

NOT FOR PUBLICATION

MAR 13 2013

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. HI-11-1464-JuMkTa
)	BAP No. HI-11-1468-JuMkTa
6	JIM SLEMONS HAWAII, INC.,)	BAP No. HI-11-1475-JuMkTa
)	(cross-appeals)
7	Debtor.)	
)	Bk. No. 09-01802
8	<hr/> JIM SLEMONS HAWAII, INC.,)	
)	
9	Appellant/Cross-Appellee,)	
)	
10	v.)	M E M O R A N D U M*
)	
11	CONTINENTAL INVESTMENT)	
	COMPANY, LTD.,)	
12)	
	Appellee/Cross-Appellant,)	
13)	
	v.)	
14)	
	U.S. Trustee; SHM, INC., dba)	
15	Car Stereo Express; TONY)	
	HAWAII CORP.,)	
16)	
	Appellees.)	
17	<hr/>)	

Argued and Submitted on February 21, 2013
at Pasadena, California

Filed - March 13, 2013

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Honorable Lloyd King, Bankruptcy Judge, Presiding.

Appearances: Anthony P. Locricchio, Esq., argued for Appellant
Jim Slemons Hawaii, Inc.; Jerrold K. Guben, Esq.,
of O'Connor Playdon & Guben LLP, argued for
Appellee Continental Investment Company, Ltd.

* 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 Before: JURY, MARKELL and TAYLOR, Bankruptcy Judges.

2 These cross-appeals arise from debtor Jim Slemons Hawaii,
3 Inc.'s second motion to recuse bankruptcy Judge Robert J. Faris
4 (Second Recusal Motion) from presiding over its bankruptcy case.

5 On October 12, 2011, this Panel affirmed Judge King's order
6 denying debtor's first motion to recuse Judge Faris (First
7 Recusal Motion) in Jim Slemons Haw., Inc. v. Office of the U.S.
8 Tr., et al. (In re Jim Slemons Haw., Inc.), BAP No. HI-10-1284.

9 A few months prior to our ruling, on June 20, 2011, debtor filed
10 its Second Recusal Motion. Judge King again decided the matter
11 and denied debtor's motion by order entered August 3, 2011
12 (Recusal Order #2). One day before the issuance of that order,
13 debtor filed an ex parte motion to reopen the Second Recusal
14 Motion asserting, among other things, that "new matters" had
15 arisen. Judge King denied debtor's motion to reopen by order
16 entered August 3, 2011. Debtor now appeals these orders (BAP
17 No. 11-1464).

18 Continental Investment Co., Ltd. (CIC) cross-appeals the
19 bankruptcy court's ruling with respect to Recusal Order #2 (BAP
20 No. 11-1475). CIC also appeals from the bankruptcy court's
21 order denying CIC's motion for reconsideration of portions of
22 Judge King's Memorandum Decision related to Recusal Order #2
23 (BAP No. 11-1468). For the reasons stated below, we DISMISS
24 CIC's cross appeal with respect to Recusal Order #2 for lack of
25 jurisdiction and AFFIRM the bankruptcy court's decisions in all
26 respects.

1 **I. FACTS¹ AND PROCEDURAL BACKGROUND**

2 Set forth below is a history of the relevant facts related
3 to debtor's chapter 11² case and a summary of debtor's two
4 motions for recusal and its allegations against Judge Faris.

5 Debtor filed its chapter 11 petition on August 10, 2009.
6 Debtor was the lessee of several leases and sub-leases (Lease)
7 with CIC, the lessor and fee owner of the underlying real
8 property. The Lease was debtor's primary asset. The real
9 property was expected to be condemned, in part, by the City and
10 County of Honolulu in connection with the right of way for its
11 new light rail system. Debtor, hoping to reap a profit from the
12 condemnation action, listed a condemnation claim against the
13 City of Honolulu in the estimated amount of \$750,000 in
14 Schedule B.

15 **A. Employment of Debtor's Attorney**

16 On September 28, 2009, Anthony P. Locricchio, filed an
17 application to be employed as debtor's attorney. After
18 objections by the United States Trustee's (UST) office were
19 resolved,³ the court approved Locricchio's employment as

20 _____
21 ¹ Some of these facts are taken from our Memorandum Decision
in In re Jim Slemmons Haw., Inc., BAP No. HI-10-1284.

22 ² Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

26 ³ In response to the UST's objections, Locricchio sent a
27 letter to the UST threatening Rule 9011 sanctions. At the
28 October 19, 2009 hearing on Locricchio's employment, UST Terri
Didion told the bankruptcy court that she had searched

(continued...)

1 debtor's general counsel by order entered on January 1, 2010.

2 **B. Postpetition Rent: The November 9, 2009 Order**

3 Shortly after the bankruptcy filing, on August 25, 2009,
4 CIC moved for the timely payment of postpetition rent under
5 § 365(d)(3) (Postpetition Rent Motion). On October 8, 2009,
6 debtor opposed the motion on the ground that CIC lacked standing
7 to bring the motion because the motion and memorandum in support
8 occasionally referred to CIC as Consolidated Investment Company,
9 Ltd. Debtor made no other arguments in opposition.

10 On the morning of October 19, 2009 - the day of the hearing
11 on CIC's motion - debtor filed a pleading labeled as a motion
12 (Rent Offset Motion) without notice of a hearing date. In the
13 motion, debtor sought to (1) obtain a \$85,000 credit against
14 rent payments due CIC for the remainder of August and all of
15 September; (2) pay the October rent; and (3) set an evidentiary
16 hearing for the resolution of various disputes between debtor,
17 CIC and others.

18 At the October 19, 2009 hearing, the bankruptcy court
19 informed Locricchio that it had not read debtor's papers which
20

21 ³(...continued)

22 Locricchio's bankruptcy experience through databases in Michigan,
23 California and Hawaii. Didion reported that she found two cases
24 that he worked on, one of which was the instant case. According
25 to Didion, her objection to the employment of Locricchio based on
26 his lack experience was founded on good faith and after a
27 reasonable inquiry. She also noted that Curtis Ching, the
28 Assistant UST, responded to the employment application because
she was on vacation when the application came in. Didion told
the judge that she was, however, the trial attorney assigned to
the case. Hr'g Tr. 10/19/09 at 14-15. Locricchio has identified
himself as an expert in condemnation cases. Hr'g Tr. 7/28/11 at
45:1-3.

1 were filed that morning because they were untimely. In granting
2 CIC's Postpetition Rent Motion, the bankruptcy court stated:

3 With regard to the motion for payment of rent, I'm -
4 I'm going to grant that motion and leave for another
5 day the question of - I understand the October rents
6 going to be paid promptly, and I'll leave for another
7 day the - the question of whether the August and
8 September rents have to be paid, and if they're not
9 what consequences the non-payment would have. Hr'g
10 Tr. 10/19/09 16:24-25; 17:1-4.

