, "the Fifth Circuit has seemingly moved away from the need for a debtor to provide absolute full disclosure of all documentation that the debtor might be able to access." *In re* Wells, 426 B.R. 579, 595 n.20 (Bankr. N.D. Tex. 2006).

[79] *See supra* notes 45 and 54 and cases cited therein (denying discharge upon application of a de facto presumption).

the sufficiency of the debtor's production, given the virtually impregnable appellate review standard of "clearly erroneous."[80]

B. Debtor's Duty to Produce Records of Closely Held Business Entities

A second area of judicial division concerning the sufficiency and scope of the preservation of financial documents is the determination of whether the chapter 7 individual debtor must produce written records of her closely held corporation(s). A minority of decisions conclude that the debtor's failure to maintain business records of a separate corporate entity, of which the bankrupt debtor is the complete or partial owner, does not provide grounds for denial of a discharge under § 727(a)(3).[81] The underlying justification of such decisions was succinctly stated in *Insurance Company of North America v. White*:

> [I]t should be pointed out that a debtor's discharge should not be denied where the financial records upon which the debtor's right to a discharge is sought to be denied based on lack of records of a bona fide separate entity such as a corporation and not the lack of records of an individual debtor. *In re Espino*, 806 F.2d 1001 (11th Cir. 1986); *In re Tocci*, 34 Bankr. 66 (Bankr. S.D. Fla. 1983). This Court, in the case of *Nguyen*, 100 B.R. 581 (Bankr. M.D. Fla. 1989) held that it is not the lack of books and records of a corporation which is relevant but the lack of books and records of individual debtors.[82]

Numerous other courts qualify the *White* decision's distinction of the debtor's records and the corporate records, by adding the specification that the failure to produce corporate records should not "in itself" be sufficient to deny a discharge.[83] The conclusion that records of debtor's closely held corporation need not be produced, as part of debtor's financial disclosure, is particularly compelling in cases where the corporation has been inactive or dissolved for a substantial period, and the corporate records were therefore discarded.[84] Similarly, it is an obvious conclusion

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[80] *See supra* notes 38–39 and accompanying text (illustrating the power granted to bankruptcy judges by the deferential standard).

[81] *See, e.g.*, United Diesel, Inc. v. Rodrique, 98 B.R. 267, 270 (Bankr. E.D. La. 1989); *In re* Summers, 320 B.R. 630, 638 (Bankr. E.D. Mich. 2005); *In re* Jackson, No. 03–10717–MD, 2004 Bankr. LEXIS 1758, at *17–18 (Bankr. N.H. Apr. 26, 2004); *In re* Cromer, 214 B.R. 86, 99 (Bankr. E.D.N.Y. 1997); *In re* Vetri, 155 B.R. 782, 784–85 (Bankr. M.D. Fla. 1993), *aff'd*, 174 B.R. 143, 147 (M.D. Fla. 1994); *In re* Espino, 48 B.R. 232, 235 (Bankr. S.D. Fla. 1985), *aff'd*, 806 F.2d 1001 (11th Cir. 1986) (all concluding that failure to maintain business records is not grounds for denial of a discharge under this section of the Code).

[82] *In re* White, 177 B.R. 110, 114–15 (Bankr. M.D. Fla. 1994).

[83] *See, e.g., In re* Hobbs, 333 B.R. 751, 757 (Bankr. N.D. Tex. 2005); *see also In re* Bishop, 420 B.R. 841, 850–51 (Bankr. N.D. Ala. 2009).

[84] *See, e.g.*, Hobbs, 333 B.R. at 757 (citing *In re* More, 138 B.R. 102, 105–06 (Bankr. M.D. Fla. 1992)) (noting the corporation had been dissolved for approximately three years prior to the bankruptcy filing); *see also In re* Fasolak, 381 B.R. 781, 784–85, 790 (Bankr. M.D. Fla. 2007) (holding that 72-year-old debtor should

that corporate records should be preserved when the court finds that the business entity is the alter ego of the debtor.[85]

In contrast to those courts concluding that records of the corporate entity need not be produced given the chapter 7 debtor's status as an individual, are a series of decisions wherein the courts have recognized no distinction between corporate records and debtor's personal financial records, even when the closely held corporation is unquestionably a distinct legal entity.[86] Perhaps the most persuasive decisions, with respect to the duty of a chapter 7 debtor to produce records of the closely held corporation, recognize the separateness of the corporate entity, but determine on the facts of the particular case whether and to what extent the corporate records must be produced in order to provide a full financial picture of the debtor's financial history:

> The facts of each situation must be analyzed with the language and statutory purpose of § 727(a)(3) in mind. That provision requires a debtor to keep or preserve "any" record from which the debtor's financial condition or business transactions might be ascertained. . . . The statute is not by its terms limited to records belonging only to debtors or that are property of the estate, but instead the mandate subsumes all records relating to a debtor's financial affairs.[87]

This case by case approach to production of the debtor's corporate records, based upon a review of the debtor's recent financial history, results in a multitude of varying

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not be denied a discharge for failure to produce corporate records, which were left on the premises of a failed family corporation, when debtor had retired from the failed business a few years before the bankruptcy filing).

[85] *See In re* DiLoreto, 266 Fed. App'x 140, 2008 WL 227655, at *4 (3d Cir. 2008); *In re* Adler, 494 B.R. 43, 69–70 (Bankr. E.D.N.Y. 2013); *In re* Mosher, 417 B.R. 772, 780–81 (Bankr. N.D. Ill. 2009). In *Mosher,* the court did not deny the debtor's discharge on the basis of § 727(a)(3), but observed the judicial trend that upon a finding of an alter ego status with regard to debtor's corporate entity, the assets of the corporation are deemed assets of the debtor for purposes of § 727(a)(3) analysis. *See In re* Mosher, 417 B.R. at 780–81.

