

AUG 22 2011

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

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re: ) BAP No. NV-10-1412-HJoJu  
BLUE PINE GROUP, INC., )  
Debtor. ) Bk. No. 09-13274

DAVID J. WINTERTON; DAVID J. )  
WINTERTON & ASSOCIATES, LTD., )  
Appellants, )

v. ) **O P I N I O N**  
HUMITECH OF NORTHERN )  
CALIFORNIA, LLC; JOHN PINK; )  
BLUE PINE GROUP, INC.; UNITED )  
STATES TRUSTEE, )  
Appellees. )

Argued and Submitted on July 20, 2011  
at Las Vegas, Nevada

Filed - August 22, 2011  
Ordered Published - August 31, 2011

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: David J. Winterton of Winterton & Associates, Ltd.  
appeared and argued for Appellants; W. George  
Wailes of Carr, McClellan, Ingersoll, Thompson &  
Horn PLC on brief for Appellee Humitech of  
Northern California

Before: HOLLOWELL, JOHNSON<sup>1</sup>, and JURY, Bankruptcy Judges.

<sup>1</sup> The Hon. Stephen L. Johnson, Bankruptcy Judge for the  
(continued...)

1 HOLLOWELL, Bankruptcy Judge:

2  
3 David J. Winterton and his law firm, David J. Winterton &  
4 Associates, Ltd. (collectively, Winterton) appeal the bankruptcy  
5 court's imposition of \$109,528 in sanctions against him for  
6 violating Rule 9011 by filing a corporate bankruptcy without  
7 proper authorization, failing to conduct a reasonable inquiry  
8 into his client's corporate affairs, and, after being put on  
9 notice that he lacked proper authorization, continuing to  
10 advocate the improper filing. We AFFIRM.

11 **I. FACTS**

12 **A. Blue Pine Group, Inc.'s Corporate Formation**

13 Blue Pine Group, Inc. (Blue Pine) was formed to operate  
14 Gaskets-N'-More, a business that installed and repaired gaskets  
15 in commercial refrigeration units. Blue Pine was conceived as a  
16 joint venture between John Pink (Pink), who owns Humitech of  
17 Northern California, LLC (Humitech), a California company that  
18 installs and repairs commercial refrigeration gaskets, and John  
19 Grose (Grose), who owns and operates a similar business in  
20 Nevada, M&G Group Enterprises, Inc. (M&G). To that end, Pink and  
21 Grose incorporated Blue Pine in Nevada in March 2008.

22 Blue Pine's articles of incorporation list Pink, his partner  
23 at Humitech, Adam Sweeney (Sweeney), Grose and his wife, Brenda  
24 Grose (together, the Groses), as directors. Pink claims that  
25 Humitech and Grose were the initial shareholders of Blue Pine,

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26  
27 <sup>1</sup>(...continued)  
28 Northern District of California, sitting by designation.

1 with Humitech holding at least 50% of the stock. However, Grose  
2 has stated that the four directors of Blue Pine were each 25%  
3 shareholders.<sup>2</sup> The record does not establish definitively  
4 whether shares of stock were actually issued, and likely they  
5 were not. However, it is clear from the record that the parties  
6 considered themselves Blue Pine's directors and shareholders.  
7 Additionally, while Blue Pine had draft bylaws, they were never  
8 signed or implemented.<sup>3</sup>

9 Gaskets-N'-More operated for only a short time before  
10 disputes arose between Pink and Grose. On February 6, 2009,  
11 Humitech and Pink<sup>4</sup> filed a complaint in California state court  
12 against the Groses, M&G and Blue Pine alleging various causes of  
13 action including conversion and fraud (the California  
14 Litigation). Humitech alleged that Grose and M&G engaged in  
15 unfair business practices by converting assets of Blue Pine -  
16 using business plans, logos, customers, employees and concepts -  
17 to operate a competing business to the detriment of Gaskets-N'-  
18 More and Humitech.

19 **B. The Blue Pine Bankruptcy**

20 Through a referral from Hannah Irsfeld (Irsfeld), a  
21 litigation attorney representing the Groses and M&G in connection  
22

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23 <sup>2</sup> Pink has stated that Humitech is Sweeney and Pink, they  
24 are "one and the same."

25 <sup>3</sup> The record does not contain any draft bylaws.

26 <sup>4</sup> Humitech and Pink are represented by the same attorney,  
27 filed motions jointly in this case, and are aligned in their  
28 arguments to the bankruptcy court. Therefore, Humitech and Pink  
will collectively be referred to as Humitech.

1 with the California Litigation, Grose consulted Winterton about  
2 filing bankruptcy on behalf of Blue Pine. On March 10, 2009,  
3 Winterton filed bankruptcy schedules (Schedules) and a statement  
4 of financial affairs (SOFA) for Blue Pine. However, the actual  
5 bankruptcy petition was not electronically filed with the  
6 Schedules and SOFA. Nevertheless, a chapter 7<sup>5</sup> bankruptcy case  
7 was commenced by the clerk's office.

8 According to the Schedules, Blue Pine had \$451,500 in assets  
9 and \$178,436.47 in liabilities. The Schedules indicated that  
10 Blue Pine had no cash, checking or saving account, no stock,  
11 equipment, vehicles, or tools. There were only two creditors,  
12 Pink and M&G. In the SOFA, Blue Pine indicated there were no  
13 directors or stockholders that owned, controlled, or held more  
14 than 5% of the voting or equity securities of the corporation and  
15 that no directors had been terminated within one year of the  
16 bankruptcy filing. Additionally, Blue Pine indicated it was not  
17 involved in any lawsuits. Grose, in his capacity as president of  
18 Blue Pine, declared under penalty of perjury that the SOFA  
19 contained true and correct information.

20 Along with the Schedules, Winterton signed and filed a  
21 Disclosure of Compensation indicating he had agreed to analyze  
22 Blue Pine's financial situation and render advice on whether to  
23 file a bankruptcy petition.

