NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-07-1362-DMkMo
BRETT MICHAEL CARNDUFF and JANETH REY CARNDUFF,	Bk. No. 05-13455
Debtors.	Adv. No. 05-01201
BRETT MICHAEL CARNDUFF and JANETH REY CARNDUFF,	
Appellants,	
v.	**M E M O R A N D U M**[1]
U.S. DEPARTMENT OF EDUCATION,	
Appellee.	

Argued by Telephone Conference and Submitted
on February 21, 2008

Filed - March 11, 2008

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Before: DUNN, MARKELL, and MONTALI, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP R. 8013-1.

The debtors, Brett and Janeth Carnduff (collectively, "debtors"), come before us once more to appeal another ruling of the bankruptcy court regarding their complaint to discharge their student loan debts to the U.S. Department of Education ("Government") pursuant to § 523(a)(8).[2]

The debtors previously appealed the bankruptcy court's ruling that their entire student loan debt to the Government was nondischargeable. In a published opinion, Carnduff v. United States Dep't of Educ. (In re Carnduff), 367 B.R. 120 (9th Cir. BAP 2007)("Carnduff I"), we reversed the bankruptcy court's ruling and, in light of the bankruptcy court's finding that the debtors could never repay their student loan debts in full, remanded the matter for a determination as to whether the debtors were entitled to a partial discharge.

On remand, the bankruptcy court granted a partial discharge of the debtors' student loan debts. In the appeal now before us, the debtors argue that, in requiring them to pay a portion of their student loan debts, the bankruptcy court should have determined more specifically what the debtors could afford to pay without undue hardship, in light of their present and future income and expenses.

In light of Saxman v. Educ. Credit Mgmt. Corp., 325 F.3d 1168 (9th Cir. 2003), we determine that the bankruptcy court did not abuse its discretion in granting partial discharge of the

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

debtors' student loan debts to the Government and AFFIRM the bankruptcy court's partial discharge judgment.

I. FACTS[3]

A. Events Leading Up to the First Appeal Decision

Brett Carnduff ("Brett") holds a master's degree in developmental and educational psychology, focusing in school psychology. Janeth Carnduff ("Janeth") holds a master's degree in science with an emphasis in community service. The debtors, both young, healthy and highly educated, sought to discharge all of their student loan debts, or in the alternative, to discharge a portion of their student loan debts to the Government pursuant to § 523(a)(8).[4] At the time of the January 31, 2006 trial in the adversary proceeding, Brett owed a total of $190,872.06 and Janeth owed a total of $168,872.98 in student loan debts to the Government.[5] Both of the debtors were scheduled to make payments under the William D. Ford Standard Repayment Plan, which had a 10-year term for repayment.

The debtors testified that their earning capacity was

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[3] As we already have set forth many of the facts of the case in Carnduff I, we only provide those facts pertinent to the appeal before us.

[4] The debtors named not only the Government, but four other private student loan lenders as defendants in their adversary complaint. Only the Government filed an answer. The debtors later obtained a default judgment against the private student loan lenders, discharging approximately $215,000 total in student loan debt.

[5] As of July 31, 2005, Brett owed $178,258.19 in principal and $12,613.87 in accrued interest, at an interest rate of 6.875%. Janeth owed $154,657.37 in principal and $14,215.62 in accrued interest, at an interest rate of 5.875%.

limited in their chosen fields, and that they could not find more remunerative work in other fields. Brett, a school psychologist employed on a contract basis, testified that he did not expect his future compensation to increase much; he estimated that he would earn $58,000 after 20 years of experience. He believed that, though he could teach at a community college at a lower salary, he could not obtain any other kind of employment with his master's degree. He further testified that he had worked at sales and as a server in the restaurant business in the past, neither job providing an income equal to that of a school psychologist.

Janeth, an administrative assistant, testified that she was unable to advance at her place of employment. She further testified that she was not qualified for more remunerative work elsewhere because, without an MBA degree, she could only work for non-profit organizations. She also explained that she could not obtain employment in her field because she did not have the requisite experience and an internship. Even if she worked at a non-profit organization within her field, Janeth asserted, such a job would pay $3 less per hour than her current job as an administrative assistant.

The debtors had several private student loan debts. Brett testified that, in order to make payments on the private student loan debts, he obtained deferments and/or forbearances on the student loan debts the debtors owed to the Government. He further testified that he paid between $500 to $1,000 per month on these private student loan debts prepetition.

The debtors also provided testimony as to their future

finances in light of the dissolution decree they obtained on January 6, 2006.[6] The debtors asserted that their expenses would increase in the future because of the dissolution. Although the debtors continued to live together as of the date of the trial, Brett testified that he would eventually move out; he only continued to live with Janeth and the children because he could not afford to live elsewhere. Brett estimated that, living on his own, he would pay between $700 and $900 in rent for an apartment, depending on the number of bedrooms. Additionally, under the dissolution decree, Brett was required to make monthly child support payments of $601.46 to Janeth and to pay for the children's medical and dental insurance.