[86] *See In re* Ross, No. 97-19956-DWS, 1999 Bankr. LEXIS 11, at *13 (Bankr. E.D. Pa. Jan. 4, 1999) (citing *In re* Magnani, 223 B.R. 177, 183 (Bankr. N.D. Iowa 1997)); *In re* Ross, 217 B.R. 319, 331–32 (Bankr. M.D. Fla. 1998); *In re* Nipper, 186 B.R. 284, 289 (Bankr. M.D. Fla. 1995); *In re* Bailey, 145 B.R. 919, 924 (Bank. N.D. Ill. 1992); *In re* Martin, 141 B.R. 986, 997 (Bankr. N.D. Ill. 1992); *In re* Pimpinella, 133 B.R. 694, 698 (Bankr. E.D.N.Y. 1991). The *Ross* decision characterizes the foregoing cited decisions as issued from courts that "fail to distinguish between the records of the individual debtor and those of his business." *See In re* Ross, 1999 Bankr. LEXIS 11, at *13. However, the court thereafter observed that "what can be concluded from these cases is that there should be no per se rule" (referring to a distinction between the bankrupt debtor and the closely held corporation). *See id.* at *14. A justification offered in *Ross* and other cases for not recognizing the distinction between the individual debtor's records and those of his closely held corporation, is the language of § 727(a)(3) that requires the debtor "to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained." *See id.* at *11.

[87] *In re* Spitko, 357 B.R. 272, 307 (Bankr. E.D. Pa. 2006) (quoting *In re* Ross, 1999 Bankr. LEXIS 11, at *4). For cases adopting this case-by-case approach, see Protos v. Silver (*In re* Protos), No. 08-16950, 322 Fed. App'x 930, 2009 WL 977314, at *4 (11th Cir. 2009); Union Planters Bank, N.A. v. Connors, 283 F.3d 896, 900 (7th Cir. 2002); Peterson v. Scott (*In re* Scott), 172 F.3d 959, 970 (7th Cir. 1999); *In re* Halpern, 387 F.2d 312, 315 (2d Cir. 1968); *In re* Hussain, 508 B.R. 417, 424–25 (B.A.P. 9th Cir. 2014); *In re* Belonzi, 476 B.R. 899, 904 (Bankr. W.D. Pa. 2012); *In re* Bishop, 420 B.R. at 850–51 (Bankr. N.D. Ala. 2009).

results that are nevertheless largely reconcilable in terms of the respective corporate documents provided. Factors that frequently dictate production of corporate records, as a prerequisite to the privilege of discharge, include: (1) settings in which the debtor's income and assets are largely derived from the corporate entity; (2) evidence suggesting financial misconduct implicating the corporation in fraudulent transfers or preferential payments to the entity; (3) debtor's engagement in numerous business transactions with the corporation in the immediate years preceding bankruptcy; and (4) debtor's destruction of corporate records in near proximity to the bankruptcy filing.[88] In other settings, courts applying an ad hoc approach have concluded that missing corporate records should not be the basis for denial of discharge given the particularized facts of the case.[89]

More recently, a bright line test has been advocated that would necessarily require the production of corporate records in certain defined cases:

> *[I]t has been held that when a debtor owns and/or controls numerous business entities and engages in substantial financial transactions, an absence of recorded information related to those entities and transactions establishes a* prima facie *case for an action to deny discharge under § 727(a)(3). Caneva v. Sun Communities Oper. Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 762 (9th Cir. 2008). Given the importance business records play in the bankruptcy process, the Court cannot find any fault with such an approach. Any party operating a business would naturally want to keep records of their financial transactions and dealings—if, for nothing else, it would help to ascertain the profitability of the business. As a result, when a person who recently maintained multiple business interests fails to produce any meaningful financial records, a natural inference

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[88] *See, e.g.*, Womble v. Pher Partners (*In re* Womble), No. 03-11135, 108 Fed. App'x 993, 2004 WL 2185744, at *2–3 (5th Cir. Sept. 29, 2004) (denying discharge based on the inadequacy of corporate record production, intertwining of personal and business expenses, and inability to trace loan proceeds of the closely held corporations); *In re* Michael, 433 B.R. 214, 222–24 (Bankr. N.D. Ohio 2010) (denying discharge based on inadequate records for multiple business entities including a recent endeavor that allowed debtor to take $100,000 monthly draws); *In re* Habboush, No. 05-33534, 2007 Bankr. LEXIS 457, at *6–11 (Bankr. E.D. Va. Feb. 6, 2007) (discharge denied as debtor caused corporation to make a fraudulent transfer to his father and deliberately destroyed the corporate records); *In re* Spitko, 357 B.R. at 308 (denying discharge based on missing banking records for two closely held corporations from which virtually all of debtor's income arose); *In re* Harron, 31 B.R. 466, 470–71 (Bankr. D. Conn. 1983) (denying discharge where corporate checking accounts were used to pay personal expenses and personal and corporate funds were occasionally commingled).

[89] *See In re* Howells, 365 B.R. 764, 769–70 (Bankr. N.D. Ohio 2007) (finding failure to produce records of corporate equipment leases is not a sufficient basis for denial of discharge); *In re* Kasoff, 146 B.R. 194, 200 (Bankr. N.D. Ohio 1992) (holding that debtor's failure to maintain records of collateral transfers of corporation's assets did not warrant denial of discharge); *In re* Jacobe, 116 B.R. 463, 468 (Bankr. E.D. Va. 1990) (finding denial of discharge not warranted based on the conclusion that although records were not of the highest quality, there was no evidence of intent by debtor to conceal corporate information).

