

JUN 23 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	CC-08-1273-DMkPa
		)		
7	MYRNA JACOBSON,	)	Bk. No.	SA 06-10093-RK
		)		
8	Debtor.	)		
		)		
9	_____	)		
		)		
10	LARRY CUNNINGHAM,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
		)		
13	GREGORY MORSE; MYRNA JACOBSON,	)		
		)		
14	Appellees.	)		
		)		

Argued and Submitted on May 14, 2009  
at Pasadena, California

Filed - June 23, 2009

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

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding

Before: DUNN, MARKELL and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Larry Cunningham ("Cunningham") appeals the bankruptcy  
2 court's order denying his motion for sanctions under Rule 9011  
3 and § 105(a)<sup>2</sup> and the bankruptcy court's inherent authority  
4 ("sanctions motion") against the debtor, Myrna Jacobson, and her  
5 former attorney, Gregory Morse ("Morse").<sup>3</sup> Having reviewed the  
6 record, we conclude that it supports the bankruptcy court's  
7 decision not to impose sanctions against the debtor and Morse.  
8 We AFFIRM.

9  
10 **FACTS**<sup>4</sup>

11 There has been bad blood between Cunningham and the debtor  
12 for years. It began more than twenty years ago, when Cunningham  
13 bought a home in Seal Beach, California, with the debtor acting  
14 as real estate broker for Cunningham.<sup>5</sup>

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17 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
18 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
19 1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
20 1001-9037.

21 <sup>3</sup> Jeffrey Vanderveen, who represents the debtor in the  
22 present appeal, later substituted in as counsel for the debtor.

23 <sup>4</sup> Neither the debtor nor Cunningham provided certain  
24 documents relevant to our review. We obtained them from the  
25 bankruptcy court's docket. See Atwood v. Chase Manhattan  
26 Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP  
27 2003) (obtaining relevant documents not included in the record on  
28 appeal from the bankruptcy court clerk and taking judicial notice  
of them).

<sup>5</sup> At the time of the purchase, the debtor and her husband,  
Donald Jacobson, were part of a general partnership that  
purchased, developed, and sold real property. Cunningham  
purchased the home from the partnership.

1 Two years after he bought the home, Cunningham filed a  
2 complaint in state court against the debtor,<sup>6</sup> alleging that the  
3 debtor forged and recorded a note and second deed of trust in her  
4 favor against the residence.<sup>7</sup> Among the numerous causes of  
5 action set forth against the debtor in the state court complaint,  
6 Cunningham asserted fraud, breach of fiduciary duty, negligent  
7 and intentional broker malpractice, intentional interference with  
8 prospective economic opportunity, and breach of warranty.<sup>8</sup> Brent  
9 Ayscough ("Ayscough") and Sidney Lanier ("Lanier") of Ayscough &  
10 Marar ("A&M") represented Cunningham in the state court action.

11 The state court action proceeded to trial. The jury  
12 returned a special verdict against the debtor on the cause of  
13 action for breach of fiduciary duty only, awarding Cunningham  
14 \$15,000 in damages. With respect to the remaining causes of  
15 action, the jury found in favor of the debtor. On or about  
16 November 8, 1989, the trial court entered judgment in favor of  
17 Cunningham in the amount of \$15,000 ("November 1989 judgment").  
18 The debtor did not appeal the November 1989 judgment. However,  
19 Cunningham appealed the state court judgment as to the causes of

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20  
21 <sup>6</sup> Cunningham named all members of the partnership as  
defendants in the state court complaint.

22 <sup>7</sup> Cunningham actually alleged that one or more members of  
23 the partnership had forged and recorded the note and second deed  
24 of trust.

25 <sup>8</sup> Cunningham asserted the following causes of action solely  
26 against the debtor individually: negligent and intentional broker  
malpractice. He asserted the following causes of action against  
27 all members of the partnership: fraud, slander of title,  
28 intentional interference with prospective economic opportunity,  
breach of warranty, breach of fiduciary duty, constructive fraud,  
and conspiracy.

1 action decided in the debtor's favor. The appellate court  
2 reversed and remanded to the trial court as to those causes of  
3 action.

4 While the state court action was pending before the trial  
5 court on remand, the debtor and her husband filed a chapter 7  
6 petition on October 6, 1995 (bankruptcy case no. 95-20255).

7 Three months later, the debtor and her husband converted  
8 their bankruptcy case from chapter 7 to chapter 13. Two months  
9 following the conversion of the bankruptcy case, Cunningham filed  
10 a proof of claim, asserting an unsecured claim of \$500,000, based  
11 on the state court action. The debtor and her husband filed an  
12 objection to Cunningham's claim; though hearings were scheduled  
13 on the objection, no order was entered as to its disposition.

14 The bankruptcy court entered an order reconverting the  
15 bankruptcy case to chapter 7 on February 25, 1997.<sup>9</sup> Six months  
16 after the reconversion, Cunningham, still represented by A&M,  
17 filed a complaint against the debtor and her husband for denial  
18 of their discharge under § 727 (adv. proc. no. 97-1934).<sup>10</sup>

19 On September 29, 1999, after a trial in the adversary  
20 proceeding, the bankruptcy court entered judgment against the

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21  
22 <sup>9</sup> On November 25, 1996, the chapter 13 trustee moved to  
23 reconvert the case from chapter 13 to chapter 7. At the February  
24 12, 1997 hearing on the chapter 13 trustee's motion to reconvert,  
25 the bankruptcy court determined that the debtors converted their  
case from chapter 7 to chapter 13 in bad faith and granted the  
chapter 13 trustee's motion.