Brett believed that the cost of car insurance for himself and Janeth would increase as well, as they would have to obtain individual car insurance. He further testified that, though the cost of his medical insurance would decrease, Janeth's medical insurance cost would increase. Additionally, the debtors have incurred $10,000 in attorney's fees.

Janeth also testified that Brett continued to live with her and the children because she "[didn't] know how [she was] going to make it, and [she didn't] know how he's going to make it." Tr. of January 31, 2006 Trial, 135:2-4. Although Brett was to move out of the house, she had not decided when he was to move out. Janeth further testified that she was not receiving any child support payments from Brett as of the date of trial.

The bankruptcy court questioned whether it had to consider

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[6] The debtors initiated the dissolution proceedings on March 18, 2005, three days before filing their bankruptcy petition.

each debtor individually in light of the dissolution or consider the debtors together as if they were continuing "as a marital unit[.]" Tr. of January 31, 2006 Trial, 9:4-7. The Government pointed out that the debtors jointly filed for bankruptcy and that the debtors had not submitted any evidence to show currently that they had separated or had separate expenses. The debtors contended, however, that the bankruptcy court should view the debtors individually when considering the first prong of the Brunner test and together when considering the second prong of the Brunner test.[7]

The bankruptcy court issued its oral ruling at a hearing on March 16, 2006. The bankruptcy court found that Brett had a monthly net income of $3,457 and Janeth had a monthly net income of $1,633. The bankruptcy court determined that the debtors had a combined monthly net income of $5,111.

Although Brett testified at length as to each of the

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[7] In United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998), the Ninth Circuit adopted the three-part test formulated by the Second Circuit in Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987), in determining whether to discharge a debtor's student loan debt as imposing an undue hardship on the debtor, pursuant to § 523(a)(8).

Under the Brunner test, debtors must establish each of the following three elements, by a preponderance of the evidence:

> (1) The debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the student loan;
> (2) Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and
> (3) The debtor has made a good faith effort to repay the student loan.

Brunner, 831 F.2d at 396.

expenses the debtors incurred, the bankruptcy court did not make any findings as to their expenses. The bankruptcy court did recognize, however, that once Brett moves out, his expenses will increase. The bankruptcy court also acknowledged that Brett was required to make child support payments under the dissolution decree.

Based on these facts, the bankruptcy court found that the debtors met the first prong of the Brunner test, determining that the debtors could not make payments on their student loan debts on their current income at that time and maintain a minimally adequate standard of living. The bankruptcy court concluded that, "unless one or both of [the] debtors [won] the lottery, receive[d] a substantial inheritance, [found] a gold mine or a treasure trove in the backyard or somehow achieve[d] wealth in some other way . . . there [was] simply no way in which these loans [would] ever be paid in full." Tr. of March 16, 2006 Hr'g, 7:17-22.

Despite this conclusion, the bankruptcy court found that the debtors were not entitled to either a full or partial discharge of their student loan debts because their earning capacity should improve in the future. In other words, the bankruptcy court concluded that the debtors failed to meet the second prong of the Brunner test. The bankruptcy court disclosed that it had "seriously considered granting a partial discharge," but felt constrained by the Brunner test.[8] Tr. of March 16, 2006 Hr'g, 7:22-25, 8:1. Because the debtors did not meet the second prong

[8] Even during closing arguments at trial, the bankruptcy court had mentioned the possibility of a partial discharge.

of the Brunner test, the bankruptcy court reasoned that it did not need to make any determination under the third prong of the Brunner test.

On May 19, 2006, the bankruptcy court entered its judgment that the debtors' student loan debts to the Government were nondischargeable in their entirety, incorporating its oral ruling as part of the judgment. The debtors did not object to entry of the judgment or to the findings of fact made orally by the bankruptcy court at the March 16, 2006 hearing.

The debtors appealed the bankruptcy court's ruling. In Carnduff I, we reversed the bankruptcy court's ruling with respect to its analysis under the second prong of the Brunner test. Carnduff I, 367 B.R. at 130. We determined that the debtors had demonstrated that they could not pay their entire student loan debt without undue hardship, which the bankruptcy court itself had concluded, even though it also found that their finances likely would improve. Id. We noted that, in light of these facts, the "case seem[ed] to cry out for a partial discharge." Id. We thus remanded the matter to the bankruptcy court for a determination as to whether the debtors were entitled to a partial discharge of their student loan debts. Id. at 138. We also charged the bankruptcy court to consider on remand any additional evidence submitted by the debtors to determine whether their future earning capacity was as limited as they claimed as to prevent the debtors from repaying their student loan debts over time and to consider whether any additional procedures were needed to assure that the debtors had a fair opportunity to present their rebuttal evidence. Id. at 134-35.

