NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-06-1372-RSD
DAVID RELITO TAN,	Bk. No. 00-40850
Debtor.	Adv. No. 00-04199
DAVID RELITO TAN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
TRANCHE 1 (SVP-AMC), Inc.,	
Appellee.	

Submitted on March 23, 2007

Filed - September 28, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Hon. Leslie Tchaikovsky, Bankruptcy Judge, Presiding.

Before: RADCLIFFE,[2] SMITH, DUNN, and 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 Rule 8013-1.

[2] Hon. Albert E. Radcliffe, U.S. Bankruptcy Judge for the District of Oregon, sitting by designation.

David Relito Tan (Debtor) appeals the denial of his discharge. We AFFIRM.

PROCEDURAL HISTORY

Debtor filed a petition for Chapter 7[3] relief on February 11, 2000. Philippine National Bank (PNB), the predecessor in interest to Appellee Tranche 1 (SVP-AMC), Inc. (Tranche 1), filed an adversary proceeding to deny Debtor his discharge under 11 U.S.C. §§ 727(a)(2),(3) and (4). PNB moved for summary judgment, which the bankruptcy court granted on the §§ 727(a)(2) and (4) claims. Debtor appealed to a prior panel, which reversed and remanded, finding a genuine issue of material fact on the issue of fraudulent intent. Tan v. Philippine Nat'l Bank (In re Tan), No. NC-03-1198 (9th Cir. BAP Dec. 16, 2003)(Tan I).

The bankruptcy court then entered orders granting a limited waiver of Debtor's attorney-client privilege (the waiver order), denying Debtor's motion to require recusal (the recusal order), and prohibiting Debtor from introducing any documents at trial (the sanctions order).

After trial, the bankruptcy court entered its memorandum of decision, Tranche 1 (SVP-AMC), Inc. v. Tan (In re Tan), 350 B.R. 488 (Bankr. N.D. Cal. 2006)(Tan II), and judgment denying Debtor his discharge, from which Debtor has timely appealed pro se.

[3] 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 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

FACTS

In September 1998, PNB obtained a judgment against both Edison-Hubbard Corp. (Edison-Hubbard) and Debtor in the principal amount of $6,999,796 in San Francisco Superior Court. Debtor's liability was based on his guaranty of a loan by PNB to Edison-Hubbard. In November 1998, PNB conducted a debtor's exam of Debtor during which he disclosed equity interest in five corporations:

1) Edison Global Ltd. (Edison Global);
2) Teledyne Marketing Corp.(Teledyne)(aka Powerline Equipment Co.);
3) Edison Mobile Hydraulics, Inc. (Edison Mobile);
4) Edison Industries, Inc.(Edison Industries)(aka Power One); and
5) Filipinas Electric and Meter Co. (Filipinas)

(the Disclosed Interests). Edison Global is a Hong Kong corporation. The other four (4) are Philippine corporations. Thereafter, PNB obtained an order assigning to it the Disclosed Interests until the judgment was paid in full.

On the date Debtor filed his Chapter 7 petition (February 11, 2000), he signed his schedules and statement of financial affairs (SOFA) under penalty of perjury. He listed the Disclosed Interests on Schedule B and, in his SOFA, disclosed that he held at least a five (5) percent interest in Edison Global, Edison Mobile, Edison Industries, and Filipinas (the Disclosed Positions) and/or was an officer or director of such corporations.

He failed to disclose his interests in seven (7) other Philippine corporations:

1) Stresscrete Pole Corporation (Stresscrete);
2) Greenergy Light Co. (Greenergy)(fka Edison Energy Corp);
3) Central Negros Power Corporation (Central);

4) Advanced Insulator Corporation (Advanced);
5) Ford Edsa, Inc. (Ford Edsa)(fka American Automotive Center, Inc.);
6) Interelectric Systems, Inc. (Interelectric); and
7) Stresscrete Negros, Inc. (Stresscrete Negros)

(the Undisclosed Interests). He also failed to disclose that he was an officer or director of and/or held at least a five (5) percent equity ownership interest in Ford Edsa, Greenergy, Stresscrete, Central, Advanced, and Teledyne (the Undisclosed Positions).

After the adversary proceeding was filed, Debtor filed an amended Schedule B and SOFA on July 6, 2000. On amended Schedule B, in addition to the Disclosed Interests, he listed the Undisclosed Interests, except Advanced,[4] Interelectric, and Stresscrete Negros. On his Amended SOFA, in addition to the Disclosed Positions, he listed the Undisclosed Positions, except Advanced.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157. We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1) Whether the court abused its discretion in sanctioning Debtor by prohibiting him from introducing documents as evidence at trial;

2) Whether the court abused its discretion in allowing Debtor one week instead of two (as requested) to decide whether to assert an advice of counsel defense;

[4] The bankruptcy court found that Debtor listed his interest in Advanced on the amended schedules. Tan II, 350 B.R. at 491 n.1. However, Advanced does not appear on same.

3) Whether the court abused its discretion in failing to recuse itself;

4) Whether the court erred in applying a "preponderance of the evidence" standard of proof on the § 727(a) claims;

5) Whether the court erred in not considering evidence that denial of discharge would work a hardship upon Debtor's life and financial circumstances;

6) Whether the court erred in failing to require evidence that any party in interest "gained" or was "harmed" by Debtor's fraudulent omissions;

7) Whether the court abused its discretion in excluding testimony based on hearsay;

8) Whether the court clearly erred in finding Debtor had the requisite intent to defraud; and

9) Whether the court clearly erred in finding Debtor's failure to keep or preserve corporate records was not justified under all the circumstances of the case.

STANDARDS OF REVIEW

Evidentiary rulings, discovery sanctions, orders denying recusal, and denials of extensions to amend pleadings are all reviewed for an abuse of discretion. Mills v. Gergely (In re Gergely), 110 F.3d 1448, 1452 (9th Cir. 1997)(evidentiary rulings); U.S. v. National Medical Enterprises, Inc., 792 F.2d 906, 910-11 (9th Cir. 1986)(sanctions); Smith v. Edwards & Hale Ltd. (In re Smith), 317 F.3d 918, 923 (9th Cir. 2002)(recusal); Fasson v. Magouirk (In re Magouirk), 693 F.2d 948, 950 (9th Cir. 1982) (extension to amend). Under this standard, the reviewing

court must affirm the judgment below unless (1) it has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors, (2) the bankruptcy court applied the wrong law, or (3) the bankruptcy court rested its decision on clearly erroneous findings of material fact. Delay v. Gordon, 475 F.3d 1039, 1043 (9th Cir. 2007).

