

OCT 22 2009

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-09-1077-PaMkH
)		
STEPHEN LAW,)	Bk. No.	LA 04-10052-TD
)		
Debtor.)		
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STEPHEN LAW,)		
)		
Appellant,)		
)		
v.)	M E M O R A N D U M ¹	
)		
ALFRED H. SIEGEL, Chapter 7)		
Trustee,)		
)		
Appellee.)		
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Submitted Without Oral Argument on September 25, 2009²

Filed - October 22, 2009

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

Hon. Thomas Donovan, United States Bankruptcy Judge, Presiding.

Before: PAPPAS, MARKELL and HOLLOWELL, Bankruptcy Judges.

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 By Order entered on September 1, 2009, the Panel approved the stipulation of the parties that this appeal be decided on the briefs and record without oral argument. 9th Cir BAP Rule 8012-1.

1 Chapter 7³ debtor Stephen Law ("Debtor") appeals an order
2 entered by the bankruptcy court surcharging his entire homestead
3 exemption of \$75,000. Debtor also appeals an order compelling his
4 attendance at a deposition and imposing a sanction of \$3,520
5 payable to the trustee for failure to comply timely with discovery
6 requests. We AFFIRM both orders.

7
8 **FACTS**⁴

9 On January 5, 2004, Debtor filed a voluntary petition for
10 relief under chapter 7 of the Bankruptcy Code. Alfred H. Siegel
11 was appointed to serve as chapter 7 trustee ("Trustee"). Debtor's
12 residence in Hacienda Heights, California (the "Property") was the
13 sole asset of the bankruptcy estate.

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³ Unless otherwise indicated, all chapter, section and rule
16 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
17 enacted and promulgated prior to the effective date (October 17,
18 2005) of the relevant provisions of the Bankruptcy Abuse
19 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil
Procedure are referred to as "Civil Rules."

20 ⁴ The many disputes involving Debtor arising in his
21 bankruptcy case have resulted in over a dozen appeals to the Panel
22 and several to the Court of Appeals. In its many decisions issued
23 over the years, the Panel has provided in great detail the facts
24 surrounding Debtor's bankruptcy filings, and his numerous contests
25 with the chapter 7 trustee concerning the administration of the
26 bankruptcy estate. See, e.g., Law v. Siegel (In re Law), BAP nos.
27 CC-05-1303/1344 (9th Cir. BAP December 29, 2006), aff'd 308
28 F. App'x 161 (9th Cir. 2009); Lin v. Siegel (In re Law), BAP nos.
CC-06-1427/1379 (9th Cir. BAP July 10, 2007), aff'd 308 F. App'x
152 (9th Cir. 2009); Law v. Siegel (In re Law), BAP no. CC-07-1127
(9th Cir. BAP October 5, 2007). Those BAP decisions are available
through PACER or via the Panel's public website, available at
<http://www.bap09.uscourts.gov>. Because the facts are well known
to the parties to this appeal, and to avoid unnecessary repetition
in the record, we recount here only those facts relevant to the
instant appeal.

1 Debtor claimed a \$75,000 homestead exemption in the Property.
2 Debtor's schedules indicated the Property had a value of \$363,348
3 and that it was subject to two voluntary liens at the time of the
4 bankruptcy filing. The first priority lien was a note and deed of
5 trust in favor of Washington Mutual Bank in the amount of
6 \$147,156.52; the second priority lien was, allegedly, a note and
7 deed of trust for \$156,929.04 in favor of "Lin's Mortgage &
8 Associates."

9 The First Surcharge Motion

10 On January 5, 2006, Trustee moved to sell the Property.⁵ At
11 the same time, Trustee filed a motion to surcharge Debtor's
12 homestead exemption ("First Surcharge Motion") contending that
13 Debtor had engaged in fraudulent conduct, exhibited bad faith by
14 pursuing frivolous litigation, and failed to comply with the
15 bankruptcy court's orders regarding Trustee's administration of
16 the Property. In particular, Trustee alleged that Debtor had lied
17 about the existence and bona fides of the alleged second mortgage
18 on the Property held by the creditor known as Lili Lin.

19 Debtor responded to the First Surcharge Motion, denied that
20 he had engaged in any fraudulent conduct, declared that he had
21

22 ⁵ The bankruptcy court conducted a hearing on the sale
23 motion on February 1, 2006, at which Trustee was represented by
24 counsel and Debtor appeared pro se. The court approved the sale
25 motion by order entered February 14, 2006; escrow closed and the
26 Property was sold on March 9, 2006. The sale proceeds totaled
27 \$208,777.91 after payment of all costs of sale and satisfaction of
28 the first mortgage. The sale proceeds are held by Trustee.
Debtor objected to the sale and appealed the sale order to the
Panel on February 6, 2006. Debtor's motions to obtain a stay
pending appeal were denied by both the Panel and the Ninth Circuit
and Debtor's appeal was dismissed as moot on December 29, 2006.
Law v. Siegel (In re Law), BAP no. CC-05-1344 (9th Cir. BAP
December 29, 2006).