11 The court granted CIC's motion by order entered on November 9,
12 2009 (November 9 Order). The order stated in relevant part:

13 IT IS FURTHER ORDERED ADJUDGED AND DECREED that Jim
14 Slemons Hawaii, Inc. is directed to timely pay the
15 monthly rent or a pro rated amount of monthly rent for
16 the post-petition period from the petition date,
17 August 10, 2009, to the present and continue to make
18 payments pursuant to Section 365(d)(3), until further
19 Order of this Court.

20 The order included signature lines for Locricchio and Didion,
21 the UST, to indicate their approval as to the form of the order.
22 The signature lines were blank when the bankruptcy court signed
23 and entered the order. The BNC Certificate of Service showed
24 that after entry of the order it was served on debtor and
25 Locricchio. Debtor did not appeal the November 9 Order and it
26 became a final order in the case. As further discussed below,
27 this order forms the crux of the dispute with respect to
28 debtor's Second Recusal Motion.

C. CIC's Motion to Terminate The Lease

29 Under § 365(d)(4)(A) and (B), the deadline for debtor to
30 assume the Lease or move for an extension of time to assume was
31 early December 2009. Debtor neither filed a motion to assume
32 the Lease nor did it move to extend the time to assume the Lease
33 within the statutory time period.

1 On December 23, 2009, CIC filed a motion (Lease Termination
2 Motion) seeking a declaration from the bankruptcy court that the
3 Lease was terminated and an order directing debtor to surrender
4 the premises.

5 On January 8, 2010, debtor filed an opposition, contending,
6 among other things, that its Rent Offset Motion barred CIC from
7 seeking to terminate the Lease until the court ruled on the
8 various disputes. Debtor further asserted that its Rent Offset
9 Motion made clear that it had assumed the unexpired lease under
10 § 365(d)(4). Finally, debtor maintained that once CIC filed its
11 Postpetition Rent Motion, it was barred from claiming that
12 debtor had not assumed the Lease.

13 At the January 19, 2010 hearing, the court took the matter
14 under advisement due to debtor's complaint that CIC gave debtor
15 twenty-seven days notice instead of twenty-eight days. The
16 court gave debtor until February 11, 2010, to file a
17 supplemental memorandum and CIC's counsel was given to
18 February 18, 2010, to file a reply.⁴ Debtor requested a further
19 extension to February 18, 2010, which the bankruptcy court
20 granted, and the time for CIC's reply was extended to
21 February 25, 2010.

22 In debtor's supplemental pleading filed on February 18,
23 2010, debtor accused the bankruptcy judge of being biased and
24 stated that it would be filing a motion to disqualify him.

25
26 ⁴ CIC filed its motion on December 23, 2009, and the hearing
27 was set for January 19, 2010. Because the motion was filed
28 during the holiday season and Locricchio did not participate in
the court's non-mandatory electronic filing system which provides
immediate notice, the court gave debtor additional time.

1 On February 22, 2010, before the filing of CIC's reply, the
2 bankruptcy court issued a Memorandum Decision, finding that the
3 Lease was rejected on December 9, 2009, by operation of law
4 under § 365(d)(4). The bankruptcy court rejected debtor's
5 argument that its Rent Offset Motion constituted a properly
6 noticed and timely motion to assume the Lease. The court also
7 observed that a debtor must pay postpetition rent under
8 § 365(d)(3) even if it later decided to reject the lease.
9 Finally, because debtor had mentioned in its papers that it
10 intended to file a motion for recusal, the bankruptcy judge
11 addressed the issue in the Memorandum Decision, concluding there
12 was no basis for his disqualification.

13 The court entered judgment for CIC on March 3, 2010
14 (Termination Judgment).

15 **D. Debtor's First Recusal Motion**

16 On February 23, 2010 – one day after the court issued its
17 Memorandum Decision terminating debtor's Lease – debtor filed
18 its First Recusal Motion to disqualify Judge Faris. Debtor
19 alleged that the judge overlooked CIC's procedural
20 irregularities and considered pleadings it should have stricken.
21 Specifically, debtor asserted that the court should have
22 stricken CIC's Lease Termination Motion because of the
23 insufficient notice (twenty-seven days instead of twenty-eight).
24 Debtor also alleged that CIC's counsel was part of a "bankruptcy
25 club," which was a social luncheon gathering of bankruptcy
26 attorneys that the bankruptcy judge regularly attended and which
27 excluded some attorneys from attending. Finally, debtor alleged
28 that the court rushed out its February 22 Memorandum on CIC's

1 Lease Termination Motion due to the possible delay caused by
2 debtor's notice of its yet-to-be-filed recusal motion.

3 Debtor's First Recusal Motion was set for hearing on
4 April 26, 2010, before Judge King.⁵ On April 7, 2010, debtor
5 filed an ex parte motion to stay the hearing so that it could
6 conduct an investigation into the court's internal procedures.
7 The investigation would supposedly uncover whether Judge Faris
8 had improperly back-dated his Memorandum Decision from
9 February 24 to February 22 due to debtor's pending recusal
10 motion. Judge King denied debtor's ex parte motion by
11 Memorandum Decision and an order entered April 9, 2010.

12 At the April 26, 2010 hearing, Judge King denied debtor's
13 First Recusal Motion.

14 On May 5, 2010, Judge King issued a Memorandum Decision,
15 finding that (1) Locricchio had not offered any evidence that if
16 luncheon meetings were held and Judge Faris participated, the
17 attendees precluded him, or any other attorney, from attending;
18 (2) although debtor had insufficient notice of CIC's motion to
19 terminate the Lease, the notice deficiency resulted in no
20 prejudice to debtor because Judge Faris gave debtor the
21 opportunity to file a supplemental pleading; (3) debtor failed
22 to cite any case law that would require a court to deny a motion
23 (versus continuing it) due to insufficient notice; and (4) Judge

24
25 ⁵ A federal judge who is the subject of a recusal motion may
26 hear that motion himself. United States v. Sibla, 624 F.2d 864,
27 867-68 (9th Cir. 1980). To avoid any appearance of conflict or
28 bias, some districts or divisions use a procedure that has a
different judge rule on a recusal motion. The District of Hawaii
used this optional procedure.