Legal conclusions are reviewed de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005), aff'd, __ Fed. Appx. __, 2007 WL 2089041 (9th Cir. Jul. 19, 2007). Factual findings, including intent to defraud and whether there was justification for failure to keep records, are reviewed for clear error. Baker v. Mereshian (In re Mereshian), 200 B.R. 342, 345 (9th Cir. BAP 1996)(intent to defraud); Robertson v. Dennis et.al. (In re Dennis), 330 F.3d 696, 703 (5th Cir. 2003)(justification).

Review under the "clearly erroneous" standard is significantly deferential. Baker, 200 B.R. at 345. The appellate court should not reverse unless it is left with a definite and firm conviction that a mistake has been committed. Id. "The reviewing court may not reverse simply because it is convinced it would have decided the case differently." Id. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Id. The reviewing court must give due regard to the opportunity of the bankruptcy court to judge the credibility of witnesses. Fed. R. Bankr. P. 8013; Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420, 427 (9th Cir. BAP 2002). This deference is also given to inferences drawn by the bankruptcy court. Id.

DISCUSSION

I. Sanctions Order

Debtor argues the bankruptcy court abused its discretion in entering the sanctions order.[5] The history is as follows:

On June 21, 2004, PNB served Interrogatories on Debtor. The Interrogatories consisted of thirteen (13) separate written interrogatories numbered 10 through 22.[6]

After remand, PNB contended Debtor had waived the attorney-client privilege. This triggered a series of motions and responses, as well as

[5] The sanctions order is an interlocutory order, U.S. v. Westinghouse Elec. Corp., 648 F.2d 642, 651 (9th Cir. 1981), and thus now properly before us, even though it was not denominated in Debtor's notice of appeal. Disabled Rights Action Committee v. Las Vegas Events, Inc., 375 F.3d 861, 872 n.7 (9th Cir. 2004) (appeal of final judgment draws into question all earlier, non-final orders and rulings which produced the judgment).

[6] Interrogatories Nos. 10 through 20 ask Debtor to identify documents in his or his attorneys' possession on February 11, 2000, which relate to all the Disclosed Interests and all the Undisclosed Interests except Stresscrete Negros and Interelectric. Interrogatory No. 21 asks Debtor to identify documents and conversations which support his contention that information which was omitted from his original petition and schedules was not omitted with intent to hinder, delay or defraud a creditor or his trustee. Interrogatory No. 22 asks Debtor to identify documents and conversations he had with any attorney that support his contention that he relied on the advice of counsel when he omitted assets and "interest" [sic] from his bankruptcy schedules, both original and amended.

The Interrogatories define "Document" as: "writings, drawings, graphs, charts, photographs, phonorecords and other data compilations from which information can be obtained." They define "identify" with respect to a "Document" as: "a description of the nature of the DOCUMENT, the author of the DOCUMENT, the intended recipient of the DOCUMENT, if any, a brief summary of the contents of the DOCUMENT, the date of the DOCUMENT, and any other information necessary to identify the DOCUMENT."

document subpoenas served by PNB on Debtor's former law firms: 1) Wendell, Rosen, Black and Dean (Wendell, Rosen); and 2) Kornfield, Paul & Nyberg. The motions culminated in the bankruptcy court's July 19, 2004 memorandum decision, which held that Debtor's attorney-client privilege had been waived with respect to attorney-client communications during the period November 1, 1998 to February 11, 2000.

The time to answer the Interrogatories ran shortly after the bankruptcy court's decision on waiver. Debtor did not timely respond. There ensued a series of letters between him and PNB's counsel, and multiple extensions granted by PNB's counsel. Finally, on January 14, 2005, PNB filed a motion to compel Debtor to answer the Interrogatories. The motion to compel (along with a status conference) was heard on March 3, 2005. Only PNB's counsel appeared. Debtor was in the Philippines and had requested a continuance.[7] By order entered March 11, 2005, the bankruptcy court granted PNB's motion and ordered Debtor to answer the Interrogatories on or before April 3, 2005 (order compelling answers).

On April 3, 2005, Debtor served his answers (the Original Answers). On April 15, 2005, PNB's counsel wrote to Debtor advising him

[7] Neither Debtor nor Tranche 1 has provided a transcript of the March 3, 2005 hearing; however we may take judicial notice of the minutes thereof. Harris v. U.S. Trustee (In Re Harris), 279 B.R. 254, 261 n.4 (9th Cir. BAP 2002)("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). The minutes may be found on the docket of adversary proceeding 00-04199. Although the memorandum and declaration in support of the motion to compel are part of the record on appeal, the motion to compel is not. It may be found at docket number 125 in adversary proceeding 00-04199.

the Original Answers were deficient in several respects and requesting revised answers by April 29, 2005.

On April 29, 2005, Debtor faxed revised answers (the Revised Answers) to PNB's counsel. The faxed Revised Answer to Interrogatory No. 21 refers to portions of Debtor's Opening Brief in Tan I, which were not attached to the Revised Answers. In a letter accompanying the Revised Answers, Debtor stated he would send the originals together with the attachments by courier on April 30, 2005. PNB did not receive the original of the Revised Answers until May 16, 2005.

On June 6, 2005, PNB moved to compel further answers to Interrogatories Nos. 10-14, or alternatively for sanctions, including default or the exclusion of evidence. The motion was heard on July 7, 2005. PNB's counsel and Debtor appeared. The motion was granted.[8]

The sanctions order was entered on August 2, 2005. It recounts part of the above procedural history and makes a finding that the Original and Revised Answers "were evasive and incomplete in that they (a) refer to no documents at all or (b) refer generally to documents that may or may not have been in the Defendant's possession on the [sic] February 11, 2000, without identifying such documents." Sanctions Order at 3, Aug. 2, 2005. The sanctions order cites Fed. R. Civ. P. 37(a)(3) and (a)(4) as the bases for the sanctions, and finds Debtor's "failure to answer at all and/or to provide unevasive and complete answers is willful

[8] Neither Debtor nor Tranche 1 has provided a transcript of the July 7, 2005 hearing. However, we are able to take judicial notice of the minutes of this hearing, Harris, 279 B.R. at 261 n.4, which can be found on the docket of adversary proceeding 00-04199.

and disobedient conduct not shown to be outside the control of the Defendant." Id. The sanctions order prohibited Debtor from introducing any "documents" (as defined by the Interrogatories) at trial.