1 borrowed a total of \$168,000 from Lili "Lin of China"⁶ and that he
2 had secured the loan with the second deed of trust on the
3 Property. Attached to Debtor's declaration was another
4 declaration, purportedly executed by Lili Lin of China in
5 Guangzhou, China, stating that she had indeed lent that sum to
6 Debtor and held the second deed of trust on the Property to secure
7 the loan.

8 On March 22, 2006, the bankruptcy court granted the First
9 Surcharge Motion. In deciding to surcharge Debtor's homestead,
10 the bankruptcy court observed,

11 [I]t seems to me that all things considered, it is
12 basically Mr. Law's conduct that has been the direct
13 cause of the expenses that have been incurred by the
14 Trustee. . . . I would have to surmise that substantial
additional expenses are going to be incurred by the
estate in defending Mr. Law's appeals.⁷

15 Debtor appealed the bankruptcy court's order granting the
16 First Surcharge Motion to this Panel. On December 29, 2006, the
17 Panel reversed the bankruptcy court's order. The Panel
18 acknowledged that Debtor had exhibited "misconduct, obstinance,
19 blatant ignorance of court orders and directives, animosity toward
20 the court and the trustee, and efforts to thwart administration of
21 the case. . . ." In re Law, BAP nos. CC-05-1303/1334, Memorandum
22 at 17. Even so, the Panel reasoned that:

24 ⁶ The quotation marks around "Lin of China" are also found
25 in Debtor's declaration. Dkt. no. 100.

26 ⁷ This is a quotation taken from the Panel's decision in In
27 re Law, BAP nos. CC-05-1303/1334, at 7-8, and is attributed
28 therein to the bankruptcy court's concluding remarks at the March
22, 2006 hearing. A transcript of that hearing is not included in
the current record on appeal. We cite to the various unpublished
memoranda involving Debtor under the doctrine of law of the case.

1 Regardless of the debtor's tactics, it is apparent that
2 the debtor was not abusing his exemptions and that the
3 trustee was not seeking to remedy such abuse. Rather,
4 the intent of the trustee was to punish the debtor for
 his tactics. The sort of extraordinary circumstances
 that would be a prerequisite to surcharge have not been
 demonstrated.

5 Similarly, it is apparent that the court was merely
6 shifting litigation expenses to the debtor in a fashion
7 designed to punish the debtor for his litigation
 activity.

8 Id. Significantly, while reversing the surcharge order, the Panel
9 expressed "no opinion whether specific instances of mischief by
10 the debtor in the past might support [a future] surcharge against
11 his exemption. . . . Any such relief to the trustee should be
12 supported by specific findings of fact and appropriate conclusions
13 of law regarding the debtor's conduct[.]" Id.

14 Trustee appealed the Panel's decision to the Ninth Circuit,
15 which affirmed the Panel's decision. In re Law, 308 F. App'x 161.

16 In the meantime, on February 5, 2007, Debtor filed a motion
17 for an order directing Trustee to pay him his claimed homestead
18 exemption from the proceeds of the sale of the Property, and to
19 sanction Trustee for his alleged bad faith in refusing to comply
20 with the Panel's decision reversing the order approving the First
21 Surcharge Motion. The bankruptcy court denied Debtor's motion at
22 a hearing on February 28, 2007, on the grounds that it lacked
23 jurisdiction to rule on distribution of the exemption proceeds
24 while the order granting the First Surcharge Motion was on appeal
25 to the court of appeals. Debtor, in turn, appealed this denial to
26 the Panel, and the Panel reversed the bankruptcy court's decision
27 on October 5, 2007.

1 The Panel held that, though an appeal to the court of appeals
2 was pending, the bankruptcy court retained the authority to
3 enforce a final judgment that had not been stayed or superseded.
4 When Trustee did not timely oppose Debtor's homestead exemption
5 claim, the exemption became final, and the bankruptcy court
6 therefore had jurisdiction to authorize payment of the exemption,
7 regardless of appeals on other matters. In re Law, BAP no. 07-
8 1127, Memorandum at 10-11.

9 Nevertheless, in its decision the Panel again made it clear
10 that, while it was ruling solely on the right of Debtor to an
11 unopposed homestead exemption, such exemption might still be:

12 subject to surcharge, based upon an appropriately
13 supported motion filed by the trustee. Although a
14 surcharge cannot be used to punish a debtor, Onubah v.
15 Zamora (In re Onubah), 2007 WL 2701336 at *6 (9th Cir.
16 BAP August 29, 2007), it may be used to prevent fraud,
17 caused by the debtor's misconduct, upon the court and
18 estate creditors, Latman v. Burdette, 366 F.3d 774, 785
(9th Cir. 2004). . . . The trustee may renew his motion
to surcharge the debtor's claimed homeowner's exemption,
as long as appropriate factual and legal bases exist to
justify such a surcharge under the standards set out in
Latman and Onubah.

