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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-09-1300-PaJuKw
)	
FRED G. LABANKOFF,)	Bk. No. 09-10970
)	
Debtor.)	
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)	
FRED G. LABANKOFF,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
UNITED STATES TRUSTEE, ²)	
)	
Appellee.)	
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Argued and submitted on May 18, 2010
at San Francisco

Filed - June 14, 2010

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

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 The United States Trustee has not filed a brief or appeared in this appeal. In addition, although a chapter 7 trustee was appointed when Debtor's case was converted to chapter 7, that trustee is not listed as an appellee and has not appeared.

1 Before: PAPPAS, JURY and KWAN³, Bankruptcy Judges

2
3 Chapter 7⁴ debtor Fred G. Labankoff ("Debtor") appeals the
4 bankruptcy court's order converting his bankruptcy case from
5 chapter 11 to chapter 7.⁵ We AFFIRM.

6
7 **FACTS**

8 These facts are reconstructed from the bankruptcy court's
9 docket.⁶

10 Debtor filed a petition for relief under chapter 11 on
11 April 9, 2009. Debtor asserted in the petition that his debts

12 _____
13 ³ The Honorable Robert N. Kwan, United States Bankruptcy
14 Judge for the Central District of California, sitting by
designation.

15 ⁴ Unless otherwise indicated, all chapter, section and rule
16 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

17 ⁵ Appellant's brief contains numerous arguments relating to
18 a separate appeal before this Panel concerning the bankruptcy
19 court's decision to abstain from an adversary proceeding,
20 Labankoff v. GMAC, (BAP no. NC-09-1294), which we address in a
separate Memorandum. We focus in this Memorandum solely on issues
relating to the conversion order.

21 ⁶ Debtor did not comply with the Rules relating to
22 bankruptcy appeals. For example, despite Rules 8009(b)(1)-(8),
23 Debtor failed to include the required contents in the excerpts of
24 record. Transcripts required by Rule 8009(b)(9) were provided by
25 Debtor, but only after repeated instructions from the Clerk.
26 Contrary to Rule 8010(a)(1)(A)-(C), Debtor's brief did not include
27 page references on its table of contents or table of cases; the
28 brief also included incorrect statements of appellate jurisdiction
and standards of review. Debtor apparently also chose to
disregard BAP Rules 8010(a)(1) and (c)(1) limiting an opening
brief to 30-pages, double spaced 14-point type; Debtor's brief was
34 pages, single spaced, with 12-point type. While these rule
violations would ordinarily warrant some response from the Panel,
under the circumstances, and in particular since no appellee has
appeared, the Panel elects to accept and consider Debtor's
nonconforming brief.

1 were primarily consumer debts as defined in § 101(8), and that he
2 was not a small business debtor as defined in § 101(51D).
3 Although the schedules are not clear, it appears that Debtor owed
4 secured creditors \$800,000 for two deeds of trust on his residence
5 and \$107,270 in unsecured debts. Debtor's listed assets
6 consisted of a residence worth \$1.5 million and three "pending"
7 United States Patents "applications" he valued at \$5 million.

8 On May 1, 2009, the bankruptcy court issued a "Chapter 11
9 Status Order and Notice of Possible Conversion or Dismissal." The
10 court scheduled the status conference for May 29, 2009, and
11 directed Debtor to file a written statement before the conference
12 addressing several questions, including whether the small business
13 provisions of the Bankruptcy Code should apply in his case. The
14 bankruptcy court advised Debtor that it may dismiss or convert the
15 case if cause existed.

16 Debtor filed a response to the bankruptcy court's order on
17 May 21, 2009, in which Debtor stated that he had "filed [a
18 proposed] disclosure statement containing information concerning
19 assets, liabilities and business affairs of the debtor which we
20 believe is sufficient to enable a creditor to make an informed
21 decision about the debtor's plan of reorganization[.]" Debtor
22 then requested to be treated as a small business debtor because he
23 was an inventor.

24 On May 22, 2009, Debtor filed two motions, one seeking
25 authority to sell his residence, and the other proposing to sell
26 his rights under the three patent applications. Debtor's motions,
27 fairly construed, sought blanket authority to sell these
28 properties on the Debtor's initiative if needed to fund the

1 reorganization plan. No notice of the motions to sell was served
2 on creditors or other parties.