26 <sup>10</sup> Cunningham earlier filed two complaints against the  
27 debtor and her husband, one to determine nondischargeability of a  
28 debt under § 523 (adv. proc. no. 95-2330) and the other for  
denial of discharge under § 727 (adv. proc. no. 96-1906). Both  
adversary proceedings were dismissed.

1 debtor denying her discharge under § 727(a)(2)(A) and (a)(4)(A)  
2 ("September 1999 discharge denial judgment").<sup>11</sup> The bankruptcy  
3 court entered judgment in favor of her husband. On the same day,  
4 the bankruptcy court entered an order in the main bankruptcy case  
5 denying the debtor's discharge ("discharge denial order"). The  
6 main bankruptcy case docket twice noted the bankruptcy court's  
7 denial of the debtor's discharge; in the docket entry regarding  
8 the discharge denial order (docket no. 149) and in the docket  
9 entry regarding the order closing the case on April 9, 2001  
10 (docket no. 154).

11 Before the chapter 7 case closed, the debtor and her husband  
12 filed a chapter 13 petition on August 6, 1998 (bankruptcy case  
13 no. 98-21038). Their second bankruptcy case was dismissed on  
14 October 15, 1998, and closed on February 19, 1999.

15 Retrial of the state court action took place on June 19,  
16 2000. The jury found in favor of Cunningham as to his causes of  
17 action for fraud, intentional interference with prospective  
18 economic opportunity, breach of warranty, and negligent broker  
19 malpractice. The trial court then, on August 11, 2000, awarded  
20 judgment in favor of Cunningham against the debtor in the amount  
21 of \$98,700, plus \$143,052 in interest. The trial court further  
22  
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24 <sup>11</sup> The bankruptcy court found that the debtor concealed  
25 assets, knowingly and with fraudulent intent, by transferring her  
26 monthly income to her daughter's bank account to prevent  
27 attachments by Cunningham to enforce the November 1989 judgment.  
28 It also found that the debtor made false oaths or accounts,  
knowingly and with fraudulent intent, on her schedules and  
statement of financial affairs by failing to disclose various  
assets and transfers of assets.

1 awarded Cunningham attorney's fees in the amount of \$596,615.75  
2 under a subsequent order (collectively, "August 2000 judgment").

3 On October 14, 2005, a writ of execution was issued to  
4 enforce the August 2000 judgment; when it was issued, the unpaid  
5 August 2000 judgment totaled \$1,302,918.03, including interest  
6 and fees. Sometime in January 2006, Cunningham initiated  
7 judgment levy proceedings to sell the debtor's residence to  
8 satisfy the August 2000 judgment.

9 On January 25, 2006, the debtor met with Morse and retained  
10 him as her bankruptcy attorney. Morse had not represented the  
11 debtor in either of her two prior bankruptcy cases. At the time  
12 she met with Morse, the debtor was 77 years old.<sup>12</sup>

13 In preparing the petition, Morse interviewed the debtor,  
14 questioning her about prior lawsuits and other legal proceedings.  
15 The debtor did not disclose the existence of the September 1999  
16 discharge denial judgment or the discharge denial order to Morse  
17 during the interview.

18 Morse also "pulled up a check on Pacer" ("PACER query"),  
19 which listed the debtor's prior bankruptcy cases and related  
20 adversary proceedings. The PACER query did not provide any  
21 information as to the history or disposition of the prior  
22 bankruptcy cases and related adversary proceedings; it did not  
23 mention the September 1999 discharge denial judgment or the  
24 discharge denial order. Morse attached a copy of the PACER query

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26  
27 <sup>12</sup> At the time Cunningham filed the sanctions motion in  
28 October 2007, the debtor was 78 years old. Declaration of Myrna  
Jacobson in Opposition to Cunningham's Motion for Sanctions, 8:7.

1 to the petition filed in the debtor's current bankruptcy case.<sup>13</sup>  
2 The debtor's prior bankruptcy cases also were listed on the  
3 petition and on the Statement of Related Cases.<sup>14</sup>

4 Cunningham was listed on the original Schedule F as a  
5 general unsecured creditor with a claim of \$1,324,256;<sup>15</sup> the  
6 claim was not characterized as contingent, unliquidated or  
7 disputed. Cunningham also was listed on the List of Creditors  
8 Holding 20 Largest Unsecured Claims as having a judgment lien of  
9 \$1,324,256, secured against the debtor's residence. The amended  
10 List of Creditors and Schedule F (docket no. 108), filed later,  
11 indicated that several general unsecured debts, including  
12 Cunningham's judgment lien of \$1,324,256, were "ordered non-  
13 dischargeable."

14 On February 2, 2006, the debtor filed her chapter 7  
15 petition. On the same day, she filed a motion to avoid  
16 Cunningham's judgment lien under § 522(f) to preserve her  
17 homestead exemption ("lien avoidance motion"). Cunningham filed  
18 an opposition to the debtor's lien avoidance motion, attaching a  
19 copy of the September 1999 discharge denial judgment and  
20

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21 <sup>13</sup> Morse apparently accessed the U.S. Party/Case Index, a  
22 system that serves as a case locator index for PACER. The U.S.  
23 Party/Case Index website is at <http://pacer.uspci.uscourts.gov>.

24 <sup>14</sup> The Statement of Related Cases is a form, known as Local  
25 Form 1015-2.1, that is required under Rule 1015-2(b) of the Local  
26 Bankruptcy Rules for the United States Bankruptcy Court, Central  
27 District of California.

28 <sup>15</sup> Cunningham also was listed as having an additional  
general unsecured claim. The second claim was in the amount of  
\$8,362, based on a judgment entered in October 1992. According  
to Lanier, the claim arose from a judgment for costs on appeal.

1 discharge denial order in support. No hearing was scheduled on  
2 the debtor's lien avoidance motion.