19 Id. at 11-12.

20 The Second Surcharge Motion

21 On April 24, 2008, Trustee filed another Motion to Surcharge
22 Debtor's Homestead Exemption (the "Second Surcharge Motion"). The
23 Second Surcharge Motion alleged, among other issues, that (1) the
24 second deed of trust on the Property was fictitious and
25 fraudulent, intended by Debtor to falsely encumber the Property so
26 as to discourage its sale as part of a scheme by Debtor to defraud
27 his creditors; (2) Debtor had perjured himself twice, once by
28 listing the second deed of trust in his schedules, and again in

1 knowingly attaching a fraudulent promissory note to his motion to
2 reconsider the order approving sale of the Property; and (3)
3 Debtor created a "Lili Lin of China" who either did not exist or,
4 if she did exist, had no interest in the Property, in furtherance
5 of his efforts to frustrate Trustee's administration of the
6 Property and to otherwise exhaust the assets of the estate.

7 Debtor responded to the Second Surcharge Motion on May 7,
8 2008, generally denying its allegations and, alternatively,
9 arguing that the BAP's decision on the First Surcharge Motion was
10 res judicata, barring consideration of the Second Surcharge Motion
11 by the bankruptcy court.

12 On May 28, 2008, Trustee served a Notice of Deposition and
13 Request for Production of Documents on Debtor regarding the Second
14 Surcharge Motion. There followed an extensive discovery dispute
15 between the parties, with Debtor generally refusing to cooperate
16 with Trustee. Trustee and Debtor submitted a summary of the
17 dispute to the bankruptcy court in a stipulation dated July 3-8,
18 2008. Trustee argued that he had the right to depose Debtor and
19 to demand that he produce documents in a contested matter pursuant
20 to Rules 7028-7037. Debtor countered that Trustee could have
21 conducted the deposition years before and was only now deposing
22 him for purposes of harassment. Additionally, Debtor argued that
23 the requested production of documents would cost in excess of
24 \$3,000, and Debtor demanded that Trustee pay this in advance.

25 On July 8, 2008, Trustee submitted a Motion to Compel
26 Debtor's Attendance at Deposition and Production of Documents and
27 requested sanctions against Debtor of \$3,520, payable to Trustee.
28 On July 20, 2008, Debtor advised Trustee that he would agree to be

1 deposited on July 28, 2008. However, Trustee informed Debtor that
2 his consent had come too late, insofar as Trustee had filed the
3 Motion to Compel. However, Trustee agreed to allow the deposition
4 to go forward if Debtor compensated Trustee for the costs of
5 bringing the Motion to Compel. In an apparent rejection of
6 Trustee's offer, Debtor filed an opposition to the Motion to
7 Compel on August 5, 2008, arguing that Trustee was harassing
8 Debtor and acting in bad faith.

9 The bankruptcy court scheduled a hearing on the Motion to
10 Compel on August 20, 2008, but indicated in a tentative ruling
11 that appearances were not required. The tentative ruling provided
12 that the court was inclined to grant Trustee's motion and to
13 impose sanctions upon Debtor. There were no appearances at the
14 hearing and, on August 28, 2008, the bankruptcy court entered its
15 order directing Debtor to appear at a deposition and provide
16 access to Trustee to the required documents. The order imposed
17 monetary sanctions of \$3,520 on Debtor.

18 On November 5, 2008, the bankruptcy court conducted a hearing
19 on the Second Surcharge Motion. Trustee was represented by
20 counsel and Debtor appeared pro se. At the conclusion of this
21 hearing, the bankruptcy court announced its oral ruling in favor
22 of Trustee. Hr'g Tr. 17:18-37:5 (November 5, 2008). The court
23 later memorialized its decision in a Memorandum Decision entered
24 on February 20, 2009. In granting the Second Surcharge Motion,
25 the bankruptcy court found that Debtor had attempted to perpetrate
26 a fiction and fraud on the court:

27 This utter absence of credible, persuasive evidence,
28 taken in the context of (1) Debtor's demonstrated
 willingness to deceive this court by filing a false

1 document – that is, the “birth date” promissory note;[⁸
2 (2) the myriad suspicious circumstances surrounding the
3 disputed second deed of trust and Lili Lin of China’s
4 pleadings; (3) the inconsistencies in Debtor’s
5 statements regarding the loan proceeds; and (4) the Lili
6 Lin of Artesia “foreclosure” episode,[⁹] leads me to
7 conclude that no person named Lili Lin ever made a loan
8 to Debtor in exchange for the disputed deed of trust on
9 Debtor’s residence. The preponderance of the evidence
10 clearly shows that the loan was a fiction, meant to
11 preserve Debtor’s equity in his residence beyond what he
12 was entitled to exempt as a homeowner, and a fraud on
13 his creditors and the court.

14 ⁸ The bankruptcy court found that Debtor had prepared two
15 almost identical promissory notes in June 1999, in an attempt to
16 document the alleged loan of \$168,000 secured by the second deed
17 of trust on the Property. One note included a birth date of Lili
18 Lin of November 22, 1947, while the other had no birth date. The
19 court found that Debtor could not explain why he prepared and
20 notarized two inconsistent documents.