1 Faris did not err by issuing his Memorandum Decision granting
2 CIC's motion to terminate the Lease prior to the hearing on
3 debtor's motion to disqualify him. Judge King concluded by
4 stating that debtor's allegations of bias against Judge Faris
5 lacked factual and legal support.⁶

6 The bankruptcy court entered the order denying debtor's
7 First Recusal Motion on May 5, 2010.⁷

8 Debtor appealed the ruling to this Panel. The Panel
9 summarily affirmed Judge King's decision denying debtor's First
10 Recusal Motion in In re Jim Slemons Haw., Inc., BAP No. 10-1284,
11 filed on October 12, 2011.⁸

12 **E. The May 24, 2010 "Ambush" Hearing**

13 Meanwhile, Locricchio, debtor, CIC and the UST filed
14 various motions.

15 On February 4, 2010, Locricchio filed an application for
16 interim fees, requesting \$39,647.40 for his services (Fee
17 Application). On February 25, 2010, the UST objected on the
18 grounds that Locricchio failed to follow the UST's guidelines
19 for fee applications or discuss any of the factors in § 330(a)

20
21 ⁶ Judge King commented that debtor's original and
22 supplemental memoranda in support of its First Recusal Motion did
23 not contain a single citation to a statute, rule, or reported
24 case.

25 ⁷ On October 18, 2010, debtor filed a motion for
26 reconsideration of the order denying debtor's First Recusal
27 Motion. The bankruptcy court denied the motion by order entered
28 on October 29, 2010. Debtor appealed that decision on
November 30, 2010 (BAP No. 10-1469). The Panel entered an order
dismissing the appeal as untimely on February 1, 2011.

⁸ Debtor has since appealed our decision to the Ninth
Circuit.

1 to assist the court in determining the reasonableness of the
2 fees. CIC also objected, arguing that its postpetition rent had
3 administrative priority over debtor's counsel's fees.

4 On April 5, 2010, debtor moved to set aside the Termination
5 Judgment under Rule 9023 (Set Aside Motion). Debtor's motion
6 essentially rehashed the same arguments it made in its First
7 Recusal Motion. In other words, the bankruptcy judge's alleged
8 bias was debtor's sole argument for setting aside the
9 Termination Judgment.

10 On April 7, 2010, CIC moved for payment of administrative
11 rent for the period August 10, 2009 (the petition date), to
12 December 9, 2009 (the rejection date)(Administrative Rent
13 Motion). Debtor did not oppose the motion.

14 On April 26, 2010, the UST moved to dismiss debtor's case
15 under § 1112(b) for "cause" (Dismissal Motion). The UST
16 asserted that debtor had no possibility of a successful
17 reorganization without the Lease. Debtor responded by stating
18 that it would not oppose the motion.

19 These motions, along with debtor's Rent Offset Motion
20 filed on October 19, 2009,⁹ were noticed for a hearing on May
21 24, 2010. On appeal, debtor refers to this hearing as the
22 "ambush" hearing.

23 On May 20, 2010, the bankruptcy court issued a tentative
24 decision regarding the various motions. The tentative stated

25
26 ⁹ On January 12, 2010, debtor filed a notice that the Rent
27 Offset Motion would be heard on February 16, 2010. Therefore, by
28 the time debtor noticed the hearing, the date for assuming the
Lease – December 8, 2009 – had passed. The hearing for the Rent
Offset Motion was continued from February 16 to May 24, 2010.

1 the court would grant the UST's Dismissal Motion on the ground
2 that debtor could not reorganize without the Lease, its primary
3 asset. It further stated that the court was inclined to deny
4 all other pending motions as moot due to its decision to dismiss
5 the bankruptcy case.

6 At the May 24, 2010 hearing, the bankruptcy court granted
7 the UST's Dismissal Motion. But then the court also decided
8 that it needed to rule on debtor's Set Aside Motion and found it
9 untimely. The court requested that the parties focus their
10 arguments on whether the remaining motions (the Fee Application,
11 Rent Offset Motion, and Administrative Rent Motion) should be
12 addressed by the bankruptcy court or litigated in state court.

13 Debtor argued that the remaining motions should be
14 litigated in state court. CIC argued that the matter of
15 Locricchio's Fee Application and its request for administrative
16 rent under § 365(d)(3) were within the bankruptcy court's
17 exclusive jurisdiction. The UST argued for dismissal with the
18 rent issue decided by the state court. The court took the
19 matters under advisement.

20 In a May 27, 2010 Memorandum Decision, the bankruptcy court
21 denied debtor's Set Aside Motion on the grounds that it was
22 untimely and did not meet the standards for altering or amending
23 a judgment; i.e., the debtor did not demonstrate a manifest
24 error of law or fact or produce any newly discovered evidence.
25 Citing Pavelich v. McCormick, Barstow (In re Pavelich), 229 B.R.
26 777, 780-81 (9th Cir. BAP 1999), the bankruptcy court also found
27 that it had jurisdiction post-dismissal over its own orders and
28 to dispose of ancillary matters that were otherwise not moot.

1 However, the court stated that it did not view its jurisdiction
2 over the amount of the rent due under the Lease or compensation
3 due debtor's attorney as exclusive. Nonetheless, the court
4 found it would be unfair to avoid deciding the pending motions
5 because debtor was holding \$95,000 cash that, without a ruling,
6 it could freely use after the dismissal of its case to the
7 detriment of CIC. Accordingly, the court exercised its
8 discretion to decide the remaining motions.

9 First, the court denied Locricchio's Fee Application in its
10 entirety. The bankruptcy court found that Locricchio's services
11 were not beneficial to the estate because he missed the deadline
12 for assumption of the Lease under § 365(d)(4) and, as a result,
13 debtor lost its most valuable asset. The bankruptcy court also
14 denied the application on the alternative ground that it lacked
15 information required by Rule 2016 and, although the UST had
16 pointed out the deficiencies, Locricchio made no effort to
17 correct them.

18 Next, the court denied debtor's Rent Offset Motion which
19 alleged CIC's misconduct and interference with its business
20 relationships was grounds for relieving debtor from the
21 statutory requirement under § 365(d)(3) of paying postpetition
22 rent for the months of August and September. The court observed
23 that in response to debtor's allegation that CIC had wrongfully
24 collected rent from Tony Honda, CIC had produced a 1998 letter
25 agreement that authorized those payments. The court found that
26 debtor had never offered any reason why the agreement might be
27 invalid. Thus, the court concluded that there was no legitimate
28 dispute that debtor owed the full amount of the rent due under

1 the Lease, minus any amounts which the subtenants paid to CIC.