While the sanctions order, on its face, precludes all documentary evidence, it appears to have been limited by subsequent rulings, i.e., at a Pre-trial Conference on April 17, 2006, the bankruptcy court stated it would consider, at trial, whether to allow Debtor to present evidence as to new transactions that may not have been covered in the Interrogatories. At trial, the court admitted Debtor's Exhibits A through K. In its opinion, the court defined the sanctions order as precluding Debtor from introducing any documents that related to the various corporations in which he held an interest. Tan II, 350 B.R. at 496, further noting that excepted from the sanctions order were any documents relating to two corporations [presumably Interelectric and Stresscrete Negros] which PNB had discovered after remand. Tan II, 350 B.R. at 496 n.9.[9]

As noted in National Medical, 792 F.2d at 910-11, we review sanctions orders for an abuse of discretion. Sanctions such as preclusion of documentary evidence are available after a party has failed to comply with an order to provide discovery. Fed. R. Civ. P. 37(b)(2)(B) (made applicable by Fed. R. Bankr. P. 7037).[10] Although we do

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[9] PNB "had not requested production of documents related to these corporations since it did not know of their existence." Tan II, 350 B.R. at 496 n.9.

[10] Fed. R. Civ. P. 37(b)(2)(B) provides in pertinent part:

(continued...)

not have a transcript of the July 7, 2005 hearing, the findings and conclusions stated in the sanctions order permit review.

Two issues arise with regard to the sanctions order. First, whether Debtor violated the order compelling answers, and if so, whether a sanction precluding documentary evidence at trial was appropriate.

The bankruptcy court did not err when it found non-compliance. The Original Answers were inadequate. Debtor did not answer under oath, in violation of Fed. R. Civ. P. 33(b)(1) (made applicable by Fed. R. Bankr. P. 7033). He answered Interrogatories Nos. 11-14 and 20, and Nos. 15-19 collectively, instead of separately, in violation of Fed. R. Civ. P. 33(b)(1). He also answered Interrogatories Nos. 10-14 and 20 by incorporating materials from the "Edison-Hubbard case" without specifying which materials, or attaching them.[11] Finally, he answered

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[10](...continued)

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . ., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (B) An order . . . prohibiting that party from introducing designated matters in evidence.

[11] "The general rule is that answers to interrogatories should be complete in and of themselves, and should not refer to pleadings, depositions, or other documents." Dipietro v. Jefferson Bank, 144 F.R.D. 279, 282 (E.D.Pa. 1992); see also American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 109 F.R.D. 263, 266 (E.D.N.C. 1985) ("[d]irecting the opposing party to an undifferentiated mass of records is not a suitable response to a legitimate request for discovery,"

(continued...)

Interrogatories Nos. 15-19 by incorporating portions of his Opening Brief in Tan I, without specifying which portions, or attaching the Brief.

The Revised Answers were also inadequate. Many courts have found that "evasive or incomplete" answers violate an order to compel answers to interrogatories. See, e.g., Cromaglass Corp. v. Ferm, 344 F. Supp. 924 (M.D. Pa. 1972); Jaffe v. Grant, 793 F.2d 1182 (11th Cir. 1986); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir. 1962). The Revised Answers to Interrogatories Nos. 10-14 were incomplete and evasive.

Interrogatories Nos. 10-14[12] are in the following form:

> IDENTIFY each and every DOCUMENT you had in your possession or which was in the possession of your attorneys on February 11, 2000, the date of filing your bankruptcy petition, involving, pertaining to, relating to or in any way connected to [name of corporation].[13]

Debtor's Revised Answers to these Interrogatories are all substantially the same, as follows:

> On the date of my filing on February 11, 2000
>
> 1. I do not believe I had in my possession documents related to [name of corporation]. I was working from memory on the approximate stock ownership I had.[14]

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[11](...continued)
interpreting Fed. R. Civ. P. 33(c) (now (d)).

[12] Interrogatory No. 20 duplicates No. 12, except "Edison Mobile Hydraulic" was identified as "Edison Mobil Hydraulics."

[13] The corporations to which these Interrogatories refer are: a) Edison Global (Interrogatory No. 10); b) Teledyne (Interrogatory No. 11); c) Edison Mobile (Interrogatory No. 12); d) Edison Industries (Interrogatory No. 13); and e) Filipinas (Interrogatory No. 14).

[14] Revised Answer to Interrogatory No. 10 re: Edison Global added: "and the amount of unreimbursed expenses and salaries owed me at that (continued...)

> 2. Since I traveled between the Philippines, Hong Kong, and the U.S. frequently, as a matter of practice, all corporate and business documents are kept by the corporate officers and managers of each company. I, of course can secure a copy of documents as needed.
>
> For my filing, I did not secure any specific documents because I was pretty sure of the extent of my stockholdings.[15]
>
> 3. In my first response Part 2, submitted April 3, 2005 [the Original Answers] I made a general reference to documents related to [name of corporation] that would be in the possession of my attorneys [from the PNB-Edison Hubbard case-see Interrogatories Nos. 10 & 11] since the interrogatory asked about documents in the possession of my lawyers on February 11, 2000.[16]
> I however would not be able to identify each and every document in my attorneys [sic] possession on that specific date.
>
> 4 I do not <u>believe</u> I gave my attorneys any new document related to [name of corporation] preparatory to my filing on February 11, 2000. (emphasis added)

It was not error to hold that answering according to "belief" more than five (5) years after the main case and Adversary proceeding had

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[14](...continued)
stage."

[15] Revised Answer to Interrogatory No. 10 re: Edison Global added: "In any case the 'current market values' would be 'unknown'."