21 The second deed of trust was recorded on June 28, 1999.
22 Attached to the filed copy was the promissory note without the
23 birth date. Los Angeles County Recorder’s Office No. 9901179298.
24 On February 19, 2006, Debtor and “Lili Lin of China” filed an
25 opposition to the sale of the Property. Attached to Debtor’s
26 opposition as Exhibit F was a copy of the promissory note that
27 Debtor asserted had been filed with the Los Angeles County
28 Recorder’s Office. However, this promissory note contained the
birth date, which was that of the person Debtor represented to the
bankruptcy court as Lili Lin of China.

In this regard, the bankruptcy court concluded that Debtor
had submitted false evidence to the court.

⁹ At the hearing, the bankruptcy court heard testimony from
a woman named Lili Lin of Artesia. She stated she was an
acquaintance of Debtor but had never loaned money to Debtor. Lin
of Artesia testified that Debtor gave her a copy of the second
deed of trust and promissory note, asking that she accept a check
from him for \$168,000 in “payment” of the loan, and then to return
the money to him. Lin of Artesia refused. In February 2000, Los
Angeles County Records Research received a letter purportedly from
Lin of Artesia, although she says she never sent it. The letter
sought to initiate foreclosure proceedings against the Property.
At the same time, Lin of Artesia received documents from Debtor,
including an assignment of the promissory note to Connie Chang,
the debtor’s ex-wife.

The bankruptcy court also heard testimony from Debtor. The
court made a determination that Lin of Artesia was more credible.
Based upon the evidence, the bankruptcy court concluded that
Debtor concocted the second deed of trust in order to protect his
equity from a judgment creditor, and then attempted to recover the
protected equity by a sham transfer to his ex-wife.

1 The bankruptcy court determined that, had Debtor not invented
2 the second deed of trust and persisted in his misrepresentations
3 to the court, ample funds would have been available in the
4 bankruptcy case to pay Debtor's creditors and Trustee's costs, pay
5 Debtor his full homestead exemption, and to return surplus funds
6 to Debtor. However, as a result of the disputes over the
7 fictitious second deed of trust, the court found that Trustee and
8 the estate had incurred \$456,112.50 in legal fees, an amount
9 considerably in excess of Debtor's \$75,000 homestead exemption,
10 all of which were the direct result of Debtor's active
11 misrepresentations to Trustee and to the court. Based upon its
12 findings, the bankruptcy court concluded that:

13 were Debtor to receive his homestead exemption, the
14 financial consequences of Debtor's misconduct would fall
15 most heavily upon Debtor's creditors, including Trustee
16 and his attorneys. A surcharge must be levied to avoid
17 this outcome. Because the actual costs to the estate far
18 exceed \$75,000 (the exemption to which Debtor would
19 otherwise be entitled), I find that Debtor's homestead
20 must be surcharged in its entirety.

21 On February 20, 2009, the bankruptcy court entered its order
22 granting the Second Surcharge Motion and surcharging Debtor's
23 homestead in its entirety of \$75,000. Debtor filed a timely
24 appeal of the bankruptcy court's surcharge order and discovery
25 sanction order on March 2, 2009.
26

27 **JURISDICTION**

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

1 **ISSUES**

2 1. Did the bankruptcy court abuse its discretion in imposing
3 a surcharge on Debtor's homestead exemption?

4 2. Did the bankruptcy court abuse its discretion in
5 compelling Debtor to attend a deposition and imposing discovery
6 sanctions on him?

7
8 **STANDARDS OF REVIEW**

9 A bankruptcy court's decision to invoke the equitable remedy
10 of surcharge of a debtor's homestead exemption is reviewed for
11 abuse of discretion. Onubah v. Zamora (In re Onubah), 375 B.R.
12 549, 553 (9th Cir. BAP 2007). The findings of fact upon which a
13 surcharge is based are reviewed for clear error, while the
14 bankruptcy court's conclusions of law are reviewed de novo.
15 Kelley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP
16 2003).

17 The imposition of discovery sanctions is reviewed for abuse
18 of discretion. Freeman v. San Diego Ass'n of Realtors, 322 F.3d
19 1133, 1156 (9th Cir. 2003).

20 A trial court abuses its discretion if it bases its decision
21 on an erroneous view of the law or clearly erroneous factual
22 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405
23 (1990). To reverse for abuse of discretion we must have a
24 definite and firm conviction that the bankruptcy court committed a
25 clear error of judgment in the conclusion it reached. Stasz v.
26 Gonzalez (In re Stasz), 387 B.R. 271, 274 (9th Cir. BAP 2008).