24 The actual chapter 7 bankruptcy petition was finally filed  
25

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26 <sup>5</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 on March 17, 2009. Winterton explained the lapse as a clerical  
2 error on the part of his staff, who had not correctly uploaded  
3 the documents into the electronic docket filing system. The  
4 petition was signed by Winterton as counsel for Blue Pine with a  
5 date of March 10, 2009. Winterton's signature certified that  
6 after conducting an inquiry, he had no knowledge that the  
7 information contained on the Schedules and SOFA was incorrect.  
8 Grose also signed the petition declaring that he had been  
9 authorized to file the petition on behalf of Blue Pine.<sup>6</sup>  
10 However, there was no corporate resolution attached either to the  
11 Schedules, SOFA, or petition that demonstrated Blue Pine had  
12 authorized the bankruptcy filing. Such a corporate resolution is  
13 required by Local Bankruptcy Rule 1002(b).<sup>7</sup>

14 On March 11, 2009, Irsfeld notified Humitech by letter of  
15 Blue Pine's bankruptcy and contended that the bankruptcy case  
16 stayed the California Litigation not only as to Blue Pine but  
17 also as to the Groses and M&G.

18 **C. Humitech's Response To The Bankruptcy Filing**

19 On March 13, 2009, Humitech's attorney, W. George Wailes  
20 (Wailes), sent a letter to Winterton along with a copy of Blue  
21 Pine's articles of incorporation (March 13 Letter). Wailes  
22

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23 <sup>6</sup> The authority to file a bankruptcy is a matter of state  
24 law. Price v. Gurney, 324 U.S. 100, 106 (1945). Nevada  
25 corporate law controls in this case. See Nevada Revised Statutes  
(NRS) 78.010 - 78.795.

26 <sup>7</sup> Local Bankruptcy Rule 1002(b) provides that "[w]hen a  
27 voluntary petition is filed by a corporation, there must be  
28 attached to it a true copy of the resolution of the corporation's  
board of directors authorizing the filing."

1 informed Winterton that Humitech owned 50% of Blue Pine and was  
2 an equal shareholder with Grose. Wailes asserted that Blue Pine  
3 had four directors and there had been no meeting of the directors  
4 or resolution authorizing the bankruptcy filing. Wailes alerted  
5 Winterton that the bankruptcy petition had not yet been filed  
6 with the Schedules and urged Winterton to promptly dismiss the  
7 case.

8 On March 16, 2009, Blue Pine filed amended Schedules and a  
9 SOFA<sup>8</sup> that again indicated there had been no removal of any  
10 directors of Blue Pine prior to its bankruptcy filing. Winterton  
11 uploaded the chapter 7 bankruptcy petition the following day.

12 Without receiving a response from Winterton to its March 13  
13 Letter, Humitech drafted and served on Blue Pine and Winterton a  
14 motion for Rule 9011 sanctions on March 18, 2009 (Proposed  
15 Sanctions Motion). Humitech insisted that there had not been a  
16 meeting of Blue Pine's shareholders or directors to discuss  
17 bankruptcy and that neither Pink nor Sweeney agreed to authorize  
18 the filing. Therefore, Humitech alleged that Grose improperly  
19 filed Blue Pine's bankruptcy to hinder or delay the California  
20 Litigation.

21 On April 7, 2009, Winterton sent a letter to Wailes in  
22 response to the March 13 Letter and Proposed Motion for  
23 Sanctions. Winterton stated:

24 I have spoken to the Directors and counsel for the  
25 Debtor. They have their own corporate counsel. They  
26 have informed me that the Bylaws for the corporation  
were prepared, but were never signed. If there are no

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27 <sup>8</sup> The amended Schedules were dated March 16, 2009, but  
28 appear to be identical to the Schedules filed on March 10.

1 signed and approved Bylaws, then you have to follow  
2 Nevada Statutes. Corporate Counsel informed me that  
3 they followed the Nevada Statutes and it was properly  
4 approved. As a result, the bankruptcy is proper. You  
5 have not provided me with complete documentation to  
6 support your position. . . . There are corporate  
7 documents showing me the documents supporting their  
8 position. I am sorry, but I cannot dismiss the case  
9 without further evidence of your position.

6 Winterton did not provide Wailes any documentation establishing  
7 that there had been a corporate resolution authorizing Blue  
8 Pine's bankruptcy filing. Wailes did not respond to Winterton's  
9 letter.

10 Then, on April 9, 2009, Winterton and Irsfeld filed, on  
11 behalf of Blue Pine, the Groses, and M&G, an adversary proceeding  
12 against Humitech alleging, among other things, breach of  
13 contract, unjust enrichment, conversion and fraud. Blue Pine,  
14 the Groses, and M&G claimed that Pink had diverted funds from  
15 Blue Pine for his own business use and profit. The complaint  
16 described Pink as a director, officer, and shareholder of Blue  
17 Pine and did not assert or allege that he had ever been removed  
18 as a director.

19 On April 15, 2009, a § 341 Meeting of Creditors was held.  
20 Grose appeared with Winterton<sup>9</sup> to testify on behalf of Blue Pine.  
21 Grose testified that there were four directors of Blue Pine, each  
22 a 25% shareholder of the corporation. He testified that the last  
23 meeting of the board of directors was in August 2008; however,  
24 Grose later explained that the Groses held a meeting in January  
25 2009, at which they authorized the filing of Blue Pine's

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27 <sup>9</sup> Winterton himself did not attend; however, an associate  
28 from his law firm did.

1 bankruptcy.<sup>10</sup> Although Grose testified that Blue Pine's  
2 corporate attorney took care of any notices, he also stated that  
3 directors' meetings had been informal and that as far as the  
4 January 2009 meeting was concerned, it would have been a "waste  
5 of time" to try to notify Pink and he had no idea how to contact  
6 Sweeney. Grose did not mention that any director had been  
7 removed from office.

