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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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In re: )  
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ALEXIS MICHAELS, aka )  
ALEXIS HILL SCHWARZKOPF, aka )  
ALEX MICHAELS, )  
)  
Debtor. )

BAP Nos. CC-08-1078-PaDMo  
CC-08-1081-PaDMo  
(Cross Appeals)  
Bk Nos. RS 03-25365-PC  
RS 03-25780-PC  
(Substantively consolidated)

\_\_\_\_\_)  
In re: )  
)  
JOANNE LOUISE MICHAELS, aka )  
JOANNE LOUISE SCHWARZKOPF, )  
)  
Debtor. )

Adv. No. RS 05-01429-PC

\_\_\_\_\_)  
ALEXIS HILL SCHWARZKOPF, )  
)  
Appellant, )

v. )  
)  
ROBERT L. GOODRICH, Chapter 7 )  
Trustee, )  
)  
Appellee and )  
Cross-Appellant, )

**M E M O R A N D U M<sup>1</sup>**

v. )  
)  
JOANNE LOUISE MICHAELS, )  
)  
Cross-Appellee. )  
\_\_\_\_\_)

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

1 Argued and Submitted on January 22, 2009  
2 at Pasadena, California

3 Filed - February 27, 2009

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

6 Honorable Mitchel R. Goldberg, Bankruptcy Judge, Presiding

7 Before: PAPPAS, DUNN and MONTALI, Bankruptcy Judges.  
8

9 Alexis Michaels ("Michaels") appeals the decision of the  
10 bankruptcy court revoking Michaels' discharge pursuant to  
11 § 727(d)(2) and (3). Robert L. Goodrich ("Trustee"), trustee of  
12 the Debtors' consolidated chapter 7<sup>2</sup> bankruptcy cases, cross-  
13 appeals the decision of the bankruptcy court declining to revoke  
14 the discharge of Joanne Louise Michaels ("Mrs. Michaels" and,  
15 together with Michaels, "Debtors"). Perceiving no errors or abuse  
16 of discretion in the bankruptcy court's decisions, we AFFIRM the  
17 revocation of Michaels' discharge pursuant to § 727(d)(3) and the  
18 decision of the bankruptcy court not to revoke Mrs. Michaels'  
19 discharge under § 727(d)(2). Having affirmed Michaels' denial of  
20 discharge under § 727(d)(3), we do not reach issues related to the  
21 bankruptcy court's denial of Michaels' discharge under  
22 § 727(d)(2).  
23  
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25 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date (October 17,  
2005) of most of the provisions of the Bankruptcy Abuse Prevention  
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20,  
2005, 119 Stat. 23.

1 **FACTS**

2 On October 21, 2003, Michaels filed a petition for relief  
3 under chapter 7 of the Bankruptcy Code. Shortly thereafter, on  
4 October 29, 2003, Mrs. Michaels, his spouse, filed a separate  
5 chapter 7 petition. By order of the bankruptcy court entered on  
6 November 11, 2003, the two cases were substantively consolidated.

7 On the schedule A filed in both cases, Debtors listed an  
8 ownership interest in a certain parcel of undeveloped real estate  
9 in Imperial County, California (the "Property"). In preparing the  
10 schedules, Michaels suggests that he searched property records and  
11 discovered that his wife was listed as the owner of the Property  
12 on the Imperial County records. Though the Property was  
13 ostensibly scheduled as a matter of prudence, Debtors allege that  
14 they were under the impression that the Property had been sold in  
15 1982 to the State of California in a tax sale.<sup>3</sup>

16 Before the bankruptcy filings, on July 23, 2003, Imperial  
17 County recorded a Notice of Power to Sell Tax-Defaulted Property  
18 against the Property. The Notice to Sell indicated that Mrs.  
19 Michaels was the holder of title to the Property. The Property  
20 was apparently sold on February 12, 2004, and the deed recorded on  
21 March 15, 2004.

22 On December 12, 2003, Trustee conducted the initial § 341(a)  
23 creditors' meeting in the bankruptcy cases and requested that  
24 Debtors provide him documentation concerning the Property.  
25 Debtors' attorney, Mr. Broker, replied in a letter to Trustee on  
26 January 27, 2005, that the Property had been sold in a tax sale.

27 \_\_\_\_\_  
28 <sup>3</sup> A copy of a tax deed, dated July 2, 1982, is included in  
the excerpts of record.

1 At the continued § 341 meeting on January 30, 2004, Michaels  
2 testified that the Property was sold at a tax sale in 1982.

3 The Debtors were granted discharges on November 19, 2004.  
4

5 The Trusts Adversary Proceeding

6 In 1992, two separate trusts, the Grove Trust and the  
7 Apartment Trust, were created by Debtors. These were irrevocable  
8 trusts created in favor of Debtors' daughter, Sydnee Michaels.  
9 Juan Briones ("Briones"), a bookkeeper in Michaels' employ, was  
10 appointed trustee of the trusts.

11 In December 1997, four lots of land that contained avocado-  
12 producing trees were purchased and became property of the Grove  
13 Trust (the "Grove Lots"). Grove Trust purchased the Grove Lots in  
14 part with notes and deeds of trust owned by Impetrol Corporation,  
15 a corporation wholly owned by Michaels.

