

JUL 09 2010

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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. AZ-09-1350-JuMkKi
)
 LEONARD SUSTAITA, JR.,) Bk. No. 08-05817-RTB
)
 Debtor.)
)
)
 RICHARD S. BERRY,)
)
 Appellant,)
)
 v.) **O P I N I O N**
)
 UNITED STATES TRUSTEE; EDWARD)
 J. MANEY, Chapter 13 Trustee;)
 RUSSELL A. BROWN, Chapter 13)
 Trustee,)
)
 Appellees.)
)

Argued and Submitted on June 18, 2010
at Phoenix, Arizona

Filed - July 9, 2010

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

Hon. Redfield T. Baum, Sr., Bankruptcy Judge, Presiding

Before: JURY, MARKELL, and KIRSCHER, Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:
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3 After an evidentiary hearing, which appellant Richard S.
4 Berry ("Berry") did not attend, the bankruptcy court entered an
5 Order Imposing Sanctions And Injunction Against Richard S. Berry
6 in favor of appellees - Chapter 13 trustees Edward Maney
7 ("Maney") and Russell Brown ("Brown") and the United States
8 Trustee (the "U.S. Trustee").¹

9 The order arose out of an enforcement proceeding against
10 Berry under §§ 110, 526, 527 and 528.² The court found Berry was
11 a "bankruptcy petition preparer" as defined in § 110(a)(1) and a
12 "debt relief agency" as defined in § 101(12A). The court
13 (1) imposed statutory fines against Berry for numerous violations
14 of § 110; (2) ordered Berry to disgorge fees obtained from
15 various debtors for violations of §§ 526, 527 and 528;
16 (3) imposed a civil penalty against Berry under § 526(c)(5)(B)
17 for \$100,000; (4) issued a permanent injunction enjoining Berry
18 from acting or advertising in any way as a bankruptcy petition
19 preparer and (5) referred the matter to the United States
20 Attorney's Office (the "U.S. Attorney") for the filing of
21 criminal contempt proceedings against Berry.

22 Berry filed a Motion For New Trial or, alternatively, Motion
23 For Relief From Judgment, which the bankruptcy court denied.
24

25 ¹ On March 4, 2010, the U.S. Trustee filed a Notice of Non-
26 Participation in this appeal.

27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Berry argues he was denied due process throughout the
2 enforcement proceeding. After a thorough review of the record,
3 we AFFIRM in part and REVERSE in part. We REVERSE the court's
4 decision to impose the \$100,000 civil penalty against Berry under
5 § 526(c)(5)(B) because we conclude on this record that Berry did
6 not have explicit notice that the court was acting on its own
7 motion or that a civil penalty under this section was under
8 consideration. We AFFIRM the court's decision in all other
9 respects because we conclude no due process violations occurred.

10 I. FACTS

11 Berry is no stranger to the bankruptcy court in the District
12 of Arizona. Berry was a licensed attorney. After he lost his
13 license, Berry started a business that provided legal-related
14 services, including those pertaining to bankruptcy.

15 In January 1998, Judge Curley of the Arizona bankruptcy
16 court issued an order permanently enjoining Berry from acting as
17 a bankruptcy petition preparer in the District of Arizona. See
18 In re Gabrielson, 217 B.R. 819 (Bankr. D. Ariz. 1998). In March
19 1998, Judge Baum of the Arizona bankruptcy court issued an Order
20 of Civil Contempt and Judgment Against Richard S. Berry, People's
21 Services, Inc., and PLA People's Law. Judge Baum found Berry in
22 contempt of court for willful and intentional violations of an
23 order issued in May 1997 and fined Berry \$1 million. See In re
24 Repp, District of Arizona Bankr. Case No. 96-01521 (March 6,
25 1998). The U.S. Attorney indicted Berry for criminal contempt.
26 He was tried, without a jury, convicted of a misdemeanor and
27 served six months imprisonment in the Federal Bureau of Prisons.

28 Later, Berry began actively assisting debtors with their

1 bankruptcy petitions, although Berry contends otherwise.

2 The debtor in this matter, Leonard Sustaita, Jr.
3 ("Sustaita") filed his Chapter 13 bankruptcy petition on May 20,
4 2008, stating that he filed pro se. Maney was appointed to serve
5 as the Chapter 13 trustee. It came to light that Berry assisted
6 Sustaita with his bankruptcy filing for a fee of \$240.
7 Sustaita's petition did not, however, contain any of the
8 disclosures required by § 110(b)(1) and (c)(1) and Berry failed
9 to provide notice in compliance with § 110(b)(2)(A).