2 Third, the court granted CIC's Administrative Rent Motion.
3 The court noted that debtor filed no opposition to this motion.
4 The court further found that debtor failed to comply with its
5 November 9 Order, which required debtor to timely pay all
6 postpetition rents until further order. Therefore, the court
7 directed debtor and its counsel to remit all of the estate's
8 cash to CIC in partial satisfaction of CIC's administrative
9 claim and reserved jurisdiction to enforce this requirement.¹⁰

10 The bankruptcy court entered the order denying Locricchio's
11 Fee Application on June 29, 2010. The court entered the orders
12 denying debtor's Set Aside Motion and Rent Offset Motion on
13 July 13, 2010, and the corresponding judgments on July 26, 2010.
14 The court entered the order granting CIC's Administrative Rent
15 Motion on July 13, 2010, and corresponding judgment on July 26,
16 2010. Finally, the bankruptcy court entered the order granting
17 the UST's Dismissal Motion on July 13, 2010.

18 Debtor timely appealed each of the orders, which we
19 affirmed in In re Jim Slemmons Haw., Inc., BAP Nos. 10-1403,
20 10-1404, 10-1405, filed October 12, 2011.¹¹

21 **F. Debtor's Second Recusal Motion**

22 On June 20, 2011, debtor filed its Second Recusal Motion,
23 the subject of these cross-appeals. The overall tone of
24 debtor's motion showed that it was unhappy about losing the

25 _____
26 ¹⁰ In response, debtor filed an interpleader action in the
Hawaii District Court.

27 ¹¹ Debtor also appealed our decision on those matters to the
28 Ninth Circuit.

1 Lease, which, in turn, caused it to allegedly lose over one
2 million dollars due to the pending condemnation action. This
3 loss, debtor suggested, occurred due to the misconduct of
4 Mr. Guben, CIC's attorney, and Curtis Ching, the Assistant UST.
5 That misconduct, debtor argued, was overlooked by Judge Faris
6 because Guben, Ching and Judge Faris are all part of an "Old
7 Boys Network." Thus, according to debtor, Judge Faris showed
8 favoritism towards Guben and Ching and this caused the Judge to
9 take the steps that he did.

10 In its motion, debtor placed the propriety of the
11 November 9 Order at issue. Debtor alleged that Guben
12 intentionally altered the November 9 Order to include August and
13 September rents even though the bankruptcy court had not ordered
14 those rents to be paid. Debtor argued that CIC did not send
15 copies of the "proposed secret order" to debtor or the UST's
16 office in violation of LBR 9072(d)(2). Debtor then alleged that
17 the court "in cooperation with or in dereliction of duty
18 approved the false secured order absent signatures as to form of
19 the order. . . ." In the end, debtor argued that the fraudulent
20 order caused debtor to default under the lease which virtually
21 ended the bankruptcy.¹²

22 After debtor filed the motion, Judge King directed CIC and
23 its counsel to file a responsive pleading to debtor's motion by
24 an order dated June 23, 2011. CIC filed its response on July 7,
25 2011. On July 13, 2011, Judge King issued an Order for
26

27 ¹² Of course debtor overlooks the fact that it never assumed
28 the Lease within the time limits under § 365(d)(4).

1 Supplemental Memorandum directing CIC to file a supplemental
2 response "specifically addressing the contents and propriety of
3 the [November 9 Order] and the circumstances surrounding the
4 submission to the court of the proposed order. . . ."

5 On July 20, 2011, Ching filed his declaration with the
6 bankruptcy court. Ching declared that he attended the
7 October 19, 2009 hearing on CIC's motion for the payment of
8 postpetition rent, that the UST did not take a position on the
9 motion, and that on October 21, 2009, he received an email from
10 CIC with the proposed form of the November 9 Order, which was
11 also sent to debtor's counsel. Ching declared that he did not
12 oppose the proposed November 9 Order.

13 On July 21, 2011, CIC filed its supplemental memorandum.
14 In that pleading, CIC addressed, among other things, the
15 procedures surrounding the entry of the November 9 Order. CIC
16 did not explain why it submitted an order to the bankruptcy
17 court which was apparently inconsistent with Judge Faris' oral
18 ruling at the October 19, 2009 hearing. On the same day, CIC
19 filed Guben's declarations. Attached to one declaration were
20 emails from Guben's office to the UST and Locricchio with the
21 proposed order and the letter to Judge Faris regarding the
22 circulation of the proposed order to Locricchio and UST Didion.
23 Guben's second declaration set forth the chronological events in
24 the bankruptcy case, which also referenced Guben's handling and
25 circulation of the proposed November 9 Order.

26 On July 26, 2011, debtor responded. Debtor again alleged
27 that Ching, along with Guben and Judge Faris, participated in
28 the entry of the fraudulent November 9 Order. Debtor raised

1 numerous examples of alleged impropriety and bias, including:
2 (1) Guben sent the proposed November 9 Order to Ching, instead
3 of Didion, who was the UST assigned to the case; (2) Judge Faris
4 approved the fraudulent order that was submitted without any
5 signature of approval of the form of the order; and (3) there
6 was no evidence that Guben served the proposed order on
7 Locricchio. In addition, debtor provided a list of thirty
8 "facts" that were allegedly "admitted" by Guben and Ching that
9 demonstrated their misconduct. These facts were reiterations of
10 the three points outlined above.

11 **The Hearing**

12 On July 28, 2011, the bankruptcy court heard the matter.
13 The transcript shows that the Judge King patiently listened to
14 Locricchio's arguments regarding Guben and Ching's alleged
15 misconduct surrounding the entry of the November 9 Order.

16 Near the beginning of the hearing, Locricchio stated on the
17 record that he "did not get the order" (referring to the
18 November 9 Order). Hr'g Tr. 7/28/11 5:21-22, 6:1-14, 20-21.
19 Locricchio also argued at length about Guben submitting the
20 proposed November 9 Order to Ching, rather than Didion who was
21 not, in his opinion, a member of the "Old Boys Network." Id. at
22 9:14-15. Locricchio argued that Ching had "no authority to
23 oppose the order. He had been specifically excluded." Id. at
24 21:21-24. At another point, Locricchio stated that he had filed
25 a motion to remove Mr. Ching.¹³ "That problem was solved on the

26
27 ¹³ Indeed, Judge King later states in his Memorandum
28 Decision that Locricchio never filed such a motion nor were we
(continued...)

1 record by Ms. Didion stating that she was the attorney." Id. at
2 39:4-8.

3 Judge King, in turn, questioned Locricchio about when he
4 learned about the discrepancy in the order regarding the August
5 and September rents and whether he ever moved for an order for
6 reconsideration or appealed the November 9 Order. The
7 transcript shows that Locricchio never directly answered the
8 Judge's question about when he learned about the discrepancy.
9 Further, Locricchio stated that he did not file a motion for
10 reconsideration because of Judge Faris' bias stating: "Wise
11 attorney practice says never file a motion to reconsider when
12 you know the judge is going to rule against you." Id. at
13 15:12-13.