3         Shortly after filing the bankruptcy petition, Morse  
4 contacted the debtor's former attorneys who had represented her  
5 in the prior bankruptcy cases. According to Morse, they provided  
6 him with little information.

7         On February 21, 2006, Cunningham filed a motion for relief  
8 from stay ("stay motion"), contending that his interest in the  
9 debtor's residence was not adequately protected and that the  
10 debtor filed the bankruptcy case to delay or hinder him from  
11 executing on the August 2000 judgment. In support of the stay  
12 motion, he again attached a copy of the September 1999 discharge  
13 denial judgment and the discharge denial order. The debtor did  
14 not oppose Cunningham's stay motion. The bankruptcy court  
15 entered an order granting Cunningham relief from stay on May 4,  
16 2006.

17         The debtor and Cunningham meanwhile began negotiating to  
18 settle Cunningham's claim.

19         On March 29, 2006, the debtor filed a motion to dismiss the  
20 bankruptcy case on the ground that a discharge would not benefit  
21 her, as most of the debts scheduled in her current bankruptcy  
22 case also were scheduled in her prior chapter 7 case, in which  
23 the debtor was denied her discharge under the September 1999  
24 discharge denial judgment and discharge denial order. Because no  
25 hearing was set on the debtor's motion to dismiss, no action was  
26 taken on it.

27         Two months later, Cunningham filed a complaint against the  
28 debtor to determine that the August 2000 judgment was



1 nondischargeable under § 523(a) (adv. proc. no. 06-1356). The  
2 debtor filed an answer, denying all but one of the allegations  
3 based on lack of knowledge or information.

4 In the meantime, Cunningham and the debtor continued to  
5 negotiate. By January 23, 2007, they had reached a tentative  
6 settlement.<sup>16</sup>

7 Under the proposed settlement agreement, the debtor agreed  
8 to pay Cunningham \$500,000 in full satisfaction of the August  
9 2000 judgment. The debtor proposed to pay Cunningham in two  
10 installments through a refinance of her residence and another  
11 property owned by her husband. She proposed to pay Cunningham  
12 \$300,000 from the refinance of her residence within twenty-five  
13 days following execution of the settlement agreement ("first  
14 installment payment") and \$200,000 from the refinance of her  
15 husband's property ("second installment payment").

16 As security for the second installment payment, the debtor  
17 and her husband agreed to give Cunningham a promissory note and  
18 trust deed against the debtor's husband's property in the amount  
19 of \$200,000. The debtor and her husband were required to execute  
20 the promissory note and trust deed concurrently with signing the  
21 settlement agreement. The debtor also agreed to release any  
22 interest she had in her husband's property. She further agreed  
23 to repair her residence and sell it, applying the remaining sale  
24 proceeds, if any, to Cunningham's claim.

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25  
26 <sup>16</sup> At a status conference on January 23, 2007, Cunningham  
27 and the debtor reported to the bankruptcy court that they had  
28 negotiated a settlement but needed additional time to finalize  
the settlement agreement.

1           The debtor agreed to pay the remainder of any sums due  
2 Cunningham on his claim no later than 120 days after the close of  
3 escrow on her residence and upon termination of her bankruptcy  
4 case. At the close of escrow, the debtor was to receive a  
5 discharge in the main bankruptcy case.

6           The debtor also stipulated to a determination that the  
7 August 2000 judgment was nondischargeable as set forth in  
8 Cunningham's complaint. The stipulation would remain in effect,  
9 whether or not the terms of the settlement agreement were  
10 performed.

11           For his part, Cunningham agreed to "execute any documents  
12 reasonably required by the lenders, title companies or escrows in  
13 order to remove encumbrances and liens from title as conditions  
14 to financing, including but not limited to documents resulting in  
15 termination of the court ordered sale of [the debtor's  
16 residence], abstracts of judgment, or any other instruments  
17 resulting in conditions which may limit [the debtor's] ability to  
18 obtain financing." Cunningham was to deliver the documents to  
19 Godfrey Escrow, which would not release them until the debtor  
20 made the first installment payment.

21           After receiving the first installment payment and subsequent  
22 additional payments, Cunningham would deliver a partial release  
23 and satisfaction of his claim in the amount of those payments.  
24 If the debtor failed to make any of the payments due under the  
25 settlement agreement, Cunningham would be entitled to the full  
26 amount of the August 2000 judgment, less any payments the debtor  
27 had made.

1           Cunningham and the debtor signed off on the settlement  
2 agreement. Although the settlement agreement was subject to the  
3 bankruptcy court's approval, neither the debtor nor Cunningham  
4 asked the court to approve it.

5           The settlement fell apart, however, when the debtor failed  
6 to make the first installment payment. The debtor subsequently  
7 filed three separate motions in the adversary proceeding in an  
8 attempt to modify and enforce the settlement agreement.

9           The debtor filed her first motion on April 23, 2007,  
10 requesting that the bankruptcy court review the settlement  
11 agreement for fairness ("motion for fairness"). The debtor  
12 contended that the terms of the settlement agreement, as drafted,  
13 unfairly limited the time in which she could sell her residence  
14 to fund the first installment payment. Such a restrictive time  
15 limit, she argued, would cause her to default; as a result,  
16 Cunningham would "take all her assets," and the debtor still  
17 would remain liable for the entire amount of the August 2000  
18 judgment.

19           The debtor further asserted that the terms of the settlement  
20 agreement unfairly required the debtor's husband, who was not a  
21 party to the adversary proceeding, to provide his separate  
22 property as security for the payments due. Moreover, the debtor  
23 claimed, Cunningham failed to comply with the terms of the  
24 settlement agreement by refusing to release his liens against the  
25 debtor's residence, which was necessary in order for the debtor  
26 to refinance it, and by instructing the chapter 7 trustee not to  
27 dismiss or discharge the bankruptcy case.