10 On September 22, 2008, Maney filed an Application for Order
11 to Show Cause for Fines and Disgorgement Against Bankruptcy
12 Petition Preparer Richard S. Berry dba Why Pay A Lawyer ("WPAL").
13 Maney asserted that Berry was a bankruptcy petition preparer
14 under § 110(a)(1) and alleged numerous violations under the
15 statute. As a result, Maney requested the court to fine Berry
16 \$24,000, to order disgorgement of the \$240 fee and to order that
17 Berry disclose all of the other bankruptcy cases in which he
18 prepared documents for debtors. Maney mailed the application to
19 Berry at WPAL's address: S. McClintock Dr., Ste. 112, Tempe, AZ
20 85282 (hereinafter, referred to as the WPAL address).³

21 On September 22, 2008, the court issued an Order to Show
22 Cause ("OSC"), scheduling a hearing for October 16, 2008. The
23 Bankruptcy Noticing Center ("BNC") did not serve Berry with the
24

25 ³ We have intentionally omitted the street numbers of all
26 addresses referenced in this decision for two reasons: (1) the
27 street numbers are not in dispute; and (2) the omission might
28 help protect the privacy of the litigants and their families.
But see Rule 9037, which excludes addresses from the list of
personal identifiers protected by redaction in bankruptcy cases.

1 OSC since he was not a party listed on the Master Mailing List.

2 On September 28, 2008, Brown joined in Maney's application.
3 Brown alleged that he had reason to believe Berry was involved in
4 at least eleven additional Chapter 13 cases assigned to Brown.
5 Brown further alleged that Berry had violated § 110 in numerous
6 respects and that Berry was a debt relief agency and had violated
7 §§ 526, 527 and 528. Finally, Brown maintained that Berry was in
8 violation of previous injunctions issued in 1997 warranting a
9 \$2 million fine against him. In his prayer for relief, Brown
10 requested the court to require "Berry to pay punitive sanctions
11 pursuant to 11 U.S.C. § 526(c)(5)(B)" and to permanently enjoin
12 "Berry from any and all bankruptcy activities". Brown mailed the
13 application to Berry at the WPAL address.

14 On September 28, 2008, the court issued an OSC in response
15 to Brown's request and consolidated Maney's and Brown's OSCs for
16 a hearing on October 16, 2008. The BNC sent out a notice
17 regarding the OSC which did not include Berry.

18 On October 16, 2008, the U.S. Trustee filed a Notice of
19 Appearance and Request for Notice in the matter. The U.S.
20 Trustee mailed its notice to Berry at the WPAL address and also
21 to his residence at E. Wesleyan Dr., Tempe, AZ 85282
22 (hereinafter, the Wesleyan address),⁴ and at Alva Drive, Pine, AZ
23 85544.

24 Berry did not attend the October 16, 2008, hearing. The
25 bankruptcy court set an evidentiary hearing for January 13, 2009.

26
27 ⁴ The Wesleyan address is the address Berry listed with the
28 Arizona Department of Motor Vehicles and Berry later admitted
that this was his residence address.

1 The Minute Order reflects that counsel was to provide notice to
2 Berry regarding the hearing.

3 On November 5, 2008, Maney mailed notice of the evidentiary
4 hearing to Berry at the WPAL address. On December 23, 2008,
5 Maney mailed notice of the evidentiary hearing, which was
6 rescheduled to February 12, 2009, to Berry at the WPAL address
7 and the Wesleyan address.

8 On January 12, 2009, the U. S. Trustee issued subpoenas to
9 Berry and his wife, Jean D. Berry, under the Sustaita bankruptcy
10 case caption, requiring their appearance for a deposition on
11 February 2, 2009. The subpoenas were mailed to the Berrys at the
12 Wesleyan address, with a copy mailed to the landlord of WPAL
13 using the WPAL address.

14 On February 5, 2009, Maney filed a Motion to File Unilateral
15 Pre-Trial Statement based on Berry's failure to file any
16 pleadings in the matter and his lack of response to a subpoena to
17 appear to give testimony. The motion was mailed to Berry at the
18 Wesleyan address.

19 Maney filed his Unilateral Pre-Trial Statement, and on
20 February 6, 2009, the court granted his motion, but directed the
21 parties to file an amended pre-trial statement if Berry responded
22 with additions.