[16] Debtor's Original Response stated the following:

> There were no documents in my possession or in the possession of our attorneys as of February 11, 2000 relating to Teledyne Marketing, Edison Mobile Hydraulics, Edison Industries and Filipinas Electric and Meter Co., other than those that were carried over from the Edison Hubbard case under which PNB had claimed security rights on David Tan's stocks in these companies. Edison Mobile Hydraulic (Interrogatory No. 12) and Edison Mobil Hydraulics (Interrogatory No. 20) refer to the same company.

been filed and after the Interrogatories had been pending for ten (10) months was evasive and/or incomplete. Further, Debtor acknowledged his attorneys possessed documents (from the Edison-Hubbard case) as of February 11, 2000, but declined to identify them, even after the privilege issues had been resolved by the waiver order eight (8) months before the Original and Revised Answers were served. He conceded the documents from his lawyers were released to him starting in December 2004, with Kornfeld, Paul & Nyberg (which held "about 90%" of the documents) starting to release them on January 7, 2005, with final delivery on March 31, 2005. Still, his Revised Answers, submitted almost one month later, did not identify a single document. It was not error to hold that this conduct violated the order compelling answers.

As to Interrogatories Nos. 15-19 and 22, Debtor responded by denying the existence of any documents pertinent thereto.[17] In response to Interrogatory No. 21, he did not "identify" within the Interrogatory's definition, a single document pertinent thereto.[18]

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[17] Part 2 of the Original Answers, and the Revised Answers to Interrogatories Nos. 15-19 stated that neither Debtor nor his attorneys had documents as of February 11, 2000, with regard to Ford Edsa, Greenergy, Central, Stresscrete (denial based on Debtor's "belief"), and Advanced. Part 1 of the Original Answers to Interrogatory No. 22, does not identify (and denies the existence of) any documents [held at any time] supporting Debtor's contention that he relied on the advice of counsel when he omitted assets and interest [sic] from his bankruptcy schedules, both original and amended.

[18] Part 1 of the Original Answers to Interrogatory No. 21 does not identify any documents [held at any time] supporting Debtor's contention that information omitted from his original bankruptcy petition and schedules was not omitted with the intent to hinder, delay or defraud.

The sanction imposed was preclusion of submission by Debtor of all documentary evidence. The court later limited this ruling to documents covered by the Interrogatories. In general, a Fed. R. Civ. P. 37(b) sanction must be "just" and must be specifically related to the particular "claim" which was at issue in the order to provide discovery. Navellier v. Sletten, 262 F.3d 923, 947 (9th Cir. 2001). Sanctions are warranted for failure to obey a discovery order as long as the established issue bears a reasonable relationship to the subject of discovery that was frustrated by sanctionable conduct. Id.[19]

The sanction here meets these criteria. Debtor had been stalling for ten (10) months. Eight months had elapsed since the entry of the waiver order defining the scope of the privilege waiver. Almost one full month had elapsed between the time Debtor asserted he received the last

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[19] "Dispositive" sanctions such as dismissal (Fed. R. Civ. P. 37(b)(2)(C)), default (Fed. R. Civ. P. 37(b)(2)(C)), and their functional equivalents (i.e. refusing to allow the disobedient party to support or oppose designated claims or defenses (Fed. R. Civ. P. 37(b)(2)(B)), or precluding any evidence as to a prima facie element of a claim, United States v. Sumitomo Marine & Fire Ins. Co., Ltd., 617 F.2d 1365, 1368-69 (9th Cir. 1980), must meet a higher standard. First, noncompliance must be due to willfulness, fault or bad faith. Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004). Then the court must weigh five factors:

> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Here, the bankruptcy court only precluded documents (and by later rulings, only certain documents). It allowed live testimony, and in fact Debtor, Debtor's former attorney, Michael Cooper, and Francis Suatengco, testified on Debtor's behalf. The sanction was not "dispositive."

shipment of records from his attorneys and the Revised Answers. The Interrogatories related to all three of Tranche 1's claims, thus preclusion of documents relating thereto was within the court's discretion. Id. The sanction bore "a reasonable relationship to the subject of discovery that was frustrated by the sanctionable conduct. Id.[20] The court did not abuse its discretion by entering the sanctions order.

II. Denial of Extension to Assert "Advice of Counsel" Defense

The bankruptcy court conducted a status conference on March 18, 2004. At the conference, PNB's counsel indicated he intended to file a new motion for summary judgment. He also indicated that, during the Tan I appeal, Debtor had asserted a defense of advice of counsel in connection with any omissions or misstatements in his schedules and SOFA. PNB's counsel contended that Debtor had thereby waived the attorney-client privilege and indicated a desire to conduct discovery concerning Debtor's communications with Wendel, Rosen. The minutes in the adversary proceeding docket indicate that, at the status conference, the bankruptcy court gave Debtor one week to file a statement as to whether he wished to assert an advice of counsel defense. The court stated that if Debtor filed nothing, it would assume he wanted to assert the defense and discovery would be reopened. The status conference was continued to May 20, 2004.

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[20] Five years after the commencement of the main case and adversary proceeding, Debtor disavowed any document relating to Interrogatory No. 22 (see supra note 17), and did not identify any document responsive to Interrogatory No. 21 (see supra note 18). Thus, in any case, Debtor should have suffered no prejudice by the Sanctions Order as to these interrogatories, both of which bear on Debtor's intent.

Debtor contends he asked for two (2) weeks to decide whether to assert the defense, and the bankruptcy court's denial of the extra week was an abuse of discretion.[21] We find no written motion in the record requesting two (2) weeks. The minutes of the status conference in the adversary proceeding docket do not indicate Debtor orally moved for two (2) weeks at the status conference. Further, Debtor has not supplied a transcript of the status conference. As such, we cannot determine if Debtor, in fact, moved for a two (2) week period. Even assuming such a request was made and denied,[22] we cannot ascertain the court's rationale. In light of these omissions, meaningful review is impossible. Fed. R. Bankr. P. 8009(b)(5); McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).[23]

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[21] Debtor does not appear to appeal the waiver order itself, instead referencing it with respect to the time given to choose an advice of counsel defense and perhaps as an "unfavorable ruling" giving rise to a claim of bias. Aplt. Brief at 7-8. Nevertheless, even assuming the waiver order is before us, Debtor has appended an insufficient record to provide meaningful review. He has not supplied the waiver order itself, or the motions/responses leading up to it. Fed. R. Bankr. P. 8009(b)(6) (motion/response); 8009(b)(3)(order). The motion/responses also include the documents submitted by Wendel, Rosen (in its efforts to quash PNB's subpoena duces tecum), PNB's responses thereto and briefs by all sides on the issue. There are also two letters, one from PNB, the other from Debtor, referenced in the bankruptcy court's July 19, 2004 Memorandum Decision but not supplied in the excerpts of record or even listed on the adversary proceeding docket. As best we can discern from the adversary proceeding docket, approximately seventeen (17) documents relate to the waiver order. Debtor has provided only the bankruptcy court's Memorandum of Decision on the issue.

