

NOT FOR PUBLICATION

FEB 27 2009

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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:)
)
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)

_____) Adv. No. RS 05-01429-PC
In re:)
)
JOANNE LOUISE MICHAELS, aka)
JOANNE LOUISE SCHWARZKOPF,)
)
Debtor.)

_____))
ALEXIS HILL SCHWARZKOPF,)
)
Appellant,)

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

MEMORANDUM¹

v.)
)
JOANNE LOUISE MICHAELS,)
)
Cross-Appellee.)
_____)

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 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 7² 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
24
25 ² 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.³

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 ³ 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.⁴

24 ⁴ 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").⁵ 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"
document. Schanafelt⁶ must sign a document releasing
funds to you. This document my [sic] be created by

24 ⁵ 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
Michaels' brief, we assume that Trustee does not challenge the
authenticity of this document.

27 ⁶ 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).⁷
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 ⁷ 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
3 On request of the trustee, a creditor, or the United
4 States Trustee, and after notice and a hearing, the
5 court shall revoke a discharge granted under subsection
6 (a) of this section if -

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

9 Section 727(a) (6), in turn, provides that: "The court shall grant
10 the debtor a discharge, unless . . . (6) the debtor has refused,
11 in this case - (A) to obey any lawful order of the court, other
12 than an order to respond to a material question or to testify[.]"
13 A trustee seeking to revoke a discharge pursuant to §§ 727(d) (3)
14 and (a) (6) (A) requires a showing that the debtor (a) was aware of
15 the order; and (b) willfully or intentionally refused to obey the
16 order (i.e., something more than a mere failure to obey the order
17 through inadvertence, mistake or inability to comply). Smith v.
18 Jordan (In re Jordan), 521 F.3d 430, 434 (4th Cir. 2008).

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

26 It is not disputed by Michaels that, in connection with the
27 Trusts Adversary Proceeding, the bankruptcy court entered an order
28 enjoining Michaels and Briones from disbursing more than \$10,000
from the Groves Trust without first notifying Trustee. Indeed,
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.⁸

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.⁹ We disagree.

12
13
14 _____
15 ⁸ 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 ⁹ 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.¹⁰ 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

24
25 ¹⁰ 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 **III.**

28 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
duty to report this fact to Trustee, and she did not inform
Trustee about the funds.

Even so, there was evidence presented to the bankruptcy court
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 42:12-16.¹¹

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:

28 ¹¹ 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),
and that the evidence submitted supports that she
basically reacted and did what her husband advised her
to do.

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

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

23
24 **IV.**

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

1 because, in the court's opinion, Michaels' credibility was not at
2 issue: "I don't believe what I stated in my ruling was that I
3 found that you lied. What I ruled was that I found that you knew
4 more and you didn't tell everyone what you knew. Whether it was
5 your professed mistaken belief or whether it was an intentional
6 belief, I reached the conclusions that I reached and the polygraph
7 expert wouldn't change anything from what was stated." Hr'g Tr.
8 3:15-22 (February 7, 2008).

9 Since Michaels offered no admissible newly discovered
10 evidence, nor otherwise showed that the bankruptcy court had
11 committed a manifest error of fact or law, the bankruptcy court
12 did not abuse its discretion in denying Debtors' motion for
13 reconsideration. In re Hansen, 368 B.R. at 878.

14
15 **CONCLUSION**

16 We AFFIRM the judgment of the bankruptcy court revoking
17 Michaels' discharge pursuant to § 727(d)(3) and declining
18 to revoke Mrs. Michaels' discharge pursuant to § 727(d)(2).

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