16 On October 28, 2004, Trustee brought an adversary proceeding  
17 against the Grove Trust, alleging that Michaels fraudulently  
18 transferred the funds to the Trusts which were used to purchase  
19 the Grove Lots. The bankruptcy court conducted a trial in this  
20 action from May 15, 2006, to June 23, 2006. Shortly after the  
21 trial began, Trustee moved for issuance of an injunction to enjoin  
22 Briones and Michaels from making any expenditures from the Grove  
23 Trust in excess of \$10,000 without providing Trustee advance  
24 notice of the proposed payment and an opportunity to object. This  
25 injunction was granted by the bankruptcy court at a hearing on  
26 June 7, 2006. At that hearing, the bankruptcy court addressed  
27 both Briones and Michaels, advising them that the injunction  
28 applied to actions by either of them.

1 On April 30, 2007, Trustee moved for an order to show cause  
2 why Michaels and Briones should not be held in civil contempt for  
3 violating the injunction. Trustee argued that Briones had  
4 disbursed \$14,155.99 to Michaels on October 16, 2006, without  
5 first advising the Trustee or obtaining approval of the bankruptcy  
6 court, thus violating the injunction. On July 2, 2007, the  
7 bankruptcy court ordered that the preliminary injunction would  
8 remain in effect until final judgment was entered in the adversary  
9 proceeding.

10 The bankruptcy court found that Briones and Michaels violated  
11 the injunction in an order entered October 19, 2007. In its  
12 order, the court observed,

13 The loan from the Grove Trust in the amount of  
14 \$14,155.99 to Mr. Michaels, on or about October 16,  
15 2006, required prior court approval, which was not  
16 obtained.

16 In accepting the loan of \$14,155.99 from the Grove Trust  
17 without prior court approval or written consent of the  
18 trustee, Mr. Michaels violated this Court's prior order.  
19 The Trustee is awarded sanctions in the amount of  
20 \$3,000, jointly and severally, against Mr. Briones and  
21 Mr. Michaels, for their violation(s) of the Injunction,  
22 which shall be paid within twenty (20) days of the entry  
23 of this Order.

20 This order was not appealed.<sup>4</sup>

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24 <sup>4</sup> The bankruptcy court would ultimately decide that Grove  
25 Trust was an alter ego of Michaels, and that the transfer of the  
26 Grove Lots into the Grove Trust was a transfer intended to defraud  
27 creditors. The judgment in the Trusts Adversary Proceeding was  
28 appealed to the district court. On November 21, 2008, the district  
court reversed the judgment of the bankruptcy court regarding  
Grove Trust, determining the Michaels was not an alter ego to  
Grove Trust, and that the transfer of the Grove Lots was not a  
fraudulent transfer. The district court judgment is now on appeal  
to the Ninth Circuit Court of Appeals.

1           Events Leading Up to the Discharge Revocation Proceeding

2           At approximately the same time that Debtors received their  
3 discharges, in late 2004 or January 2005, Michaels alleges that he  
4 had a telephone conversation with a representative of Global  
5 Discoveries, an asset search company. In that conversation, the  
6 Global Discoveries agent informed Michaels that his wife might  
7 have a claim to some property. While the caller did not discuss  
8 details, Michaels deduced that the property referred to was likely  
9 the Property. Michaels alleges that he then contacted the  
10 Imperial County tax office and was informed that there had been a  
11 tax sale of the Property and that funds were available from that  
12 sale as a result of an overbid.

13           Michaels contacted Anthony Sias ("Sias"), who occasionally  
14 worked for him, and asked him to investigate the status of the  
15 Property. Sometime in early January 2005, Sias sent Michaels a  
16 memo (the "Sias Memo").<sup>5</sup> Sias reported that he had a conversation  
17 with Debbie Walters ("Walters") of the Imperial County tax office,  
18 and that the county was holding overbid proceeds of \$31,997.89  
19 from the tax sale of the Property. Sias also reported:

20           There is an excess proceeds claim form. It will be  
21 mailed to my home address. They will not accept a fax  
22 copy. There is no "Assignment of Beneficial Interest"  
23 document. Schanafelt<sup>6</sup> must sign a document releasing  
24 funds to you. This document my [sic] be created by

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24           <sup>5</sup> There is no copy of the Sias Memo in the excerpts of  
25 record, but a copy of the Sias Memo is attached to Michaels'  
26 brief. Because Trustee cites in his Reply Brief to this text in  
27 Michaels' brief, we assume that Trustee does not challenge the  
28 authenticity of this document.

27           <sup>6</sup> Schanafelt is Mrs. Michaels' maiden name, and apparently,  
28 the name appearing on the county's records as the former owner of  
the Property.

1 legal counsel and must be notarized. You then may fill  
2 out the excess proceeds claim form and attach notarized  
3 document. The notarized document gives you the right to  
4 sign and submit claim form.

4 On or about January 8, 2005, the tax office sent Mrs.  
5 Michaels, in care of Sias, a letter and accompanying claim form  
6 that advised her that "our records indicate that you may be a  
7 party of interest" who may have a right to file a claim for excess  
8 proceeds from the tax sale of the Property. The claim form  
9 indicated that the deadline for filing a claim was March 15, 2005.

10 Between January 8 and March 2005, Michaels admits that he  
11 contacted Walters "three or four times" to inquire whether any  
12 other party had filed a claim for the overbid proceeds. Then, as  
13 Mrs. Michaels would later testify, in early March 2005, Michaels  
14 instructed her to sign the claim form for submission to the county  
15 claiming the proceeds, a document that Michaels had already filled  
16 out. Acting on Michaels' instructions, on March 11, 2005, Mrs.  
17 Michaels submitted the claim form to the Imperial County tax  
18 office.