> arises that the person is attempting to obfuscate his financial dealings.[90]

The varying judicial positions on the debtor's duty to preserve records of her closely held corporation has recently resulted in a clear majority position adopting the case-by-case analysis as to the extent such records are deemed necessary to conduct a meaningful examination of the debtor's recent financial history.[91]

C. Debtor's Nonproduction of Records Based on Drug Addiction or Compulsive Gambling

The § 727(a)(3) justification defense comports with the principle that bankruptcy courts are essentially equitable in nature, and accordingly, are afforded great discretion in the pursuit of fundamental fairness given the unique circumstances of each case.[92] Additionally, the justification defense is readily compatible with the overarching principle that the essential purpose of bankruptcy is to provide the honest debtor with a fresh start.[93] Closely linked to the § 727(a)(3) exception to discharge is the § 727(a)(5) exception, providing for denial of discharge based upon the debtor's failure to explain a substantial loss of assets:

> (a) The court shall grant the debtor a discharge, unless—
> . . . .
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities; . . .[94]

Cases frequently include objections to discharge under both § 727(a)(3) and (a)(5).[95] Countless explanations are offered by debtors in seeking to justify a failure

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[90] *In re* Michael, 433 B.R. at 222–23 (emphasis added).

[91] *In re* Steffensen, 567 B.R. 188, 200 (Bankr. D. Utah 2016); *In re* Manfredonia, 561 B.R. 1, 17 (Bankr. D. Mass. 2016) (citing Razzaboni v. Schifano (*In re* Schifano), 378 F.3d 60, 68–69, 70 n.3 (1st Cir. 2004)); *In re* Kandel, No. 11-62597, 2015 WL 1207014, at *5 (Bankr. N.D. Ohio Mar. 13, 2015).

[92] *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity."); *accord In re* Kaiser Aluminum Corp., 456 F.3d 328, 339 (3d Cir. 2006) (quoting the *Hunt* decision in observing the equitable nature of bankruptcy courts); *In re* Barrett, 132 F. 362, 372 (W.D. Tenn. 1904) (discussing the great discretion afforded to bankruptcy judges given the nature of the bankruptcy court as a court of equity).

[93] *See supra* note 1 and cases therein cited with regard to the debtor's entitlement to a fresh start. *See supra* notes 34–39 and accompanying text for a discussion of the § 727(a)(3) justification defense.

[94] 11 U.S.C. § 727(a)(5) (2012).

[95] *See In re* Adler, 494 B.R. 43, 73 n.7 (Bankr. E.D.N.Y. 2013) (observing the overlapping proof frequently required for § 727(a)(3) & (a)(5) claims for exceptions to discharge); *In re* Hirsch, 36 B.R. 643, 645 (Bankr. S.D. Fla. 1984) ("The two issues are related in that it is usually difficult for a debtor to account for losses unless adequate records have been kept."); *In re* Cook, 146 B.R. 934, 943 (Bankr. E.D. Pa. 1992) (observing the considerable overlap of § 727(a)(3) & (a)(5)).

to maintain sufficient financial records or to evidence a loss or deficiency of assets.[96] Justifications offered by debtors range from destruction of records by acts of God or theft, to government seizure of the records, to a longstanding custom of the debtor not preserving the financial records.[97]

A recurring area of judicial division in § 727(a)(3) and (a)(5) objection to discharge proceedings is the role that debtor's alleged compulsive gambling or sustained drug addiction should play in the analysis of the sufficiency of debtor's financial record production, justification for nonproduction, and the explanation of a loss or deficiency of assets under § (a)(5). Courts frequently employ a multifactor test in determining the sufficiency of the loss or a deficiency of assets under § 727(a)(5).[98] The recent, unprecedented growth of opioid addiction and the ever-increasing venues for the average person to engage in gambling or other games of chance portend that the frequency of these particular debtor justifications and explanations will proliferate in the litigation of denial of discharge exceptions.[99] Specifically, drug addiction and compulsive gambling greatly heighten the prospect that the individual will dissipate her assets and destroy a means of income, thus requiring ultimate resort to bankruptcy. Additionally, such a dependency or obsession will inevitably lead to numerous debtors failing to preserve records of their recent financial history due to acquisition of drugs in illicit cash transactions, or the multiplicity of undocumented gaming transactions characteristic of the compulsive gambler.[100]

Cases in which objections to discharge are lodged under both § 727(a)(3) and (a)(5), implicating the debtors' urging of justification and explanation of asset loss

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[96] *See* Buchwalter, *What Constitutes Justification*, *supra* note 9, at 21–23 (categorizing the myriad of debtors' justifications offered in hundreds of cases).

[97] *See, e.g., In re* Rivas, 558 B.R. 690, 702–03 (Bankr. D.N.J. 2016) (explaining how theft of an automobile wherein records were kept warranted justification); *In re* Branch, 54 B.R. 211, 214–15 (Bankr. D. Colo. 1985) (providing that failure to retain records was justified by accidental loss of records in fire); *In re* Kinney, 33 B.R. 594, 596–97 (Bankr. N.D. Ohio 1983) (establishing that failure to produce financial documents that were destroyed in a flood constituted justification). *But see, e.g., In re* Silverman, 10 B.R. 727, 731 (Bankr. S.D.N.Y. 1981) (declaring debtor's custom of not maintaining financial records did not meet the "justification" standard). *See* Buchwalter, *What Constitutes Justification*, *supra* note 9, at 12–13 (providing different circumstances giving rise to justification or excuse for failing to keep or preserve recorded information).