3 The bankruptcy court conducted the status conference on May
4 29, 2009. The attorney for the U.S. Trustee and Debtor appeared.
5 When asked for its position, counsel for the U.S. Trustee
6 described Debtor's proposal to sell the patent rights as
7 "illusory," and argued that Debtor lacked sufficient knowledge of
8 chapter 11 to be able to propose and confirm a reorganization
9 plan. Hr'g Tr. 2:20-24 (May 29, 2009).

10 At the status hearing, both the bankruptcy court and the
11 U.S. Trustee observed that Debtor's actions thus far in the
12 chapter 11 case had been incorrect. Debtor had filed two motions
13 to obtain unlimited authority to sell property of the estate
14 without complying with the Rules; Debtor had also commenced an
15 adversary proceeding against secured creditors GMAC Mortgage, LLC,
16 Homecomings Financial, LLC and ETS Services LLC, apparently not
17 appreciating that the subject matter of the action was non-core,
18 and that the bankruptcy court therefore could not enter a final
19 judgment; and, the court observed, Debtor proposed funding the
20 plan from the proceeds of present and unfiled lawsuits. The
21 bankruptcy court opined that a debtor could not fund a
22 reorganization plan from future lawsuits. Hr'g Tr. 4:18-22.

23 As a result of the status conference, the bankruptcy court
24 informed Debtor that his case would be converted to a chapter 7
25 case within 120 days if Debtor had not confirmed a chapter 11
26 plan. Clearly expressing his skepticism about the prospects for
27 confirmation of a plan, the bankruptcy judge informed Debtor that
28 "I think there is no way on God's earth that can happen. But I am

1 giving you the time in the hope that you get a lawyer and get some
2 good competent advice." Hr'g Tr. 3:21-4:3. Implementing the
3 comments at the conference, on May 29, 2009, the bankruptcy court
4 entered an order that Debtor's chapter 11 case would be converted
5 to chapter 7 on September 29, 2009 if a plan had not been
6 confirmed by that date. Also on May 29, the bankruptcy court
7 entered orders denying the motions to sell the residence and the
8 patent applications because of Debtor's failure to comply with the
9 Rules.

10 On August 10, 2009, Debtor submitted his First Proposed Small
11 Business Plan of Reorganization. Debtor's proposed plan⁷ states
12 that its purpose is to pay off \$14,354 in unsecured debt resulting
13 from expenses related to Debtor's "business of inventing,"
14 although the original petition listed unsecured debts in excess of
15 \$100,000. Debtor proposed to pay these debts through recoveries
16 from litigation and sale of the patent applications. Only if the
17 litigation proceeds and sale of the patent applications were
18 insufficient would Debtor attempt to sell his residence.

19 In his brief on appeal, Debtor complains that he was having
20 difficulty complying with the bankruptcy court's order to submit
21 and confirm a chapter 11 plan because of the "bias" of the
22 bankruptcy court, the fact that the principal secured creditor had
23 "defaulted" on its responsibilities by failing to answer Debtor's
24 complaint, and because the bankruptcy court clerks had conspired
25 with the judge to destroy documents and had failed to set hearing

26
27 ⁷ The plan states that a disclosure statement is attached,
28 but that statement was not included in the appellate record nor in
the bankruptcy court's docket.

1 dates in the adversary proceeding.⁸

2 On September 29, 2009, the bankruptcy court, sua sponte,
3 entered a memorandum and order converting the case from chapter 11
4 to chapter 7, in reliance upon the May 29 status conference order.

5 The same day, Debtor filed a timely appeal of the conversion
6 order.

7 8 JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
10 and 157(b)(2)(A). We have appellate jurisdiction under 28 U.S.C.
11 § 158.

12 13 ISSUES

- 14 1. Whether the bankruptcy court abused its discretion in
15 converting Debtor's bankruptcy case from chapter 11 to
16 chapter 7.
17 2. Whether the bankruptcy court was biased against Debtor.

18 19 STANDARD OF REVIEW

20 The bankruptcy court is given "wide discretion" in converting
21 a chapter 11 case to chapter 7. Greenfield Drive Storage Park v.
22 Cal. Para-Professional Servs., Inc. (In re Greenfield Drive
23 Storage Park), 207 B.R. 913, 916 (9th Cir. BAP 1997).