19 On or about March 10, 2005, Global Discoveries contacted  
20 Trustee, suggesting that the bankruptcy estate may have an  
21 interest in the excess proceeds from sale of the Property.  
22 Trustee instructed Global Discoveries to take whatever steps were  
23 necessary to collect the asset on his behalf. With Global  
24 Discoveries' help, Trustee filed a claim with the county on behalf  
25 of the bankruptcy estate on March 15, 2005.

26 On, or shortly after, March 15, 2005, Michaels again  
27 contacted Walters and was told that Trustee had filed a claim.  
28 Michaels then instructed his wife to withdraw her claim. He told

1 Mrs. Michaels that her claim was no longer necessary. She  
2 attempted to withdraw the claim by phoning the Imperial County tax  
3 office, but was told that claims could only be withdrawn by a  
4 written request. She never submitted a written request to  
5 withdraw the claim. Eventually, the overbid proceeds were  
6 distributed by the county to Trustee.

7 Both Michaels and Mrs. Michaels admit in a Pre-trial Order  
8 approved by the parties that, at all relevant times, they knew  
9 they were under an obligation to inform Trustee if they learned of  
10 the existence of possible assets of the bankruptcy estate. They  
11 also concede that neither ever contacted Trustee to advise him of  
12 the existence of the overbid proceeds for the Property, nor that  
13 they were submitting a claim to the county for those proceeds.  
14 Trial Tr. 168:2-6 (Michaels); Trial Tr. 98:9-14 (Mrs. Michaels).

15

16 The Discharge Revocation Proceeding

17 On November 17, 2005, Trustee filed an adversary complaint  
18 against Debtors seeking to revoke their discharges. He alleged in  
19 the complaint that Debtors had fraudulently used a family trust to  
20 shield assets from the reach of their creditors. Second, he  
21 alleged that Debtors had fraudulently submitted a claim to collect  
22 the tax sale overbid proceeds for the Property without reporting  
23 their entitlement to the proceeds to Trustee or the court. Based  
24 upon this conduct, Trustee requested that the bankruptcy court  
25 revoke Debtors' discharges under § 727(d)(1) and (2). Trustee  
26 later added an additional claim against Michaels in the Pre-trial  
27 Order they approved and submitted to the bankruptcy court, in  
28 which Trustee alleged that Michaels discharge should be revoked

1 because he had intentionally violated a lawful order of the court,  
2 thus implicating § 727(d)(3) and (a)(6).

3 In response to Trustee's allegations, Debtors maintained that  
4 there was no fraud. Regarding the tax sale proceeds, Debtors  
5 argued that they had, or believed they had, no remaining interest  
6 in the Property, that they filed the claim with the county not to  
7 obtain the funds, but as a way to protect the bankruptcy estate  
8 from expiration of the state statute of limitations for submitting  
9 claims for the proceeds, and that they never concealed anything  
10 from Trustee regarding the Property.

11 A three-day trial was conducted by the bankruptcy court on  
12 October 9, 11 and 12, 2007. Trustee and Debtors were represented  
13 by counsel and presented evidence, testimony, and argument.  
14 During the course of the trial, the bankruptcy court dismissed  
15 Trustee's claim under § 727(d)(1). However, regarding Trustee's  
16 claims under § 727(d)(2) and (3), the bankruptcy court found and  
17 concluded:

18 -that Michaels had intentionally, knowingly, willingly and  
19 fraudulently failed to properly report or disclose to his counsel  
20 or to Trustee Debtors' entitlement to the overbid proceeds from  
21 the tax sale of the Property;

22 -that Michaels' testimony and explanation regarding his  
23 actions concerning submission of the claim for the excess proceeds  
24 was not credible;

25 -that Michaels intentionally, knowingly, willingly and  
26 fraudulently attempted to obtain the overbid proceeds;

27 -that Mrs. Michaels was an unwitting participant in Michaels'  
28 efforts to obtain the excess proceeds;

1            -that Michaels violated the bankruptcy court's injunction  
2 issued in the Trusts Adversary Proceeding by soliciting and  
3 accepting \$14,155.99 in avocado grove revenues from Briones  
4 without first advising Trustee or the court; and, among other  
5 findings,

6            -that Michaels' testimony and explanation regarding his  
7 motives in disregarding the court's injunction were not justified  
8 as excusable neglect.

9            On December 4, 2007, the bankruptcy court entered its  
10 judgment revoking Michaels' discharge under § 727(d)(2) and (3);  
11 the judgment denied Trustee's request to revoke Mrs. Michaels'  
12 discharge.

13            On December 14, 2007, Debtors, now acting pro se, moved for  
14 reconsideration of the judgment revoking Michaels' discharge. In  
15 their motion, Debtors generally disputed the findings of the  
16 bankruptcy court. In an effort to shore up his credibility,  
17 Michaels attached and offered to the court the report of a  
18 technician who had conducted his post-trial polygraph examination  
19 in support of the truthfulness of his testimony before the  
20 bankruptcy court.

21            The bankruptcy court considered Debtors' motion for  
22 reconsideration on February 2, 2008. The bankruptcy court ruled  
23 the polygraph examination was inadmissible evidence and, even if  
24 admitted, would not have persuaded the court to modify its  
25 judgment. The court denied the motion for reconsideration by  
26 order entered February 26, 2008.

27            Debtors filed a timely appeal of the judgment revoking  
28 Michaels' discharge on March 7, 2008. Trustee filed a timely

1 cross-appeal of the judgment dismissing his claim for revocation  
2 of Mrs. Michaels' discharge on March 14, 2008.