8 **1. Motion to Dismiss**

9 On April 24, 2009, Humitech filed a motion to dismiss Blue  
10 Pine's bankruptcy case based on Winterton's refusal to withdraw  
11 the alleged unauthorized petition (the Motion to Dismiss).<sup>11</sup>  
12 Humitech argued that under Nevada corporate law, a majority of  
13 the members of a corporation's board of directors was required to  
14 approve a resolution to dissolve a corporation and, by analogy,  
15 the same requirement was necessary to approve a resolution to  
16 file bankruptcy. Based on Grose's testimony at the § 341  
17 meeting, it was undisputed that Blue Pine did not have the  
18 approval of at least three of the four directors since neither  
19 Pink nor Sweeney attended any board of directors meeting that  
20 resolved to file the bankruptcy case. Consequently, Humitech  
21 argued the resolution was invalid and the case had to be  
22 dismissed. Additionally, Humitech argued that Blue Pine filed  
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24 <sup>10</sup> There is no evidence of a January 2009 board of  
25 directors' meeting.

26 <sup>11</sup> Humitech sought dismissal "for cause" under § 707(a).  
27 See Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th  
28 Cir. 2000) (grounds for dismissal listed in statute are  
illustrative and not exhaustive).

1 the case solely to hinder or forum shop the California  
2 Litigation.

3 Winterton filed an opposition to the Motion to Dismiss on  
4 behalf of Blue Pine (Opposition to Dismissal). In the Opposition  
5 to Dismissal, Blue Pine contended that Sweeney and Pink had been  
6 removed as directors and the remaining directors, the Grose,  
7 properly approved a resolution authorizing Blue Pine's  
8 bankruptcy. In support of the Opposition to Dismissal, Grose  
9 filed a declaration reiterating that he had never met Sweeney,  
10 did not know how to get in touch with him, and that because  
11 Sweeney was never involved in Blue Pine, Sweeney was removed as a  
12 director.

13 In furtherance of the Opposition to Dismissal, Blue Pine  
14 submitted minutes from a February 4, 2009, meeting of the board  
15 of directors. The minutes indicated that only the Grose were  
16 present at the meeting, "constituting a quorum." The meeting  
17 minutes stated, in relevant part:

18 1. John R. Pink, has failed as a member of the Blue  
19 Pine Group Inc. to follow the direction of the  
20 corporate bylaws, he has also ignored the direction of  
21 the other directors with the miss use [sic] of the  
22 funds of our business venture "Gaskets-N-More". He has  
made choices to take on debts without consulting the  
directors, and has acted out of text as a director of  
the corporation with malice to the corporation's  
direction.

23 RESOLVED  
The vote is in favor to remove John R. Pink as a  
director/member of Blue Pine Inc.

24 John Grose yes  
25 Brenda Grose yes

26 2. Adam Sweeney has not been an active member and has  
27 not provided any financial support to the Blue Pine  
28 Corporation, both John Grose or Brenda Grose has never  
had any correspondence of any kind with Mr. Sweeney and  
they have never met him in person.

RESOLVED

1 The vote is in favor to remove Adam Sweeney as a  
2 director/member of Blue Pine Inc.

3 John Grose yes  
4 Brenda Grose yes

5 Additionally, Blue Pine submitted minutes of a March 2,  
6 2009, meeting of the board of directors, which again included  
7 participation only by the Groses, stating:

8 Due to the actions of the past board member John Pink,  
9 the following issue have caused [sic] the Corporation  
10 to start closing its operation down in the areas it is  
11 doing business in California. Blue Pine Group sole  
12 intention was to do business in the Northern California  
13 area known as San Joaquin Valley. . . . John Pink has  
14 also mismanaged the funds of the Corporations / DBA:  
15 Gaskets-N-More. John Pink was the Treasure [sic] of  
16 the Corporation and did not follow the guide lines set  
17 forth by the Corporation and has caused major damage to  
18 the corporation with his misconduct. The Corporation  
19 feels that the only way it will be able to protect the  
20 remaining board members is to place it into bankruptcy.  
21 Motion accepted and agreed to place Blue Pine into  
22 Bankruptcy.

23 Winterton explained in a declaration attached to the  
24 Opposition to Dismissal that he had addressed whether Blue Pine  
25 had authority to file bankruptcy with Grose and Irsfeld at the  
26 time he prepared the Schedules, SOFA and petition, and they both  
27 assured him that the requisite corporate authority existed.  
28 Winterton declared that he continued his investigations after  
receiving the March 13 Letter and Proposed Sanctions Motion by  
consulting with Irsfeld. He then received the minutes from the  
two board of directors meetings and believed they confirmed  
Irsfeld's representation that there was corporate authorization  
for the bankruptcy filing.<sup>12</sup>

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12 In his declaration, Winterton does not say when he  
received from Irsfeld the minutes from the board of directors'  
(continued...)

1 In its reply, Humitech pointed out that according to Nevada  
2 law, any removal of a director requires that proper notice of a  
3 meeting of the board of directors be served on all shareholders  
4 and that 2/3 of shareholders must vote to agree to remove a  
5 director. Again, Humitech alleged that since Grose admitted that  
6 there were four shareholders and that he had never contacted  
7 Sweeney, the resolutions to remove Sweeney and Pink were invalid.  
8 Additionally, Humitech noted that Nevada law requires a majority  
9 of directors to constitute a quorum in order to transact  
10 business. Without Pink or Sweeney's attendance at the March 4,  
11 2009 meeting, Humitech contended that the resolution to file  
12 bankruptcy for Blue Pine was also invalid.

13 The bankruptcy court held a hearing on the Motion to Dismiss  
14 on June 10, 2009 (the Dismissal Hearing).<sup>13</sup> At the close of the  
15

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16 <sup>12</sup>(...continued)  
17 meeting, which he believed constituted the corporate resolution.  
18 However, he has argued and testified (numerous times) that he  
19 received them on March 20, 2009. He has also testified (a few  
20 times) that he received the documents on March 16, 2009.