24
25 ⁸ Debtor's allegations of judicial bias are discussed below.
26 In our Memorandum in the separate appeal, we review the bankruptcy
27 court's decision in the adversary proceeding, Labankoff v. GMAC
28 (BAP appeal no. NC-09-1048). In our view, however, events in the
adversary proceeding are not relevant to our review of the
bankruptcy court's decision to convert the chapter 11 case to
chapter 7.

1 Federal trial court judges are granted broad discretion in
2 supervising proceedings, and a judge's behavior during proceedings
3 justifies reversal if he abuses that discretion by exhibiting
4 bias. Price v. Kramer, 200 F.3d 1237, 1252 (9th Cir. 2002).

5 In applying an abuse of discretion test, we first "determine
6 de novo whether the [bankruptcy] court identified the correct
7 legal rule to apply to the relief requested." United States v.
8 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy
9 court identified the correct legal rule, we then determine whether
10 its "application of the correct legal standard [to the facts] was
11 (1) illogical, (2) implausible, or (3) without support in
12 inferences that may be drawn from the facts in the record." Id.
13 (internal quotation marks omitted). If the bankruptcy court did
14 not identify the correct legal rule, or its application of the
15 correct legal standard to the facts was illogical, implausible, or
16 without support in inferences that may be drawn from the facts in
17 the record, then the bankruptcy court has abused its discretion.
18 Id.

20 DISCUSSION

21 I.

22 **The bankruptcy court did not abuse its discretion 23 in converting Debtor's chapter 11 case to chapter 7.**

24 A.

25 Section 1112 governs conversion or dismissal of chapter 11
26 cases. This provision was significantly amended by BAPCPA in
27 2005. The earlier version of § 1112(b) vested discretion in the
28 bankruptcy court to decide whether to order conversion or

1 dismissal, even if the movant established cause. The amendment to
2 § 1112(b)(1) requires conversion or dismissal if cause is
3 established "absent unusual circumstances specifically identified
4 by the court that establish that the requested conversion is not
5 in the best interests of creditors and the estate"

6 A movant bears the burden of establishing by preponderance
7 of the evidence that cause exists to convert the case from chapter
8 11 to chapter 7, or to dismiss the case, whichever is in the best
9 interest of creditors and the estate. In re Pittsfield Weaving
10 Co., 393 B.R. 271, 274 (Bankr. D.N.H. 2008). When the bankruptcy
11 court acts without a movant, it may rely on the record before it
12 in determining cause. 7 COLLIER ON BANKRUPTCY ¶ 1112.04[4] (Alan J.
13 Resnick & Henry J. Sommer, eds., 16th ed. 2010).

14 Once cause has been established, under § 1112(b)(2),⁹ the

15 ⁹ Section 1112(b)(2), which a leading treatise has described
16 as "linguistically difficult," 7 COLLIER ON BANKRUPTCY ¶ 1112.05[2],
17 provides:

18 The relief provided in paragraph (1) shall not be
19 granted absent unusual circumstances specifically
20 identified by the court that establish that such
21 relief is not in the best interests of creditors
22 and the estate, if the debtor or another party in
23 interest objects and establishes that--

24 (A) there is a reasonable likelihood that
25 a plan will be confirmed within the timeframes
26 established in sections 1121(e) and 1129(e) of
27 this title [11 USCS §§ 1121(e) and 1129(e)],
28 or if such sections do not apply, within a
reasonable period of time; and

(B) the grounds for granting such relief
include an act or omission of the debtor other
than under paragraph (4)(A)--

(i) for which there exists a
reasonable justification for the act or
omission; and

(continued...)

1 burden shifts to the party opposing conversion. A bankruptcy
2 court explained the operation of this provision in In re Orbit
3 Petroleum, Inc., 396 B.R. 145, 148 (Bankr. D.N.M. 2008):

4 Once "cause" has been demonstrated, the Court must
5 convert or dismiss, unless the Court specifically
6 identifies "unusual circumstances . . . that establish
7 that such relief is not in the best interest of
8 creditors and the estate." 11 U.S.C. § 1112(b)(1).
9 However, absent unusual circumstances, the court must
10 not convert or dismiss a case if (1) there is a
11 reasonable likelihood that a plan will be confirmed
12 within a reasonable time, (2) the "cause" for dismissal
13 or conversion is something other than a continuing loss
14 or diminution of the estate coupled with a lack of
15 reasonable likelihood of rehabilitation; and (3) there
16 is reasonable justification or excuse for a debtor's act
17 or omission and the act or omission will be cured in a
18 reasonable time.