3  
4 **JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
6 and 157(b)(2)(A) and (J). The Panel has jurisdiction under 28  
7 U.S.C. § 158.

8  
9 **ISSUES**

- 10  
11 1. Whether the bankruptcy court erred in revoking Michaels'  
12 discharge under § 727(d)(3) and (a)(6).  
13 2. Whether the bankruptcy judge erred in not recusing himself  
14 for bias and prejudice under 28 U.S.C. § 455(a).<sup>7</sup>  
15 3. Whether the bankruptcy court erred in declining to revoke  
16 Mrs. Michaels' discharge under § 727(d)(2).  
17 4. Whether the bankruptcy court abused its discretion in denying  
18 Michaels' motion for reconsideration and excluding the report  
19 of the polygraph examiner.

20  
21 **STANDARD OF REVIEW**

22 In reviewing a bankruptcy court's decisions regarding  
23 revocation of discharge pursuant to § 727(d), we examine its legal  
24 conclusions de novo and its factual findings for clear error.  
25 Bowman v. Belt Valley Bank (In re Bowman), 173 B.R. 922, 924 (9th  
26 Cir. BAP 1994).

27  
28 <sup>7</sup> Michaels first raised this issue on appeal to this Panel.

1 We review a bankruptcy judge's failure to recuse for bias and  
2 prejudice, where the issue was not raised before the bankruptcy  
3 court, for plain error. Morris Weiss v. Sheet Metal Workers  
4 Local. No. 544 Pension Trust, 719 F.2d 302, 304 (9th Cir. 1983).  
5 Plain error may only be found "where there is (1) error, (2) that  
6 was clear or obvious, (3) that affected substantial rights, and  
7 (4) that seriously affected the fairness, integrity, or public  
8 reputation of the judicial proceedings." United States v. Randall  
9 162 F.3d 557, 561 (9th Cir. 1998).

10 A trial court's decision to admit or exclude expert testimony  
11 is reviewed for abuse of discretion. Kumho Tire Co. v.  
12 Carmichael, 526 U.S. 137, 152 (1999).

13 Likewise, a bankruptcy court's denial of a motion for  
14 reconsideration is reviewed for abuse of discretion. In re  
15 Sandoval, 186 B.R. 490, 492 (9th Cir. BAP 1996). We find an abuse  
16 of discretion if we have a "definite and firm conviction" that the  
17 bankruptcy court committed a clear error of judgment in the  
18 conclusion it reached. A bankruptcy court also necessarily abuses  
19 its discretion if it bases its ruling on an erroneous view of the  
20 law. Sewell v. MGF Funding, Inc. (In re Sewell), 345 B.R. 174,  
21 178-79 (9th Cir. BAP 2006).

## 22

## 23 DISCUSSION

### 24 I.

25 The bankruptcy court did not err in revoking Michaels'  
26 discharge under § 727(d)(3).

1 Section 727(d) (3) provides:

2 On request of the trustee, a creditor, or the United  
3 States Trustee, and after notice and a hearing, the  
4 court shall revoke a discharge granted under subsection  
(a) of this section if -

5 (3) the debtor committed an act specified in subsection  
6 (a) (6) of this section.

7 Section 727(a) (6), in turn, provides that: "The court shall grant  
8 the debtor a discharge, unless . . . (6) the debtor has refused,  
9 in this case - (A) to obey any lawful order of the court, other  
10 than an order to respond to a material question or to testify[.]"

11 A trustee seeking to revoke a discharge pursuant to §§ 727(d) (3)  
12 and (a) (6) (A) requires a showing that the debtor (a) was aware of  
13 the order; and (b) willfully or intentionally refused to obey the  
14 order (i.e., something more than a mere failure to obey the order  
15 through inadvertence, mistake or inability to comply). Smith v.  
16 Jordan (In re Jordan), 521 F.3d 430, 434 (4th Cir. 2008).

17 A bankruptcy court has authority to issue injunctions.  
18 Celotex Corp. v. Edwards, 514 U.S. 300, 303 (1995). The injunction  
19 was issued in the Trusts Adversary Proceeding that arose in  
20 Michaels' main bankruptcy case. Michaels has not questioned the  
21 authority of the bankruptcy court to enter the injunction or the  
22 applicability of § 727(a) (6) to an order entered in an adversary  
23 proceeding related to his own bankruptcy case.

24 It is not disputed by Michaels that, in connection with the  
25 Trusts Adversary Proceeding, the bankruptcy court entered an order  
26 enjoining Michaels and Briones from disbursing more than \$10,000  
27 from the Groves Trust without first notifying Trustee. Indeed,  
28 that Michaels was aware that this injunction prohibited Briones

1 from disbursing more than \$10,000 without advance notice to  
2 Trustee or prior order of the bankruptcy court is evidenced from  
3 his trial testimony:

4       PEMBERTON [Trustee's atty]: Do you recall your attorney,  
5 Mr. Broker, standing up and stating to the court that he  
6 understood that the injunction also applied to you and  
7 Mrs. Michaels and that you would abide by the  
8 injunction?

9       MICHAELS: Not overly clear on that but I understood what  
10 was going on.

11       PEMBERTON: And you did not voice any objection to that  
12 injunction at the time, did you?

13       MICHAELS: No.

14 Trial Tr. 5:9-14 (October 11, 2007).

15       Though he was aware of the restrictions in the bankruptcy  
16 court's injunction, Michaels later engineered a "loan" from the  
17 trustee of the Grove Trust, in violation of that order:

18       PEMBERTON: Nevertheless [in spite of the injunction] you  
19 accepted a payment of \$14,155.99 from Mr. Briones in the  
20 form of receipts from the fall avocado grove. Isn't  
21 that correct?