[22] If an oral order exists, it is appealable. Ingram v. ACandS, Inc., 977 F.2d 1332, 1339 n.7 (9th Cir. 1992).

[23] Likewise, at the same conference, Debtor asserted the bankruptcy (continued...)

Even assuming meaningful review is possible, the court's time-line for asserting the advice of counsel defense is reviewed for an abuse of discretion. We find no reversible error. The only possible prejudice in claiming an advice of counsel defense is waiver of the attorney-client privilege. Even assuming the privilege was waived by assertion of the defense, Debtor does not explain how he was prejudiced. In fact, he admits that even after production of "a few" boxes of documents from Debtor's lawyers, "Plaintiff did not find any real evidence of fraudulent intent on the part of the Debtor." Aplt. Brief at 7-8, Jan. 25, 2007.

III. Bias/Partiality/Recusal

Debtor argues the bankruptcy court was "biased." He did not, however, move for recusal at trial. "[W]hile failure to move for recusal at the trial level does not preclude raising the issue on appeal, an appellant bears a greater burden in demonstrating that the judge erred in failing to grant recusal." Noli v. C.I.R., 860 F.2d 1521, 1527 (9th Cir. 1988).

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[23](...continued)
court granted PNB a thirty (30) day extension on the setting of the next status conference. He assigns this as error. However, as noted, he has not supplied a transcript of the March 18, 2004 hearing. Neither do the minutes entered in the adversary proceeding docket note the extension. (The minutes do note that the conference was "continued until 5/20/04 . . . [and] may be rescheduled to the date of hearing on motion for summary judgment."). As such, meaningful review of the alleged thirty (30) day extension is impossible. Fed. R. Bankr. P. 8009(b)(5); McCarthy, 230 B.R. at 417.

Even if a thirty (30) day extension was in fact allowed, and is thus reviewable, we cannot find an abuse of discretion in the bankruptcy court re-scheduling a status conference.

Under 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." The substantive standard is: "Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997)(internal quotation omitted). In general, the alleged bias or impartiality must arise from "an extrajudicial source and not from conduct or rulings made during the course of the proceeding." United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566-67 (9th Cir. 1995). Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Focus Media v. National Broadcasting Co. (In re Focus Media, Inc.), 378 F.3d 916, 930 (9th Cir. 2004). To warrant recusal based on a non-extrajudicial source, the movant must show the trial court's substantive rulings and remarks were products of "deep-seated favoritism or antagonism that [made] fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994).

Aside from general assertions, Debtor points to three instances of alleged bias or partiality. The first, counter-intuitively, derives from a ruling favorable to him. On his schedules, Debtor listed the values of all but one of the Disclosed Interests as "unknown." Tranche 1 argued on summary judgment and at trial that this was an indication of fraudulent intent. At trial, the bankruptcy court rejected this argument. Despite this favorable ruling, Debtor posits Tranche 1's argument on the impact of "unknown" values somehow prejudiced the court. Next he argues the bankruptcy court's finding at trial that he lacked

credibility, in light of his "equally persuasive evidence," showed prejudice. Finally, he argues the sanctions order showed "manifest partiality." All these alleged instances of bias or partiality derive from the bankruptcy court's rulings and events within the litigation. Without more, they do not support a recusal motion. Focus Media, 378 F.3d at 930. Debtor points to nothing to sustain his burden that the bankruptcy court was influenced by any "extrajudicial" source, or displayed "deep-seated favoritism or antagonism that [made] fair judgment impossible." Liteky, 510 U.S. at 555. The bankruptcy court did not abuse its discretion in failing to recuse itself.

IV. Standard of Proof in § 727(a) Actions

Debtor argues the appropriate standard of proof in a § 727(a) action is "beyond reasonable doubt." It is well established, however, that the standard is "preponderance of the evidence." Grogan v. Garner, 498 U.S. 279, 289 (1991); Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 730 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743, 2001 WL 246057 (9th Cir. 2001). The bankruptcy court did not err in applying this standard.

V. Evidence of "Hardship" Irrelevant

At trial, Debtor attempted to proffer evidence that denial of discharge would work an extreme hardship upon him, to which Tranche 1 objected. The bankruptcy court excluded the evidence as irrelevant. Debtor argues this was error.

Relevant evidence must relate to a fact that "is of consequence to the determination of the action." Fed. R. Evid. (FRE) 401. "Irrelevant evidence" is inadmissible. FRE 402. We could find (and the

parties cite) no authority discussing "hardship" as a defense in a § 727(a) action. However principles of statutory construction, case/law on the use of § 105(a), and sound public policy all support a conclusion that hardship is not available as a defense and is irrelevant in a § 727(a) action.

In analyzing a statute's text, the court's job is to apply the statute as written, not to "add nor to subtract, neither to delete nor to distort." Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ., 464 F.3d 1003, 1007 (9th Cir. 2006)(quoting 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596, (1951)). Section 727(a) in general, and §§ 727(a)(2),(a)(3), and (a)(4)(A) in particular, contain no "hardship" defense; nor do they require a plaintiff to show "lack of hardship" as part of its prima facie case.[24] A similar defense does exist in the context of the dischargeability of student loans. See 11 U.S.C. § 523(a)8).[25] "It is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002). In a similar vein, several sections of § 727(a) contain affirmative defenses on grounds other than hardship, see, e.g., § 727(a)(3) (justification for failure to keep or maintain

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[24] See discussion infra as to the prima facie elements of §§ 727(a)(2),(a)(3), and (a)(4)(a).

[25] Section 523(a)(8) generally excepts student loans from discharge "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."

records); § 727(a)(5) (satisfactory explanation for loss or deficiency of assets), again evidencing Congress' intent to exclude a hardship defense. Boudette v. Barnette, 923 F.2d 754, 756-57 (9th Cir. 1991) (doctrine of expressio unius est exclusio alterius, "creates a presumption that when a statute designates certain . . . things or manners of operation, all omissions should be understood as exclusions").