1 **DISCUSSION**

2 I.

3 The bankruptcy court did not abuse its discretion
4 in surcharging Debtor's homestead exemption.

5 The Bankruptcy Code does not expressly authorize surcharges
6 against a debtor's exemptions. However, the Ninth Circuit has
7 held that a bankruptcy court may equitably surcharge a debtor's
8 statutory exemptions when reasonably necessary to protect the
9 integrity of the bankruptcy process and to ensure that a debtor
10 receives as exempt property an amount no more than what is
11 permitted by the Bankruptcy Code. Latman v. Burdette, 366 F.3d
12 774, 786 (9th Cir. 2004).

13 In Latman, the bankruptcy court authorized a surcharge as a
14 form of offset. The debtors had acted fraudulently in their
15 bankruptcy case by intentionally failing to disclose certain
16 assets, and the sale of those assets, in their schedules. When
17 the trustee became aware of the assets and their sale, he sought
18 an accounting from the debtors of the sale proceeds. When they
19 refused to provide the accounting and turn over the sale proceeds,
20 the trustee moved to surcharge the debtors' exemptions. Latman,
21 366 F.3d at 779. In affirming the decision to impose a surcharge,
22 the Ninth Circuit held that the bankruptcy court did not act to
23 "punish" the debtors by denying them the value of their exemption.
24 Rather, under the facts, the surcharge remedy fashioned by the
25 bankruptcy court was intended to prevent what would otherwise have
26 been a fraud on the bankruptcy court and the Latmans' creditors.
27 Id. at 787.

1 This Panel has also endorsed use of an exemption surcharge.
2 In In re Onubah, the Panel applied the holding in Latman in an
3 appeal from a surcharge of a homeowner's exemption. 375 B.R. at
4 553-58. In Onubah, the debtor claimed a \$75,000 homestead
5 exemption. The trustee arranged for a sale of the residence,
6 which would generate \$96,000 for the bankruptcy estate. While the
7 debtor did not oppose the sale, he later attempted to block the
8 sale by refusing to vacate the residence. The trustee was then
9 forced to prosecute a motion for turnover. On the day the
10 turnover motion was to be heard by the bankruptcy court, the
11 debtor caused the case to be converted from chapter 7 to chapter
12 11. When the debtor was unable to explain to the bankruptcy court
13 any legitimate purpose for the conversion, the trustee was able to
14 obtain an order reconverting the case to chapter 7 and granting
15 the turnover motion. But when the U.S. Marshal attempted to
16 enforce the turnover order, the debtor informed him that an
17 involuntary bankruptcy had been filed against him in another
18 bankruptcy court, staying the sale. The trustee was thus forced
19 to seek reassignment of the involuntary case to the bankruptcy
20 judge presiding over the chapter 7 voluntary case so the sale
21 could proceed. Ultimately, the bankruptcy court determined that
22 the debtor had colluded with the involuntary petitioners in an
23 effort to prevent the sale and to obstruct the trustee's
24 administration of the estate.

25 In Onubah, the debtor's obstructionist and fraudulent conduct
26 caused the trustee to expend over \$50,000 of estate funds. The
27 trustee filed a motion to surcharge the debtor's homestead
28

1 exemption to recover the expense. The bankruptcy court granted
2 the motion.

3 On appeal, the Panel affirmed, agreeing that the debtor's
4 inequitable conduct was not undertaken in good faith. In re
5 Onubah, 375 B.R. at 554. The Panel explained that while Latman
6 involved a case where the debtors had concealed assets, the
7 surcharge remedy may be applied in other exceptional
8 circumstances, too. For example, surcharge can be utilized where
9 a debtor "abused the processes of the bankruptcy court" or where
10 the debtor's "efforts at obstruction were not litigation tactics
11 undertaken in good faith." Id. at 554. Citing a prior decision,
12 the Panel observed that a debtor's conduct resulting in "prejudice
13 to the estate or to the creditors causing actual economic loss may
14 be the basis for the disallowance of an exemption, or conditioning
15 its allowance on the debtor purging the effect of his prejudicial
16 conduct." Id. at 555-56 (citing Arnold v. Gill (In re Arnold),
17 252 B.R. 778, 788-89 (9th Cir. BAP 2000)). Noting that while a
18 "surcharge may not be used to shift costs to a debtor who has
19 unsuccessfully, but in good faith, opposed a trustee's effort to
20 liquidate [assets] or who has otherwise challenged the trustee's
21 administration of the estate [. . . ,]" it is proper to impose a
22 surcharge where required "to compensate the estate for the actual
23 damage inflicted by [a debtor's] misconduct." Id. at 556.

24 Taken together, Latman and Onubah stand for the proposition
25 that a surcharge of a debtor's exemptions is appropriate only in
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27
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1 "exceptional circumstances." Latman, 366 F.3d at 786.¹⁰ However,
2 those exceptional circumstances justifying a surcharge exist when
3 a debtor engages in inequitable or fraudulent conduct that, when
4 left unchallenged, denies creditors access to property in excess
5 of that which is properly exempted under the Bankruptcy Code.
6 Latman, 366 F.3d at 786; In re Onubah, 376 B.R. at 554.