22       MICHAELS: Yes.

23 Trial Tr. 6:9-12 (October 11, 2007).

24       Michaels admitted that, intentionally and willfully, he did  
25 not inform Trustee or the bankruptcy court about his plan to  
26 "borrow" funds from the trust:

27       PEMBERTON: Was there a reason you didn't ask your  
28 counsel to simply petition the court for an order  
allowing [you to obtain money from the Grove Trust?]

      MICHAELS: Good question, Mr. Pemberton.

      THE COURT: You didn't even go and discuss it with your  
counsel about the possibility?

      MICHAELS: Because I knew . . . you're [the Court] a very  
smart guy and . . . it just would have been

1           inappropriate for you to give permission and that I  
2           know.

3           THE COURT: So you decided to take matters into your own  
4           hands?

5           MICHAELS: Yes.

6           Trial Tr. 12:10-13:6.

7           Thus, Michaels does not dispute that there was an injunction,  
8           that he was aware of it, and that he was present when the  
9           bankruptcy court explicitly warned him that he was bound by its  
10          terms. In spite of the injunction, Michaels persuaded Briones to  
11          "loan" him more than \$14,000 in violation of the injunction. In  
12          doing so, Michaels admits that he "t[ook] matters into his own  
13          hands," intentionally refusing to obey the court order because he  
14          knew the court would not approve his access to these funds. In  
15          short, Michaels concedes that he "committed an act specified in  
16          subsection (a)(6) of this section," that is, he "refused, in this  
17          case - (A) to obey any lawful order of the court, other than an  
18          order to respond to a material question or to testify[.]"

19          Michaels argues that his motive in obtaining the trust funds  
20          was pure. But it is of no moment that Michaels may have believed  
21          he was justified in his refusal to obey a lawful order of the  
22          court. Persons subject to an injunction are required to "obey  
23          that decree until it is modified or reversed, even if they have  
24          proper grounds to object to the order." GTE Sylvania, Inc. v.  
25          Consumers Union of U.S., Inc., 445 U.S. 375, 389 (1980). The  
26          injunction was never appealed, and the bankruptcy court was under  
27          no legal compulsion to entertain Michaels' excuses for its willful  
28          violation. Consequently, we conclude that the bankruptcy court's

1 revocation of Michaels' discharge was appropriate under  
2 § 727(d)(3) and (a)(6).

3 While it need not have done so, the bankruptcy court  
4 considered Michaels' explanation for his decision to willfully  
5 disobey the bankruptcy court's injunction because he needed the  
6 funds for settlement negotiations with Trustee. Reacting to his  
7 story, the court found that "Mr. Michael's testimony and  
8 explanation regarding his conduct in violating the court's  
9 injunction is not excusable neglect." Indeed, the bankruptcy  
10 court found that Michaels used the funds from the trust for his  
11 personal benefit.

12 "[I]t is totally within the discretion of the bankruptcy  
13 court to find a particular violation of the court's order so  
14 serious as to require denial of discharge under § 727(a)(6)(A)."  
15 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751,  
16 755 (9th Cir. 1985). But even were we free to weigh Michaels'  
17 conduct anew, we would nonetheless conclude that his brazen  
18 flouting of the bankruptcy court's injunction simply because he  
19 "needed" the money, and because he felt that the bankruptcy court  
20 would never let him access the funds if he asked, justifies the  
21 bankruptcy court's decision to revoke Michaels' discharge under  
22 § 727(d)(3).

23 The bankruptcy court committed neither legal error nor an  
24 abuse of discretion in deciding to revoke Michaels' discharge  
25 under § 727(d)(3) based upon his intentional and willful refusal  
26  
27  
28

1 to obey the court's order.<sup>8</sup>

2  
3 **II.**

4 Michaels contends that the bankruptcy judge presiding in the  
5 adversary proceeding exhibited bias and animus toward him and that  
6 the court's judgment was tainted. Michaels cites multiple  
7 examples of statements and comments by the bankruptcy judge from  
8 various hearings or the trial to evidence what he considers to be  
9 the judge's bias, derision, scorn, and prejudice toward him.  
10 Because the judge was biased, Michaels argues that the bankruptcy  
11 court's judgment should not be allowed to stand.<sup>9</sup> We disagree.

12  
13  
14 \_\_\_\_\_  
15 <sup>8</sup> Because we affirm the bankruptcy court's decision to  
16 revoke Michaels' discharge under § 727(d)(3), we need not address  
his appeal of the court's decision to revoke his discharge under  
§ 727(d)(2).

17 <sup>9</sup> It is not clear from Michaels' brief if he is requesting  
18 that the Panel order the recusal of the bankruptcy judge, or that  
the judgment of the bankruptcy court be reversed. Michaels never  
19 asked the bankruptcy judge in this case to recuse himself.  
Technically, recusal refers to the removal of a judge from further  
20 proceedings in a case; it does not necessarily affect a final  
judgment entered by that judge. Further, we agree with Trustee  
21 that an appellate court cannot order a judge to recuse, because  
the applicable law, 28 U.S.C. § 455(a) and (b) only provides that  
22 the judge "shall disqualify himself." But contrary to Trustee's  
position, it is possible for an appellate tribunal to review for  
23 error a trial court's failure to recuse itself pursuant to 28  
U.S.C. § 455(a) and (b)(1), even if that request is not raised  
24 before entry of final judgment. Lijeberg v. Health Servs.  
Acquisition Corp., 486 U.S. 847, 848 (1988). However, where, as  
25 here, the demand for recusal was not first addressed to the trial  
court, the level of review is very high – plain error. And, even  
26 if it is shown that the trial judge committed plain error by not  
recusing, the appropriate remedy is vacatur of the judgment, not  
recusal or reversal. Id.