Although not cited specifically, Debtor's argument is an appeal to invoke § 105(a)'s equitable principles.[26] However, § 105(a) does not "empower courts to issue orders that defeat rather than carry out explicit provisions of the Bankruptcy Code. . . ." Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1080 (9th Cir. 1989). Section 105(a) has been rejected as a separate means to revoke discharge. Disch v. Rasmussen, 417 F.3d 769 (7th Cir. 2005). Similarly, in Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 852-53 (9th Cir. BAP 2002), this court held its use was not "appropriate" to deny a Chapter 7 discharge, when denial was not supported under § 727. If § 105(a) cannot be used as a sword to deny a discharge, it follows that it should not be permitted to be used as a shield to defend against denial of discharge.

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[26] Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Finally, as a matter of policy, allowing a defense of "hardship" to a debtor who has perpetrated a fraud under §§ 727(a)(2) and (a)(4) would contravene Congressional policy that the principal purpose of the Bankruptcy Code is to grant a "fresh start" to the "honest but unfortunate debtor." Grogan, 498 U.S. at 286-87 (1991); Marrama v. Citizens Bank, __ U.S. __, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007). Further, a denial of discharge almost always imposes a "hardship" on a debtor. In the vast majority of Chapter 7 cases, an unmanageable debt load is what motivates the filing. Allowing a "hardship" defense would, for the most part, negate the provisions of § 727(a). The court did not commit an error of law and thereby abuse its discretion in preluding evidence of hardship.[27]

VI. Suatengco Hearsay Testimony

Francis Suatengco testified at trial to explain what a "qualifying share" is under Philippine corporate law and to attempt to corroborate Debtor's testimony regarding the extent of Debtor's interests in certain of the corporations at issue. At several points, his answers were precluded by sustained hearsay objections. Debtor complains of the exclusions in his Supplemental Brief at 4-6. A careful reading indicates the main error asserted is the sanctions order precluding the documentary evidence upon which Suatengco attempted to testify. The sanctions order is discussed above. In any case, the hearsay rulings were not error.

[27] Debtor's Reply Brief argues denial of discharge under his circumstances violates the 8th Amendment's ban on cruel and unusual punishment. Aside from Debtor's failure to raise this argument at trial, we need not consider issues raised for the first time in a Reply brief. U.S. v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995).

In the first ruling, Debtor's counsel asked Suatengco if he knew how many Stresscrete shares Debtor owned in 2000. Because Suatengco had previously testified he had not become affiliated with Stresscrete until 2002, Tranche 1's attorney asked for foundation. Suatengco testified he based his knowledge on an "earlier" document (the incorporation papers of Stresscrete) that had not been admitted. At this point the bankruptcy court sustained a hearsay objection.[28] The other ruling occurred when Debtor's counsel asked whether Stresscrete Negros ever became operational. Suatengco's response was based not on personal knowledge, but instead on corporate documents, such as a project study, which were not in evidence. The bankruptcy court sustained a hearsay objection.

Both these rulings were proper. Suatengco's testimony was based on corporate documents, not his personal knowledge. FRE 602. The documents were hearsay in that they were written statements, other than statements made by a declarant testifying at trial, the contents of which were being offered for the truth of the matters asserted (i.e., Debtor's interest in Stresscrete and whether Stresscrete Negros ever became operational). FRE 801(c); Spear v. Global Forest Products (In re Heddings Lumber & Bldg. Supply, Inc.), 228 B.R. 727, 730 (9th Cir. BAP 1998).[29] The statements were inadmissible. FRE 802.

[28] The bankruptcy court also ruled that the evidence was cumulative because Debtor could testify as to the value of his holdings.

[29] Debtor did not argue that any exception to the hearsay rule applied for either ruling.

VII. Fraudulent Intent (Including Gain/Harm Not Necessary Element)

Tan I's mandate on remand was to try the issue of fraudulent intent on the § 727(a)(2)[30] and (a)(4)[31] claims. Its legal analysis, as set out below, is the law of the case. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 281 (9th Cir. 1996); see also 9th Cir. BAP R. 8013-1 (unpublished opinions may be cited as law of the case).

In order to deny discharge under § 727(a)(2)(A) or (B), the Plaintiff must show that 1) the debtor transferred or concealed property;

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[30] Section 727(a)(2) provides:

> (a) The court shall grant the debtor a discharge, unless:
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> > (2) the debtor, with intent to hinder, delay or defraud a creditor or officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed-
> >
> > > (A) property of the debtor, within one year before the date of the filing of the petition; or
> > >
> > > (B) property of the estate, after the date of the filing of the petition.

[31] Section 727(a)(4)(A) provides:

> (a) The court shall grant the debtor a discharge, unless:
>
> > (4) the debtor knowingly and fraudulently, in or in connection with the case-
> >
> > > (A) made a false oath or account.

2) the property was property of the debtor, if pre-petition, or property of the estate if post-petition; 3) the transfer or concealment occurred within one year before bankruptcy was filed, or after the petition was filed, and 4) the debtor acted with the intent to hinder, delay, or defraud a creditor or officer of the estate.[32] Tan I at 4-5 (citing In re Devers, 759 F.2d 751 (9th Cir. 1985)). Failure to list assets in a debtor's bankruptcy schedules can constitute concealment. Tan I at 5 (citing In re Scott, 172 F.3d 959 (7th Cir. 1999)).

To deny a discharge under § 727(a)(4)(A), the plaintiff must show that 1) the debtor knowingly and fraudulently made a false oath; and 2) the false oath related to a material fact. Tan I at 5 (citing In re Aubrey, 111 B.R. 268, 273 (9th Cir. BAP 1990)). A false oath may involve a false statement or omission in the debtor's schedules. Tan I at 5 (citing In re Beaubouef, 966 F.2d 174 (5th Cir. 1992)).

Under both §§ 727(a)(2) and (a)(4), intent must be actual, not constructive. Tan I at 6 (citing In re Devers, 759 F.2d 751 (9th Cir. 1985). Fraudulent intent may, however, be established by circumstantial evidence, or by inferences drawn from a course of conduct.[33] Tan I at 6 (citing In re Wills, 243 B.R. 58, 64 (9th Cir. BAP 1999)).