23 On February 10, 2009, Berry filed a Motion for Continuance,
24 requesting a sixty to ninety-day continuance. In his motion,
25 Berry acknowledged that he learned of the proceeding against him
26 in late November. Attached to Berry's request was a letter that
27 he faxed to the U.S. Trustee in which he stated that he did not
28 get mail at the WPAL address, but received it at a Post Office

1 Box (the "P.O. Box"). Berry contended that it was unnecessary to
2 subpoena anyone and to merely mail "whatever it is to the Box".

3 On the same day, Berry filed a Notice and Suggestion of
4 Recusal. Berry's request for recusal was based on Judge Baum's
5 former ruling against him.

6 On February 12, 2009, the evidentiary hearing took place.
7 Berry did not appear.⁵ The court denied Berry's request for a
8 continuance and also denied his request for recusal. After that,
9 numerous debtors testified that they met Berry at the WPAL
10 address and that Berry assisted them in filing their respective
11 cases. At the conclusion of the hearing, the court asked the
12 trustees to lodge orders with requested relief and took the
13 matter under advisement.

14 Maney mailed the proposed Order Imposing Sanctions and
15 Injunction Against Richard S. Berry to Berry on March 6, 2009,
16 and mailed a revised order to him on June 8, 2009. Both were
17 mailed to Berry at the WPAL address, the Wesleyan address, and
18 his self-designated P.O. Box address. Berry did not file an
19 objection to either of the lodged orders.

20 The court subsequently made findings of fact and conclusions
21 of law, which were embodied in its order entered on June 11,
22 2009. On June 23, 2009, the court entered a judgment in favor of
23

24 ⁵ In his opening brief, Berry provides an unusual
25 explanation for not appearing on behalf of himself. He states
26 that his insurer had not yet appointed counsel for WPAL and,
27 while he could appear himself, he could not appear for the
28 corporation WPAL since he was not an attorney. He says that if
he did appear "he would have been considered practicing law
without a license, something in part, that 110 [sic] is to
prevent as implemented in the Arizona district. . . ."

1 Brown.

2 On June 22, 2009, Berry moved for a new trial under Fed. R.
3 Civ. P. 59, or, alternatively, moved for relief from the judgment
4 under Fed. R. Civ. P. 60.⁶ In his motion, Berry alleged that
5 neither he nor WPAL had been served with the OSCs and that he
6 learned of the matter in late November through a telephone call
7 with a staff attorney, Richard Cuellar ("Cuellar"), at the U.S.
8 Trustee's office. Berry maintained that Cuellar indicated that
9 he would send Berry all the pleadings, but Cuellar never did.
10 Berry also asserted that he told Cuellar that he did not receive
11 mail at the WPAL office address and gave him the P.O. Box number
12 where he received his mail. Berry stated that Cuellar never
13 passed on the correct address to the Chapter 13 trustees.

14 In addition, Berry reminded the bankruptcy judge that he had
15 requested a continuance and also requested the court to recuse
16 itself. He erroneously stated the court had not yet ruled on
17 those matters, although the court's oral rulings were reflected
18 in the Minute Entry for February 12, 2009. Berry asserted
19 several defenses, including, but not limited to: (1) that the
20 work cited in the June 11, 2009, order involved non-debtor
21 parties not covered by § 110; (2) that he never gave any legal
22 advice; and (3) that there was no prohibition under any rules or
23 law preventing Berry from selling bankruptcy kits and giving
24 simple advice on how to fill them out.⁷

25 _____

26 ⁶ Rules 9023 and 9024 incorporate Fed. R. Civ. P. 59 and 60,
27 respectively.

28 ⁷ Although we need not address the merits of Berry's
(continued...)

1 Brown and the U.S. Trustee filed opposition. The U.S.
2 Trustee noticed a hearing for August 18, 2009. On July 20, 2009,
3 Berry filed a reply reasserting that he was denied due process
4 and reiterating that he believed the court was biased against
5 him.

6 At the August 18, 2009, hearing, Berry argued his position
7 and orally moved the court to recuse itself. The court denied
8 his oral motion for recusal, advised Berry to file a written
9 motion, and took the matter under advisement.

10 On October 8, 2009, the court issued a Minute Entry/Order
11 denying Berry's motion. The court found that the evidence showed
12 Berry had received multiple notices both at the WPAL address and
13 his residence for many months prior to the evidentiary hearing.
14 In addition, the court found that Berry had ample notice, but
15 chose to not appear or defend notwithstanding his knowledge of
16 the hearing.