27 Since we do not find that the bankruptcy judge committed  
28 plain error by not recusing himself for bias, we need not consider  
the question of whether vacatur or reversal is appropriate.

1           In general, comments made by a trial judge during the course  
2 of judicial proceedings are rarely sufficient to establish bias  
3 requiring recusal. Pau v. Yosemite Park & Curry Co., 928 F.2d  
4 880, 885 (9th Cir. 1991) (although district judge was "gruff," he  
5 accorded heavy-handed treatment to all parties equally); United  
6 States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (judge's  
7 comments about insufficiency of evidence before completion of  
8 evidentiary hearing were insufficient to show bias and require  
9 recusal). A finding of judicial bias must usually stem from the  
10 existence of some personal interest by the judge in the matter  
11 before him or her, or result from some extrajudicial source.  
12 Liteky v. United States, 510 U.S. 540, 552-53 (1994). There is no  
13 evidence in the record before us that the bankruptcy judge held  
14 any personal interest, financial or otherwise, in the matters  
15 involved in this bankruptcy case or adversary proceeding.

16           The "extrajudicial source" rule is implicated when a judge's  
17 bias originates outside the courtroom. United States v. Grinnell  
18 Corp., 384 U.S. 563, 583 (1966) (explaining that the "alleged bias  
19 and prejudice to be disqualifying must stem from an extrajudicial  
20 source and result in an opinion on the merits on some basis other  
21 than what the judge learned from his participation in the case.").  
22 There is also no indication in the record that the bankruptcy  
23 judge's opinions as expressed in this action were based on any  
24 information or events originating outside the bankruptcy court  
25 proceedings. United States v. Bray, 546 F.2d 851, 857 (10th Cir.  
26 1976) ("unjudicious" remarks such as referring to counsel's  
27 comments as ridiculous, or describing a witness as pathetic are

28

1 not extrajudicial, but "reflected the judge's attitude and  
2 reactions to specific incidents occurring at trial").

3         Sixty-plus instances which Michaels suggest evidence the  
4 bankruptcy court's bias and prejudice toward him occurred in the  
5 Trusts Adversary Proceeding.<sup>10</sup> In the only cited example in the  
6 discharge revocation proceeding, Michaels asserts that the  
7 bankruptcy judge exhibited extrajudicial bias by stating that he  
8 could not "put a blind eye to testimony" he learned in the Trusts  
9 Adversary Proceeding. Trial Tr. 26:24-27 (October 12, 2007).  
10 However, opinions held by judges based upon events in earlier  
11 proceedings are not extrajudicial. In re Liteky, 510 U.S. at 551  
12 (noting that "Also not subject to deprecatory characterization as  
13 "bias" or "prejudice" are opinions held by judges as a result of  
14 what they learned in earlier proceedings. It has long been  
15 regarded as normal and proper for a judge to sit in the same case  
16 upon its remand, and to sit in successive trials involving the  
17 same defendant.").

18         There is an exception to the rule that judicial bias must  
19 arise either personally or extrajudicially. This is the so-called  
20 "pervasive bias" exception. The Supreme Court instructs that  
21 "opinions formed by the judge on the basis of facts introduced or  
22 events occurring in the course of the current proceedings, or of  
23 prior proceedings, do not constitute a basis for a bias or

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24  
25         <sup>10</sup> We also note that all transcripts of the Trusts Adversary  
26 Proceeding were unofficial transcripts, to which Trustee objected  
27 to their inclusion in the excerpts of record. In his reply brief  
28 and attached supplemental excerpts of record, Michaels replaced  
the unofficial transcripts with official transcripts of the  
hearings in the Discharge Revocation Proceeding, but did not  
provide official transcripts of the Trusts Adversary Proceeding  
where the offending passages occur.

1 partiality motion unless they display a deep-seated favoritism or  
2 antagonism that would make fair judgment impossible." Liteky, 510  
3 U.S. at 555 (emphasis added). As one treatise explains:

4 This pervasive bias exception to the extrajudicial  
5 source factor arises when a judge's favorable or  
6 unfavorable disposition toward a party, although  
7 stemming solely from the facts adduced or the events  
8 occurring at trial, nonetheless becomes so extreme as to  
9 indicate the judge's clear inability to render fair  
10 judgment. However, the exception is construed narrowly;  
11 bias stemming solely from facts gleaned during judicial  
12 proceedings must be particularly strong in order to  
13 merit recusal.

14 12 MOORE'S FED. PRAC.- CIV. § 63.21[5] (Matthew Bender, 3d ed. 2007);  
15 accord In re Huntington Commons Assocs., 21 F.3d 157, 158 (7th  
16 Cir. 1994) (explaining that a judge does not have to be impervious  
17 to impressions about litigants; impatience, admonishments to  
18 defendant, adverse rulings, and vague references to possible  
19 predisposition are not remotely sufficient to meet requirement of  
20 deep-seated and unequivocal antagonism that would render fair  
21 judgment impossible).