[98] *See, e.g., In re* Lobera, No. 7-10-13203 SA., 2012 WL 640980, at *8 (Bankr. D.N.M. Feb. 18, 2014) (providing that "factors relevant to a determination under § 727(a)(5) include '(1) a debtor's education; (2) a debtor's sophistication and business experience; and (3) any special circumstances that may exist'") (quoting *In re* Rajabali, 365 B.R. 702, 713 (Bankr. S.D. Tex. 2007)).

[99] *See, e.g.*, Joel Spivak, *Recovering from Debt After Recovering from Addiction*, LAW OFFICE OF JOEL R. SPIVACK (July 11, 2012), http://www.spivacklaw.com/blog/recovering-from-debt-after-recovering-from-addiction (observing the increasing frequency of New Jersey bankruptcy filings attributable to drug addiction). *See* Leslie R. Masterson, *Rolling the Dice: The Risks Awaiting Compulsive Gamblers in Bankruptcy Court*, 83 AM. BANKR. L.J. 749, 761–64 (2009) (reviewing the obstacles to the compulsive gambler's securing of a bankruptcy discharge, specifically insufficient recordkeeping and an inability to adequately explain loss or deficiency of assets); Max Fay, *Gambling and Debt*, DEBT.ORG, https://www.debt.org/advice/gambling/ (last updated Aug. 25, 2017) (observing that twenty percent of compulsive gamblers ultimately file for bankruptcy relief because of gambling losses).

[100] *See* Masterson, *supra* note 99, at 761–63 (highlighting the reality that individuals with drug or gambling addictions do not usually keep copious financial records).

attributable to compulsive gambling or addiction, frequently result in a denial of discharge on both counts.[101] These denials of discharge under both § 727(a)(3) and (a)(5) occur despite the distinct analyses that are employed under these two exceptions to discharge.[102] As observed in the *Drenckhahn* decision, § 727(a)(3) has the underlying purpose of assuring "the trustee and creditors that they will be provided with sufficient information with which they can assess the debtor's estate and general financial posture."[103] In contrast, § 727(a)(5) "is directed toward insuring debtors' *accountability* for past transactions, and does not require or even allow inquiry into the substantive character of the loss or deficiency of assets itself."[104]

A significant majority of courts reject the debtor's alleged compulsive gambling losses as a futile justification for the failure to produce minimal financial records and an insufficient explanation for a loss or deficiency of assets.[105] The Sixth Circuit Court of Appeals' landmark decision of *In re Dolin* succinctly summarized the rationale of numerous decisions rejecting gambling as a sufficient explanation or justification for the bankrupt debtor's failure to produce sufficient financial records.[106] In *Dolin,* the debtor asserted that he had expended over $500,000 in the three years preceding his bankruptcy filing in pursuit of compulsive gambling and an accompanying cocaine addiction.[107] In affirming the lower court's decision that the debtor's discharge should be denied under § 723(a)(3) and (a)(5), the Sixth Circuit concluded:

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[101] *See, e.g.*, Dolin v. N. Petrochemical Co. (*In re* Dolin), 799 F.2d 251, 253–54 (6th Cir. 1986); *In re* Hong Minh Tran, 464 B.R. 885, 896 (Bankr. S.D. Cal. 2012); *In re* Bressler, 321 B.R. 412, 418–20 (Bankr. E.D. Mich. 2005).

[102] *See infra* notes 103–04 and accompanying text (discussion of distinctive analyses).

[103] *See In re* Drenckhahn, 77 B.R. 697, 707 (Bankr. D. Minn. 1987) (quoting *In re* Shapiro, 59 B.R. 844, 848 (Bankr. E.D.N.Y. 1986)).

[104] *See id.* at 709 (citing *In re* Nye, 64 B.R. 759, 762 (Bankr. E.D.N.C. 1986)). A more recent decision further elaborated on the distinctions between the purposes and distinctive proofs to be offered by a debtor in defending objections to discharge under § 727(a)(3) & (a)(5):

> First, § 727(a)(5) concerns itself exclusively with the loss of assets, while § 727(a)(3) is not limited to records documenting the disposition of lost assets. Second, to prevail on a § 727(a)(5) action, a debtor must offer a satisfactory explanation of a loss of assets, whereas in a § 727(a)(3) action a debtor may prevail by showing only that his failure to keep or preserve records documenting the disposition of lost assets was reasonable. Third, a debtor can defeat a § 727(a)(5) action by offering persuasive testimonial explanations of his loss of assets, while a testimonial explanation of lost assets will not defeat a § 727(a)(3) action absent a reasonable explanation of the absence of records of same.

In re Stiff, 512 B.R. 893, 900 (Bankr. E.D. Ky. 2014) (citations omitted).

[105] *See, e.g.*, Davis v. Macway (*In re* Macway), 667 Fed. App'x 658, 659 (9th Cir. 2016); *In re* Salazar, No. 16-40346, 2016 Bankr. LEXIS 3947, at *9–11 (Bankr. W.D. Mo. Nov. 10, 2016); *In re* McNamara, 310 B.R. 664, 667–68 (Bankr. D. Conn. 2004); *In re* Carter, 274 B.R. 481, 485–86 (Bankr. S.D. Ohio 2002); *In re* Barman, 244 B.R. 896, 900–01 (Bankr. E.D. Mich. 2000); *In re* Murphy, 244 B.R. 418, 421–22 (Bankr. N.D. Ohio 2000); *In re* Burns, 133 B.R. 181, 185 (Bankr. W.D. Pa. 1991).