17 On October 22, 2009, the court entered an Order Overruling
18 Motion For a New Trial Or, In The Alternative Motion For Relief
19 From Judgment Order.

20 On October 30, 2009, Berry filed a timely Notice of Appeal,
21 referencing the Order Overruling Motion For a New Trial Or In The
22 Alternative Motion For Relief From Judgment Order, the Order
23 Imposing Sanctions And Injunction Against Richard S. Berry, and
24 the Judgments in favor of Brown and Maney.

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26 _____
27 ⁷(...continued)
28 defenses, it is clear from the testimony of the various debtors
that Berry was doing more than simply selling bankruptcy kits.

1 discretion. United States v. Hernandez, 109 F.3d 1450, 1453 (9th
2 Cir. 1997). We follow a two-part test to determine objectively
3 whether the bankruptcy court abused its discretion. United
4 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). If we
5 determine that the court erred under either part of the test, we
6 must reverse for an abuse of discretion. Id. First, we
7 “determine de novo whether the [bankruptcy] court identified the
8 correct legal rule to apply to the relief requested.” Id.
9 Second, we examine the bankruptcy court’s factual findings under
10 the clearly erroneous standard. Id. at 1262 n.20. We must
11 affirm the court’s factual findings unless those findings are
12 “(1) ‘illogical,’ (2) ‘implausible,’ or (3) without ‘support in
13 inferences that may be drawn from the facts in the record.’” Id.

14 **V. DISCUSSION**

15 Berry’s due process argument has several prongs. He asserts
16 that he was (1) never served with either of the OSCs and
17 improperly served with other pleadings, (2) did not have timely
18 notice of the evidentiary hearing, (3) was deprived of procedural
19 protections that accompany criminal contempt proceedings, and (4)
20 the bankruptcy judge was biased against him. We address each of
21 his contentions in seriatim.

22 **A. Berry Was Properly Served And Was Afforded Due Process With** 23 **One Exception**

24 Berry asserts that the Chapter 13 trustees did not comply
25 with the applicable rules for service, citing Rules 9014 and
26 9020. Berry argues that Rule 9014, which provides for a
27 “summons, service, time for witnesses to appear, etc. . . . was
28 ignored here, as was due process in general”.

1 According to Rule 9014, motions shall be served in
2 accordance with Rule 7004. Rule 7004 governs the service of a
3 summons and complaint. Berry contends that there was never a
4 summons issued as required in a contested matter. However, Berry
5 confuses contested matters under Rule 9014 with adversary
6 proceedings under Rule 7001. There is no summons in a contested
7 matter. Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121,
8 125-26 (9th Cir. BAP 2005) (explaining the differences between a
9 contested matter and adversary proceeding). “[I]n a contested
10 matter, the notice of hearing is treated as a summons and the
11 motion is treated as a complaint.” In re Parker, 392 B.R. 490,
12 496 (Bankr. D. Utah 2008).

13 Methods of service for contested matters and adversary
14 proceedings are both governed by Rule 7004. Rule 7004(b)(1)
15 authorizes service by mail on an individual, by mailing a copy of
16 the motion to the individual’s dwelling house or usual place of
17 abode or to the place where the individual regularly conducts a
18 business or profession.⁸ Berry alleges that the only proper
19 place to serve him by mail was at P.O. Box 26222, Tempe, AZ
20 85285. However, Rule 7004(b)(1) provides for service by mail

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22 ⁸ Rule 7004(b)(1) states as follows:

23 (b) Service by First Class Mail. Except as provided in
24 subdivision (h), in addition to the methods of service authorized
25 by Rule 4(e)-(j) F.R.Civ.P., service may be made within the
United States by first class mail postage prepaid as follows:

26 (1) Upon an individual other than an infant or
27 incompetent, by mailing a copy of the summons and
28 complaint to the individual’s dwelling house or usual
place of abode or to the place where the individual
regularly conducts a business or profession.

1 addressed to Berry's residence rather than to some P.O. Box he
2 designated after the trustees filed their applications for an
3 OSC. Further, Rule 7004(b)(1) provides for service at a place
4 where Berry regularly conducted a business or profession. Under
5 the plain language of the Rule, service on Berry at his residence
6 or business would comply with the Rule.⁹

7 The record shows certificates of mailing of both Maney's and
8 Brown's applications for an OSC to Berry at the WPAL address.
9 There is also a certificate of mailing of notice of the
10 evidentiary hearing scheduled for January 13, 2009, showing it
11 was mailed to Berry at the WPAL address. Another certificate of
12 mailing of notice of the evidentiary hearing rescheduled to
13 February 12, 2009, shows that it was mailed to Berry at both the
14 WPAL and Wesleyan addresses.