14 Finally, although Locricchio never filed an appeal of the
15 November 9 Order, he alludes at the hearing that he had in fact
16 done so. Id. at 11-14, 30-32, 43. After a lengthy discussion
17 about these things, Locricchio again stated that the order "did
18 not come to me period." Id. at 28:16-17. However, he later
19 admitted that he did get the order after it was entered. Id. at
20 29:13. At that point, the court advised Locricchio that he
21 should have done something to get the order corrected. Id. at
22 29:21-25.

23 The hearing on the Second Recusal Motion also covered
24 numerous other subjects related to Locricchio's conduct during
25 the case. Locricchio admitted on the record that he was
26

27 ¹³(...continued)
28 able to locate one on the docket.

1 representing both Jim Slemons and Jim Slemons Hawaii, Inc.
2 during the bankruptcy case, but that fact was never disclosed to
3 the court. Id. at 17:3-14. It also came out that Mr. Slemons
4 was making unauthorized loans to the debtor. Id. at 18.
5 Locricchio sent a check from his client trust account to pay
6 CIC's rent, but CIC ultimately returned that money to
7 Locricchio. Locricchio argued that the money was Mr. Slemons',
8 not the debtor's. Although Judge Faris ordered Locricchio to
9 return the funds, Locricchio filed instead an interpleader
10 action in the Hawaii District Court. Id. at 18, 53-54.

11 Locricchio also accused Judge Faris of being biased when he
12 denied Locricchio's application for fees in its entirety.
13 Locricchio claimed that he did not act to "adopt the lease I
14 knew my client couldn't pay" so it was "ridiculous" that Judge
15 Faris denied Locricchio's fees on the ground that his services
16 were not beneficial to the estate because he missed the deadline
17 for assuming the lease. Id. at 48. Locricchio also pointed to
18 Judge Faris' failure to hold a hearing on the Rent Offset Motion
19 as a further example of his bias. Id.

20 Guben then argued about the procedures surrounding the
21 entry of the November 9 Order. He maintained that it was sent
22 by email to Locricchio and Ching for their comments. He stated
23 that it went to Ching because Ching appeared at the October 19,
24 2009 hearing. Guben pointed out that the transcript from the
25 October 19, 2009 hearing, which his firm ordered, was lodged
26 with the court on October 22, 2009. Id. at 66. Guben
27 maintained that he sent a letter on October 26, 2009, to Judge
28 Faris that attached the proposed form of order he was going to

1 lodge pursuant to LBR 9021-1(a) and (b). The letter and order
2 went to Didion by email and to Locricchio, not only by email but
3 also facsimile.¹⁴

4 Judge King then questioned Guben on why the November 9
5 Order was inconsistent with the Judge Faris' verbal ruling. Id.
6 at 66. Guben stated that he thought the order was consistent
7 with the judge's ruling. Id. at 67:6-8. Guben reiterated that
8 Ching, Locricchio, Didion and the judge all had an opportunity
9 to review the transcript and the order. Id. at 67:16-22.

10 Finally, Didion argued that Ching's declaration was
11 submitted to the court so that the court would know that the
12 order was emailed to the office of the UST. Id. at 71:6-8. The
13 court then took the matter under submission.

14 **The August 3, 2011 Memorandum Decision**

15 In his August 3, 2011 Memorandum Decision, Judge King found
16 that debtor's Second Recusal Motion did not meet the standard
17 for disqualification under 28 U.S.C. § 455 and applicable Ninth
18 Circuit case law because debtor did not come forward with any
19 extrajudicial sources evidencing bias. Judge King also
20 concluded that debtor's arguments in its papers and at oral
21 argument had no merit. Judge King found that (1) there was no
22 evidence that the November 9 Order was entered fraudulently, in
23 secrecy, or with any bias against debtor; (2) there was no
24 requirement under the applicable local rule that the order

26 ¹⁴ Locricchio argued at the hearing that the reputed service
27 on him by ECF was false because he was not an ECF filer.
28 However, Guben never asserted that Locricchio was served by ECF;
he said by email and/or facsimile.

1 contain signatures of counsel for the debtor or the UST; (3) the
2 October 26, 2009 letter transmitting the proposed order to Judge
3 Faris indicated that copies had been provided to counsel for the
4 debtor and counsel for the UST; (4) Judge Faris waited an
5 additional period of time to see if there were any objections to
6 the proposed order; and (5) there were no objections and the
7 order was eventually entered on November 9, 2009.

8 Judge King also noted that CIC stated in a sworn
9 declaration that it complied with the local bankruptcy rules in
10 preparing and circulating a proposed order. The UST also
11 submitted a sworn declaration by Ching stating that it received
12 the proposed order sent by counsel for CIC and made no
13 objections. The exhibit, a copy of the email correspondence
14 sent by counsel for CIC attached to the UST's declaration,
15 identified Locricchio to be a recipient of the email
16 correspondence and proposed order. In the end, Judge King did
17 not believe Locricchio had not received the filed November 9
18 Order when the BNC Certificate of Service and the Clerk of the
19 Court both indicated that the debtor and Locricchio received
20 notice of the entry of the November 9 Order.

21 Tellingly, Judge King concluded that Locricchio provided no
22 reasonable excuse as to why he waited to advise the court of the
23 problems with the text of the November 9 Order until 18 months
24 after its entry. "The best explanation Locricchio gave was that
25 it would have been a waste of time to seek to have the order
26 corrected, given the bias of the presiding judge against
27 debtor's counsel." The court found this explanation "wholly
28 unsatisfactory." In short, Judge King found Locricchio had it

1 in his power to have this matter promptly addressed and
2 corrected, but he failed to do so.

3 Judge King concluded by finding debtor's Second Motion to
4 recuse Judge Faris was without factual or legal support. The
5 court entered the order denying debtor's Second Recusal Motion
6 on August 3, 2011.

7 **Debtor's Motion to Reopen**

8 On August 2, 2011, the day before the court issued its
9 Memorandum Decision, debtor filed an ex parte motion to reopen
10 the matter. Debtor sought this relief on the grounds that CIC
11 had ordered a transcript of the July 28, 2011 hearing, debtor's
12 counsel received a call from a clerk of the court concerning the
13 date of a notice of appeal filed by debtor, and unspecified "new
14 matters" were alleged to have arisen. The court denied the ex
15 parte motion on the grounds that there was nothing extraordinary
16 about counsel ordering a transcript, the call from the clerk was
17 to remind debtor to supply the date of the filing of his notice
18 of appeal and the "new matters" were not stated in any detail
19 and thus could not be the basis for reopening. On August 3,
20 2011, the court entered the order denying debtor's motion to
21 reopen.