Debtor argues the court erred, as a matter of law, in not requiring proof that anyone "gained" by his fraud or was "harmed"

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[32] The hinder, delay, or defraud elements are disjunctive. Each independently provides a basis for denying discharge. Beauchamp, 236 B.R. at 731.

[33] Tan I held that Debtor's disclosures in his Amended Schedules and SOFA do not absolve him of fraud. Tan I at 13-14.

therefrom. In this context, we construe "gain" and "harm" as flip-sides of the same coin; "harm" to creditors logically follows "gain" by Debtor.

As to § 727(a)(4), this argument mainly goes to "materiality." Assuming arguendo "materiality" was still an issue at trial,[34] a statement is material if it relates to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings or the existence or disposition of property. Tan I at 5 (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). A false statement or omission may be material even if it does not cause direct financial prejudice to creditors. Tan I at 5 (citing Wills, 243 B.R. at 63 (9th Cir. BAP 1999)). A discharge may be denied if the omission adversely affects the trustee's or creditors' ability to discover other assets or to fully investigate the debtor's pre-bankruptcy dealings and financial condition. Tan I at 5 (citing Wills, 243 B.R. at 63).

Similarly, for § 727(a)(2) purposes, "lack of injury to creditors is irrelevant. . . ." Wills, 243 B.R. at 65. "Transfers made with the intent to hinder or delay a creditor's collection efforts may be grounds for denial of discharge even if the transfer does not reduce a debtor's total assets." Id.

It follows that gain or harm is not a necessary element to §§ 727(a)(2) and (a)(4) claims. Even if they were, the bankruptcy court found (which was not clear error), that Debtor did have "something to gain" by failing to disclose the Undisclosed Interests, as evidenced by

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[34] Tan I's mandate on remand arguably precluded issues as to "materiality". Tan I at 11:6-8 ("only question with regard to debtor's nondisclosure of these business interests is whether the failure to disclose was done with an intent to defraud")(emphasis added); Id. at 14:13-14 ("there is a question of fact as to debtor's intent in failing to disclose his interest in certain assets").

the description contained in the Millenium Plan of his role as the "prime mover" in the Power One Group. Tan II, 350 B.R. at 494 n.7.

Although Debtor's summary judgment materials have not been provided, it appears from the facts recited in Tan I that predominantly the same evidence was presented on summary judgment as was adduced at trial. Trial was held, in large part, to gauge Debtor's credibility.[35] The bankruptcy court found Debtor "generally lacking credibility." Tan II, 350 B.R. at 494. It found he was "lying" when he said he "forgot" to list Central, Advanced, and Greenergy, Tan II, 350 B.R. at 495, and when he stated Greenergy has either never operated or had not operated since 1995. Id. We must give these credibility determinations deference. Thiara, 285 B.R. at 427. A finding that Debtor was "lying" indicates purposeful deceit.

One of Debtor's main assertions is that he merely owned "qualifying shares"[36] in the Philippine corporations, holding little, if

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[35] Debtor's fraudulent intent turns largely on the veracity of his explanations as to why he omitted the Undisclosed Interests and Positions. In his briefs, Debtor addresses those explanations, however, with few exceptions, he fails to make specific reference to the relevant portions of the record as required by Rule 8010(a)(1)(D). Neither we nor Tranche 1 are obliged to search the record unaided for error, particularly a voluminous record, such as the one before us. Dela Rosa v. Scottsdale Memorial Health Systems, Inc., 136 F.3d 1241 (9th Cir. 1998). However, given Debtor's pro se status, we have endeavored to fairly review the record provided, which appears consistent with the bankruptcy court's recitations. Tan II, 350 B.R. at 494-95. The bankruptcy court did not find the Debtor's explanations credible.

[36] Suatengco explained "qualifying shares" as follows: Under Philippine law, a corporation's president must be a director. In turn, a director must own shares in the corporation. Thus, a corporation will often buy a number of shares on behalf of its president to "qualify" him for that position. The shares are listed on the books as paid for by the shareholder. The president does not receive share certificates,

(continued...)

any value.[37] He argues Suatengco corroborated this. However, Debtor references nothing in the record supporting such corroboration. Any attempted corroboration was properly excluded as hearsay.[38] Further, contrary to Debtor's testimony, various exhibits admitted at trial show Debtor paid for more than de minimis interests, that is, more than mere "qualifying shares."

There is ample other evidence indicating fraudulent intent. First, there is the sheer scope of the omissions, interests in seven (7) corporations, positions in six (6). Next there is Debtor's continuing concealment at his § 341(a) meeting of creditors, including:

> 1)Upon inquiry from the Trustee, failing to mention any errors in his Schedule B or SOFA;
> 2) Upon inquiry from PNB's counsel, denying any equity interest in Ford Edsa (although he admitted he was a director);
> 3) Denying that Greenergy had any assets and asserting that it had stopped operating at least four (4) years previously, although admitting he owned shares;[39] and
> 4) Denying he owned any other interests in companies that were not already listed on Schedule B.

Another of Debtor's explanations for the omissions is that several of the corporations were dormant. However, Tranche 1's Ex. 9,

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[36](...continued)
typically doesn't receive dividends, and if he or she leaves their position, the shares are forfeited.

[37] A low value of concealed or transferred assets is a factor in determining a debtor's intent. Mereshian, 200 B.R. at 346.

[38] Michael Cooper, Debtor's counsel at the time he filed his petition, did testify that Debtor's interests were "minuscule." However, he was referring to the "Disclosed Interests" and in any event had no firsthand knowledge, instead relying on Debtor, who the bankruptcy court found "not credible."

[39] Tranche 1's Ex. 12, Edison Global's audited Financial Statement for year-end 1997, showed Global Edison had loaned $107,000 to Edison Energy (Greenergy's prior name), and had invested $100,000 in same.

Stresscrete's "Millenium Plan," prepared in October, 1999 (just four (4) months prepetition), described Debtor as the "prime mover" of the Power One (fka Edison Industries) group, "the umbrella management and holding company for a group of affiliated companies [including Teledyne], specializing in niche markets within the electric power sector in the Philippines."

All the foregoing evidence from the record, along with the bankruptcy court's finding that Debtor was not credible, support the conclusion that the court did not "clearly err" when it found Debtor had the requisite fraudulent intent.