7 In this case, based upon an ample record, the bankruptcy
8 court found Debtor had engaged in inequitable conduct, bad faith,
9 and fraud on a truly egregious scale. As in Onubah, Debtor
10 attempted to derail Trustee's sale of his house and the proper
11 distribution of the sale proceeds. The bankruptcy court found
12 that the Lili Lin of China second deed of trust was a fiction
13 invented by Debtor, and that Debtor submitted a false document to
14 the bankruptcy court, a promissory note that materially differed

15 ¹⁰ Our concurring colleague, while acknowledging it applies
16 under these facts, opines that the Ninth Circuit's decision in
17 Latman is no longer "good policy" and describes the court's
18 holding as an "outlier." Admittedly, the Tenth Circuit declined
19 to follow Latman in Scrivner v. Mashburn (In re Scrivner),
20 535 F.3d 1258 (10th Cir. 2008). Notably, it reversed that
21 circuit's BAP in doing so, which expressly endorsed the merits of
22 Latman's approach. See Scrivner v. Mashburn (In re Scrivner),
23 370 B.R. 346, 352-354 (10th Cir. BAP 2007). Latman teaches that
24 exemption surcharges should not be employed to punish debtors who
25 vigorously, but unsuccessfully, litigate their interests in
26 bankruptcy cases, restricting the use of the bankruptcy court's
27 § 105(a) equitable powers in this context to "exceptional
28 circumstances" where debtors have attempted to abuse or manipulate
the bankruptcy system at their creditors' expense. Given these
parameters, we disagree with the Tenth Circuit's conclusion that
§ 105(a) powers are unavailable to compensate for debtor fraud.
Moreover, the advent of Rule 4003(b)(2) does not change this
analysis. That rule provides a procedure, and establishes a time
limit, for challenging the validity of a debtor's exemptions; it
does not address situations where an exemption is claimed and
allowed, but due to a debtor's bad conduct during the case, ought
to be surcharged. Read fairly, the rule does not limit the scope
of a bankruptcy court's powers when confronted with debtor fraud.
In short, we believe Latman is not only binding here, but that it
was correctly decided.

1 from the note filed with the Los Angeles County Recorder's Office,
2 in an attempt to facilitate payment of the fictitious debt. Based
3 on his many dealings with Debtor, the bankruptcy judge did not
4 find credible Debtor's assertions that his submission of this
5 document was accidental. This Panel gives special deference to
6 credibility determinations made by the bankruptcy court. Rule
7 8013; Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

8 As in his other appeals, Debtor's position here is premised
9 on the existence of a second deed of trust, supposedly granted to
10 and owned by Lili Lin. Of course, had the second deed of trust
11 existed, the total secured liens on the Property would have
12 extinguished any equity in the Property, and Trustee would have
13 had no reason to pursue the sale of the house.

14 The bankruptcy court heard testimony from Lili Lin of Artesia
15 and Debtor concerning Debtor's attempts to construct a fraudulent
16 second deed of trust to protect his equity from a judgment
17 creditor, and then his attempt to recover the protected equity by
18 a sham transfer from Lin of Artesia to his ex-wife. Lin of
19 Artesia outlined Debtor's scheme, and the bankruptcy court found
20 her testimony credible and Debtor's testimony not credible.
21 Again, we give deference to these credibility findings.

22 Debtor argues that the "real" Lili Lin was the Lili Lin of
23 China. The Panel, in its decision reversing the First Surcharge
24 Motion, indicated that the Lili Lin of China claim had to be
25 addressed by Trustee and the bankruptcy court. The bankruptcy
26 court did so directly, and dismissed out of hand the notion that
27 such a creditor or claim existed.

28

1 Lili Lin of China has never filed a proof of claim in
2 this case. Any pleading that she has filed in this case
3 has proved to be a forgery, fictitious, nor worthy of
4 consideration. And although I've given Lili Lin of
5 China every opportunity that I'm capable of according to
6 her, . . . no lawyer speaking on behalf of the purported
7 Lili Lin of China has come forth with plausible
8 evidence, credible evidence, useful evidence, persuasive
9 evidence. The claim of Lili Lin of China simply does
10 not exist.

11 Hr'g Tr. 33:4-19 (November 5, 2008). The bankruptcy court
12 succinctly summarized its findings regarding Lili Lin of China in
13 its Memorandum Decision:

14 No person named Lili Lin ever made a loan to Debtor in
15 exchange for the disputed deed of trust on Debtor's
16 residence. The preponderance of the evidence¹¹ clearly
17 shows that the loan was a fiction, meant to preserve
18 Debtor's equity in his residence beyond what he was
19 entitled to exempt as a homeowner, and a fraud on his
20 creditors and the court.