12 Section 1112(b)(4) sets forth a non-exclusive list of
13 examples of "cause" upon which the bankruptcy court may rely in
14 ordering conversion. In this case, after reviewing the status of
15 this case at a hearing Debtor attended, the bankruptcy court
16 ordered Debtor to confirm a reorganization plan within 120 days,
17 *i.e.*, by September 29, 2009. In the September 29 memorandum
18 decision, the bankruptcy court found that Debtor had not confirmed
19 the plan within the time it had specified in its status hearing
20 order. This finding is consistent with cause for conversion under
21 § 1112(b)(4)(J), which targets a debtor's "failure to file a
22 disclosure statement, or to file or confirm a plan, within the
23 time fixed by this title or by order of the court." See,
24 In re Sanchez, 2010 Bankr. LEXIS 1322 *8, 2010 WL 1791249 *5

25

26 ⁹(...continued)

27 (ii) that will be cured within a
28 reasonable period of time fixed by the court.

§ 1112(b)(2).

1 (Bankr. D.P.R. 2010) (cause exists for conversion if debtor fails
2 to file or confirm a plan within "any time" fixed by the
3 bankruptcy court). In other words, on September 29, because
4 Debtor had not confirmed a plan as ordered, the bankruptcy court
5 clearly had cause under the Code to exercise its discretion in
6 favor of conversion.¹⁰

7 In this case, the bankruptcy court had warned Debtor at the
8 status conference that he could not expect to fund a
9 reorganization plan from speculative recoveries from unfiled
10 lawsuits. The court also agreed with the U.S. Trustee's position
11 that Debtor's prospects for generating income from his sale of
12 patent rights was "illusory."¹¹ Nevertheless, in his proposed
13 plan, and despite the clear admonition of the bankruptcy court at
14 the status conference, Debtor relied primarily on funds from both
15 of those sources to pay creditors. Under these circumstances, the
16 bankruptcy court could conclude that Debtor could not
17 realistically effectuate a plan of reorganization because the
18 proposed funding sources were not available or were illusory.

19
20 ¹⁰ Of course, the Code requires that, with cause, the
21 bankruptcy court either convert or dismiss, whichever is in the
22 best interest of creditors and the bankruptcy estate. The
23 bankruptcy court has discretion to determine whether conversion or
24 dismissal is appropriate. Shulkin Hutton, Inc. v. Treiger
(In re Owens), 552 F.3d 958, 960-61 (9th Cir. 2008). Because
25 Debtor does not argue on appeal that the bankruptcy court should
26 have dismissed his case, rather than converting it to a chapter 7
27 case, we express no opinion on this aspect of the court's
28 decision.

29
30 ¹¹ The U.S. Trustee did not appear in this appeal, and so we
31 do not know precisely why the U.S. Trustee considered Debtor's
32 projected patent sales income illusory. However, Debtor refers to
33 the income from sale of "applications" for the patents, so we
34 presume that patents had not been granted by the U.S. Patent
35 Office and, thus, the value and marketability of any possible
36 rights would be conjecture.

1 motion, convert or dismiss a chapter 11 case. For support, Debtor
2 cites frequently to the Second Circuit's opinion in Gusam
3 Restaurant Corp. v. Speciner (In re Gusam Restaurant Corp.),
4 737 F.2d 274 (2d Cir. 1984). Gusam held that a bankruptcy court
5 could not sua sponte convert a chapter 11 case to chapter 7. Id.
6 at 277. However, Debtor is incorrect in describing this case as
7 binding precedent. It is neither binding nor precedent.