22 We have carefully examined the record in this appeal and,  
23 while some of the bankruptcy judge's comments and statements made  
24 during the proceedings are sharply critical of Michaels, we find  
25 no evidence the bankruptcy judge harbored the sort of "deep-seated  
26 antagonism" against Michaels necessary for the Panel to intervene.  
27

### 28 **III.**

The bankruptcy court did not err in denying Trustee's request  
to revoke Mrs. Michaels' discharge under § 727(d)(2).

1 Section 727(d) (2) provides that:

2 On request of the trustee, a creditor, or the United  
3 States Trustee, and after notice and a hearing, the  
4 court shall revoke a discharge granted under subsection  
5 (a) of this section if -

6 (2) the debtor acquired property that is property of the  
7 estate, or became entitled to acquire property that  
8 would be property of the estate, and knowingly and  
9 fraudulently failed to report the acquisition of or  
10 entitlement to such property, or to deliver or surrender  
11 such property to the trustee[.]

12 To revoke a debtor's discharge under § 727(d) (2), the trustee  
13 must prove (1) that the debtor acquired, or became entitled to  
14 acquire, property of the bankruptcy estate and (2) the debtor  
15 knowingly and fraudulently failed to report or deliver such  
16 property to the trustee. Bowman, 173 B.R. at 925-26, citing In re  
17 Yonikus, 974 F.2d 901 (7th Cir. 1992). Yonikus explained,  
18 regarding the first element, that "[debtors have an absolute duty  
19 to report whatever interests they hold in property, even if they  
20 believe their assets are worthless or are unavailable to the  
21 bankruptcy estate." 974 F.2d at 904. As to the second element,  
22 the court held that a finding of fraudulent intent may be based on  
23 inferences drawn from a course of conduct, or inferred from all  
24 the surrounding circumstances or the debtor's "whole pattern of  
25 conduct." 974 F.2d at 905, citing In re Devers, 759 F.2d at  
26 753-54.

27 Trustee argues that the Mrs. Michaels' trial testimony shows  
28 she was aware of the existence of the overbid proceeds and of her  
29 duty to report this fact to Trustee, and she did not inform  
30 Trustee about the funds.

31 Even so, there was evidence presented to the bankruptcy court  
32 that Mrs. Michaels did not, as required for revocation under

1 § 727(d)(2), "knowingly and fraudulently" fail to report the  
2 existence of the overbid proceeds to Trustee. Specifically, in  
3 her deposition testimony, admitted into evidence at the trial,  
4 Mrs. Michaels testified that she had been informed by her husband  
5 that she was submitting the claim on behalf of the trustee:

6 QUESTION: What was the purpose of your submitting [the  
7 claim form]?

8 MRS. MICHAELS: From my understanding of what Alex told  
9 me, there needed to be a claim file to preserve a  
10 statute of the property for the trustee.

11 Deposition of Joanne Michaels 18:1-5 (September 11, 2006).

12 . . . .

13 QUESTION: [I]f the claim wasn't of any value, why did  
14 you believe you had to preserve it?

15 MRS. MICHAELS: Once again, my understanding from my  
16 husband, from what he told me, was that it needed to be  
17 done for the trustee. That's all he told me.

18 Id. at 42:12-16.<sup>11</sup>

19 The bankruptcy court found that Mrs. Michaels routinely and  
20 without question relied upon the advice and instructions of her  
21 spouse in matters involving the parties' property and finances.  
22 The bankruptcy court decided that Mrs. Michaels was, in effect,  
23 merely her husband's pawn in his scheme to obtain the overbid  
24 proceeds. Substantial, competent evidence was introduced at trial  
25 upon which the bankruptcy court could base such findings.

26 For example, Michaels glibly acknowledged that he engaged in  
27 a practice of concealing business information from his wife:

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28 <sup>11</sup> On January 29, 2009, the Panel received a letter from Mrs.  
Michaels in which she drew our attention to the two statements she  
made in her deposition testimony. We deem this letter a Motion to  
Supplement the Record. The Motion is DENIED. The deposition  
testimony is already included in the excerpts of record and was  
examined by the Panel before receipt of Mrs. Michaels' letter.

1           PEMBERTON: Would it have been a custom and practice in  
2           your relationship [with your wife] to have shared  
          [business details] with her?

3           MICHAELS: Actually, it's one of the things that keep[]  
4           the marriage good and keep the wife sane . . . was give  
          her as little information as possible[.]

5           Trial Tr. 3:12-19 (October 9, 2007).

6           Mrs. Michaels confirmed her passive approach to matters of  
7           business in her relationship with her husband:

8           PEMBERTON: Mrs. Michaels, why didn't you take any steps  
9           to notify the Trustee of this excess proceeds claim?

10          MRS. MICHAELS: It was my understanding from Alex that he  
11          already knew about it. That was my understanding, that  
          the attorneys knew about it. Everybody knew about it.

12          Trial Tr. 98:9-13.

13          PEMBERTON: Is it your practice to sign documents in  
14          front of a notary without reading those documents?

15          MRS. MICHAELS: When my husband gives me the document,  
          pretty much.

16          Trial Tr. 81:1-4.

17          THE COURT: Who filled this thing [the claim] out? Did  
18          your husband fill out all the handwritten part?