28

1 Cunningham opposed the debtor's motion for fairness. He  
2 argued that "the deal was off" because the debtor, not  
3 Cunningham, failed to comply with the conditions of the  
4 settlement agreement.<sup>17</sup> He contended that the debtor failed to  
5 make the first installment payment and to provide a promissory  
6 note and trust deed against her husband's property as security,  
7 as required under the settlement agreement.

8 At the hearing on May 23, 2007, the bankruptcy court denied  
9 the debtor's motion for fairness. The bankruptcy court reasoned  
10 that it was not its role to rewrite or interpret the settlement  
11 agreement, but it was "a matter between the parties as to what  
12 they agreed to." Tr. of July 12, 2007 Hr'g, 2:21-24, 3:2-3. The  
13 bankruptcy court could only approve or disapprove the settlement  
14 agreement. Tr. of July 12, 2007 Hr'g, 3:5-6.

15 Following the bankruptcy court's cue, on May 29, 2007, the  
16 debtor filed a motion to enforce the settlement agreement  
17 ("motion to enforce settlement"). A month later, she filed a  
18 motion to approve the settlement agreement ("motion to approve  
19 settlement"). In both the motion to enforce settlement and the  
20 motion to approve settlement (collectively, "settlement  
21 motions"),<sup>18</sup> the debtor advanced essentially the same arguments

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22  
23 <sup>17</sup> Cunningham rescinded the settlement agreement in a letter  
24 dated April 27, 2007. Cunningham, through Lanier, informed the  
25 debtor that, because she failed to comply with the terms of the  
26 settlement agreement, "the [settlement] agreement [was]  
27 repudiated."

28 <sup>18</sup> According to the debtor, she managed to obtain approval  
for a \$300,000 loan, but because Cunningham failed to release his  
liens against her residence, the debtor was unable to complete  
the loan transaction and make the first installment payment. The  
(continued...)

1 she had made in the motion for fairness.

2 Cunningham opposed the debtor's motion to enforce  
3 settlement.<sup>19</sup> He argued that it simply was a motion for  
4 reconsideration of the bankruptcy court's denial of her earlier  
5 motion for fairness. He further alleged that the debtor was  
6 acting in bad faith by failing to keep him informed of the  
7 progress of the escrow and by refusing to disclose details of the  
8 sale of her residence.

9 He further alleged that, even though Cunningham had selected  
10 a specific escrow company, Godfrey Escrow, to process the payment  
11 of his claim through the refinance, the debtor used another  
12 escrow company.<sup>20</sup> Because the debtor did not comply with the  
13 terms of the settlement agreement, Cunningham "called off" the  
14 settlement.

15 At a hearing on July 12, 2007, the bankruptcy court denied  
16 the settlement motions. The bankruptcy court found that the  
17 settlement agreement was not binding against Cunningham because  
18 it had not been approved by the bankruptcy court. Tr. of July  
19 12, 2007 Hr'g, 3:25, 4:1-3, 13:23-25, 15:22-25. Because the  
20 settlement agreement was not binding, the bankruptcy court

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21 <sup>18</sup> (...continued)  
22 debtor managed to find a buyer for her residence and proposed to  
23 pay Cunningham his claim in full with the sale proceeds, but he  
24 again failed to release his liens against her residence,  
preventing escrow from closing.

25 <sup>19</sup> Reviewing the adversary proceeding docket and the record  
26 before us, it appears that Cunningham did not file an opposition  
27 to the Motion to Approve Settlement. The bankruptcy court's  
subsequent order addressed both the settlement motions, however.

28 <sup>20</sup> The debtor claimed that the buyer had selected the escrow  
and the title insurance company.

1 continued, Cunningham could and did rescind the settlement  
2 agreement. Tr. of July 12, 2007 Hr'g, 8:22-24, 15:22-25. The  
3 bankruptcy court declined to approve or enforce it. On July 24,  
4 2007, the bankruptcy court entered an order denying the  
5 settlement motions.

6 After the bankruptcy court entered its order denying the  
7 settlement motions, Cunningham proceeded to execute on the August  
8 2000 judgment, selling the debtor's residence at a sheriff's sale  
9 on August 2, 2007.<sup>21</sup>

10 On August 31, 2007, Cunningham filed a motion for summary  
11 judgment as to the nondischargeability of the August 2000  
12 judgment under § 523(a) ("summary judgment motion"). Before  
13 filing the summary judgment motion on Cunningham's behalf,  
14 however, in a letter dated July 20, 2007, Lanier informed Morse  
15 of his intent to file the summary judgment motion. He warned  
16 Morse against opposing the summary judgment motion, as such an  
17 "unwarranted opposition" would be disfavored by the court under  
18 Rule 9011. Lanier then proposed that the debtor stipulate to a  
19 judgment of nondischargeability to avoid incurring further legal  
20 fees and costs.

21 After receiving no response from the debtor to his  
22 proposal,<sup>22</sup> in a letter dated August 23, 2007, Lanier advised  
23

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24 <sup>21</sup> In his declaration in support of the sanctions motion,  
25 according to Lanier, Cunningham purchased the debtor's residence  
26 for \$765,000.

27 <sup>22</sup> Morse sent to Lanier an e-mail correspondence, dated July  
28 27, 2007, informing Lanier that he was discussing the proposed  
stipulated judgment with the debtor. Morse would contact Lanier  
once the debtor made a decision.