[106] *See In re* Dolin, 799 F.2d at 253–54. An earlier Fifth Circuit Court of Appeals decision had similarly rejected compulsive gambling as a viable defense under the former Bankruptcy Act. *See* McBee v. Silman (*In re* McBee), 512 F.2d 504, 506 (5th Cir. 1975) (finding "the gambling spree explanation unacceptable").

[107] *In re* Dolin, 799 F.2d at 252–53.

> Dolin could only allege that he had used the money to support his cocaine habit and to gamble. The actual expenditures, to whom and when made, are unknown. . . . *The mere fact that a debtor has spent money illegally does not satisfactorily explain the debtor's deficiency of assets. In particular, we hold that neither Dolin's chemical dependency nor his compulsive gambling satisfactorily explain his deficiency of assets*.[108]

The *Dolin* rationale, with respect to a debtor's defense of compulsive gambling, has continued to be the justification underlying the majority position of bankruptcy courts in the succeeding thirty plus years.[109] Nevertheless, over the course of decades a series of decisions, reflecting a growing minority position, have found compulsive gambling to constitute a sufficient justification or a viable explanation by debtors in denying objections to discharge under § 727(a)(3) and (a)(5).[110] With respect to the sufficiency of debtor's explanation under § 727(a)(5), this minority position can best be articulated in terms of reliance on the debtor or third party's credible testimony concerning gambling losses unsupported by corroborating documentation, or alternatively, the debtor's credible testimony accompanied by minimal documentation corroborating the losses of assets.[111] With respect to objections to discharge under § 727(a)(3), some courts have essentially lowered the sufficiency of financial record production deemed adequate to evidence the alleged gambling losses.[112] The minority decisions, in granting the compulsive gambler's discharge in

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[108] *Id.* at 253 (emphasis added). Ironically, one of the more articulate statements of the inherent defect in a debtor seeking to explain losses or deficiencies by attribution to compulsive gambling was provided in a case wherein the debtor's explanation of compulsive gambling was thereafter deemed a sufficient explanation under § 727(a)(5):

> The problem of "undocumented" theft and gambling losses claimed by a bankrupt debtor is especially troublesome to creditors and to bankruptcy courts because of the ease with which any debtor can make such claims to explain away a substantial discrepancy in his assets at the time of the bankruptcy filing.

In re Mitchell, 74 B.R. 457, 461 (Bankr. D.N.H. 1987).

[109] *See supra* note 105 and cases therein cited.

[110] *See In re* Sauntry, 390 B.R. 848, 856–58 (Bankr. E.D. Tex. 2008) (finding minimal records and credible testimony of bankrupt couple concerning husband's gambling losses sufficient to grant discharge in face of § 727(a)(3) & (a)(5) objections); *In re* McCaffrey, 216 B.R. 196, 202 (Bankr. E.D. Mich. 1997) (deeming some personal records sufficient to corroborate gambling losses); *In re* Mitchell, 74 B.R. at 461–62 (finding debtor's credible explanation of gambling losses without any supporting documentation to be sufficient to avoid denial of discharge under § 727(a)(5)); *In re* Hirsch, 36 B.R. 643, 644–46 (Bankr. S.D. Fla. 1984) (holding that compulsive stock market trading losses corroborated by wife's testimony and minimal stock market records were sufficient to deny objections to discharge under § 727(a)(3) & (a)(5)).

[111] *See In re* Buzzelli, 246 B.R. 75, 117 (Bankr. W.D. Pa. 2000) (providing an excellent discussion of varying judicial positions concerning what is required for a sufficient explanation under § 727(a)(5)).

[112] *See, e.g., In re* Tauber, 349 B.R. 540, 557 (Bankr. N.D. Ind. 2006) (explaining that no journal or other documents itemizing winnings/losses in any respect need be produced to fulfill the condition of a full financial disclosure). The *Tauber* court acknowledged that its pronouncements would "have repercussions in perhaps as many as 25% of the consumer bankruptcy cases filed in this Division." *Id.* at 554; *accord In re* Hirsch, 36

the face of § 727(a)(3) or (a)(5) objections, reflect a willingness to subordinate the debtor's required full financial disclosure to the ultimate goal of securing the debtor's discharge.[113]

In a scenario closely related to the compulsive gambler with large losses and minimal or no supporting documentation, debtors urging drug addiction or alcoholism as a mitigating factor in § 727(a)(3) and (a)(5) proceedings have been met with little success in avoiding a denial of discharge. For example, the Sixth Circuit in *Dolin* found no evidence that the debtor was incapacitated from retaining records as a result of an alleged cocaine addiction.[114] However, the court critically noted that even if such an incapacitation had been established, it would not constitute justification under § 727(a)(3) since an individual's decision to initially use narcotics is a voluntary choice even if it ultimately blossoms into an incapacitating full scale addiction.[115] In a similar explanation for the denial of debtor's discharge under § 727(a)(3) and (a)(5), a court observed that "[t]he excuse of (the debtor's) drug addiction and dependency is not a satisfactory explanation for the loss of assets. Bankruptcy is a privilege and creditors are defrauded if considerable funds are missing and this is merely chalked off to a gambling spree, a toot or an addiction."[116]

CONCLUSION

A. Summation of the Divergent Judicial Interpretations of the Debtor's Requirement to Produce Financial Records

Flexibility and discretion are essentially vested in the bankruptcy judge given the countless, unique circumstances inherent in each chapter 7 proceeding.[117] Creation of unyielding per se rules for determinations of the sufficiency of the bankrupt debtor's financial record production or the sufficiency of the debtor's explanation for a loss or deficiency of assets would deny bankruptcy courts this needed discretion to address

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B.R. at 646 (discussing the failure to maintain records of gambling losses as justified under § 727(a)(3) on the basis that the creditors purportedly suffered no harm as a result).