We stressed, however, that the debtors, not the bankruptcy court, had the burden to demonstrate what portion of their student loan debts they would be unable to pay without undue hardship. Id. at 134. The bankruptcy court did not have the obligation to show the converse, "let alone calculate the precise dollar amounts." Id. We noted that, though the debtors attempted to meet their burden of proof, the bankruptcy court was not required to give credence to their evidence. Id. We pointed out that the bankruptcy court did not believe that the debtors' future earning capacity was as limited as they claimed. Id.

We also noted that "it was proper for the bankruptcy court to assume that the debtors will restructure their loans to the extent that they can do so." Id. at 136.

B. The Decision on Remand

On remand, the bankruptcy court held a hearing on July 6, 2007. Both the debtors and the Government submitted briefs on the issue of partial discharge, but neither side introduced any new evidence.

In their brief on remand, the debtors contended that, under the third prong of the Brunner test, the debtors made good faith efforts to repay their debts. The debtors pointed out that they never defaulted on their student loan debts to the Government due to the various deferments and/or forbearances they obtained. Additionally, the debtors argued that they had maximized their income; they had established that they cannot earn much more in their respective fields of employment. Although the debtors had not negotiated a repayment plan, they argued that efforts or lack

thereof to negotiate a repayment plan were not dispositive in determining good faith under the Brunner test.

As they met all three prongs of the Brunner test, the debtors asserted, they were entitled to at least a partial discharge of their student loan debts. The debtors asked the bankruptcy court, in granting partial discharge, to require no payments on their student loan debts until their youngest child reaches the age of 18 or completes high school, whichever is later, or completes college, if that child attends college. The debtors also requested that the bankruptcy court find that Janeth cannot make payments on her student loan debt to the Government in light of her present and anticipated income and expense situation.

The debtors further asked the bankruptcy court to establish the payment amounts and payment schedules for each of the debtors; that is, to determine the amount of monthly payments Janeth and Brett must make and to fix a date on which payments on the loans should commence and a date on which payments should end. In addition, the debtors asked the bankruptcy court to determine whether to terminate repayment of the nondischarged portion of their student loan debts if the debtors incur a disability that prevents them from repaying.

The debtors also challenged some of the factual findings made by the bankruptcy court in its March 16, 2006 oral ruling. In particular, the debtors contended that the bankruptcy court miscalculated Janeth's monthly net income by improperly deducting her 10% tithe. The debtors agreed with the bankruptcy court that Janeth's monthly net income was $1,633, but argued that the

bankruptcy court should have subtracted her 10% tithe from this amount.[9] Thus, the debtors argued, Janeth's monthly net income was actually $1,469.70, not $1,633 as the bankruptcy court had calculated.

At the July 6, 2007 hearing, the bankruptcy court found that the debtors met the third prong of a good faith effort to repay under the Brunner test because the student loan debts have never been in default due to the deferments and/or forbearances the debtors obtained. The bankruptcy court also pointed out that it had been established at trial that the debtors could not afford to make payments on their student loan debts at that time under any of the Government's repayment plans available to them.

The debtors repeatedly asked the bankruptcy court to review the evidence of the debtors' income and expenses again and determine that the debtors could not possibly repay their student loan debts without undue hardship until their children came of age. The bankruptcy court refused to consider setting the payments out that far, stating that such scheduling was "so far out to be ridiculous. What I am [sic] supposed to do, pick a figure out of the air and say this is the partial discharge?" Tr. of July 6, 2007 Hr'g, 13:8-10.

Additionally, as at trial, the bankruptcy court did not believe that the debtors' earning capacity was as limited as they claimed. The bankruptcy court determined that, despite their current financial circumstances, the debtors "[were] young

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[9] According to the debtors' calculations, 10% of $1,633 was $163.30, which, subtracted from $1,633, would leave $1,469.70 – which, the debtors asserted, was Janeth's actual monthly net income.

people, and we [could] anticipate that over the years that their economic circumstances [would] improve, or at least they should be making some effort to improve their economic circumstances." Tr. of July 6, 2007 Hr'g, 13:24-25, 14:1-3.

Although the debtors contended that they could not afford to make payments on their student loan debts until their youngest child reached age 18, they did not submit any additional evidence beyond what they submitted at the January 31, 2006 trial. The debtors simply reasserted that their income and expenses constrained them from making payments on their student loan debts until their youngest child came of age.

Noting that the evidence at trial indicated that the debtors could not afford to make any of the payments offered under any of the Government's student loan repayment plans, the bankruptcy court contemplated imposing its own repayment plan.

Although the debtors assured the bankruptcy court that it had the ability to impose its own repayment plan, they did not propose a formula by which to fashion a partial discharge apropos of their circumstances. Instead, the debtors again urged the bankruptcy court to review the debtors' current and future incomes and expenses in determining payments on the nondischarged portion of their student loan debts and not to require the debtors to repay their student loan debts until their youngest child reached the age of 18 or completed college.