21 Winterton steadfastly contends on appeal that he had the  
22 corporate resolution prior to filing the bankruptcy petition and  
23 any finding that he did not have it was clearly erroneous.  
24 Appellants' Opening Br. at 11. However, the bankruptcy court  
25 found that Blue Pine's bankruptcy was filed without proper  
26 corporate authorization when it ruled on the Motion to Dismiss  
27 and that finding was not appealed. Furthermore, the petition was  
28 dated March 10, 2009, and Winterton confessed that it was purely  
a clerical error that caused it to be uploaded later on March 17,  
2009.

<sup>13</sup> A hearing on the Motion to Dismiss was initially held on  
May 26, 2009. At that hearing, the bankruptcy court pointed out  
that there were issues of fact about bylaws, shareholders, and  
(continued...)

1 Dismissal Hearing, the bankruptcy court recited its findings of  
2 fact and conclusions of law. It determined that under Nevada  
3 law, the directors of a corporation must participate in  
4 transactions outside the ordinary course of business and that  
5 removal of a director requires 2/3 of the shareholders' votes.  
6 The bankruptcy court found, based on the undisputed facts in the  
7 record, that: (1) there were four directors and shareholders of  
8 Blue Pine; and, (2) neither Pink nor Sweeney were notified of  
9 (and they were not present for) the February 4, 2009 board of  
10 directors' meeting where Pink and Sweeney were removed as  
11 directors, or the March 2, 2009 meeting where the bankruptcy case  
12 was authorized. The bankruptcy court noted that Blue Pine's SOFA  
13 and amended SOFA indicated there had been no removal of directors  
14 in the year prior to the bankruptcy filing.

15 Therefore, the bankruptcy court concluded that the  
16 February 4 and March 2, 2009 board of directors' meetings were  
17 invalid and there was no corporate authorization to file the  
18 bankruptcy case. The bankruptcy court dismissed the case but  
19 reserved jurisdiction to rule on any request for sanctions  
20 brought by Humitech as a result of the improper bankruptcy  
21 filing.

22  
23  
24 <sup>13</sup>(...continued)  
25 meeting notices and set an evidentiary hearing. Prior to the  
26 scheduled June 10, 2009 hearing, the bankruptcy court contacted  
27 the parties and changed the hearing to one that reconsidered the  
28 necessity of an evidentiary hearing. Ultimately, the Motion to  
Dismiss was taken up and resolved on a summary judgment standard  
without the need for an evidentiary hearing.

1 A final order dismissing Blue Pine's bankruptcy case was  
2 entered on June 29, 2009 (Dismissal Order). Blue Pine did not  
3 appeal the Dismissal Order.<sup>14</sup> The bankruptcy court subsequently  
4 approved a stipulation to dismiss the adversary proceeding.<sup>15</sup>  
5 Blue Pine's bankruptcy case was closed on July 9, 2009.

6 **2. Motion For Sanctions**

7 On September 16, 2009, Humitech filed a motion to reopen  
8 Blue Pine's bankruptcy case and for an award of sanctions under  
9 Rule 9011 (Sanctions Motion). Humitech asserted that Rule 9011  
10 sanctions were in order because Winterton knew that Blue Pine was  
11 not authorized to file bankruptcy but nevertheless proceeded with  
12 the case. Humitech attached billing records and timesheets and  
13 requested compensation for the fees and costs associated with  
14 responding to the improperly filed bankruptcy case, including  
15 responding to a motion filed by Irsfeld in the California  
16 Litigation that sought to enforce the automatic stay against the  
17 Groses and M&G.

18  
19  
20 

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<sup>14</sup> In considering sanctions against Winterton, the  
21 bankruptcy court later asked him why, if he continued to still  
22 believe that he possessed the requisite corporate authorization  
23 to file Blue Pine's bankruptcy, he did not appeal the Dismissal  
24 Order. Winterton responded: "Because without [Blue Pine's  
25 corporate counsel's] testimony and strength . . . I just didn't  
26 have the evidence to present to the court." Hr'g Tr. (Jan. 25,  
27 2010) at 109:13-18; Hr'g Tr. (Feb. 4, 2010) at 166.

28 <sup>15</sup> The stipulation was signed by Winterton as "Attorneys for  
29 Plaintiffs Blue Pine Group, Inc., M&G Group Enterprises, Inc.,  
30 John Grose and Brenda Grose. Irsfeld, who was the attorney for  
31 the Groses and M&G, however, did not sign the stipulation on  
32 behalf of the Groses.

1 Winterton opposed the Sanctions Motion (Opposition to  
2 Sanctions). In justifying his conduct in the case, Winterton  
3 explained that he had appropriately relied on the assurances from  
4 Grose and Irsfeld that there was a corporate resolution and also  
5 that Blue Pine had only two directors, the Groses, who could  
6 authorize acts on behalf of Blue Pine. Winterton contended this  
7 information was confirmed on March 20, 2009, when he received  
8 copies of the February 4 and March 2, 2009 minutes of the board  
9 of directors' meetings. Furthermore, Winterton argued the  
10 bankruptcy case was not filed for an improper purpose but because  
11 Blue Pine's assets were being diverted by Pink.

12 Thereafter, a discovery dispute ensued between the parties,  
13 which was ultimately resolved by the bankruptcy court in early  
14 January 2010. The hearing on the Sanctions Motion was scheduled  
15 for January 25, 2010 (the Sanctions Hearing).

16 In the meantime, the Groses, M&G, Humitech, and Pink settled  
17 the California Litigation. A Stipulation for Settlement was  
18 entered on January 14, 2010 (the Stipulation). The Stipulation  
19 stated, in relevant parts:

- 20 1. This case . . . is deemed settled . . . .  
21 5. Counsel for each of the parties to this agreement  
22 represents that he/she has fully explained to  
23 his/her client the legal effect of this agreement  
24 and of the Release and Dismissal with Prejudice  
25 provided for herein . . . each attorney represents  
26 that his/her client(s) has freely consented to and  
27 authorized this agreement.  
28 . . .  
7. [E]ach party will bear its own attorneys' fees and  
court costs.