15 Proof of mailing creates a rebuttable presumption of its
16 receipt. Cuna Mut. Ins. Group v. Williams (In re Williams),
17 185 B.R. 598, 599 (9th Cir. BAP 1995) citing Bucknum, 951 F.2d at
18 207. In Williams, we observed that "[t]his rule is a key support
19 of the bankruptcy system's notice by mail. 'If a party were
20 permitted to defeat the presumption of receipt of notice
21 resulting from the certificate of mailing by a simple affidavit
22 to the contrary, the scheme of deadlines and bar dates under the
23 Bankruptcy Code would come unraveled.'" Williams, 185 B.R. at
24 599-600. Moreover, the Ninth Circuit in Bucknum held that "[t]he
25 presumption can only be overcome by clear and convincing evidence

26
27 ⁹ In this regard, Berry's contention that the U.S. Trustee
28 failed to pass on his P.O. Box address to the Chapter 13 trustees
is irrelevant.

1 that the mailing was not, in fact, accomplished." Bucknum, 951
2 F.2d at 207.

3 We interpret some of Berry's argument to mean that the
4 mailings were not sent to any qualifying addresses under Rule
5 7004(b)(1). He maintains that the zip code was incorrect for the
6 Wesleyan address and he did not regularly conduct a business or
7 profession at the WPAL address. These contentions regarding
8 service are purely factual matters. Bucknum, 951 F.2d at 206.
9 On factual matters we defer to the bankruptcy court unless its
10 findings are clearly erroneous. From our examination of the
11 record, we have no reason to disturb that judgment.

12 The record shows that Berry offered only self-serving
13 statements in support of his contentions. At the hearing on his
14 Motion For New Trial, Berry admitted that the Wesleyan address
15 was his residence, but maintained that the Post Office had
16 changed the zip code. But there is no evidence in the record
17 that any of the mailings to his residence were returned as
18 undeliverable.

19 Berry mistakenly contends there is a factual issue regarding
20 receipt because there is no affidavit in the record that the
21 mailings were not returned. However, when there is proof of
22 mailing, it was Berry who had the burden to rebut the presumption
23 of receipt with clear and convincing evidence. Bucknum, 951 F.2d
24 at 207.

25 Berry also implies that the mailings to the WPAL address
26 were ineffective since he was "retired" and did "not work full
27 time at the WPAL office". However, at oral argument, Berry
28 admitted that he was at the WPAL address two to three times per

1 week. At another time, Berry states that WPAL was sold in 2004
2 to his wife, Jean Berry; by implication, the business is his
3 wife's, not his. But there was no evidence in the record that
4 confirmed his assertion. Finally, he argues that he is the
5 statutory agent for WPAL, LLC (which coincidentally has the same
6 address as WPAL), but the LLC is an internet business and does
7 not conduct business at the WPAL address.

8 We cannot ignore the testimony of numerous debtors at the
9 February 12, 2009 evidentiary hearing. The debtors indicated
10 that they met Berry at the WPAL address and that they received
11 his assistance with their petitions at the WPAL office. The
12 testimony of the various debtors established that the WPAL
13 address was one that Berry used to regularly conduct business.
14 Since Berry did not avail himself of the opportunity to present
15 opposing evidence at the evidentiary hearing, there is no
16 contrary evidence in the record.¹⁰ Accordingly, we are not left
17 with a firm and definite conviction that a mistake has been made.
18 Anderson, 470 U.S. at 573.

19 For service to be proper, it must not only comply with
20 Rule 7004(b)(1), but must comport with due process as well.
21 See Rule 9014(a) (providing that "reasonable notice" and an
22 opportunity for a hearing shall be given to the party against
23 whom relief is sought). "The standard for what amounts to
24 constitutionally adequate notice, however, is fairly low; it's
25 'notice reasonably calculated, under all the circumstances, to

27 ¹⁰ Although Berry's Motion For New Trial was not an
28 evidentiary hearing, Berry did not submit any evidence in support
of his various contentions at the one hearing he did attend.