1 Morse that he intended to file a motion for sanctions against  
2 Morse and the debtor under § 105 and Rule 9011, based on their  
3 conduct in the main bankruptcy case and the adversary proceeding,  
4 which included their refusal to withdraw the answer in the  
5 adversary proceeding. Lanier suggested that the debtor and Morse  
6 “mitigate [their] financial exposure” by withdrawing the answer  
7 in the adversary proceeding and stipulating to a judgment of  
8 nondischargeability of the August 2000 judgment.

9 Despite this warning, on October 5, 2007, the debtor filed  
10 an opposition to the summary judgment motion, admitting that  
11 Cunningham had a judgment against her, but disputing the amount  
12 that remained owing on the judgment. After holding a hearing,  
13 the bankruptcy court granted Cunningham’s summary judgment  
14 motion. It later entered judgment against the debtor on March  
15 21, 2008, finding the August 2000 judgment nondischargeable under  
16 § 523(a)(6) and (a)(10) (“March 2008 nondischargeability  
17 judgment”).<sup>23</sup>

18 On October 3, 2007, in the main bankruptcy case, Cunningham  
19 filed the sanctions motion. Cunningham filed the sanctions  
20 motion against the debtor and Morse under Rule 9011 and the  
21 bankruptcy court’s inherent authority and § 105(a) for filing the  
22 bankruptcy petition in bad faith. He requested that sanctions in  
23 the amount of \$153,560.31, representing his attorney’s fees and  
24 costs, be imposed against the debtor and Morse. Cunningham also  
25 requested that Morse disgorge to the chapter 7 trustee any  
26 attorney’s fees paid to him by the debtor.

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27  
28 <sup>23</sup> The adversary proceeding closed on July 28, 2008.

1 Specifically, Cunningham called for imposing sanctions  
2 against the debtor and Morse under Rule 9011 on the ground that  
3 they filed the bankruptcy petition for the improper purpose of  
4 frustrating his attempt to execute judgment against the debtor.<sup>24</sup>  
5 Cunningham further argued that filing the bankruptcy petition was  
6 frivolous, as the debtor had no dischargeable debts as a result  
7 of the September 1999 discharge denial judgment.

8 Cunningham alternatively asserted that sanctions should be  
9 imposed against the debtor and Morse under § 105(a) and the  
10 bankruptcy court's inherent authority because they engaged in bad  
11 faith conduct prior to and during the present bankruptcy case.  
12 Specifically, he contended that, in filing the prior and present  
13 bankruptcy cases, the debtor and her attorneys, including Morse,  
14 sought to hinder Cunningham's attempts to obtain and execute  
15 judgment against her - conduct that demonstrated an abuse of the  
16 bankruptcy system.

17 The debtor opposed the sanctions motion. The debtor claimed  
18 that she did not file the bankruptcy petition to frustrate her  
19 creditors, but to obtain "some breathing room" from them; she had  
20 debts, other than those owed to Cunningham, that she was unable  
21 to pay and had defaulted on payments on the second mortgage  
22 against her residence.

23 The debtor also contended that she did not engage in any bad  
24 faith conduct during the bankruptcy case, but cooperated with the

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25  
26 <sup>24</sup> At the November 28, 2008 hearing, Cunningham, through  
27 Ayscough, also contended that the debtor violated Rule 9011 by  
28 filing her answer to his § 523(a) nondischargeability complaint.  
Tr. of November 28, 2007 Hr'g, 32:21-23, 33:4-8; 33:19-25, 34:3-  
5. It appears that Cunningham did not pursue this argument.



1 chapter 7 trustee and Cunningham and performed all of her duties  
2 as debtor. Although she faced foreclosure of her residence by  
3 Cunningham, the debtor did not attempt to prevent him from  
4 proceeding with the foreclosure.

5 Morse, for his part, contended that he made every effort to  
6 prepare the debtor's petition and schedules properly before  
7 filing them. He asserted that, given the time constraints, he  
8 conducted as reasonable an investigation as he could into the  
9 circumstances giving rise to the bankruptcy petition. When he at  
10 last became aware of the September 1999 discharge denial  
11 judgment, Morse took steps to mitigate any negative effects of  
12 the filing of the bankruptcy petition on Cunningham.

13 The bankruptcy court held a hearing on the sanctions motion  
14 on November 28, 2007 ("initial hearing"). At the close of the  
15 initial hearing, the bankruptcy court asked the debtor and  
16 Cunningham to file supplemental briefs. After reviewing  
17 supplemental briefing from Cunningham and the debtor, as well as  
18 the papers they earlier submitted, the bankruptcy court issued an  
19 order ("evidentiary hearing order") setting an evidentiary  
20 hearing on the sanctions motion ("evidentiary hearing") to hear  
21 testimony from the debtor, Morse, Ayscough and Lanier in order to  
22 address several material factual issues raised in the papers.

23 In the evidentiary hearing order, the bankruptcy court set  
24 forth the following factual issues it wished to address at the  
25 evidentiary hearing:

26 (1) What was the basis for the debtor's statements in  
27 her declarations in opposition to the [sanctions]  
28 petition was filed in bad faith;

1 (2) Did Morse know of the debtor's prior bankruptcy  
2 cases and the court's judgment denying debtor's  
discharge in the prior bankruptcy case, and if not, why  
not;

3 (3) What was the urgent need for the debtor to file  
this bankruptcy case when she did;

4 (4) How long did Morse have to prepare the bankruptcy  
petition for filing before the case was filed;

5 (5) Did Ayscough refuse to discuss a possible  
6 resolution of the debt owed by the debtor to Cunningham  
with Morse and hang up on Morse when Morse contacted  
7 A&M, Cunningham's attorneys, before the petition was  
filed, and did Ayscough use inappropriate language in  
his conversation with Morse;

8 (6) Should the attorney's fees and costs claimed by A&M  
9 be reduced as excessive, or allowed as reasonable.