21 Given this record, the bankruptcy court did not clearly err
22 in finding that the second trust deed loan was a fiction intended
23 by Debtor as a fraud on the court. Based upon the evidence and
24 testimony, the court found that Debtor submitted a false document
25 to support the Lin of China secured claim; there were numerous,
26 suspicious circumstances surrounding the second deed of trust;
27 there were inconsistencies in Debtor's statements about the loan
28

22 ¹¹ Although Debtor has not argued that the court erred in
23 this regard, we note that the bankruptcy court correctly
24 identified and applied the burden of proof concerning Trustee's
25 surcharge motion. As in all exemption disputes, Trustee had the
26 burden of proving that Debtor was not entitled to a portion of a
27 claimed exemption. Rule 4003(c) ("the objecting party has the
28 burden of proving that the exemptions are not properly claimed.").
This burden may be satisfied by a preponderance of the evidence.
See Gillman v. Ford (In re Ford), 492 F.3d 1148, 1155 (10th Cir.
2007)("If the trustee fails to carry the burden of proving by a
preponderance of the evidence that the exemption should be
disallowed, the exemption will stand.")(quoting In re Ciotta,
222 B.R. 626, 629 (Bankr. C.D. Cal. 1998).

1 proceeds; and Debtor attempted to create a sham transaction
2 through Lin of Artesia.

3 Based upon these factual findings, the bankruptcy court did
4 not abuse its discretion in deciding to impose an equitable
5 surcharge on Debtor's homestead exemption. Had it not done so,
6 Debtor's scheme may have succeeded in frustrating Trustee's
7 efforts to generate funds from the sale of the Property for the
8 benefit of Debtor's creditors. To protect the integrity of the
9 bankruptcy system, and to prevent Debtor from reaping a benefit
10 from his actions to the prejudice of his creditors, the bankruptcy
11 court was justified in deciding that Debtor not receive his
12 homestead exemption under these facts.

13 Even so, Debtor argues that, based upon the Panel's decisions
14 in his prior appeals, res judicata precluded relitigation of
15 whether Debtor's homestead exemption could be surcharged in the
16 Second Surcharge Motion. While preclusion prevents relitigating
17 the issues of fact or law necessary to support a judgment,
18 preclusive effect should be denied to judgments and orders that
19 are, by their terms, tentative. RESTATEMENT (SECOND) OF JUDGMENTS § 13;
20 Christopher Klein, Lawrence Ponoroff & Sarah Borrey, Principles of
21 Preclusion and Estoppel in Bankruptcy Cases, 79 AM. BANKR. L.J.
22 839, 854 (2005). Here, the Panel twice stated in its prior
23 decisions the tentative nature of its rulings regarding whether
24 Debtor's homestead exemption could, upon a proper factual showing,
25 be surcharged. In reversing the First Surcharge Motion, the Panel
26 observed that the Trustee "could seek further monetary sanctions,
27 including a surcharge against exemptions." Then, in its decision
28 reversing the bankruptcy court's order denying Debtor's motion for

1 an order directing Trustee to pay Debtor's homestead exemption,
2 the Panel noted that, even though Debtor "is entitled to his
3 claimed homestead exemption, it still might be subject to
4 surcharge, based on an appropriately supported motion filed by the
5 trustee." Law v. Siegel, BAP no. CC-07-1127, Memorandum at 11-12.

6 We conclude that the previous decisions of the Panel
7 reversing the bankruptcy court's order on the First Surcharge
8 Motion and the order denying Debtor's motion to pay the claimed
9 homestead exemption were tentative as to the question whether the
10 exemption might be subject to surcharge such that Trustee was not
11 precluded from seeking a surcharge exemption in the Second
12 Surcharge Motion.

13 II.

14 The bankruptcy court did not abuse its discretion in
15 compelling Debtor to attend a deposition and
16 imposing discovery sanctions.

17 Debtor also appeals the bankruptcy court's order compelling
18 him to attend a deposition in connection with the Second Surcharge
19 Motion, and imposing monetary sanctions against him for failure to
20 cooperate in discovery, on several grounds.¹² Debtor first argues
21 that Trustee had ample opportunity to take his deposition years

22 ¹² In addressing Debtor's second issue on appeal, we
23 acknowledge the objection of Trustee that an order concerning
24 discovery is, usually, interlocutory and not appealable. Church
25 of Scientology v. United States, 113 St. Ct. 447, 452 n.11 (1992).
26 The discovery order at issue here, though, and the monetary
27 sanctions imposed on Debtor, were directly related to the Second
28 Surcharge Motion. The bankruptcy court's order granting the
Second Surcharge Motion was a final judgment disposing of the
dispute between Trustee and Debtor concerning the surcharge of the
homestead exemption. An interlocutory order, such as this
discovery and sanctions order entered as part of the surcharge
motion dispute, merges with the final judgment and may be
challenged in an appeal of that judgment. Baldwin v. Redwood
City, 540 F.2d 1360, 1364 (9th Cir. 1976).

1 earlier, such that he should not have been ordered to submit to
2 deposition later. Second, Debtor insists that Trustee's demand
3 that he appear at a deposition and produce documents was intended
4 to harass Debtor. Finally, Debtor contends that production of the
5 documents requested by Trustee would cost \$3,000, and Debtor
6 should not be required to provide the documents unless Trustee
7 paid this sum in advance. None of these contentions has merit.