1 apprise interested parties of the pendency of the action and
2 afford them an opportunity to present their objection.’” Espinosa
3 v. United Student Aid Funds, Inc., 553 F.3d 1193, 1202 (9th Cir.
4 2008) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S.
5 306, 314-15 (1950)) aff’d 130 S.Ct. 1367 (2010).

6 Although Berry contends he was not served with the OSCs – a
7 contention that is supported by the record – the bankruptcy court
8 found that over several months in the fall of 2008 and early 2009
9 multiple notices and pleadings were mailed to Berry at both the
10 WPAL and Wesleyan addresses, where “he acknowledged he worked and
11 lived”. The record fully supports the court’s findings.
12 Accordingly, we conclude that notice of the trustees’
13 applications for an OSC and notice of the evidentiary hearing was
14 sufficient to apprise Berry of the pendency of the enforcement
15 proceeding and afford him an opportunity to present his
16 objections to the trustees’ allegations.

17 Moreover, Berry admits having actual notice of the
18 proceeding against him at least ten days before the hearing.
19 Generally, actual notice satisfies due process. Espinosa,
20 553 F.3d at 1203. Once Berry spoke with staff attorney Cuellar
21 at the U.S. Trustee’s office, he was on notice that an
22 enforcement proceeding was initiated against him. Besides having
23 received numerous pleadings by mail, had Berry made any inquiry
24 following his conversation with Cuellar, he would have discovered
25 that he needed to act to protect his interest. At oral argument,
26 Berry acknowledged in hindsight that he should have followed up.

27 “If a party is adequately notified of a pending lawsuit,
28 [he] is deemed to know the consequences of responding or failing

1 to respond, even if gaining actual knowledge requires inquiry
2 into court files, hiring a lawyer or conducting legal research.”

3 Id. Under these circumstances, we cannot say that Berry was
4 denied due process. Quite the contrary: he knew about the
5 proceeding against him and chose not to appear and defend.

6 Berry also complains that the court abused its discretion in
7 not granting his request for a continuance of the evidentiary
8 hearing since he did not have enough time to prepare. A
9 bankruptcy court has discretion to decide not to continue a
10 hearing. United States v. 2.61 Acres of Land More or Less,
11 791 F.2d 666, 670 (9th Cir. 1985). Four factors are relevant to
12 our inquiry into whether the court abused its discretion in
13 denying a continuance; no one factor is dispositive. Id. at 671.

14 First, we consider the extent of appellant’s diligence
15 in his [or her] efforts to ready his [or her] defense
16 prior to the date set for hearing. Second, we consider
17 how likely it is that the need for a continuance could
18 have been met if the continuance had been granted.
19 Third, we consider the extent to which granting the
20 continuance would have inconvenienced the court and the
21 opposing party, including its witnesses. Finally, we
22 consider the extent to which the appellant might have
23 suffered harm as a result of the district court’s
24 denial.

25 Id. Absent a showing of prejudice suffered by Berry, we will not
26 disturb the ruling below. Id.

27 The record shows that Berry was not diligent in his efforts
28 to avoid the purported need for a continuance. He was served
with various notices and pleadings over several months in the
fall of 2008 and early 2009, well before the evidentiary hearing.
Yet, Berry requested the continuance just two days before the
hearing. Further, a continuance would have been inconvenient for
the court, the numerous debtors who were scheduled to testify and

1 the Chapter 13 trustees. Finally, although Berry contends he was
2 harmed because he did not have time to prepare, the record shows
3 otherwise. He had adequate time to prepare when he received
4 notices and pleadings well in advance of the evidentiary hearing,
5 but he chose to enter an appearance in the matter at the last
6 minute. Under these circumstances, we conclude Berry was not
7 prejudiced and we will not disturb the court's ruling denying his
8 request for a continuance.

9 However, because of due process implications, there are two
10 aspects of the court's decision that give us pause. First, Brown
11 requested injunctive relief under § 110(j),¹¹ which the
12 bankruptcy court granted. This relief was distinct and separate
13 from contempt relief under Rule 9020 which authorizes a party to
14 proceed by motion to enforce a pre-existing injunction. See Rule
15 9020 (providing that Rule 9014 applies to a motion for contempt);
16 In re WorldCorp, Inc., 252 B.R. 890, 895 (Bankr. D. Del. 2000)
17 ("[A]n adversary proceeding is not necessary where the relief
18 sought is the enforcement of an order previously obtained.").