22 **CIC's Motion for Reconsideration**

23 On August 3, 2011, CIC filed a motion for clarification or
24 reconsideration of the August 3, 2011 order and memorandum. CIC
25 requested that the court modify certain language in the decision
26 pertaining to "inconsistencies" between Judge Faris' oral ruling
27 at the October 19, 2009 hearing and the language in the
28 November 9 Order. That "inconsistency" had to do with whether

1 or not the August and September rents were to be included in the
2 order.

3 According to CIC, as a matter of law,¹⁵ there could be no
4 offset of a prepetition claim against a postpetition debt. CIC
5 also argued that the court could not delay the payment of the
6 postpetition rent beyond October 11, 2009 under § 365(d)(3)
7 "excuse period". CIC maintained that debtor never requested to
8 be excused from timely paying the postpetition rent. Therefore,
9 CIC argued that Judge Faris knew, as a matter of law, that
10 debtor was not eligible for a 60-day "excuse" or delay to pay
11 the postpetition rent for the months of August and September
12 2009.

13 CIC also argued that Judge King's interpretation of Judge
14 Faris' comments at the October 19, 2009 hearing was contrary to
15 the specific language of § 365(d)(3). CIC contended that the
16 court's interpretation made it seem like Judge Faris was giving
17 debtor an open-ended extension or delay until it had to pay
18 postpetition rent under § 365(d)(3).

19 **The August 18, 2011 Memorandum Decision**

20 In its August 18, 2011 Memorandum Decision, the bankruptcy
21 court denied CIC's motion for reconsideration for several
22 reasons. First, because debtor's Second Recusal Motion alleged
23 a discrepancy between Judge Faris' statements at the October 19,
24 2010 hearing and the November 9 Order, Judge King made clear
25 that he assumed, but did not decide, that certain discrepancies
26

27 ¹⁵ This "law" was submitted to Judge King for the first time
28 in the reconsideration motion.

1 did in fact exist. Second, Judge King noted that CIC was given
2 three opportunities to present its side of the discrepancy
3 issue. Judge King concluded that CIC had ample opportunity to
4 present the arguments set forth in its motion to reconsider, but
5 did not. Finally, Judge King found that hearing CIC's motion to
6 reconsider would serve no purpose because the issue before the
7 court was whether or not to disqualify the presiding bankruptcy
8 judge, not debtor's claim of a discrepancy between the judge's
9 verbal ruling and the written order prepared by CIC's counsel.
10 Judge King stated that his ruling on the motion to disqualify
11 would not change even if he assumed no discrepancy.
12 Accordingly, Judge King denied the motion by order entered on
13 August 18, 2011.

14 **G. The Appeals**

15 Debtor timely appealed the orders denying its Second
16 Recusal Motion and motion to reopen (BAP No. 11-1464). CIC
17 timely filed its appeal of the order denying CIC's motion for
18 reconsideration (BAP No. 11-1468) and timely filed its cross
19 appeal of the order denying Debtor's Second Recusal Motion (BAP
20 No. 11-1475).¹⁶

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction over this proceeding
23 under 28 U.S.C. §§ 1334 and 157(b). We have jurisdiction under
24
25

26 ¹⁶ After the briefs were submitted, CIC submitted additional
27 authorities to the Panel on February 6 and 14, 2013. Although we
28 have reviewed the additional authorities, we do not find them
pertinent to the issues on appeal.

1 28 U.S.C. § 158.¹⁷

2 **III. ISSUES**

3 A. Whether the bankruptcy court erred in denying debtor's
4 Second Recusal Motion;

5 B. Whether the bankruptcy court erred in denying debtor's
6 motion to reopen;

7 C. Whether the bankruptcy court erred in denying CIC's
8 motion for reconsideration of the Second Recusal Motion.

9 **IV. STANDARDS OF REVIEW**

10 We review under an abuse of discretion standard a
11 bankruptcy court's decision to (1) deny a motion for recusal of
12 a bankruptcy judge; (2) deny a motion to reopen; and (3) deny a
13 motion for reconsideration under Rule 9023. See Berry v. U.S.
14 Tr. (In re Sustaita), 438 B.R. 198, 208 (9th Cir. BAP 2010)
15 (motion for recusal); Zenith Radio Corp. v. Hazeltine Research
16 Inc., 401 U.S. 321, 331 (1971) (motion to reopen);
17 Diker v. Dye (In re Edelman), 237 B.R. 146, 150 (9th Cir. BAP
18 1999) (reconsideration under Rule 9023).

19 A bankruptcy court abuses its discretion if it applied the
20 wrong legal standard or its findings were illogical,
21 implausible, or without support in the record.
22 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
23 Cir. 2011).

24
25 _____
26 ¹⁷ On October 13, 2011, the BAP issued a Clerk's Order Re
27 Finality, indicating that the appeals might be interlocutory and
28 requiring a response from the parties. The Panel received and
considered the responses and issued an order on January 6, 2012,
finding the orders on appeal were final.

1 V. DISCUSSION

2 A. The Bankruptcy Court Did Not Abuse Its Discretion In
3 Denying Debtor's Second Recusal Motion (BAP No. 11-1464)

4 "A bankruptcy judge shall be governed by 28 U.S.C. § 455,
5 and disqualified from presiding over the proceeding or contested
6 matter in which the disqualifying circumstance arises, or, if
7 appropriate, shall be disqualified from presiding over the
8 case." Rule 5004(a). Section 455 of Title 28 provides:

9 (a) Any justice, judge, or magistrate of the United
10 States shall disqualify himself in any proceeding in
11 which his impartiality might reasonably be questioned.

12 (b) He shall also disqualify himself in the following
13 circumstances:

14 (1) Where he has a personal bias or prejudice
15 concerning a party, or personal knowledge of disputed
16 evidentiary facts concerning the proceeding.

17 In evaluating recusal motions, we start from the premise
18 that "[j]udicial impartiality is presumed." First Interstate
19 Bank of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987
20 (9th Cir. 2000); see also Liteky v. U.S., 510 U.S. 540, 554-55
21 (1994).

22 Evaluations of bias or prejudice are judged from an
23 objective perspective; "whether a reasonable person with
24 knowledge of all the facts would conclude that the judge's
25 impartiality might reasonably be questioned." Seidel v. Durkin
26 (In re Goodwin), 194 B.R. 214, 222 (9th Cir. BAP 1996); Liteky,
27 510 U.S. at 548. The reasonableness test is "limited to outward
28 manifestations and reasonable inferences drawn therefrom. In
applying the test, the initial inquiry is whether a reasonable
factual basis exists for calling the judge's impartiality into

1 question." United States v. Cooley, 1 F.3d 985, 993 (10th Cir.
2 1993). However, "factual allegations do not have to be taken as
3 true," and "[t]here is as much obligation for a judge not to
4 recuse when there is no occasion . . . to do so as there is
5 . . . to [recuse] when there is. A judge should not recuse
6 . . . on unsupported, irrational, or highly tenuous
7 speculation." Lopez v. Behles (In re Am. Ready Mix, Inc.),
8 14 F.3d 1497, 1501 (10th Cir. 1994).