8 An opinion of another circuit's court of appeals, although
9 perhaps persuasive, is not binding on federal courts in the Ninth
10 Circuit. Moreover, other courts in the Second Circuit have ruled
11 that Gusam is no longer precedential because it was statutorily
12 overruled in 1986 by amendments to § 105(a). See, e.g., In re 1883
13 Lorraine St. Assocs., 198 B.R. 16, 32 (E.D.N.Y. 1996) (noting that
14 the rule announced in Gusam that a bankruptcy court could not sua
15 sponte convert a chapter 11 case to chapter 7 was not precedent
16 because the 1986 amendments to the Bankruptcy Code added a new
17 sentence to § 105(a): "No provision of this title providing for
18 the raising of an issue by a party in interest shall be construed
19 to preclude the court from, sua sponte, taking any action or
20 making any determination necessary or appropriate to enforce or
21 implement court orders or rules, or to prevent abuse of
22 process.").

23 Our court of appeals has held that a chapter 13 case may be
24 converted to chapter 7 by the court sua sponte under its § 105(a)
25 powers. Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764 (9th
26 Cir. 2008) ("Although the statute provides for conversion 'on
27 request of a party . . . or the . . . trustee, . . .' there is no
28 doubt that the bankruptcy court may also convert on its own

1 motion. See id. § 105(a) ("No provision of this title providing
2 for the raising of an issue by a party in interest shall be
3 construed to preclude the court from, sua sponte, taking any
4 action or making any determination necessary or appropriate to
5 enforce or implement court orders or rules, or to prevent an abuse
6 of process."))." The same rationale would appear to be applicable
7 to conversions from chapter 11 to chapter 7. Indeed, most post-
8 1986 decisions directly addressing conversion from chapter 11 to
9 chapter 7 have held that § 105(a) allows the bankruptcy court to
10 convert a chapter 11 case to chapter 7 on its own motion. See,
11 e.g., In re Muntenneau, 2007 U.S. Dist. Lexis 48233, 2007 WL
12 1987783 (E.D.N.Y. 2007); Spencer v. Steinman (In re Argus),
13 206 B.R. 757, 763 (E.D. Pa. 1997); In re 183 Lorraine Street
14 Assocs., 198 B.R. 16, 32-33 (E.D.N.Y. 1996); Pleasant Pointe
15 Apartments, Ltd. v. Kentucky Housing Corp., 139 B.R. 828, 832
16 (W.D. Ky. 1992); In re Starmark Clinics, 388 B.R. 729, 735 (Bankr.
17 S.D. Tex. 2008); In re State Street Assocs., L.P., 348 B.R. 627,
18 641-42 (Bankr. N.D.N.Y. 2006); In re A-1 Specialty Gasolines,
19 Inc., 238 B.R. 876, 878 (Bankr. S.D. Fla. 1999). In addition, the
20 only two published decisions on this issue after the 2005 BAPCPA
21 modifications to § 1112, Muntenneau, 2007 U.S. Dist. Lexis 48233
22 at *8 and Starmark Clinics, 388 B.R. at 735, both held that the
23 bankruptcy court could convert from chapter 11 to chapter 7 on its
24 own motion.

25 C.

26 Debtor also objects to the bankruptcy court's decision
27 requiring him to confirm a plan within 120 days. Debtor argues
28

1 that, as a "small business debtor," he should have been allowed
2 180 days to confirm a plan.

3 In his bankruptcy petition, Debtor checked the boxes
4 confirming that his debts were primarily consumer debts and that
5 he was not a small business debtor. Debtor's elections had
6 consequences. Rule 1020(a) provides:

7 In a voluntary Chapter 11 case, the debtor shall state
8 in the petition whether the debtor is a small business
9 debtor. . . . [T]he status of the case as a small
10 business case shall be in accordance with the debtor's
statement under this subdivision, unless and until the
court enters an order finding that the debtor's
statement is incorrect.

11 (Emphasis added.) Although later, in his response to the
12 bankruptcy court's status conference order, Debtor requested that
13 the bankruptcy court treat him as a small business debtor, the
14 bankruptcy court had no grounds to find that Debtor's statements
15 in his petition were incorrect.