19 A request to enjoin a bankruptcy petition preparer under
20 § 110(j) requires an adversary proceeding unless the court is
21 acting on its own motion. Graves, 279 B.R. at 273. There is no
22 indication from this record that the court was acting on its own
23 motion. Berry's failure to "specifically and distinctly" address
24 this issue in the bankruptcy court or in his opening brief

25
26 ¹¹ Section 110(j) provides that a debtor, the trustee, a
27 creditor, or the United States trustee "may bring a civil action
28 to enjoin a bankruptcy petition preparer from engaging in any
conduct in violation of this section or from further acting as a
bankruptcy petition preparer."

1 constitutes a waiver. Alcaraz v. INS, 384 F.3d 1150, 1161 (9th
2 Cir. 2004).

3 Nonetheless, even if Berry hasn't waived the issue, failure
4 to provide an adversary proceeding is subject to a harmless error
5 analysis. USA/Internal Revenue Serv. v. Valley Nat'l Bank (In re
6 Decker), 199 B.R. 684, 689 (9th Cir. BAP 1996). We conclude that
7 the error was harmless because the court essentially followed the
8 same procedure afforded by an adversary proceeding. The notice
9 procedures are the same whether for a contested matter or
10 adversary proceeding and the record supports the bankruptcy
11 court's finding that Berry was properly served with the trustees'
12 applications for an OSC and notice of the evidentiary hearing.
13 In addition, the record shows that Berry had ample opportunity to
14 file responsive pleadings and to testify, produce witnesses or
15 cross-examine witnesses at the evidentiary hearing. In short,
16 Berry was given all the process he would have received if an
17 adversary proceeding had been filed.

18 Our second concern is the court's decision to impose a
19 \$100,000 civil penalty against Berry under § 526(c)(5)(B).
20 Section 526(c)(5)(B) authorizes the court to impose an
21 appropriate civil penalty against Berry, if the court on its own
22 motion or on the motion of the U.S. Trustee finds that Berry
23 intentionally violated § 526 or engaged in a clear and consistent
24 pattern or practice of violating the section. § 526(c)(5)(B).
25 Although Brown's application urged the court to grant punitive
26 sanctions under this section, a plain reading of Brown's
27 application shows that it was insufficient to alert Berry that
28 the court was acting on its own motion or that a civil penalty

1 under this section was even under consideration.

2 Moreover, the U.S. Trustee's joinder in Brown's application
3 did not alleviate the need for explicit notice that the U.S.
4 Trustee was moving under § 526(c) (5) (B). The U.S. Trustee has an
5 independent statutory right to file a motion under this section,
6 a right which the Chapter 13 trustee does not have. Further, we
7 cannot say the U.S. Trustee's interests are perfectly aligned
8 with those of the Chapter 13 trustee.

9 Finally, the Unilateral Pre-Trial Statement, which outlined
10 the issues to be resolved at the OSC evidentiary hearing, made no
11 reference to § 526(c) (5) (B) in the contested issues.

12 The Ninth Circuit has held that prior to sanctioning a
13 party, the court must provide the party to be sanctioned with
14 particularized notice to comport with due process. Miller v.
15 Cardinale (In re Deville), 361 F.3d 539, 548 (9th Cir. 2004).
16 Such notice necessarily includes a description of the alleged
17 misconduct as well as the source of the court's sanctioning power
18 so that the party would know which factors to address to avoid
19 sanctions.

20 This rule is equally applicable to the court's statutory
21 power to act on its own motion when imposing a civil penalty
22 under § 526(c) (5) (B) or to a motion initiated by the U.S.
23 Trustee. Although we believe Maney's and Brown's applications
24 most likely informed Berry of the conduct alleged to be
25 sanctionable under § 526(c) (5) (B), we conclude that Berry did not
26 receive explicit notice that the court was acting on its own
27 motion or considering a civil penalty under § 526(c) (5) (B) nor
28 was there any indication that the U.S. Trustee was moving under

1 this section. Accordingly, we reverse the court's decision to
2 impose a civil penalty against Berry under this section.¹²

3 However, we affirm the court's decision in all other
4 respects because due process requirements were met.

5 **B. The Statutory Penalties, Fines And Sanctions Were Civil In**
6 **Nature**

7 Berry asserts that he was entitled to additional due process
8 protections, reasoning that since the bankruptcy court made the
9 referral to the U.S. Attorney to find him in criminal contempt,
10 the enforcement proceeding against him was in the nature of
11 criminal contempt.