The Government suggested other methods to determine what portion of the debtors' student loan debt should be discharged, including discharging the accrued interest and any remaining amounts due and owing at the end of the repayment period or

reducing the amount of principal owed by one-third. The Government urged the bankruptcy court, however, to refrain from setting a monthly repayment schedule as there were neither facts nor evidence to show what the debtors would earn over the next five to twenty-five years. It believed that, should the bankruptcy court decide to discharge a portion of the debtors' student loan debts, the Government could calculate what payments the debtors could afford to make on the nondischarged portion of their student loan debts. The Government also suggested that, in fashioning a partial discharge, the bankruptcy court discharge the balance of any student loan debts remaining at the end of the repayment period.

On July 20, 2007, the bankruptcy court issued an oral ruling. The bankruptcy court found that, as the debtors obtained various forbearances and/or deferments of their student loan debts, the debtors established good faith under the third prong of the Brunner test. The bankruptcy court granted the debtors a partial discharge, believing that "with some effort and with some tightening of their belts, payments [could] be made on these loans." Tr. of July 20, 2007 Hr'g, 4:2-4.

The bankruptcy court then proceeded to determine what portion of the debtors' student loan debts would be discharged. The bankruptcy court eliminated the interest accrued on the debtors' respective student loan debts and reduced the principal balances of the debtors' respective student loan debts by one-third. Brett thus was left with nondischarged student loan debt of $118,838.80, with the original 6.785% interest rate to accrue upon entry of the judgment. Janeth was left with nondischarged

student loan debt of $101,654.66, with the original 5.875% interest rate to accrue upon entry of the judgment. The bankruptcy court concluded that, with respect to the remaining nondischarged portions of their student loan debts, the debtors "should be able to satisfy these student loans if, in fact, they are sincere in their attempt to pay." Tr. of July 20, 2007 Hr'g, 4:24-25, 5:1.

At the end of the July 20, 2007 hearing, the bankruptcy court told counsel for the Government to prepare and present the judgment for the bankruptcy court's ruling on the partial discharge. A few weeks later, the Government submitted its proposed judgment.

The debtors objected to entry of the proposed judgment, arguing that the bankruptcy court miscalculated the amount of nondischarged principal on Janeth's student loan debt. The debtors also contended that the proposed judgment contained factual findings and legal conclusions that the bankruptcy court did not make at the July 20, 2007 hearing.

The debtors further argued that the bankruptcy court made no determination as to each of the following: (1) how much each debtor could afford to pay based on their individual incomes and expenses, given the divorce; and (2) the effect of future increased expenses on the debtors' ability to make payments on their student loan debts. The debtors also asked that the bankruptcy court include a provision in its judgment that the debtors would have no tax liability on any unpaid amount of student loan debt remaining at the end of the repayment period.

On September 14, 2007, the bankruptcy court held a hearing

to address the debtors' objections to the form of judgment. To "avoid a big argument over the form of [the] judgment," the bankruptcy court itself prepared the judgment. Tr. of September 14, 2007 Hr'g, 3:7-9. The bankruptcy court corrected the amount of nondischarged principal on Janeth's student loan debt.

At the hearing, the debtors asked the bankruptcy court to correct the judgment to reflect Janeth as ex-wife, not wife, of Brett. The bankruptcy court believed that, "as of the date of the trial, [the debtors] were in the process of a divorce, but because of monetary matters . . . were still living in the same house[.]" Tr. of September 14, 2007 Hr'g, 4:18-21. The debtors informed the bankruptcy court that the dissolution decree had been entered before the trial.

The debtors also reiterated their request that the bankruptcy court determine the amount of their monthly payments on the nondischarged portions of their student loan debts and how much each debtor could afford to pay, in light of their respective incomes and expenses. When the bankruptcy court asked whether the debtors wanted another evidentiary hearing, the debtors stated that they had already "asked before" and presented to the bankruptcy court the relevant facts and the requisite analysis to calculate the payments on the nondischarged portions of their student loan debts to the Government.

The Government countered that the bankruptcy court was not required to set monthly payment amounts. Rather, the Government would calculate the debtors' monthly payments once it had determined which repayment plans were available to the debtors.

The bankruptcy court finally responded, "All right. I'm

going to sign the judgment. I'm not going to set any payments. I'm going to sign the judgment." Tr. of September 14, 2007 Hr'g, 8:5-6. The bankruptcy court also refused to correct the judgment to reflect Janeth as Brett's ex-wife.

The bankruptcy court entered its judgment on September 14, 2007. The debtors timely appealed the judgment.

At no time during the adversary proceeding, did the debtors move to disqualify the bankruptcy judge.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

(1) Whether the bankruptcy court properly determined the amounts of the debtors' student loan debts to the Government that should be discharged.

(2) Whether the bankruptcy court abused its discretion in the way in which it dealt with the nondischarged portions of the debtors' student loan debts.

(3) Whether the bankruptcy court clearly erred in its calculations of the debtors' income.

(4) Whether the bankruptcy judge should be recused.

IV. STANDARDS OF REVIEW

"We review de novo the bankruptcy court's application of the legal standard in determining whether a student loan debt is

dischargeable as an undue hardship." Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001).