8 Under the Rules, the Second Surcharge Motion was a contested
9 matter. Rule 9014(a). Rule 9014(c) provides that, unless the
10 bankruptcy court orders otherwise, the discovery procedures set
11 forth in Rules 7028-7037, which effectively incorporate Civil
12 Rules 28-37, are available to the parties in a contested matter.
13 Depositions of parties may be taken without leave of court under
14 Rule 7030 and Civil Rule 30, and the production of documents may
15 be sought under Rule 7034 and Civil Rule 34. See In re Sundridge
16 Assocs., 202 B.R. 761 (E.D. Cal. 1996)(production of documents in
17 connection with a contested matter can be compelled under Rule
18 7034).

19 Nothing in the record supports the notion that Trustee, in
20 seeking discovery from Debtor, was motivated by any desire to
21 harass him. Indeed, the Panel's decision regarding the First
22 Surcharge Motion made clear that Trustee would be expected to
23 support any subsequent request for a surcharge of Debtor's
24 exemptions with appropriate and adequate facts and evidence. It
25 appears that Trustee was endeavoring to discover facts relevant to
26 the Second Surcharge Motion.

27 Moreover, nothing in Rule 7034 requires Debtor to provide the
28 documents demanded by Trustee at Debtor's expense. Instead, the

1 Rule requires only that the documents be produced by Debtor; it
2 was Trustee's responsibility, if he chose to do so, to reproduce
3 copies of the documents at the expense of the estate.¹³

4 Lastly, Debtor argues that sanctions should not have been
5 imposed upon him by the bankruptcy court because he agreed in good
6 faith to participate in the deposition. Trustee correctly notes
7 that Civil Rule 37(a)(5)(A), incorporated in Rule 7037, states
8 that if the motion to compel is granted (which occurred here) or
9 if the requested discovery is only provided after the motion to
10 compel is filed (which occurred here) "the court must, after
11 giving an opportunity to be heard, require the party or deponent
12 whose conduct necessitated the motion, the party or attorney
13 advising that conduct, or both to pay the movant's reasonable
14 expenses incurred in making the motion, including attorney's
15 fees." (Emphasis added.) The record indicates that Trustee
16 complied with the requirements of this rule in that he attempted
17 in good faith to obtain the discovery without judicial
18 intervention. The bankruptcy court provided Debtor an opportunity
19 to be heard on the sanctions motion but Debtor did not attend the
20 hearing.

21 The sanction imposed by the bankruptcy court of \$3,520 was
22 supported and adequately documented by Trustee's declaration of
23 expenses related to the motion to compel. We conclude that the

24
25 ¹³ "A party may serve on any other party a request within the
26 scope of Rule 26(b): (1) to produce and permit the requesting
27 party to inspect, copy, test or sample . . . items in the
28 responding party's possession, custody or control[.]" Civil
Rule 34(a)(1), incorporated in Rule 7034 (emphasis added); Ares-
Serono, Inc. v. Organon Int'l, 151 F.R.D. 215, 220 (S.D.N.Y.
1993)(party seeking documents under Civil Rule 34 is responsible
for expense of copying).

1 bankruptcy court did not abuse its discretion in compelling Debtor
2 to attend the deposition and produce documents, and imposing
3 compensatory monetary sanctions for Debtor's failure to comply.
4

5 CONCLUSION

6 We AFFIRM the orders of the bankruptcy court.
7

8 MARKELL, Bankruptcy Judge, concurring:

9 I concur. While there is nothing wrong with the panel's
10 application of Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004), I
11 question whether Latman remains good policy. As an initial
12 matter, since Latman was decided, no other federal appellate court
13 has adopted it. See Scrivner v. Mashburn (In re Scrivner),
14 535 F.3d 1258, 1263-65 (10th Cir. 2008); Mazon v. Tardif (In re
15 Mazon), 395 B.R. 742, 748-50 (M.D. Fla. 2008) (following
16 Scrivner). A leading treatise has also noted Latman's outlier
17 status. 2 COLLIER ON BANKRUPTCY ¶ 105.02[5][b] at n.130 (Henry J.
18 Sommer & Alan Resnick, eds., 16th ed. 2009).

19 Further, in 2008, after Latman and Onubah v. Zamora
20 (In re Onubah), 375 B.R. 549 (9th Cir. BAP 2007) were decided, the
21 Federal Rules of Bankruptcy Procedure were amended to address
22 fraudulently asserted exemptions. Rule 4003(b)(2) now allows the
23 bankruptcy trustee to challenge fraudulently asserted exemptions
24 for up to one year after a debtor's case is closed. Fed. R.
25 Bankr. P. 4003(b)(2). As this addition specifically addresses the
26 consequences of fraudulently asserted exemptions, I question
27 whether Latman's reliance on Section 105(a)'s residual equitable
28

1 powers can continue to justify imposing a surcharge in the absence
2 of any specific statutory authority.

3 But Latman still binds. I thus concur in the panel's
4 application of Latman to these facts.

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