12 We disagree. The bankruptcy court simply made a referral to
13 the U.S. Attorney's Office; the court did not imprison Berry or
14 impose the equivalent. It is also persuasive that Congress
15 intended the fines and penalties under §§ 110 and 526 as civil in
16 nature when the statutes give the bankruptcy court the authority
17 to impose them.

18 Moreover, monetary fines have not "historically been viewed
19 as punishment." Hudson v. United States, 522 U.S. 93, 104 (1997)
20 ("[T]he payment of fixed or variable sums of money . . . ha[s]
21 been recognized as enforceable by civil proceedings since the
22 original revenue law of 1789."); see also, Martini v. We the
23 People Forms & Serv. Ctrs. USA, Inc. (In re Barcelo), 313 B.R.

24
25 ¹² Under 28 U.S.C. §§ 151 and 157, bankruptcy courts are
26 "units" of the district courts to which bankruptcy matters may be
27 referred. Currently, all district courts have entered standing
28 orders referring all bankruptcy cases in their districts to
bankruptcy courts. As a result, the statutory reference to
"district court" in § 526(c) applies to the bankruptcy court.

1 135, 151 (Bankr. E.D.N.Y. 2004). In addition, the disgorgement
2 of fees, whether under § 110 or § 526, like other disgorgement
3 remedies, does not constitute "damages," nor is disgorgement in
4 any way punitive. Barcelo, 313 B.R. at 151. "Rather,
5 disgorgement compensates a debtor for paying more than the value
6 of the services rendered, a value that the court can determine."
7 Id.

8 In sum, the various fines and penalties were civil in nature
9 and thus Berry received all the procedural protections to which
10 he was entitled (except as noted above under § 526(c)(5)(B)).

11 **C. The Bankruptcy Court Did Not Abuse Its Discretion In Denying**
12 **Berry's Written And Oral Motion For Recusal**

13 Berry's last allegation is that the bankruptcy judge's bias
14 against him violated due process. In re Murchison, 349 U.S. 133,
15 136 (1955) (The right to trial by an impartial judge "is a basic
16 requirement of due process.").

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

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

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

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

28 "Judicial impartiality is presumed." First Interstate Bank

1 of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987
2 (9th Cir. 2000); see also Liteky v. U.S., 510 U.S. 540, 554-55
3 (1994). Generally, allegations of bias or prejudice must stem
4 from some extrajudicial source. Liteky, 510 U.S. at 550-55. If
5 there is no evidence of extrajudicial sources of bias or
6 prejudice, then a charge of partiality would have to be supported
7 on evidence that the judge exhibited "such a high degree of
8 favoritism or antagonism to make fair judgment impossible." Id.
9 at 554-55. Further, evaluations of bias or prejudice are judged
10 from an objective perspective; "whether a reasonable person with
11 knowledge of all the facts would conclude that the judge's
12 impartiality might reasonably be questioned." Seidel v. Durkin
13 (In re Goodwin), 194 B.R. 214, 222 (9th Cir. BAP 1996).

14 Berry's sole ground for seeking recusal of Judge Baum is
15 based on the judge's previous ruling against him in In re Repp.
16 To demonstrate Judge Baum's bias against him, Berry points to
17 another ruling where the judge appointed a Chapter 11 trustee in
18 a bankruptcy case once it came to light that Berry was involved
19 with the debtor.¹³ However, "[j]udicial rulings alone almost
20 never constitute a valid basis for a bias or partiality motion,"
21 absent a showing of a high degree of antagonism or favoritism in
22 the text accompanying the order or ruling. Liteky, 510 U.S. at
23 555. There is no evidence in the record that shows Judge Baum
24 obtained information from an "extrajudicial" source nor do any of
25 the facts before us show that the bankruptcy judge exhibited

27 ¹³ See In re Hannon B, LLC, District of Arizona Bankr. Case
28 No. 09-08430, Emergency Motion For Authority to Use Cash
Collateral Hr'g Tr., May 12, 2009.

1 "such a high degree of favoritism or antagonism to make fair
2 judgment impossible."

3 In sum, the record does not create a reasonable doubt
4 concerning the judge's impartiality. To the extent Berry's due
5 process challenge rests on impartiality grounds, it too must
6 fail.

7 **VI. CONCLUSION**

8 For these reasons, we AFFIRM in part and REVERSE in part.
9 We REVERSE the court's decision to impose a civil penalty against
10 Berry under § 526(c)(5)(B). We AFFIRM the court's decision in
11 all other respects.