26 Addendum:

- 27 1. [E]ach party, for himself and his respective legal  
28 successors and assigns release and forever  
discharges the other Parties and their respective  
shareholders, directors, officers, employees,

1 agents, attorneys . . . from any and all claims,  
2 demands, damages, debts, liabilities, . . .  
3 expenses, liens, actions, and causes of action of  
4 every kind and nature . . .

5 The Stipulation was signed by Wailes as attorney for  
6 Humitech and Pink, Pink for himself and Humitech, and Richard  
7 Kutche<sup>16</sup>, as attorney for the Groses and M&G, along with the  
8 Groses individually, and Grose for M&G. Blue Pine had a  
9 signature line under Kutche's representation, but none of its  
10 directors signed on behalf of Blue Pine.<sup>17</sup>

11 In Winterton's trial brief filed just prior to the Sanctions  
12 Hearing, he asserted that because he had represented Blue Pine  
13 and the Groses, individually, with respect to the stipulation to  
14 dismiss the adversary proceeding, that he was released by the  
15 Stipulation from liability under Rule 9011 in the bankruptcy  
16 case. Alternatively, Winterton maintained that Blue Pine's  
17 bankruptcy case was authorized, legitimate<sup>18</sup>, and justified.

18 Winterton generally opposed the reasonableness of Humitech's  
19 fees as duplicative and unclear as to the fees relating to work  
20 in the California Litigation, but provided no specific assertions

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21 <sup>16</sup> Richard Kutche is a California attorney not associated  
22 with Winterton's practice.

23 <sup>17</sup> Blue Pine never answered the complaint or appeared in the  
24 California Litigation after the bankruptcy case was dismissed.

25 <sup>18</sup> Winterton asserted the bankruptcy was legitimate because  
26 Blue Pine had "negative equity . . . was insolvent . . . had  
27 accounts receivable of over \$100,000 . . . vehicles and furniture  
28 and equipment. There were accounts payables, credit cards, and  
loans. There was also outstanding taxes due to the State of  
California." This assertion contradicts the Schedules.

1 or amounts he felt should be excluded.

2 The Sanctions Hearing comprised a full day of testimony on  
3 January 25, 2010, and a half-day on February 4, 2010. On October  
4 7, 2010, the bankruptcy court issued its written Memorandum  
5 Imposing Sanctions (Memorandum Decision). The bankruptcy court  
6 found, as it did in the Dismissal Order, that the bankruptcy  
7 petition was filed without corporate authorization. It further  
8 found that faced with the information from Wailes and the  
9 Proposed Sanctions Motion, Winterton lacked a reasonably  
10 sufficient basis for his later filings and appearances in the  
11 case, and therefore proceeded to take positions in the case that  
12 "later advocated" the impropriety of the initial filing.  
13 Consequently, the bankruptcy court decided that monetary  
14 sanctions were appropriate.

15 The bankruptcy court reviewed the evidence from Humitech  
16 demonstrating it had incurred over \$100,000 in attorneys' fees  
17 and expenses related to dismissing the bankruptcy case and  
18 pursuing the Sanctions Motion. It ruled that, had Winterton  
19 conducted a reasonable inquiry into the corporate affairs of his  
20 client, none of those expenses would have been necessary. After  
21 considering Winterton's conduct, and any aggravating or  
22 mitigating factors, the bankruptcy court determined that a  
23 compensatory award of \$109,528 in sanctions was appropriate.  
24 Winterton timely appealed.

## 25 **II. JURISDICTION**

26 The bankruptcy court had jurisdiction under 28 U.S.C.  
27 § 1334(b) and § 157(b)(2)(A). We have jurisdiction under 28  
28 U.S.C. § 158.



1 **V. DISCUSSION**

2 **A. Violation of Rule 9011 And Imposition of Monetary Sanctions**

3 Pursuant to Rule 9011, bankruptcy courts have the authority  
4 to sanction parties, attorneys, and law firms who present (sign,  
5 file, submit, or later advocate) a petition, pleading, or paper  
6 to a bankruptcy court that is either frivolous or presented for a  
7 an improper purpose.<sup>19</sup> In determining if sanctions are warranted

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9 

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<sup>19</sup> Rule 9011 provides, in relevant part:

10 (b) Representations to the Court. By presenting to the  
11 court (whether by signing, filing, submitting, or later  
12 advocating) a petition, pleading, written motion, or  
13 other paper, an attorney or unrepresented party is  
14 certifying that to the best of the person's knowledge,  
information, and belief, formed after an inquiry  
reasonable under the circumstances,-

15 (1) it is not being presented for any improper  
16 purpose, such as to harass or to cause unnecessary  
17 delay or needless increase in the cost of litigation;

18 . . .  
19 (3) the allegations and other factual contentions  
20 have evidentiary support or, if specifically so  
identified, are likely to have evidentiary support  
after a reasonable opportunity for further  
investigation or discovery; and

21 (4) the denials of factual contentions are  
22 warranted on the evidence or, if specifically so  
23 identified, are reasonably based on a lack of  
information or belief.

24 (c) Sanctions. If, after notice and a reasonable  
25 opportunity to respond, the court determines that  
26 subdivision (b) has been violated, the court may,  
27 subject to the conditions stated below, impose an  
appropriate sanction upon the attorneys, law firms, or  
28 parties that have violated subdivision (b) or are

(continued...)

1 under Rule 9011, the bankruptcy court must consider both  
2 frivolousness and improper purpose "on a sliding scale, where the  
3 more compelling the showing as to one element, the less decisive  
4 need be the showing as to the other." Dressler v. The Seeley Co.  
5 (In re Silberkraus), 336 F.3d 864, 870 (9th Cir. 2003) (quoting  
6 In re Marsch, 36 F.3d at 830).