[113] A review of decisions such as *Sauntry* and *Tauber* reflect that, at best, there was some indirect financial documentation produced that could give rise to an inference of compulsive gambling. In the *Mitchell* case, there was no such documentation offered to explain a loss of assets. *In re* Mitchell, 74 B.R. at 462.

[114] *See* Dolin v. N. Petrochemical Co. (*In re* Dolin), 799 F.2d 251, 253 (6th Cir. 1986); *see also In re* Liberatore, 503 B.R. 23, 36–37 (Bankr. E.D. Pa. 2013) (rejecting debtor's Demerol addiction as a justification and denying discharge under § 727(a)(3)); *In re* Watson, 122 B.R. 476, 481 (Bankr. M.D. Ga. 1990) (denying the drug-addicted debtor's discharge in bankruptcy, since debtor failed to maintain the required records). *But see In re* Banks, 420 B.R. 579, 590, 596 (Bankr. M.D. Fla. 2009) (finding that drug and alcohol-addicted debtor's failure to maintain minimal financial documentation was justified under § 727(a)(3)).

[115] *See In re* Dolin, 799 F.2d at 253–54, 253 n.1.

[116] *In re* Tripp, 224 B.R. 95, 99 (Bankr. N.D. Iowa 1998) (quoting *In re* McManus, 112 B.R. 773, 775 (Bankr. E.D. Va. 1990)).

[117] *See, e.g.*, Kelley v. Cypress Fin. Trading Co., LP (*In re* Cypress Fin. Trading Co., LP), 620 Fed. App'x 287, 289 (5th Cir. 2015) (discussing the flexibility afforded bankruptcy courts in determining whether a chapter 7 proceeding should be dismissed); *In re* Morse, 535 B.R. 268, 284 (Bankr. E.D. Tenn. 2015) (noting the "broad discretion" vested in bankruptcy judges in determining the adequacy of financial disclosure under § 727(a)(3)).

the kaleidoscopic facts appearing in chapter 7 proceedings.[118] Bankruptcy courts must navigate a channel between the conflicting principles of full and honest financial disclosure as a prerequisite to discharge, and the required strict construction of § 727(a) and its various exceptions to discharge. However, the compendium of cases on § 727(a)(3) and (a)(5) litigation reflects an inconsistency of outcomes that can only be attributed to the varying values and predilections of bankruptcy judges. Otherwise stated, much of the inconsistency of outcomes herein surveyed illustrate an underlying judicial disagreement concerning the nature and extent of debtor's preservation of financial documentation as a precursor to discharge.[119] One judicial trend commences its analysis from a baseline that debtor's financial records should provide some itemization of the debtor's financial transactions for a reasonable period preceding the bankruptcy filing.[120] Other courts have adopted an analytical paradigm that concludes, particularly in the "simple" consumer bankruptcy case, that preservation of tax returns or other documents providing an overview of debtor's financial status is sufficient. Despite the longstanding principle that creditors and the trustee are not required to rely simply on the debtor's verbal recounting of his financial history, discharges are sometimes granted in cases wherein debtors offer only an oral financial history with no accompanying financial documentation.[121] The inconsistent outcomes herein surveyed readily give rise to a cynical view that the grant or denial of discharge is purely the product of the particular judge's preferences. To the extent that greater consistency of outcome can be attained, without eviscerating the necessary discretion vested in the bankruptcy judge, it should be done. The three areas of judicial division in dischargeability litigation explored in this Article reflect subjects in which imposition of rebuttable evidentiary presumptions can be implemented, without doing harm to the discretion necessarily vested in the bankruptcy judge.[122]

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[118] *See, e.g., In re* Salvador, 570 B.R. 460, 475 (Bankr. D. Mass. 2017); *In re* Bennitt, No. 05-03935-BCG-7, 2010 Bankr. LEXIS 3950, at *10 (Bankr. N.D. Ala. Nov. 4, 2010) (acknowledging the absence of per se rules).

[119] *See supra* notes 82 and 86 with accompanying text. One caveat to this observation is that the judicial division concerning the debtor's duty to retain records of the closely held corporation is better explained in terms of a fundamental disagreement over statutory interpretation of § 727(a)(3)'s terminology "debtor's financial condition and business transactions" and whether such is intended to encompass the records of the closely held, but separate corporate entity.

[120] *See, e.g., supra* notes 47–56 and accompanying text.

[121] *See supra* notes 58–59 and cases therein cited.