9 Generally, allegations of bias or prejudice must stem from
10 some extrajudicial source. Liteky, 510 U.S. at 550-55. If
11 there is no evidence of extrajudicial sources of bias or
12 prejudice, then a charge of impartiality has to be supported on
13 evidence that the judge exhibited "such a high degree of
14 favoritism or antagonism to make fair judgment impossible." Id.
15 at 554-55.

16 Debtor alleged that Judge Faris had a relationship with
17 Guben and Ching because they were all part of what debtor refers
18 to as an "Old Boys Network". What that exactly means is not
19 readily apparent from the record. Instead, what is apparent is
20 that debtor's vague accusations about the relationship and
21 resulting bias have no factual support in this record. Further,
22 even if such a relationship existed, evidence of which is not in
23 the record, it does not follow that the relationship was
24 sufficient to demonstrate personal bias or an inability to be
25 impartial. Social acquaintances, friendships or associational
26 relationships are rarely grounds for recusal. See Sexson v.
27 Servaas, 830 F.Supp.475, 482 (S.D. Ind. 1993) (judge's social or
28 associational relationship was not grounds for recusal); Clay v.

1 Doherty, 608 F.Supp. 295 (N.D. Ill.1985) (judge's acquaintance
2 with key witness in civil rights case did not justify recusal);
3 M.K. Metals, Inc. v. Nat'l Steel Corp., 593 F.Supp. 991, 994-95
4 (N.D. Ill. 1984) (judge's friendship with the principal of a
5 "think-tank" that was providing an expert witness to the
6 defendant did not justify recusal); United States v. Conforte,
7 457 F.Supp. 641 (D. Nev. 1978), aff'd, 624 F.2d 869, cert.
8 denied, 449 U.S. 1012 (1980) (recusal not required in criminal
9 case in which defendant had dozens of social encounters with
10 judge at bridge tournaments, despite the fact that the judge had
11 publicly expressed a negative impression of the defendant).

12 Debtor would like us to infer from the alleged "Old Boys
13 Network" relationship that Judge Faris showed favoritism towards
14 Guben and Ching and bias against debtor when he entered the
15 November 9 Order. The factual record does not reasonably
16 support such an inference. Indeed, the record shows that there
17 was nothing sinister going on when Judge Faris entered the
18 order. Rather, the facts show that the November 9 Order was
19 properly served on debtor and Locricchio prior to and after its
20 entry. Although Locricchio maintained that he never received
21 the proposed order, Judge King did not believe him when the
22 emails in evidence and Guben's declaration showed otherwise.
23 Furthermore, the BNC Certificate of Service clearly showed that
24 Locricchio received the order after it was entered. The
25 transcript of the October 19, 2009 hearing was readily available
26 for all parties to review prior to the entry of the order, but
27 at no time did Locricchio review the transcript. Locricchio
28

1 also did not appeal the November 9 Order¹⁸ nor could he tell
2 Judge King exactly when he learned about the so-called
3 discrepancy in the order. We do not think a reasonable person,
4 possessing knowledge of these facts, could plausibly question
5 Judge Faris' impartiality in entering the November 9 Order. In
6 reality, debtor's Second Recusal Motion appears to have been
7 fueled by its attempt to collaterally attack the November 9
8 Order which was not appealed. In any event, dissatisfaction
9 with a ruling may present ample grounds for appeal, but it
10 rarely - if ever - presents a basis for recusal. Liteky,
11 510 U.S. at 555.

12 On this record, we also cannot conclude that Judge Faris'
13 handling of the May 24, 2010 hearing - the so-called "ambush"
14 hearing - shows any "outward manifestation" of affirmative bias
15 against debtor. Debtor complains about Judge Faris' failure to
16 rule on its Rent Offset Motion, but Judge Faris denied the
17 motion in his May 27, 2010 Memorandum Decision. Judge Faris did
18 not rule on the motion any sooner because debtor failed to
19 notice a hearing on the matter.

20 Debtor next complains that Judge Faris departed from his
21 tentative ruling because of his bias against debtor. But Judge
22 Faris' tentative decision was just that - tentative. Of course,
23 Judge Faris could depart from that ruling after hearing oral
24 argument from the parties. Debtor conveniently ignores the
25 basis for Judge Faris' rulings on matters that the judge

26
27 ¹⁸ Locricchio continues to assert on appeal that he indeed
28 filed an appeal to set aside the November 9 Order. His assertion
is incorrect. This false assertion is troubling.

1 previously thought may be mooted by the dismissal of debtor's
2 case. A huge issue was the fact that \$95,000 remained in the
3 DIP bank account. How did it get there? The record reflects
4 that money came out of Locricchio's client trust account to pay
5 CIC's postpetition rent and CIC returned that money to debtor.
6 Locricchio then claimed the money was Jim Slemons. The record
7 shows that Locricchio never obtained court authorization for Jim
8 Slemons to loan debtor money to pay the rents. Based on these
9 facts, Judge Faris perhaps was concerned, rightly so, that once
10 debtor's bankruptcy case was dismissed, debtor could use the
11 money for purposes other than the payment of CIC's
12 administrative rent, which was ordered to be paid in the
13 November 9 Order.

14 In short, Judge Faris' handling of the hearing does not
15 indicate that he had any bias or prejudice against debtor. A
16 reasonable person with knowledge of these facts could not
17 conclude that Judge Faris exhibited "such a high degree of . . .
18 antagonism [towards debtor] as to make fair judgment
19 impossible." Liteky, 510 U.S. at 555. Finally, to the extent
20 Judge Faris' rulings on the various orders are adverse rulings
21 against debtor, such rulings are not grounds for
22 disqualification, but grounds for appeal. Id. Debtor in fact
23 appealed each of the orders that stemmed from the May 24, 2010
24 hearing and we affirmed Judge Faris' rulings on appeal.¹⁹

25
26 ¹⁹ As previously mentioned, debtor has appealed these
27 decisions to the Ninth Circuit. Further, besides requesting
28 recusal of Judge Faris, it is unclear what remedy debtor seeks
for the alleged bias when its case has been dismissed. From what

(continued...)