7 The word "frivolous," when used in connection with sanctions  
8 denotes a filing that is both baseless - lacks factual foundation  
9 - and made without reasonable competent inquiry. Townsend v.  
10 Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990). An  
11 attorney has a duty to conduct a reasonable factual investigation  
12 as well as to perform adequate legal research that confirms that  
13 his position is warranted by existing law (or by a good faith  
14 argument for a modification or extension of existing law).  
15 Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002).  
16 Thus, a finding that there was no reasonable inquiry into either  
17 the facts or the law is tantamount to a finding of frivolousness.  
18 Townsend, 929 F.2d at 1362.

19 The Ninth Circuit has held that the standard to determine  
20 the reasonableness of an attorney's inquiry as to facts contained  
21 in signed documents submitted to a court is an objective one. In  
22 considering sanctions under Rule 9011, the bankruptcy court must

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23  
24 <sup>19</sup>(...continued)  
25 responsible for the violation.

26 The language of Rule 9011 parallels that of Fed. R. Civ.  
27 P. 11. Therefore, courts analyzing sanctions under Rule 9011 may  
28 appropriately rely on cases interpreting Fed. R. Civ. P. 11. See  
Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir.  
1994).

1 measure the attorney's conduct "objectively against a  
2 reasonableness standard, which consists of a competent attorney  
3 admitted to practice before the involved court." Valley Nat'l  
4 Bank of Ariz. v. Needler (In re Grantham Bros.), 922 F.2d 1438,  
5 1441 (9th Cir. 1991); G.C. & K.B. Inv., Inc. v. Wilson, 326 F.3d  
6 1096, 1109 (9th Cir. 2003). Additionally, an improper purpose is  
7 analyzed under an objective standard. In re Grantham Bros., at  
8 1443.

9 In applying these standards to this case, the bankruptcy  
10 court found that while Winterton should have complied with Local  
11 Bankruptcy Rule 1002(b) and obtained the corporate resolution  
12 authorizing Grose to file bankruptcy on behalf of Blue Pine prior  
13 to filing the case, it may not have been unreasonable for him to  
14 have initially relied on Grose's and Irsfeld's assurances and  
15 representations that a corporate resolution existed. However,  
16 the bankruptcy court found that Winterton's actions soon  
17 thereafter, when he was alerted to inconsistencies in those  
18 representations, were not reasonable.

19 Winterton asserts that the bankruptcy court's finding was  
20 erroneous; he contends that he acted reasonably throughout the  
21 bankruptcy case. After carefully reviewing the evidence in the  
22 record, we agree with the bankruptcy court that Winterton's  
23 conduct did not meet the standards set by Rule 9011.

24 Winterton stated that after receiving the March 13 Letter  
25 and Proposed Sanctions Motion, he further investigated the issue  
26 of whether a corporate resolution existed, but admitted such  
27 investigation consisted only of consulting with Irsfeld.  
28 Although he had information from Wailes that conflicted with

1 Irsfeld's information, he proceeded with the case without  
2 reviewing for himself the corporate documents or researching the  
3 relevant corporate law. Winterton acknowledged that Blue Pine's  
4 records were in disarray and it was unclear if there were  
5 enforceable bylaws or if stock had ever been issued, but  
6 Winterton did not receive or review those documents until he  
7 responded to the Motion to Dismiss.

8 Thus, although he received copies of the February 4 and  
9 March 2, 2009 minutes from the meetings of the board of  
10 directors, Winterton testified that he did not immediately review  
11 them in connection with Blue Pine's corporate documents or Nevada  
12 corporate law. He did not further question Irsfeld or Grose as  
13 to whether the meetings were properly noticed and held, or  
14 whether the requisite number of directors had approved the  
15 resolutions to effectively remove Sweeney and Pink or authorize  
16 the bankruptcy. Instead, he relied on Irsfeld's earlier  
17 representations that she had understood from Grose that Blue  
18 Pine's corporate counsel, Henry Lichtenberger (Lichtenberger),  
19 complied with all corporate procedures. He proceeded to file the  
20 adversary proceeding, attend the § 341 meeting of creditors, and  
21 oppose the Motion to Dismiss.

22 By Winterton's own admission, he only consulted the Nevada  
23 law regarding corporations after the Motion to Dismiss was filed  
24 and he was preparing his Opposition to Dismissal. He admitted it  
25 was at that time that he consulted with Lichtenberger about Blue  
26 Pine's corporate governance and whether there were actually any  
27 enforceable bylaws. See e.g., Appellants' Opening Br. at 4, 14-  
28 15. And only then did Winterton ask for and investigate

1 corporate documents that Grose had regarding Blue Pine. Id. at  
2 11. Moreover, Winterton waited until he was preparing for the  
3 Dismissal Hearing to request an affidavit and documentation to  
4 confirm Lichtenberg's alleged representation that all required  
5 procedures leading to Blue Pine's resolution to file bankruptcy  
6 were properly followed. Id. at 15.

7 A cursory review of the Nevada statutes regarding  
8 corporations would have revealed that a majority of a board of  
9 directors is necessary to constitute a quorum for the transaction  
10 of any corporate business. NRS 78.315. Also, no less than 2/3  
11 vote of shareholders is required before a director can be removed  
12 from office. NRS 78.335. If no stock has been issued, the  
13 directors are required to approve the dissolution of a  
14 corporation. NRS 78.580. While it was not clear that Blue Pine  
15 had actually issued stock, and while Blue Pine and Grose  
16 contested whether Humitech was a shareholder, there was never any  
17 dispute that Blue Pine and Grose considered Pink, Sweeney, and  
18 the Groses the directors and shareholders of Blue Pine at its  
19 inception. The general rules provided in the NRS should have  
20 guided Winterton to press for more information and to investigate  
21 the validity of whether the corporate resolution was valid.

22 Consequently, we agree with the bankruptcy court's finding  
23 that Winterton failed to undertake an objectively reasonable  
24 inquiry into the facts and law supporting the bankruptcy  
25 petition, relying instead on information others told him. He  
26 proceeded (even though he was facing potential Rule 9011  
27 sanctions) with a frivolous bankruptcy case. As the bankruptcy  
28 court noted, if Winterton "had simply examined the evidence in

1 the record, done even the minimal research into Nevada corporate  
2 law, and compared this with what his clients told him, he would  
3 have understood that he had no authority to file the petition and  
4 continue to advocate that it was proper." Memorandum Decision at  
5 13.