10 At the May 9, 2008 evidentiary hearing, the debtor testified  
11 that she filed for bankruptcy because she had fallen behind on  
12 payments on the second mortgage against her residence.<sup>25</sup> Tr. of  
13 May 9, 2008 Hr'g, 11:3-10.

14 She filed for bankruptcy also because her stepson, in whose  
15 name she had taken out the first mortgage against the residence,  
16 threatened her with legal action unless she "[got] the loan out  
17 of his name." Tr. of May 9, 2008 Hr'g, 7:12-17, 10:18-22.

18 Morse also appeared as a witness at the evidentiary hearing.  
19 Morse testified that he had represented the debtor for only a  
20 week before he filed the bankruptcy petition. Tr. of May 9, 2008  
21 Hr'g, 19:1-4, 22:4-9. He believed that there was an urgent need  
22 for the debtor to file the bankruptcy petition because her  
23 residence "was in eminent [sic] threat of sale." Tr. of May 9,  
24 2008 Hr'g, 19:5-11, 21:23-25, 22:1-3. Moreover, Morse continued,  
25 the debtor had "valid debts and limited income [with which] to

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26  
27 <sup>25</sup> According to the debtor's Schedule D, Alvin and Barbara  
28 Fink had a second position lien of \$32,500 against the debtor's  
residence.

1 pay them," as "her work was diminishing due to [her] health."  
2 Tr. of May 9, 2008 Hr'g, 21:5-7. He believed that the debtor  
3 needed the automatic stay that resulted from filing the  
4 bankruptcy petition "to understand what was going on with the  
5 sale and give her a chance to reorganize." Tr. of May 9, 2008  
6 Hr'g, 21:12-14.

7 Morse testified that it took a few days for him to obtain  
8 from the debtor the information necessary to complete the  
9 bankruptcy petition. Tr. of May 9, 2008 Hr'g, 22:9-12. He  
10 asserted that, because of his PACER query, he knew of the  
11 debtor's prior bankruptcy cases before he filed the petition.  
12 Tr. of May 9, 2008 Hr'g, 19:12-16. He had "pulled up a check on  
13 PACER and [he] saw the cases listed there from an earlier and  
14 previous decade." Tr. of May 9, 2008 Hr'g, 19:14-16. He also  
15 was aware of the August 2000 judgment as it was the basis for the  
16 sheriff's sale of the debtor's residence and for the writ of  
17 execution. Tr. of May 9, 2008 Hr'g, 19:19-21.

18 Morse testified he was not aware of the September 1999  
19 discharge denial judgment when he filed the debtor's bankruptcy  
20 petition, however, because certain cases, such as the debtor's  
21 prior bankruptcy cases, had limited records available on PACER.  
22 Tr. of May 9, 2008 Hr'g, 20:5-8. He even "took the liberty to  
23 communicate with PACER" to confirm this. Tr. of May 9, 2008  
24 Hr'g, 20:1-4. He further testified that, although he questioned  
25 the debtor about prior lawsuits before filing the bankruptcy  
26 petition, the September 1999 discharge denial judgment did not  
27 "come up." Tr. of May 9, 2008 Hr'g, 22:13-22. Morse did not  
28 discover the September 1999 discharge denial judgment until

1 Cunningham filed the stay motion. Tr. of May 9, 2008 Hr'g, 20:9-  
2 15.

3 Morse testified that he contacted Ayscough before filing the  
4 bankruptcy petition in order to determine the nature of  
5 Cunningham's claim and to determine whether the debtor "could  
6 work out something where she could retain her home and yet  
7 satisfy [the] debt" without needing to file for bankruptcy. Tr.  
8 of May 9, 2008 Hr'g, 23:3-12, 23:21-25, 24:1-7. Ayscough refused  
9 to discuss the matter with Morse, however; "the only thing  
10 [Ayscough] said to [Morse] was an obscenity and then hung up the  
11 phone immediately." Tr. of May 9, 2008 Hr'g, 24:23-24.

12 At the evidentiary hearing, Ayscough questioned the debtor  
13 and Morse and appeared as a witness. Ayscough testified that the  
14 sheriff's sale was "just around the corner from the date of the  
15 filing of the bankruptcy . . . it was a matter of days." Tr. of  
16 May 9, 2008 Hr'g, 37:22-24.

17 After the evidentiary hearing, the bankruptcy court took the  
18 matter under submission. On October 16, 2008, the bankruptcy  
19 court entered its order denying Cunningham's sanctions motion.  
20 It issued the Memorandum Decision re: Creditor Larry Cunningham's  
21 Motion for Sanctions ("Memorandum Decision") on the same day.

22 The bankruptcy court held that the debtor and Morse did not  
23 violate Rule 9011 in filing the bankruptcy petition. Memorandum  
24 Decision, 8:21-23. The bankruptcy court found that the debtor  
25 filed the bankruptcy petition because she owed debts to  
26 creditors, other than Cunningham, that she could not pay.  
27 Memorandum Decision, 11:10-12. Although the debtor incorrectly  
28 characterized Cunningham's claim as a general unsecured claim,

1 for the most part, she accurately disclosed her assets and  
2 liabilities and financial circumstances and disclosed her prior  
3 bankruptcy cases. Memorandum Decision, 11:14-17. The bankruptcy  
4 court thus concluded that the bankruptcy petition was not  
5 frivolous. Memorandum Decision, 11:10.