1 As debtor has argued, it is best to look at the
2 proceedings in this case in their entirety. Looking at the
3 record as a whole, debtor's grounds for recusal of Judge Faris
4 here are no more persuasive than in its first motion. Debtor
5 implies that just about everyone involved in this case, with the
6 exception of Didion, is part of the "Old Boys Network". At one
7 point, debtor questions whether Judge King could be impartial.
8 But none of what debtor complains about would have caused a
9 reasonable person to question the impartiality of any judge who
10 handled any part of this case. As stated before, the fact that
11 a court rules against a party cannot, in and of itself, be
12 grounds for recusal. This point needs no further elaboration.

13 In sum, Judge King properly identified the correct legal
14 rules to apply to the recusal motion. On this record, we cannot
15 say that his factual findings were illogical, implausible or
16 without support in inferences that may be drawn from the facts
17 in the record. Accordingly, Judge King did not abuse his
18 discretion in denying debtor's Second Recusal Motion.

19 **B. The Bankruptcy Court Did Not Abuse Its Discretion in**
20 **Denying Debtor's Motion to Reopen (BAP No. 11-1464)**

21 We have looked at the entire record in this matter and the
22 defects in debtor's motion to reopen are similar to the defects
23 in its Second Recusal Motion. There was simply no basis for
24 debtor's motion.

25
26 _____
27 ¹⁹(...continued)
28 we can tell, the only remaining aspect of the case is the
distribution of the \$95,000 which was left in the DIP bank
account.

1 Factors for a trial court to consider when deciding to
2 reopen a case are:

3 (1) the importance and probative value of the evidence
4 or arguments sought to be introduced, i.e., whether it
5 is cumulative or might 'affect the outcome of the case
6 by, for example, offering a new theory of liability or
7 present a significant alteration of the evidence
8 presented at trial[,] (2) the moving party's
9 diligence and explanation for failing to previously
10 introduce the evidence or arguments, (3) the undue
11 prejudice that the delay might cause the non-moving
12 party, and (4) whether the court has already announced
13 its decision.

9 In re W. Shore Assocs., Inc., 435 B.R. 723, 725 (Bankr. M.D.
10 Fla. 2010). The Ninth Circuit has stated that "reopening a case
11 for the purpose of introducing overlooked evidence must be done
12 with extreme reluctance because of the undue emphasis given to
13 the introduced evidence with consequent distortion of the
14 evidence as a whole and the possibility that such prejudice will
15 result to the other party as to require a mistrial." Eason v.
16 United States, 281 F.2d 818, 822 (9th Cir. 1960).

17 Debtor's motion did not meet any of the standards for a
18 motion to reopen. Its motion simply asserted vague and
19 ambiguous arguments regarding "new matters" and offered no
20 discussion as to what these matters were or how they would
21 affect the outcome of the case. Further, as found by the
22 bankruptcy court, the ordering of a transcript or the phone call
23 by the court's clerk had nothing to do with the underlying
24 merits of the Second Recusal Motion. Finally, debtor made no
25 showing to excuse the untimeliness of the proposed introduction
26 of new evidence. For these reasons, we conclude that Judge
27 King's denial of the motion to reopen was not an abuse of
28 discretion.

1 **C. The Bankruptcy Court Did Not Abuse Its Discretion in**
2 **Denying CIC's Motion for Reconsideration (BAP No. 11-1468)**

3 CIC contends that Judge King's findings regarding the
4 discrepancy between Judge Faris' ruling at the October 19, 2010
5 hearing and the November 9 Order are incorrect as a matter of
6 law. We do not decide in this appeal whether or not the
7 "findings" regarding the order were right or wrong. In his
8 Memorandum Decision, Judge King made clear that he did not
9 decide there was in fact a discrepancy, but he simply assumed
10 the discrepancy existed because debtor's Second Recusal Motion
11 directly raised the issue. Moreover, as pointed out by Judge
12 King, the issue before him was whether the facts surrounding the
13 entry of the November 9 Order demonstrated that Judge Faris was
14 biased against debtor. Judge King found those facts did not
15 demonstrate bias. Therefore, according to Judge King,
16 regardless of the alleged discrepancy, Judge King's decision
17 regarding the alleged bias would not change. On this basis,
18 there was really no reason for Judge King to reconsider his
19 findings.

20 In addition, CIC had ample opportunity to make a record of
21 its legal arguments to its liking on the issue, but did not do
22 so until after the fact. There were also no grounds for
23 reconsideration - CIC did not present newly discovered evidence,
24 demonstrate clear error, or show an intervening change in
25 controlling law. See Fontenot v. Mesa Petroleum Co., 791 F.2d
26 1207, 1219 (5th Cir. 1986) (a motion to amend under Rule 52(b)
27 is intended "to correct manifest errors of law or fact or, in
28 some limited situations, to present newly discovered

1 evidence."); 389 Orange St. Partners v. Arnold, 179 F.3d 656,
2 665 (9th Cir. 1999) (setting forth grounds for reconsideration
3 under Civil Rule 59(e)); see also Rules 7052 and 9023 (applying
4 Civil Rule 52 and 59 to bankruptcy proceedings). Under these
5 circumstances, we conclude that the bankruptcy court did not
6 abuse its discretion by denying CIC's motion for
7 reconsideration.

8 **D. CIC's Cross Appeal of Recusal Order #2 (BAP No. 11-1475)**

9 Similar to its motion for reconsideration, CIC filed its
10 cross appeal of Recusal Order #2 seeking to amend Judge King's
11 findings. As stated, Judge King made clear in his Memorandum
12 Decision that he did not decide the issue regarding the alleged
13 discrepancy in the November 9 Order. Therefore, because the
14 alleged discrepancy was not one of the issues adjudicated, CIC
15 did not suffer an adverse impact from entry of Recusal Order #2.
16 See Cobb v. Aytch, 539 F.2d 297, 300 (3d Cir. 1976) (appellants
17 suffered no adverse impact from the decree and lacked standing).

18 Moreover, Judge King stated that if a discrepancy occurred,
19 that fact was immaterial to his decision regarding recusal. The
20 Supreme Court has held: "A party may not appeal from a judgment
21 or decree in his favor, for the purpose of obtaining a review of
22 findings he deems erroneous which are not necessary to support
23 the decree." Elec. Fittings Corp. v. Thomas & Betts Co.,
24 307 U.S. 241, 242 (1939); see also N.Y. Telephone Co. v.
25 Maltbie, et al., 291 U.S. 645 (1934) (appellant not entitled to
26 an appeal from a decree for the purpose of reviewing portions of
27 the decree that are not res judicata). For these reasons,
28 because we lack jurisdiction over CIC's cross appeal of Recusal

1 Order #2, the cross appeal is dismissed.

2 **VI. CONCLUSION**

3 Having determined that there is no basis for reversal of
4 any of Judge King's decisions, we AFFIRM each of the orders on
5 appeal.

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