6 Winterton contends that he was justified in relying on the  
7 representations of Irsfeld and Lichtenberger. However, an  
8 attorney may not delegate his duty to validate the truth and  
9 legal reasonableness of papers filed with the court. Giebelhaus  
10 v. Spindrift Yachts, 938 F.2d 962, 965 (9th Cir. 1991).

11 The signing attorney cannot leave it to [another] to  
12 satisfy himself that the filed paper is factually and  
13 legally responsible; by signing he represents not  
14 merely the fact that it is so, but also the fact that  
15 he personally applied his own judgment. . . . [T]he  
16 text [of Rule 9011] establishes a duty that cannot be  
17 delegated.

18 Id. (emphasis added). Winterton admitted that he pursued the  
19 case even though he failed to personally review the facts and law  
20 or even to press for declarations or documents to support or  
21 verify the information given to him by Irsfeld or Lichtenberger.

22 Furthermore, the bankruptcy court found that Winterton acted  
23 improperly by persisting in advocating the propriety of the  
24 filings and positions he knew were frivolous and causing Humitech  
25 to incur fees and expenses in dismissing the bankruptcy case and  
26 in protecting its rights in the California Litigation.<sup>20</sup>

27 Memorandum Decision at 12. Although Winterton was told by  
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29 <sup>20</sup> Winterton himself did not take actions in the California  
30 Litigation, but because Winterton did not voluntarily dismiss the  
31 bankruptcy case, Humitech was required to contest the motion to  
32 extend the automatic stay to Blue Pine's directors.

1 Irsfeld that the bankruptcy had to be filed because Pink was  
2 misappropriating Blue Pine's assets and a trustee would allow the  
3 dispute between Pink and Grose to be worked out, Winterton failed  
4 to explain how alleged misappropriation was a proper basis for  
5 filing bankruptcy without corporate authorization. There was no  
6 evidence to explain the haste necessary for the filing that would  
7 have precluded ensuring that proper corporate authority existed.  
8 See Townsend, 929 F.2d at 1364 (if attorney has only short time  
9 in which to act, a more cursory inquiry may be tolerated).

10 The bankruptcy court's finding that Winterton's conduct in  
11 this case fell short of the standard set by Rule 9011 was not  
12 illogical, implausible, or unsupported by the evidence in the  
13 record. We therefore conclude that the bankruptcy court did not  
14 abuse its discretion in determining that Winterton violated  
15 Rule 9011(b) and that sanctions were appropriate.

16 **B. Determination That \$109,528 Was An Appropriate Sanction**

17 In assessing an award of sanctions, we examine whether the  
18 proceedings were fair, the evidence supports the award, and  
19 whether the award is reasonable. In re Nguyen, 447 B.R. at 276.

20 We have no doubt that these proceedings were fair.  
21 Winterton received the Proposed Sanctions Motion, Motion to  
22 Dismiss, and Sanctions Motion, all of which detailed Humitech's  
23 specific arguments under Rule 9011 as to why sanctions were  
24 appropriate. Winterton was given ample opportunity to respond to  
25 each of the motions and participated in the Dismissal Hearing and  
26 the Sanctions Hearing. The bankruptcy court conducted a lengthy  
27 hearing on the Sanctions Motion where Winterton and others  
28 testified about their role in the bankruptcy case. Winterton had

1 a full and fair opportunity to present his positions and to  
2 challenge the amount of any sanctions requested.

3 On appeal, Winterton contends the sanctions award is  
4 unreasonable as excessive and punitive.<sup>21</sup> However, the evidence  
5 supports that the bankruptcy court imposed reasonable sanctions  
6 against Winterton, notwithstanding its large amount.

7 Within the express limitations of Rule 9011(c), the  
8 bankruptcy court has considerable discretion in determining the  
9 amount of the award. Miller v. Cardinale (In re DeVille),  
10 361 F.3d 539, 553 (9th Cir. 2004). Rule 9011(c) provides that  
11 "sanction[s] imposed for violation of this rule shall be limited  
12 to what is sufficient to deter repetition of such conduct or  
13 comparable conduct by others similarly situated," and that such  
14 sanctions may include "some or all of the reasonable attorneys'  
15 fees and expenses incurred as a direct result of the violation."  
16 Rule 9011(c)(2). Under Rule 9011(c)(2), a bankruptcy court may  
17 not impose a deterrence penalty that is a "serious penalty" in  
18 the nature of criminal contempt. Fjeldsted v. Lien (In re

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20  
21 <sup>21</sup> Winterton seems to argue that the sanctions award is  
22 punitive because his conduct was only negligent and therefore,  
23 was not subject to sanctions. He relies on Chapman v. U.S.  
24 Trustee (In re Aston-Nevada Ltd. P'ship), 409 Fed.Appx. 107  
25 (9th Cir. 2010) (unpublished) to support his position. However,  
26 in that case, the bankruptcy court's sanctions award, under  
27 Rule 9011 and its inherent authority, was premised on a finding  
28 that the attorney acted in bad faith, which the Ninth Circuit  
concluded was clearly erroneous given the evidence in the record.  
Here, we concluded that the sanction award was not based on  
clearly erroneous factual findings. The sanctions award was made  
pursuant to Rule 9011(c) and no finding of bad faith was found or  
required.

1 Fjeldsted), 293 B.R. 12, 28 (9th Cir. BAP 2003). But by the  
2 plain language of Rule 9011(c), a restitutionary award to  
3 compensate an opposing party for unnecessary litigation expenses  
4 (as opposed to a punitive fine paid to the court) may be an  
5 appropriate sanction. In re Marsch, 36 F.3d at 831. Moreover,  
6 an appropriate deterrence penalty may still be greater than the  
7 amount of compensatory damages. In re DeVille, 280 B.R. 483, 498  
8 (9th Cir. BAP 2002), aff'd, 361 F.3d 539 (9th Cir. 2004).