16 In his schedules, Debtor listed \$800,000 in secured debts
17 related to his residence, which are unquestionably consumer debts.
18 See § 101(8) (consumer debt means debt incurred by an individual
19 primarily for a personal, family, or household purpose); Zolq v.
20 Kelly (In re Kelly), 841 F.2d 908 (9th Cir. 1988)(home mortgage is
21 a consumer debt unless used to fund a business purpose). Debtor
22 listed \$107,270 in unsecured debt on his petition schedules.
23 Later, in his proposed plan, Debtor acknowledged that only \$14,354
24 of his unsecured debt was related to his business of inventing.
25 Thus, between the petition and Debtor's later admissions, the
26 bankruptcy court had no evidence that Debtor was a small business
27 debtor. Consequently, the bankruptcy court could conclude that
28 his statement on his petition that his debts were primarily

1 consumer debts was correct and his statement on the petition that
2 he was not a small business debtor was not incorrect.

3 Moreover, even if Debtor were to be treated as a small
4 business debtor, the 180-day period he refers to in § 1121(e)(1)
5 prescribes the period during which a small business debtor has the
6 exclusive right to file a plan; it does not establish the date by
7 which the debtor must obtain confirmation of the plan.¹² Of
8 course, here the bankruptcy court was not concerned with the
9 exclusivity period for filing a proposed plan.¹³

10 Exercising its authority to manage cases under § 105,¹⁴ which
11 the bankruptcy court explicitly invoked in its status conference
12 order, the bankruptcy court ordered Debtor to obtain confirmation
13 of a plan within 120 days. In setting this deadline, the

14
15 ¹² In addition, the 180-day exclusivity period extends from
16 the date of the order for relief (i.e., the petition date). The
17 120-day confirmation deadline imposed by the bankruptcy court ran
18 from the date of the status conference order, May 29. As a
19 result, the difference in time between the two periods was only
20 about ten days.

21 ¹³ Indeed, § 1121(e)(2) requires that a plan in a small
22 business case be filed "not later than 300 days after the order
23 for relief. . . ." However, this is the latest date by which the
24 plan must be filed; nothing in the Code prevents the bankruptcy
25 court from establishing a shorter deadline for plan filing.

26 ¹⁴ Section 105(a) provides that "[t]he court may issue any
27 order, process, or judgment that is necessary or appropriate to
28 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." Section 105(d) provides, in pertinent part, that the
bankruptcy court "shall hold such status conferences as are
necessary to further the expeditious and economical resolution of
the case" and that the court shall "issue an order at any such
conference prescribing such limitations and conditions as the
court deems appropriate to ensure that the case is handled
expeditiously and economically"

1 bankruptcy court was merely performing its statutory duties. In
2 particular, the Code both instructs the bankruptcy court to
3 conduct status conferences and to issue an order at such
4 conferences in chapter 11 cases which order, among other things,
5 "sets the date by which the debtor . . . shall file a disclosure
6 statement and plan." § 105(d)(2)(A) and (B)(i). The 120-day
7 period in this case was apparently the bankruptcy court's choice
8 of a period in which he would expect Debtor to either confirm a
9 plan or consult an attorney. Debtor has not objected in this
10 appeal to the bankruptcy court's exercise of its § 105 powers; he
11 merely complains that the bankruptcy court did not treat him as a
12 small business debtor. However, Debtor's status as either a small
13 business debtor or a "regular" chapter 11 debtor was irrelevant to
14 the bankruptcy court's ability to enter an appropriate case
15 management order.

16 Given this record, the bankruptcy court did not abuse its
17 discretion in converting Debtor's bankruptcy case from chapter 11
18 to chapter 7.

19 II.

20 **The bankruptcy court was not biased against Debtor.**

21 Debtor alleges that the bankruptcy judge exhibited bias
22 against him. We disagree. No evidence or examples of prejudice
23 appear in the transcripts of the hearings or in the court's
24 written documents. An individual asserting judicial bias has an
25 exceptionally heavy burden and must "overcome a presumption of
26 honesty and integrity in those serving as adjudicators." Withrow
27 v. Larkin, 412 U.S. 35, 47 (1975).

28

1 On the contrary, we find that the comments made by the
2 bankruptcy court at the status hearing show concern and sympathy
3 for a debtor who, attempting to accomplish highly complex legal
4 tasks, clearly lacked the ability to do so:

5 THE COURT: You [Debtor] asked me to sign two orders.
6 You didn't even come close to the procedural
7 requirements. . . . You filed a lawsuit in this Court.
8 The United States Supreme Court decided over 20 years
9 ago for that type of action a Bankruptcy Court has no
10 jurisdiction. You've done absolutely nothing right. I
11 should be dismissing this case today or converting it to
12 chapter 7.