We review the bankruptcy court's exercise of its equitable powers under § 105(a) for abuse of discretion. Missoula Fed. Credit Union v. Reinertson (In re Reinertson), 241 B.R. 451, 454 (9th Cir. BAP 1999). "A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings." Id. "To reverse for abuse of discretion we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached." Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. 2007).

We review the bankruptcy court's findings of fact for clear error. Rifino, 245 F.3d at 1086. A finding of fact is clearly erroneous, even though there is evidence to support it, if we have the definite and firm conviction that a mistake has been committed. Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).

"'Failure to move for recusal at the trial level . . . does not preclude raising on appeal the issue of recusal under [28 U.S.C.] § 455.'" United States v. Holland, 501 F.3d 1120, 1122 (9th Cir. 2007)(quoting Noli v. Comm'r of Internal Revenue, 860 F.2d 1521, 1527 (9th Cir. 1988)). Thus, even when the issue of recusal has been raised for the first time on appeal, we review for plain error. Holland, 501 F.3d at 1122. See also United

States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991)("[E]ven assuming that [the defendant] may raise his [28 U.S.C.] section 455 recusal claim for the first time on appeal . . . we would review the district court's failure to recuse himself under the plain error standard.").

V. DISCUSSION

A. The Bankruptcy Court Did Not Abuse Its Discretion in Its Decision to Discharge a Portion of the Debtors' Student Loan Debts

The debtors do not oppose the grant of a partial discharge of their student loan indebtedness to the Government. Rather, the debtors contest the way in which the bankruptcy court determined how much of their student loan debt should be discharged and how the bankruptcy court dealt with the nondischarged portion of their student loan debts.

On remand following Carnduff I, the bankruptcy court found that the debtors had met their burden of proof under all three elements of the Brunner test to establish undue hardship and their consequent entitlement to a partial discharge of their student loan debt to the Government. Neither party challenges that ultimate conclusion in this appeal.

The debtors argue, however, that the bankruptcy court had a further duty to calculate how much the debtors reasonably could pay each month during the balance of the terms of their remaining student loan obligations in order to determine whether the nondischarged portions of the student loan debt imposed an undue hardship on the debtors. There is no such duty.

In Saxman, the Ninth Circuit held that a bankruptcy court

could enter a partial discharge of student loan debt in the exercise of the bankruptcy court's equitable powers under § 105(a),[10] so long as each of the three prongs of the Brunner test were satisfied. Saxman, 325 F.3d at 1174-75. In this case, after approximately $215,000 of the debtors' student loan debt owed to private lenders had been discharged by entry of a default judgment, the bankruptcy court discharged further student loan debt to the Government in the amount of $93,535.64 for Brett and $82,121.40 for Janeth. Brett's remaining nondischarged student loan debt to the Government was $118,838.80, and Janeth's nondischarged student loan debt to the Government was $101,654.66.

From the record, we agree with the debtors that the bankruptcy court apparently followed suggestions from the Government's counsel that it could discharge all accrued interest plus one-third of principal of the debtors' student loan indebtedness to the Government. The standard for reviewing a bankruptcy court's exercise of its equitable authority under § 105(a) is abuse of discretion. In this case where the bankruptcy court had made clear that it did not believe that the debtors' future earning capacity was as limited as they claimed, it is not our role to substitute our view as to what would be an equitable resolution, where we do not have a "firm and definite conviction" that the bankruptcy court made a clear error of

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[10] Section 105(a) provides in relevant part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . . .

judgment. We have no such firm conviction in this case.

As this Panel stated in Carnduff I,

> It is one thing for a Court to determine that payment of a certain amount of debt would or would not impose an undue hardship. It is entirely another matter to ask the Court to establish exactly how much debt could be paid without creating an undue hardship. This would put the Court into the position of micro-managing the debtor's lifestyle, determining precisely the amount that should be spent each month on variables such as food, clothing, cable television, recreation, subscriptions, retirement savings and grooming. Indeed, the Court could even become involved in adjusting what might normally be considered fixed expenses, such as by requiring the debtor to move to a less expensive home....

Carnduff I, 367 B.R. at 132. There is no requirement that the bankruptcy court engage in such inherently speculative and intrusive decision making in determining the extent of a partial discharge of student loan debt.

Contrary to the debtors' interpretation, Saxman does not really "offer any practical guidance . . . concerning how to craft a partial discharge." Mason v. Help Servs. Group, Inc. (In re Mason), 303 B.R. 459, 464 (Bankr. D. Idaho 2004), rev'd on other grounds, 464 F.3d 878 (9th Cir. 2006)(emphasis in original);[11] accord Bossardet v. Educ. Credit Mgmt. Corp. (In re Bossardet), 336 B.R. 451, 457 (Bankr. D. Ariz. 2005) ("Unfortunately, Saxman provides little guidance to trial courts

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[11] In Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 884-85 (9th Cir. 2006), the Court of Appeals reversed our affirmance of the bankruptcy court's ruling and remanded to the bankruptcy court on the ground that the debtor did not meet his burden to establish a good faith effort to repay under the third prong of the Brunner test. The Court of Appeals did not address the questions posed by the bankruptcy court regarding the exercise of a court's discretion in fashioning a partial discharge remedy.

as to what standards should be applied in determining if the court should invoke its § 105 jurisdiction to partially discharge an already fully dischargeable loan or how to determine the amount which should not be discharged."). Saxman simply does not address how the bankruptcy court should determine the amount of student loan debt that should be partially discharged or describe the extent of the bankruptcy court's discretion in establishing terms of repayment of student loan debts not discharged. Mason, 303 B.R. at 464.