[122] *See The Chapter 7 Discharge*, U.S. Courts, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics. Initially, it is critical to note that the adoption of such rebuttable presumptions would only impact an infinitesimally small percentage of chapter 7 proceedings. Specifically, in ninety-nine percent of the chapter 7 cases filed, a discharge is granted. *Id.* Moreover, ninety-five percent of chapter 7 proceedings constitute "no asset" cases. *See In re* Beltran, No. 09 B 17482, 2010 WL 3338533, at *4 (Bankr. N.D. Ill. Aug. 25, 2010). In the "no asset" cases, rarely will the trustee or creditor have great incentive to prosecute a § 727(a) objection to discharge given the strong likelihood that the potential financial benefits to be secured post-bankruptcy will be little or none. In the vast majority of cases, the debtor's discharge will usually follow the § 341 creditor's meeting wherein the trustee generally expects a production of recent tax returns and perhaps requests supplementation with respect to any significant financial transactions of the debtor. Only when the trustee verbally demands extensive financial

B. Proposals for Production of Bank Statements and Credit Card Statements

Initially, with respect to the debtor's production of credit card statements and bank records for a reasonable period preceding the bankruptcy, no per se rule is herein advocated that would require debtor's production of such records in all chapter 7 proceedings. Accepting the premise that credit card statements and bank records "form the core"[123] of what creditors would need to ascertain the financial condition of the debtor, courts should adopt a rebuttable presumption that the debtor's failure to produce her banking records and credit card statements, for a two-year period preceding the bankruptcy, is inadequate to merit a discharge.[124] Such a production would generally afford the trustee and creditors an opportunity to conduct a review of the debtor's recent particularized receipt of funds, the source of the debtor's funds, and an itemized review of the expenditures of money the debtor has made. Neither would such a presumption impose a heavy burden on the debtor in the event she has failed to maintain such records. In this respect, the advanced state of technology customarily affords the debtor the ready ability to retrieve credit card statements and bank records from the internet.[125] This presumption with respect to bank records and credit card statements could readily be tempered by judicial determinations on issues

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documentation or when the trustee or creditor secures a Rule 2004 order for an extensive production of debtor's financial documentation will the sufficiency of the production or documentation of a loss of assets be potentially challenged. The rebuttable presumptions will only come in to play in those rare cases where § 727(a)(3) or (a)(5) objections to discharge are pursued.

[123] *See supra* note 61 and accompanying text.

[124] *See* supra note 61 and accompanying text. Such a presumption seems particularly appropriate given the fact that the vast majority of chapter 7 proceedings seek discharge of one or more credit card debts. In this respect, multiple studies reflect that seven out of ten Americans have at least one credit card. *See* Jamie Gonzalez-Garcia, *Credit Card Ownership Statistics*, CREDITCARDS.COM, (October 25, 2016), https://www.creditcards.com/credit-card-news/ownership-statistics.php. Similarly, in 2016, the FDIC reported that ninety-three percent of Americans have access to one or more bank accounts. *See* Madeline Farber, *The Percentage of Americans Without Bank Accounts is Declining*, FORTUNE (Sept. 28, 2016), http://fortune.com/2016/09/08/unbanked-americans-fdic.

[125] *See, e.g., In re* Bennitt, No. 05-03935-BCG-7, 2010 Bankr. LEXIS 3950, at *8–9 (Bankr. N.D. Ala. Nov. 4, 2010) (denying discharge under § 727(a)(3) and observing that debtor could have "easily" obtained bank statements from the financial institution); *In re* Hansen, 325 B.R. 746, 762–63 (Bankr. N.D. Ill. 2008); *In re* Wells, 426 B.R. 579, 595 n.20 (Bankr. N.D. Tex. 2006) (referencing the *Terrell* case and the ability of the debtor to obtain credit card records upon request); *In re* Tanglis, 344 B.R. 563, 571 (Bankr. N.D. Ill. 2006) (observing that the debtor had ten months to request copies of her credit card statements); *In re* Shahid, 334 B.R. 698, 707 (Bankr. N.D. Fla. 2005) (noting the ability of the debtor to obtain credit card statements upon request). For exemplary instructions on obtaining past credit card statements online, see Jeannie Marcini, *How Do I Retrieve Old Credit Card Statements?*, SAPLING.COM, (September 11, 2010), https://www.sapling.com/6983014 /do-old-credit-card-statements. For exemplary instructions on obtaining past banking statements online, see *Frequently Asked Questions*, WELLS FARGO, https://www.wellsfargo.com/help/faqs/statement; *Frequently Asked Questions*, BANK OF AMERICA, https://www.bankofamerica.com/deposits/manage/faq-account-statements.go. Certainly, it is not the obligation of creditors to obtain such documents if the debtor has not retained them. Specifically, creditors are not required to reconstruct the debtor's financial affairs and such documents are deemed to be in the "possession, custody, or control" of the debtor since they can be secured by him upon request to the bank or credit card company. *See In re* Terrell, No. 4:01-CV-0399-E, 2002 WL 22075, at *5 (N.D. Tex.), *aff'd*, 46 Fed. App'x 731, 2002 WL 1973217, at *1–2 (5th Cir. 2002); *see also In re* Wells, 426 B.R. at 610.

such as the debtor's cost of retrieval or similar factors.[126] Judicial flexibility is retained with adoption of such a rebuttable presumption. For example, the debtor who demonstrates by way of income tax returns or other reliable financial documentation that he has received little or no income over the previous two years, or possessed no credit cards during the period, could readily rebut the presumption. Similarly, the debtor could readily rebut the presumption by producing other financial documentation such as ledgers or similar records that would reflect some itemization of his income, sources of income, and expenditures.[127] Moreover, the creation of such a presumption will, in no respect, limit the necessity for a far greater production of financial documentation in cases wherein the debtor has compiled a complex financial history or the debtor's business transactions cannot be sufficiently examined without additional records.[128]

C. Proposed Adoption of the Caneva Prima Facie Rule with Accompanying Case-by-Case Analysis of the Need for Production of Corporate Records

With respect to the debtor's duty to produce records of her closely held corporation(s), the defect in the vanishing minority view of no required documentary production from the wholly separate business entity is apparent. Frequently, the debtor will have regularly received income from the closely held entity or entities.[129] Furthermore, the debtor will many times have engaged in numerous business transactions with the entity that requires production of corporate records in order to conduct a meaningful examination of his financial affairs.[130] Similarly, the closely held entity, in many cases, will have engaged in business transactions with other entities that materially affect the debtor's finances,[131] thereby necessitating the