13 I'm going to order the case will be converted to
14 Chapter 7 in 120 days if you haven't confirmed a plan.
15 I'm not giving you that time because I think you can
16 confirm a plan. I think there is no way on God's earth
17 that can happen. But I am giving you the time in the
18 hope that you get a lawyer and get some good competent
19 advice. Otherwise you're just creating expenses for
20 everyone, aggravation for yourself, and disaster is
21 looming. So I have sympathy for you. . . .

22 You cannot, as a matter of law, base your
23 reorganization on the idea that you're going to win a
24 lawsuit. . . . So the idea that you can fund a
25 reorganization [by a future lawsuit] is just beyond the
26 pale of possibility. So all I can do, and I'm doing
27 this mainly for my own conscience, is tell you you're
28 headed for disaster and hope that you take my advice and
get a bankruptcy lawyer.

Hr'g Tr. 3:11-4:22.

29 In short, the bankruptcy court observed that Debtor had "done
30 nothing right," filing motions, an adversary proceeding, and a
31 plan that lacked support under the law. Although the court
32 apparently considered dismissing or converting the case
33 immediately, it instead opted to give Debtor four months either to
34 confirm a plan or obtain legal advice.

35 The bankruptcy court's position in this last respect is
36 unassailable. While it is true that Debtor has the right to
37 represent himself, Logan v. Zimmerman Brush Co., 455 U.S. 422, 437

1 (1982), and that the bankruptcy court must construe his pro se
2 pleadings liberally, Haines v. Kerner, 404 U.S. 519, 520-21
3 (1972), "[t]he right of self-representation is not a license to
4 abuse the dignity of the courtroom. Neither is it a license not
5 to comply with relevant rules of procedural and substantive law."
6 Faretta v. Cal., 422 U.S. 806, 834 n.46 (1975) (emphasis added);
7 McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (self-representation
8 is conditioned on party's ability and willingness to abide by
9 rules of procedure and courtroom protocol); see also Eagle Eye
10 Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 506
11 (1st Cir. 1994) (although criminal cases, Faretta and McKaskle are
12 applicable in civil proceedings); In re Kleinman, 136 B.R. 69, 71
13 (Bankr. S.D.N.Y. 1991) (Faretta's requirement that self-
14 represented party comply with rules of procedure applies in
15 bankruptcy proceedings). Although the bankruptcy court could not
16 require Debtor to obtain counsel (which did not occur in this
17 bankruptcy case)¹⁵, the court should make Debtor aware "of the
18 dangers of self-representation, so that the record will establish
19 that 'he knows what he is doing and his choice is made with eyes
20 open.'" Faretta, 422 U.S. at 835.¹⁶

21
22
23 ¹⁵ The bankruptcy court consistently used the phrases "the
24 hope that you get a lawyer and get some good competent advice" and
"the hope that you take my advice." Hr'g Tr. 3:25-4:1, 4:21-22.

25 ¹⁶ On a related note, Debtor complains that the court staff
26 was biased against pro se litigants and would not schedule hearing
27 dates for him. As the court stated in its conversion order, that
28 was a responsibility of Debtor. It is a well established
principle that court staff are not to engage in the practice of
law, and are not required "to take over chores for a pro se
defendant that would normally be attended to by trained counsel as
a matter of course." McKaskle, 465 U.S. at 183-84.

1 In other words, the bankruptcy court's observations were
2 consistent with its duty to open Debtor's eyes to the reality that
3 his lack of legal knowledge, as demonstrated by his multiple
4 mistakes made thus far in the case, would inevitably lead to
5 expenses and aggravation for all concerned, and that "disaster
6 [was] looming." None of these comments are indicative of bias.
7 Rather, they signal the bankruptcy court's sympathetic concern for
8 Debtor, and its willingness to exercise its discretion by
9 affording Debtor time to either propose and confirm a proper plan,
10 or to at least secure competent legal advice.