In the absence of such guidance, courts generally exercise their discretion in determining the amount of a partial discharge and terms for payment of the balance, leaving room for the parties to negotiate. See, e.g., Bossardet, 336 B.R. at 459 (granting student loan lender's request to modify student loan by partially discharging some of the principal, reducing the principal balance, reducing the interest rate, and setting the term of the loan). "Since the court's authority to allow partial discharge is premised on its equitable powers, the method may depend on the equities of each case." Sequeira v. Sallie Mae Serv. Corp. (In re Sequeira), 278 B.R. 861, 866 (Bankr. D. Or. 2001). The court's task under § 523(a)(8) simply is to determine the extent that excepting a student loan debt from discharge will result in undue hardship for the debtor. Id. When possible, the court should "leave it to the parties to determine the ultimate terms of repayment . . . ." Id.

As we noted in Carnduff I, the bankruptcy court could safely assume that the debtors would restructure their student loan debts to the extent that they could. Carnduff I, 367 B.R. at

136. We did not require the bankruptcy court to make any determinations as to the amount of payments, the length of the repayment period, or provisions for any future contingencies, such as potential tax liabilities, with respect to the nondischarged portion of the debtors' student loan debt. We only suggested that the bankruptcy court could consider future tax liabilities and other consequences of available repayment plans, but only when determining what portion of the student loan debts would cause the debtors undue hardship. Id. The bankruptcy court had the discretion to leave it up to the debtors and the Government to set the terms of repayment. See Sequeira, 278 B.R. at 866.

It is unreasonable of the debtors to demand that the bankruptcy court make such determinations based on information that was speculative and uncertain, at best. For instance, at the time of trial, the debtors continued to live together, and the payment of a number of projected expenses resulting from the dissolution of their marriage had not even commenced. In addition, it would have been inappropriate for the bankruptcy court to determine, using the debtors' current income, whether the debtors would continue to be unable to pay the nondischarged balance of their student loan indebtedness to the Government, when, as the bankruptcy court repeatedly stressed, the debtors were young, and their economic circumstances likely would improve. Further, to demand that the start date for the debtors' repayment of their student loan debts be set on a contingent event, possibly many years in the future (i.e., the youngest child reaching the age of 18 or completing college), was, as the

bankruptcy court pointed out, "so far out [as] to be ridiculous." We agree with the bankruptcy court that postponing any payment obligation until the debtors' youngest child completes college, as suggested by debtors, is not reasonable or appropriate in light of the length of time and contingencies involved.

At oral argument, the debtors complained that the bankruptcy court simply followed the formula suggested by the Government in calculating the partial discharge of their student loan debts. The debtors did not propose an alternative method, however; in fact, the debtors admitted at oral argument that they did not explain to the bankruptcy court what an appropriate partial discharge would be under the circumstances. Under Saxman, the bankruptcy court could exercise its discretionary powers to fashion a partial discharge – including adopting the method proposed by the Government. We do not find that the bankruptcy court abused its discretion in doing so.

Further, the debtors did not meet their burden of proof in demonstrating that they could not afford to pay the nondischarged portion of their student loan debts over time. At the July 6, 2007 hearing following Carnduff I, the debtors did not present any additional evidence beyond what they submitted at trial to support their contentions. Drawing on what evidence the debtors presented at the January 31, 2006 trial, the bankruptcy court emphatically concluded that, given the debtors' age, health and level of education, their economic circumstances would improve such that the debtors could afford to repay the nondischarged portions of their student loan debts eventually. Our own review of the record leads us to conclude that the bankruptcy court did

not abuse its discretion in finding that the debtors failed to meet their evidentiary burden.

At oral argument, the debtors contended that the bankruptcy court should have provided for a discharge of the balance of any student loan debts remaining at the end of the repayment period. Such a remedy was discussed before the bankruptcy court; at least twice during the July 6, 2007 hearing, the Government suggested that the bankruptcy court consider including such a remedy when fashioning a partial discharge of the debtors' student loan obligations. However, there is no evidence in the record before us that the bankruptcy court did not consider this remedy when it made its final determination of the amounts of partial discharge of the debtors' student loan debts.

B. The Bankruptcy Court Did Not Clearly Err in Its Findings as to the Debtors' Income

On appeal before us, the debtors contend that the bankruptcy court erred in its calculation of Janeth's monthly net income and in combining the incomes and expenses of both debtors. The debtors argue that the bankruptcy court should have considered the income of each debtor individually in light of their future increased expenses arising from the dissolution of their marriage.