19          MRS. MICHAELS: Yes.

20          THE COURT: So all you did was sign it?

21          MRS. MICHAELS: Yes.

22          THE COURT: At his request.

23          MRS. MICHAELS: Yes.

24          Trial Tr. 93:8-22.

25          PEMBERTON: So Mr. Michaels gave you a phone number of  
26          the office of Imperial County tax collector and asked  
          you to call up the tax collector and withdraw this  
          claim, correct?

27          MRS. MICHAELS: Correct.

28          PEMBERTON: He told you to do so because it wasn't

1 necessary. In other words, it wasn't necessary to have  
2 the claim form in there. Is that correct?

3 MRS. MICHAELS: Yes, I believe he did.

4 Trial Tr. 95:15-22.

5 After considering all the testimony and evidence, the  
6 bankruptcy court observed that:

7 As to Mrs. Schwarzkopf, the Court finds that throughout  
8 their marital history, Mrs. Schwarzkopf was an unknowing  
9 participant in the conduct of Mr. Schwarzkopf. I find  
10 insufficient evidence to support that Mrs. Schwarzkopf  
11 should be denied her discharge pursuant to § 727(d)(2),  
12 and that the evidence submitted supports that she  
13 basically reacted and did what her husband advised her  
14 to do.

15 Trial Tr. 2:17-25 (October 11, 2007).

16 While Trustee argued otherwise, the bankruptcy court declined  
17 to conclude that Mrs. Michaels acted fraudulently, a necessary  
18 element for revocation of discharge under § 727(d)(2). In re  
19 Bowman, 173 B.R. at 925; In re Yonikus, 974 F.2d at 905. While we  
20 acknowledge that the trial evidence and testimony may be open to  
21 varying interpretations, under the circumstances, the bankruptcy  
22 court's decision that Mrs. Michaels did not act fraudulently was  
23 not clearly erroneous. Anderson, 470 U.S. at 574 ("Where there  
24 are two permissible views of the evidence, the fact finder's  
25 choice between them is not clearly erroneous.").

#### 26 IV.

27 The bankruptcy court did not abuse its discretion in denying  
28 Debtors' motion for reconsideration and rejecting his offer to  
submit the results of his post-trial polygraph examination to  
bolster his credibility.

1 In the bankruptcy court, and now on appeal, Michaels contends  
2 that the polygraph examination report was "new evidence."  
3 Michaels is correct that "newly discovered evidence" may be  
4 submitted to a bankruptcy court to support a motion for  
5 reconsideration. Hansen v. Moore (In re Hansen), 368 B.R. 868,  
6 878 (9th Cir. BAP 2007) ("Reconsideration under . . . Rule 9023 is  
7 appropriate only if the moving party demonstrates . . . (3) newly  
8 discovered evidence.").

9 However, the newly discovered evidence offered to the trial  
10 court for reconsideration must have been in existence at the time  
11 of the trial. Contemp. Metal Furniture Co. v. E. Tex. Motor  
12 Freight Lines, Inc., 661 F.2d 761, 766 (9th Cir. 1981).

13 Here, the polygraph test was apparently administered to Michaels  
14 on November 29, 2007, more than six weeks after the trial  
15 concluded. The bankruptcy court correctly rejected the polygraph  
16 result as inadmissible in evidence because the test was performed  
17 post-judgment. Hr'g Tr. 1:23-25 (February 7, 2008). This ruling  
18 is consistent with the law and thus not an abuse of discretion.

19 In addition, Michaels' attempt to use the results of the  
20 polygraph examination to bolster the credibility of his testimony  
21 is problematic for other reasons.

22 First, for our purposes, Michaels' credibility is not at  
23 issue with respect to the basis upon which the Panel has concluded  
24 his discharge was properly revoked, § 727(d)(3). Michaels  
25 admitted to willfully and intentionally violating the bankruptcy  
26 court's order. He attempted to excuse his conduct by asserting  
27 that he violated the order to obtain money that he needed and that  
28 he did not seek the court's permission because he knew the court

1 would not grant it. Michaels' credibility as to these points was  
2 never challenged by the bankruptcy court. As a result, we will  
3 not reverse the bankruptcy court's decision to reject the  
4 polygraph results because that decision does not impact our  
5 analysis on appeal.

6 Second, even if there was a reason for the polygraph test  
7 evidence to be considered now, Michaels did not submit the  
8 polygraph results, only an unsworn statement from the polygraph  
9 examiner. An unsworn statement provides no foundation to  
10 authenticate the test results. FED. R. EVID. 901. Moreover, even  
11 if an unsworn expert witness report were admissible, it cannot be  
12 used to prove the facts therein without submission of the actual  
13 evidence. 7-Up Bottling Co. v. Archer Daniels Midland Co. (In re  
14 Citric Acid Litigation), 191 F.3d 1090, 1102 (9th Cir. 1999) ("The  
15 law is clear, however, that an expert report cannot be used to  
16 prove the existence of facts set forth therein").

17 Third, polygraph test results, and testimony from polygraph  
18 examiners, regarding a party's character for truthfulness have  
19 routinely been held inadmissible under the standards set by the  
20 Ninth Circuit in United States v. Benavidez-Benavidez, 217 F.3d  
21 720, 724 (9th Cir. 2000); see also FED. R. EVID. 608 ("Specific  
22 instances of the conduct of a witness, for the purpose of  
23 attacking or supporting the witness' credibility, other than  
24 conviction of crime as provided in rule 609, may not be proved by  
25 extrinsic evidence.").

26 Finally, as the bankruptcy court observed, to the extent the  
27 polygraph evidence was offered to test whether Michaels lied to  
28 the court, the test results would not sway the judge's position