6 With respect to Morse, the bankruptcy court determined that  
7 Morse made a reasonable inquiry into the facts and law under the  
8 circumstances before he filed the bankruptcy petition on the  
9 debtor's behalf. Memorandum Decision, 12:6-10. Because the  
10 debtor was facing immediate foreclosure of her residence, Morse  
11 had little time to conduct a prefiling investigation. Memorandum  
12 Decision, 12:25-26. Morse had to rely on the debtor, "a  
13 layperson," for much of the information regarding the state court  
14 action and her prior bankruptcy cases. Memorandum Decision,  
15 12:27-28, 13:1. The bankruptcy court also found that Morse was  
16 unable to retrieve information regarding the September 1999  
17 discharge denial judgment because it was not readily available  
18 from PACER, and could be obtained only from the federal archives,  
19 "a process which could take weeks, if not months." Memorandum  
20 Decision, 13:1-5. The bankruptcy court further found that Morse  
21 tried, unsuccessfully, to obtain information from Ayscough, who  
22 refused to cooperate. Memorandum Decision 13:7-11. The  
23 bankruptcy court ultimately determined that Morse had not known  
24 of the September 1999 discharge denial judgment, despite his  
25 efforts to obtain the information. Memorandum Decision, 13:19-  
26 20, 14:1.

27 The bankruptcy court also determined that the debtor did not  
28 file the bankruptcy petition for an improper purpose. Memorandum

1 Decision, 11:9-10. It found that the debtor filed the bankruptcy  
2 petition because she owed debts to creditors, other than those  
3 she owed to Cunningham. 11:10-12. The bankruptcy court further  
4 found that the debtor filed the bankruptcy petition in an attempt  
5 to settle Cunningham's claim and to avoid foreclosure of her  
6 residence. Memorandum Decision, 11:12-13, 13:11-15. The  
7 bankruptcy court believed that the debtor "was attempting to deal  
8 with her liability to Cunningham through negotiation rather than  
9 mere avoidance or evasion." Memorandum Decision, 11:19-20. The  
10 bankruptcy court further found that the debtor did not  
11 unreasonably oppose Cunningham's summary judgment motion.  
12 Memorandum Decision, 11:22-23, 12:1.

13 The bankruptcy court also held, under its inherent authority  
14 and § 105(a), that the debtor and Morse did not engage in bad  
15 faith conduct to warrant the imposition of sanctions against  
16 them. Memorandum Decision, 8:23-24.

17 The bankruptcy court determined that the debtor had been  
18 forthcoming with it and the creditors. Memorandum Decision,  
19 15:4. It noted that the debtor filed her bankruptcy petition  
20 before Cunningham executed the judgment levy. Memorandum  
21 Decision, 14:27-28. Although it acknowledged that the debtor had  
22 moved to avoid Cunningham's judgment lien, the bankruptcy court  
23 noted that Morse, on the debtor's behalf, filed the lien  
24 avoidance motion at the beginning of the case when he had limited  
25 information about the debtor's prior bankruptcy cases.  
26 Memorandum Decision, 15:6-8. The bankruptcy court found that the  
27 debtor thereafter did not try to prevent Cunningham from  
28 executing on his judgment lien; she did not oppose the stay

1 motion and opposed the summary judgment motion only to question  
2 the balance of the debt owed to him. Tr. of May 9, 2008 Hr'g,  
3 15:10-15. Considering the totality of the circumstances, the  
4 bankruptcy court did not find any attempts by the debtor to  
5 mislead it or to manipulate the bankruptcy process. Memorandum  
6 Decision, 15:4-6, 15:19. Rather, it concluded, the debtor "was  
7 making an honest attempt to deal with her debts," filing the  
8 bankruptcy petition to try to settle Cunningham's claim to avoid  
9 foreclosure of her residence and to deal with her other  
10 creditors. Memorandum Decision, 15:20-23.

11 The bankruptcy court found that Morse did not act in bad  
12 faith in aiding the debtor in filing for bankruptcy. Memorandum  
13 Decision, 15:25-26. Morse had limited information in preparing  
14 and filing the bankruptcy case, despite his efforts to obtain  
15 information. Memorandum Decision, 15:27-28, 16:1. When Morse  
16 learned of the September 1999 discharge denial judgment, he tried  
17 "to mak[e] the best of a bad situation by attempting to negotiate  
18 a settlement with Cunningham" and by not opposing the stay  
19 motion. Memorandum Decision, 16:3-5. The bankruptcy court thus  
20 concluded that Morse "was sincere and diligent in trying to  
21 resolve [the] case for . . . [the debtor] through legitimate,  
22 nonfrivolous means . . ." Memorandum Decision, 16:7-9.

23 Cunningham appeals.  
24

### 25 JURISDICTION

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





1 We review the bankruptcy court's findings of fact for clear  
2 error. Rifino v. United States (In re Rifino), 245 F.3d 1083,  
3 1086 (9th Cir. 2001). A finding of fact is clearly erroneous,  
4 even though there is evidence to support it, if we have the  
5 definite and firm conviction that a mistake has been committed.  
6 Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d  
7 862, 869 (9th Cir. 2001) (quoting Anderson v. City of Bessemer  
8 City, N.C., 470 U.S. 564, 573 (1985)). "Where there are two  
9 permissible views of the evidence, the factfinder's choice  
10 between them cannot be clearly erroneous." Anderson, 470 U.S. at  
11 574.

### 12 **DISCUSSION**

13  
14 A. The bankruptcy court did not abuse its discretion in  
15 declining to impose sanctions against the debtor and Morse  
under Rule 9011

16 Under Rule 9011, the bankruptcy court may sanction litigants  
17 and attorneys who file a frivolous petition, written motion or  
18 other paper or file a petition, written motion or paper for an  
19 improper purpose.<sup>26</sup> Dressler v. The Seeley Co. (In re

20  
21 <sup>26</sup> Rule 9011(b) provides, in relevant part:

22 (b) By presenting to the court (whether by signing,  
23 filing, submitting, or later advocating) a petition,  
24 pleading, written motion, or other paper, an attorney  
25 or unrepresented party is certifying that to the best  
of the person's knowledge, information, and belief,  
formed after an inquiry reasonable under the  
circumstances, -

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

(continued...)