Although the bankruptcy court announced its findings at the March 16, 2007 hearing, the debtors did not object. They had an opportunity to contest these findings, but did not appeal them in Carnduff I. It is too late to do so in this second appeal.

More important, we have no definite and firm conviction that

the bankruptcy court clearly erred in making these determinations. See Banks, 263 F.3d at 869. At the time of trial, although the debtors had obtained a dissolution decree, the debtors were still living together. On the record, they indicated that neither of them could afford to live on their own at that time. Janeth also testified that she did not know when Brett would move out.

The debtors provided estimates as to their increased living expenses, but most of these figures were based on speculation. The only definite figure that the debtors could provide as to their increased expenses was the amount of child support – which, at that time, Brett had not been paying.

The debtors complain that the bankruptcy court miscalculated the amount of their incomes. However, the debtors themselves had confirmed at trial the bankruptcy court's determination as to the amount of their combined income. At trial, Brett agreed that the net income for both himself and Janeth was approximately $5,111. With respect to Janeth's income, during closing argument, counsel for the debtors stated that Janeth had $1,653 in net income at that time. Although at the July 6, 2007 hearing, counsel for the debtors stated Janeth's net income was $1,469, after tithing, even if the bankruptcy court's calculation of Janeth's income was incorrect, the difference in the amounts is relatively inconsequential.

Given these circumstances, it was not clearly erroneous for the bankruptcy court to combine the debtors' income and expenses in reaching its decision. The debtors even requested the bankruptcy court to consider the debtors together for the

purposes of conducting its analysis under the second Brunner prong.

C. The Recusal of the Bankruptcy Judge Is Unwarranted

Without citing to a specific statute, the debtors contend that the bankruptcy judge should be disqualified as he has repeatedly failed to comply with the applicable law. Because of the bankruptcy judge's argued noncompliance with the law, the debtors assert that they have had to file two appeals; they cannot afford "the continued need to appeal the [bankruptcy judge's] decisions which fail to comply with the law." They further assert that the bankruptcy judge "faulted" the debtors for incurring student loan debts. The debtors therefore ask that we "take the unusual step" of replacing the bankruptcy judge with another bankruptcy judge within the district to review the evidence and to make an appropriate decision(s) with respect to any nondischarged student loan obligations of the debtors to the Government.

The Government points out that the debtors did not move to recuse the bankruptcy judge at any time during the adversary proceeding. The Government adds that, although there is no absolute time period in which to file a recusal motion, the debtors should have filed it as soon as they discovered any facts supporting recusal. The Government argues that, at any rate, because the debtors did not bring the recusal motion at the trial level, it is improper on appeal.

The Government also asserts that the debtors have failed to present sufficient facts to support their request for

disqualification; the debtors have not demonstrated that the bankruptcy judge had such a high degree of antagonism as to make a fair judgment impossible or that he derived his opinion from an extrajudicial source.

Although the debtors fail to provide a statutory basis for their allegations, we nonetheless apply the standards of 28 U.S.C. § 455 ("§ 455").[12] Klenske v. Goo (In re Manoa Finance

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[12] 28 U.S.C. 455 provides in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (I) Is a party to the proceeding, or an officer, director, or trustee of a party;

(continued...)

Co.), 781 F.2d 1370, 1373 (9th Cir. 1986)("We have applied the standards of § 455 even when the statute has not been asserted."). We first address the Government's request that we decline to consider the debtors' request for recusal as they did not bring it before the bankruptcy court.

As mentioned earlier, failure to move for recusal at the

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[12](...continued)

(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interest, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

...

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

trial court level does not preclude raising the issue of recusal on appeal. Holland, 501 F.3d at 1122. Therefore, though the debtors raise the issue of recusal for the first time on appeal, we consider it here. We note, however, that as the debtors did not bring the recusal motion before the bankruptcy judge, they will bear a greater burden on appeal in showing that the bankruptcy judge erred in failing to recuse himself pursuant to § 455. Noli, 860 F.2d at 1527 (quoting United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980)).

Section 455 applies to bankruptcy judges. Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 221 (9th Cir. BAP 1996). Under § 455(a), a judge shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). Under § 455(b)(1), a judge shall disqualify himself or herself where he or she has a personal bias or prejudice against a party or personal knowledge of disputed evidentiary facts concerning the proceeding. 28 U.S.C. § 455(b)(1). Section 455(a) covers situations that appear to create a conflict of interest, whether or not actual bias exists, whereas section 455(b) addresses situations in which an actual conflict of interest exists. Preston v. United States, 923 F.2d 731, 734 (9th Cir. 1991). Further, in providing examples where judicial impartiality might be questioned, § 455(b) describes situations where an apparent conflict exists. Id.