VIII. Failure to Keep Records

Section 727(a)(3) denies discharge when:

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

The initial burden of proof under § 727(a)(3) is on the plaintiff. Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994)(Cox II). In order to establish a prima facie case under § 727(a)(3), the plaintiff must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. Id. What constitutes adequate records must be decided case by case based on debtor's business operations and sophistication. AVCO Fin. Services v. Sullivan (In re Sullivan), 111 B.R. 317, 321 (Bankr. D. Mt. 1990)(citing In re Horton, 621 F.2d 968 (9th

Cir. 1980)(construing 11 U.S.C. § 32(c)(2) under the Bankruptcy Act)). The bankrupt must maintain "sufficient written evidence which will enable his creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." Cox v. Lansdowne (In re Cox), 904 F.2d 1399, 1402 (9th Cir. 1990)(Cox I)(quoting In re Horton, 621 F.2d 968, 971 (9th Cir. 1980)). "Keep" means to maintain a record, as in "to keep a diary." Peterson v. Scott (In re Scott), 172 F.3d 959, 969 (7th Cir. 1999). "This language places an affirmative duty on the debtor to create books and records accurately documenting his business affairs." Id.

Debtor was a certified public accountant and a sophisticated businessman, with interests and positions in numerous corporations. The bankruptcy court found, that as such, he should be held to a high level of accountability in record keeping. Tan II, 350 B.R. at 496-97 (citing with approval Meridian Bank v. Alten, 958 F.2d 1226, 1230-31 (3rd Cir. 1992)). The bankruptcy court found Tranche 1 had met its burden to show the inadequacy of the Debtor's records, as Debtor testified he did not keep any records of any of his interests in the subject corporations. Debtor does not forcefully argue this finding was error. Instead, he concentrates on justification for the inadequacy.

Once the objecting party shows that the debtor's records are absent or inadequate, the burden of proof shifts to the debtor to justify the inadequacy or nonexistence of records. Cox II, 41 F.3d at 1296. Debtor must show, by a preponderance of the evidence, that failure to keep adequate business records was justified under all of the circumstances in the case. Id. at 1297. "If the extent and nature of

the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, [he] must show more than that [he] did not comprehend the need for them." Id. "In such cases, the justification must indicate that because of unusual circumstances, the debtor was absolved from the duty to maintain records [him]self." Id. Factors which may be considered in making this factual determination include debtor's education, the sophistication of the debtor's business experience, the size and complexity of debtor's business, debtor's personal financial structure, and any special circumstances. Singer Sewing Co. v. Harmon (In re Harmon), 1992 WL 13624 at *5 (Bankr.W.D. Tenn. Jan. 10, 1992)(cited with approval in Cox II, 41 F.3d at 1299).

The bankruptcy court found that Debtor "provided no explanation to justify his failure to keep or preserve adequate documentation to permit his financial condition and business transactions to be ascertained." Tan II, 350 B.R. at 497. This was not clear error.

As to Edison Global, Teledyne, Edison Mobile, Edison Industries, and Filipinas, Debtor explained in his Revised Answers to Interrogatories that he:

> traveled between the Philippines, Hong Kong and the U.S. frequently, as a matter of practice, all corporate and business documents are kept by the corporate officers and managers of each company. I, of course can secure a copy of documents as needed.

Tranche 1's Jud. Ntc. Ex. No. 19.[40] As to Ford Edsa and Stresscrete, he explained he did not believe he owned any shares. Tranche 1's Jud. Ntc. Ex. No. 19. As to Greenergy, Central, and Advanced, he explained he lost awareness of the corporations entirely. Tranche 1's Jud. Ntc. Ex. No. 19. At trial, he reiterated that he could get the records upon request.

As noted above, the bankruptcy court found Debtor "generally lacking credibility," Tan II, 350 B.R. at 494, and found he was "lying" as to Central, Advanced, and Greenergy. Tan II, 350 B.R. at 495. These credibility determinations must be given deference. Thiara, 285 B.R. at 427. Further, given Debtor's education, sophistication, and the size and complexity of his business, the explanations, even if true, would be insufficient. In general, "the demands of operating a business do not excuse a debtor from keeping basic financial records." Pher Partners v. Womble (In re Womble), 289 B.R. 836, 858 (Bankr. N.D. Tex. 2003), aff'd, 299 B.R. 810 (N.D. Tex. 2003), aff'd, 108 Fed. Appx. 993 (5th Cir. 2004). Further, that a debtor transacts business with one or more small closely held entities is generally no defense. Id.

The records' location is another factor. Debtor's interests were in foreign corporations, with all but one (Edison Global) located in the

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[40] Likewise, in his Original Answers to Interrogatories, Debtor stated as to the Disclosed Interests:

> I didn't need to maintain copies of these stocks and the companies' financial statements because they were just nominal shares and I can get copies from the accountants and corporate secretaries if I need them.

Tranche 1's Jud. Ntc. Ex. No. 19.

Philippines. Debtor chose to live in the United States and sought the protection of its insolvency laws. Neither the creditors nor trustee should have to venture overseas to ascertain Debtor's financial condition.

Debtor argues his bankruptcy counsel advised him he did not need substantiation, at least not at the time he filed his petition, and that he retrieved the records when the trustee so requested. In certain circumstances, if the corporate records were complete, accurate and were promptly retrieved, this might provide some justification. It is impossible, however, to retrieve documents that one has forgotten existed, as Debtor claims for Greenergy, Central, and Advanced. If Debtor would have kept even a rudimentary list of his holdings, he would not have forgotten. Also, one cannot retrieve something that doesn't exist. At trial, Debtor conceded he had no documentation, not even a share certificate, with respect to his stock ownership in Edison Global (the "mother" company and Debtor's most significant interest) and that despite being president, he didn't know who the other shareholders were. Tr. Trscpt. 47:13-48:5.

The court did not clearly err in finding Debtor did not provide sufficient justification for his failure to keep records.

CONCLUSION

The bankruptcy court's evidentiary rulings, decision to deny recusal and preclusion of documentary evidence as a discovery sanction, were not abuses of discretion. Its legal conclusions that hardship is irrelevant in § 727(a) actions and that prejudice to creditors is not a necessary element of §§ 727(a)(2) and (a)(4) claims were correct. Its

factual findings that Debtor intended to defraud his creditors and/or the trustee and that his financial records were inadequate without sufficient justification, were not clearly erroneous.

The bankruptcy court's decision is AFFIRMED.