9 Here, the bankruptcy court carefully considered the amount  
10 of Humitech's damages resulting from Winterton's conduct. It  
11 considered the ABA's Standards for Imposing Lawyer Sanctions,  
12 such as whether (1) Winterton violated a duty to a client, the  
13 public, legal system or profession; (2) Winterton acted  
14 intentionally, knowingly or negligently; (3) Winterton's  
15 misconduct caused a serious or potentially serious injury; and  
16 (4) any aggravating or mitigating factors existed to justify the  
17 degree of discipline imposed.<sup>22</sup>

18 The bankruptcy court noted that Winterton "unwaveringly"  
19 pursued the improper bankruptcy, held himself out as a business  
20 and bankruptcy attorney with extensive experience before the  
21 bankruptcy court, and presented no evidence of any personal or  
22 emotional problems. After reviewing the record in this case, we  
23 conclude that the proceedings in the bankruptcy court were fair,  
24

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25  
26 <sup>22</sup> At the time the bankruptcy court issued its decision,  
27 consideration of the ABA Standards was required by our holding in  
28 In re Brooks-Hamilton, 400 B.R. 238 (9th Cir. BAP 2009), in  
determining the reasonableness of sanctions. That holding has  
since been modified in In re Nguyen, 447 B.R. at 268.

1 the evidence solidly supported the bankruptcy court's findings,  
2 conclusions and sanctions award, and the amount of that award,  
3 \$109,528, was reasonable as compensatory payment for Humitech's  
4 fees incurred as a result of Winterton's actions. Thus, the  
5 bankruptcy court did not abuse its discretion in awarding a  
6 sanction of \$109,528 against Winterton.

7 Winterton argues, however, that the Stipulation filed in the  
8 California Litigation insulates him from the imposition of  
9 sanctions in this case. We disagree.

10 Winterton claims that he represented Grose, individually, by  
11 advising him about the implications of dismissing the adversary  
12 proceeding with or without prejudice. Based on this interaction,  
13 Winterton asserts he is one of Grose's attorneys and covered by  
14 the release terms of the Stipulation.<sup>23</sup> Winterton's argument is  
15 belied by his repeated statements that he represented only Blue  
16 Pine, not Grose. For example, he stated he was only Blue Pine's  
17 attorney in his Opposition to Sanctions dated October 23, 2009,  
18 and in response to discovery requests in January 2010, both of  
19 which were after the stipulation dismissing the adversary  
20 proceeding was entered. Winterton acknowledged this  
21 contradiction:

22 I recognize I told the Court 100 percent that, you  
23 know, I had represented Blue Pine Group, and it wasn't  
24 until we were doing preparation that we discovered this  
[the signed stipulation to dismiss the adversary  
proceeding] that refreshed my memory.

25 Hr'g Tr. (February 4, 2010) at 154:23-155:1.

26 \_\_\_\_\_  
27 <sup>23</sup> Blue Pine was not a party to the Stipulation and  
28 Winterton does not argue on appeal that as attorney for Blue Pine  
he was included in the release.

1           Furthermore, Winterton never produced a written agreement,  
2 consent, or retainer for the representation. The bankruptcy  
3 court found that Winterton "did not intend to represent, and  
4 therefore did not represent, either of the Groses in anything  
5 other than an unimportant ministerial capacity of facilitating  
6 one filing in their name." Memorandum Decision at 18. This  
7 finding is not clearly erroneous.

8           Winterton makes a lengthy argument that the bankruptcy court  
9 exceeded its jurisdiction by determining the scope of the  
10 Stipulation. Winterton asserts that "[b]ecause the issue of  
11 awarding attorney fees is subject to the state court  
12 interpretation of the release in the [Stipulation], Humitech's  
13 claim for attorney fees after entering the [Stipulation] is not  
14 one arising under the bankruptcy code." Appellants' Opening Br.  
15 at 23-24. Winterton's argument is misguided. The bankruptcy  
16 court did not determine the scope of the Stipulation or interpret  
17 the terms of its release. It simply made a factual finding  
18 regarding whether Winterton represented Grose. Its finding that  
19 Winterton did not represent Grose was not illogical, implausible  
20 or unsupported by the evidence in the record.

21           Finally, Winterton raises a few arguments on appeal that  
22 were not raised before the bankruptcy court, including that  
23 (1) the bankruptcy court should have allocated the sanctions  
24 between himself, Irsfeld, Lichtenberger and the Groses,  
25 (2) \$47,497 of the attorneys' fees was for communications between  
26 attorneys and was unreasonable; and (3) the bankruptcy court  
27 should have considered Winterton's ability to pay. "An issue  
28 will generally be deemed waived on appeal if the argument was not

1 'raised sufficiently for the trial court to rule on it.'"   
2 Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive   
3 Corp., 618 F.3d 988, 992 (9th Cir. 2010) (quoting O'Rourke v.   
4 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957   
5 (9th Cir. 1989)). Because he did not make these arguments to the   
6 bankruptcy court, Winterton's arguments have been waived.

7 In closing, we note that Winterton continues, on appeal, to   
8 advocate his conviction that the bankruptcy court erred in   
9 interpreting Nevada law and concluding that the bankruptcy case   
10 was filed without corporate authorization. See particularly   
11 Appellants' Reply Brief. However, the finding that the   
12 bankruptcy was filed without corporate authorization was the   
13 underpinning of the Dismissal Order, which Winterton did not   
14 appeal. Accordingly, that finding is not subject to our review   
15 here. Our concern in this appeal is whether Winterton made an   
16 objectively reasonable inquiry into the legal and factual basis   
17 for the bankruptcy filing. As we concluded above, the bankruptcy   
18 court did not abuse its discretion in ruling that Winterton's   
19 conduct did not adequately satisfy the standard of Rule 9011 and   
20 was sanctionable in the compensatory amount of \$109,528.

21 **VI. CONCLUSION**

22 For the foregoing reasons, we AFFIRM.   
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