11 Moreover, although the bankruptcy court used firm language
12 in admonishing Debtor for his failure to comply with bankruptcy
13 procedure and the Rules, in general, comments made by a court in
14 the course of judicial proceedings are rarely sufficient to
15 establish bias requiring recusal. Pau v. Yosemite Park & Curry
16 Co., 928 F.2d 880, 885 (9th Cir. 1991) (district court's "gruff"
17 demeanor was not sufficient to establish bias); United States v.
18 Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (court's comments on
19 insufficiency of evidence before completion of evidentiary hearing
20 insufficient to find bias and require recusal). Instead, a
21 finding of judicial bias must stem from some personal interest in
22 the case or an extrajudicial source. Liteky v. United States,
23 510 U.S. 540, 552-53 (1994).

24 The "extrajudicial source" rule is implicated when a court's
25 bias originates outside the courtroom. United States v. Grinnell
26 Corp., 384 U.S. 563, 583 (1966) (explaining that the "alleged bias
27 and prejudice to be disqualifying must stem from an extrajudicial
28 source and result in an opinion on the merits on some basis other

1 than what the judge learned from his participation in the case.");
2 United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976)
3 ("unjudicious" remarks such as referring to counsel's comments as
4 ridiculous, or describing a witness as pathetic are not
5 extrajudicial, but "reflected the judge's attitude and reactions
6 to specific incidents occurring at trial").

7 There is no evidence in the record before us that the
8 bankruptcy judge had any personal interest, financial or
9 otherwise, in this case. There is also no indication in the
10 record that the bankruptcy judge's opinions expressed in the
11 transcripts or written documents were based on any information or
12 events other than those originating in the bankruptcy court
13 proceedings.

14 Therefore, to succeed, Debtor's claim of judicial bias must
15 fall within a narrow exception to the rule that bias arise either
16 personally or extrajudicially: the so-called "pervasive bias"
17 exception. The United States Supreme Court instructs that
18 "opinions formed by the judge on the basis of facts introduced or
19 events occurring in the course of the current proceedings, or of
20 prior proceedings, do not constitute a basis for a bias or
21 partiality motion unless they display a deep-seated favoritism or
22 antagonism that would make fair judgment impossible." Liteky,
23 510 U.S. at 555 (emphasis added). As one treatise explains:

24 This pervasive bias exception to the extrajudicial
25 source factor arises when a judge's favorable or
26 unfavorable disposition toward a party, although
27 stemming solely from the facts adduced or the events
28 occurring at trial, nonetheless becomes so extreme as to
indicate the judge's clear inability to render fair
judgment. However, the exception is construed narrowly;
bias stemming solely from facts gleaned during judicial

1 proceedings must be particularly strong in order to
2 merit recusal.

3 12 MOORE'S FED. PRAC.- CIV. § 63.21[5] (Matthew Bender, 3d ed. 2007)
4 (emphasis added); accord, In re Huntington Commons Assocs.,
5 21 F.3d 157, 158 (7th Cir. 1994) (judge is not required to be
6 impervious to impressions about litigants; impatience,
7 admonishments to defendant, adverse rulings, and vague references
8 to possible predisposition are not remotely sufficient to meet
9 requirement of deep-seated and unequivocal antagonism that would
10 render fair judgment impossible).

11 We have carefully examined the record in this appeal and
12 find no evidence of any "deep-seated antagonism" shown by the
13 bankruptcy judge against Debtor. On the contrary, the bankruptcy
14 court in effect determined that Debtor was not capable of
15 confirming a plan at the status conference on May 29, 2009. At
16 that conference, the court stated that it should convert the case
17 immediately. However, the court indicated that its conscience
18 required it to give Debtor additional time to seek advice from a
19 qualified bankruptcy counsel, so the court allowed Debtor an
20 additional 120 days to seek that advice and/or to try to confirm a
21 plan.¹⁷ This act of discretion by the bankruptcy court is not
22 consistent with a pattern of "deep-seated antagonism" against
23 Debtor.

24 Debtor has not shown that the bankruptcy court was biased
25 against him.

26 ¹⁷ To be clear, while the bankruptcy court was skeptical
27 about Debtor's prospects for success without at least advice from
28 a qualified chapter 11 attorney, the court never mandated that he
engage counsel. Debtor was free, however unwise, to proceed pro
se, which he obviously decided to do, albeit with poor results.

CONCLUSION

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We AFFIRM the order of the bankruptcy court converting the case to a chapter 7 case.