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[126] Certainly, a debtor is not required to have a bank account or keep credit card statements. However, the court in *Shahid* proceeded to deny the discharge under § 727(a)(3) based upon its finding that the debtor could have obtained the credit card records, but didn't. *See In re* Shahid, 334 B.R. at 708 (citing Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3d Cir. 1992)); *see also* Chauncey v. Dzikowski (*In re* Chauncey), 454 F.3d 1292, 1295 (11th Cir. 2006) (affirming discharge denial under § 727(a)(3) and concluding that the debtor was not justified in failing to obtain financial records); *In re* Khanani, No. 6:04-bk-07648-ABB, 2005 Bankr. LEXIS 1876, at *12–13 (Bankr. M.D. Fla. Sept. 27, 2005) (rejecting debtor's justification of failing to obtain bank records based on cost and stating that debtor should bear all "reasonable costs").

[127] *See, e.g., In re* Guenther, 333 B.R. 759, 766 (Bankr. N.D. Tex 2005) (deeming certain missing banking records and credit card statements unnecessary in view of the plethora of other financial records preserved by the debtors).

[128] *See, e.g., supra* note 88 and cases therein cited, as well as accompanying text discussing the case-by-case determinations that must be made with respect to the extent of the individual debtor's duty to produce corporate records of closely held corporations; *see also supra* note 30 and accompanying text (setting forth factors considered in determining the sufficiency of debtor's financial recordkeeping).

[129] *See In re* Spitko, 357 B.R. 272, 308 (Bankr. E.D. Penn. 2006) (noting that all or substantially all of the debtor's income came from a closely held entity).

[130] *See supra* note 88 and cases therein cited showing the frequent need for production of corporate records to meaningfully review the debtor's personal financial history.

[131] *See* Womble v. Pher Partners (*In re* Womble), No. 03-11135, 108 Fed. App'x 993, 2004 WL 2185744, at *2 (5th Cir. Sept. 29, 2004) ("[W]here personal and business expenses are intertwined, the business transactions cannot be fully ascertained without tracing the loan proceeds of closely held entities.").

production of corporate records. The Ninth Circuit Court of Appeal's *Caneva* prima facie rule should be generally adopted providing that "when a debtor owns and controls numerous business entities and engages in substantial financial transactions, the complete absence of recorded information related to those entities and transactions establishes a prima facie violation of 11 U.S.C. § 727(a)(3)."[132] The *Caneva* rule could be generally imposed for a two-year period prior to bankruptcy, but the required corporate record production could be expanded to encompass earlier years in settings wherein corporate transactions, possibly affecting the bankruptcy estate, occurred prior to the two-year period. To the extent that the circumstances of the case do not fulfill the qualifications triggering the *Caneva* prima facie case, bankruptcy courts should strictly apply a case-by-case analysis in determining the extent to which corporate records should be produced.[133]

D. Proposed Rejection of the Defense of Debtor's Conscious Decision to Not Maintain Recent Financial Records or a Failure to Maintain Records by Virtue of an Addiction or Compulsion

Finally, the debtor's assertions of an addiction or compulsive gambling in § 723(a)(3) litigation, should not excuse the required financial record production.[134] Neither should debtor's resort to a purely verbal recitation of addiction or compulsive gambling, uncorroborated by supporting documentation, be deemed a sufficient explanation for a deficiency or loss of assets under § 723(a)(5).[135] This is not to say that a wholly verbal explanation of the loss or deficiency of assets is unacceptable when occurrences beyond the debtor's control preclude preservation of financial documentation.[136] While constituting the primary goal of the chapter 7 bankruptcy proceeding, securing the debtor's discharge is not sacrosanct. The debtor's required financial disclosure, as a precursor to securing a discharge, should not be reduced or jettisoned in pursuing the debtor's fresh start.[137]

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[132] Caneva v. Sun Cmtys. Oper. Ltd. P'ship (*In re* Caneva), 550 F.3d 755, 762 (9th Cir. 2008). The *Caneva* prima facie rule will have limited application given its requirements that the debtor have "*numerous business entities*" coupled with a "*complete absence*" of corporate records. *See id.* (emphasis added).

[133] *See supra* note 88 and accompanying text for a discussion of circumstances generally triggering a need for corporate record production in cases adopting a case-by-case approach to corporate record analysis.

[134] The determination of whether the spouse of the addict or compulsive gambler should receive a discharge in such circumstances should be determined on a case-by-case basis. For example, relevant factors would include: (1) whether the gambling or drug losses were concealed from the spouse; and (2) the ability of the spouse to maintain records of the other spouse's gambling wins and losses, or funds expended in drug transactions.

[135] This is not to say that debtor's intentional destruction of financial records should not be an acceptable justification when the court determines that the reasonable person would have discarded the records based on the age of the records or their minimal relevance to debtor's financial dealings.

[136] *See supra* note 97 and cases therein cited reflecting loss or destruction of records by circumstances beyond the debtor's control, such as fire or theft.

[137] A recent decision has well summarized the relationship of the "fresh start" and the "privilege" of a bankruptcy discharge: "The cost to the debtor for an unencumbered fresh start is minimal, but it includes honesty and accurately disclosing his or her financial affairs and cooperating with the trustee." *See In re* Hentz, No. 12-30114, 2013 Bankr. LEXIS 1137, at *26 (Bankr. N.D. Mar. 25, 2013).