An objective standard is used for judging the appearance of impartiality for purposes of recusal under § 455. Preston, 923 F.2d at 734. This standard involves ascertaining "'whether a

reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Id. (quoting United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)). This standard applies to both § 455(a) and (b). United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980)("[W]e think the test under either subsection (a) or (b) is the same, namely, whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice."). See also Seidel, 194 B.R. at 222 ("All evaluations of bias or prejudice under section 455 are made using an objective standard.").

A judge's bias or prejudice must be shown as a product of an extrajudicial source. Klenske, 781 F.2d at 1373. See also Byrne v. United States Trustee (In re Basham), 208 B.R. 926, 933 (9th Cir. BAP 1997)("An allegation of personal bias must be based on an 'extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'")(quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). Partialities that develop during the course of the proceedings can be the basis for recusal only "when the judge displays a deep-seated and unequivocal antagonism that would render fair judgment impossible." F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1145 (9th Cir. 2001).

Here, the debtors have not demonstrated that the bankruptcy judge had a bias that would cause us reasonably to question his impartiality under § 455(a), or that he had a personal bias

against the debtors that warrants his disqualification under § 455(b)(1).

The debtors construe the bankruptcy court's refusal to consider their request to defer payments on their student loan debts until their children come of age, as well as its failure to make findings as to their future expenses, as indicative of bias. As we earlier explained, we have determined that the bankruptcy court did not err in refusing to set a payment schedule for the remaining terms of the nondischarged portions of the debtors' student loan debts.

Even if we determined to the contrary, an erroneous adverse ruling in and of itself does not constitute grounds for recusal. Focus Media, Inc. v. NBC, Inc. (In re Focus Media, Inc.), 378 F.3d 916, 930 (9th Cir. 2004). Although judges are known to make procedural and substantive errors, such errors would be the basis for an appeal, not recusal. Id. (quoting F.J. Hanshaw Enters., Inc., 244 F.3d at 1145).

The debtors also perceive the bankruptcy judge's rulings to be prejudicial in that they compel the debtors to "continually" appeal them and incur greater attorney's fees and expenses. Admittedly, an appeal is a time-consuming and costly process. However, having to appeal an allegedly erroneous ruling does not go to the bankruptcy judge's ability to render a fair and impartial judgment – it simply evidences the possibility that the bankruptcy judge erred on a point of law or fact.

The debtors further contend that the bankruptcy court "faults" them for incurring student loan debts. The debtors fail to point out any facts or circumstances in the record

demonstrating that the bankruptcy judge had a bias against them.

Based on our review of the record, we note that, although the bankruptcy judge expressed some disapproval of some of the debtors' expenses and their suggested repayment schedule[13] and the fact that they had taken on substantial student loan debt,[14] and further expressed some impatience and weariness with the proceedings,[15] such comments do not evince an impartiality necessitating his recusal. Judicial remarks made during the course of a trial that are critical or disapproving of or even hostile to a party or his or her counsel ordinarily do not support a bias or partiality challenge, unless they spring from an extrajudicial source or result from a high degree of antagonism that would render fair judgment impossible. See Focus, 378 F.3d at 931; see also, e.g., Noli, 860 F.2d at 1527-28 (determining that comments made by the judge, expressing his frustration at the appellants' attempts to stall the trial, do

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[13] Tr. of July 6, 2007 Hr'g, 5:10-21, 13:5-10.

[14] At the end of the July 6, 2007 hearing, the bankruptcy court stated:

> Well, I tell you, I really have mixed emotions about this case. We have these two debtors who went to private schools where the tuitions were extremely high. They educated themselves well, advanced degrees. I think all the student loans taken together must have been over $500,000. And I get the impression that now they don't want to pay for any of that.
>
> On the other hand, this is a student loan case, and if they can demonstrate undue hardship, they're entitled to discharge the loans.

Tr. of July 6, 2007 Hr'g, 28:1-11.

[15] Tr. of July 6, 2007 Hr'g, 3:5-7; Tr. of September 14, 2007 Hr'g, 3:5-7.

not demonstrate pervasive bias or prejudice).

Despite his feelings on the matter, the bankruptcy judge listened to the arguments of counsel for the debtors and the Government and questioned them closely before rendering his final judgment. In short, the bankruptcy judge carried out his "duty to sit in judgment . . . [in the case] before him . . . [and] to administer justice without respect to persons." Holland, 501 F.3d at 1123. We determine that the bankruptcy judge's comments do not establish reasonable grounds for questioning his impartiality or demonstrate that he had a personal bias against the debtors.

Although the debtors had the burden on appeal to demonstrate that the bankruptcy court had such a bias against them as to warrant recusal, they have not provided a record adequate to support their contention. We find nothing in the record that would cause us to question the bankruptcy judge's impartiality or that shows us that he had a personal bias or prejudice against the debtors. We therefore deny the debtors' request to recuse the bankruptcy judge.

VI. CONCLUSION

We conclude that the bankruptcy court did not abuse its discretion in partially discharging the debtors' student loan debts and AFFIRM the bankruptcy court's judgment.