1 Silberkraus), 336 F.3d 864, 870 (9th Cir. 2003). A frivolous  
2 paper is one "that is both baseless and made without a reasonable  
3 and competent inquiry." Townsend, 929 F.2d at 1362. That is, it  
4 is neither "well-grounded in fact and warranted by existing law  
5 [nor] a good faith argument for the extension, modification or  
6 reversal of existing law." Marsch v. Marsch (In re Marsch), 36  
7 F.3d 825, 829 (9th Cir. 1994) (internal quotations omitted).

8 Attorneys or litigating parties file a petition, written  
9 motion or paper for an improper purpose if they file it "to  
10 harass or to cause unnecessary delay or needless increase in the  
11 cost of litigation." Id. at 829 (internal quotations omitted).  
12 While frivolousness and improper purpose are not completely  
13 separate considerations, as they often overlap, "bankruptcy  
14 courts must consider both frivolousness and improper purpose on a  
15 sliding scale, where the more compelling the showing as to one  
16 element, the less decisive need be the showing as to the other."  
17 Id. at 830.

18 Cunningham claims that the bankruptcy court abused its  
19 discretion in declining to impose sanctions against the debtor  
20 and Morse under Rule 9011 because it based its decision on an  
21 erroneous view of the law and evidence. After reviewing the  
22 record before us, we do not have a definite and firm conviction  
23 that the bankruptcy court erred.

---

24  
25 <sup>26</sup>(...continued)

26 (2) the claims, defenses, and other legal  
27 contentions therein are warranted by existing  
28 law or by a nonfrivolous argument for the  
extension, modification, or reversal of  
existing law or the establishment of new law;

. . . .

1           1.     The bankruptcy court did not err in its view of Rule  
2                    9011

3           Cunningham argues that the bankruptcy court erred in  
4 declining to consider all of the papers filed by the debtor and  
5 Morse in the bankruptcy case in determining whether to impose  
6 sanctions against them under Rule 9011. The bankruptcy court  
7 refused to take these papers into account because Cunningham  
8 failed to provide the debtor and Morse an opportunity to withdraw  
9 or correct the challenged papers as required under Rule  
10 9011(c) (1) (A). Cunningham asserts that the bankruptcy court  
11 nonetheless should have considered these papers because "all [of]  
12 the proceedings were the fruit of the warrantless petition."  
13 Appellant's Opening Brief at 24. In other words, as Cunningham  
14 asserted at the initial hearing, "because the bankruptcy itself  
15 was filed in bad faith with no creditors means that all [of] the  
16 motions that the [d]ebtor [had filed were] filed in bad faith."  
17 Tr. of November 28, 2007 Hr'g, 18:5-9.

18           Rule 9011 "requires that precise procedures be followed . .  
19 . ." Polo Bldg. Group, Inc. v. Rakita (In re Shubov), 253 B.R.  
20 540, 545 (9th Cir. BAP 2000). Among these procedures, Rule  
21 9011(c) (1) (A) requires the moving party to allow the offending  
22 party to withdraw or correct the offending matter before  
23 submitting the motion for sanctions to the bankruptcy court.<sup>27</sup>

---

24  
25           <sup>27</sup> Rule 9011(c) provides, in relevant part: "If, after  
26 notice and a reasonable opportunity to respond, the court  
27 determines that subdivision (b) has been violated, the court may,  
28 subject to the conditions stated below, impose an appropriate  
sanction upon the attorneys, law firms, or parties that have  
violated subdivision (b) or are responsible for the violation.

(continued...)

1 This requirement does not apply to filing a bankruptcy petition.  
2 Silberkraus, 336 F.3d at 868.

3 "No party can file a Bankruptcy Rule 9011 motion until after  
4 the targeted party has been served with the motion and given 21  
5 days (or a court-prescribed interval) in which to withdraw or  
6 correct the offending matter." Shubov, 253 B.R. at 545. The  
7 party requesting sanctions must give the offending party the  
8 chance to escape sanctions by withdrawing or correcting the  
9 offending matter. See Barber v. Miller, 146 F.3d 707, 710 (9th  
10 Cir. 1998) ("The purpose of the safe harbor, however, is to give  
11 the offending party the opportunity . . . to withdraw the  
12 offending pleading and thereby escape sanctions.") (emphasis in  
13 original). Accord Shubov, 253 B.R. at 546.

14 Cunningham did not comply with Rule 9011(c)(1)(A); he failed  
15 to provide the debtor and Morse an opportunity to withdraw or  
16 correct the allegedly offending papers before filing the

---

19 <sup>27</sup>(...continued)

20 (1) How Initiated.

21 (A) By Motion. A motion for sanctions under this  
22 rule shall be made separately from other motions  
23 or requests and shall describe the specific  
24 conduct alleged to violate subdivision (b) . . .  
25 . The motion for sanctions may not be filed  
26 with or presented to the court unless, within 21  
27 days after service of the motion (or such other  
28 period as the court may prescribe), the  
challenged paper, claim, defense, contention,  
allegation, or denial is not withdrawn or  
appropriately corrected, except that this  
limitation shall not apply if the conduct  
alleged is the filing of a petition in violation  
of subdivision (b)."

1 sanctions motion.<sup>28</sup> Cunningham does not cite any authority  
2 excusing him from the safe harbor requirement under Rule  
3 9011(c)(1)(A). Simply alleging that all of the papers in the  
4 bankruptcy case were filed in bad faith because the bankruptcy  
5 petition was filed in bad faith does not release Cunningham from  
6 his duty under Rule 9011(c)(1)(A). The bankruptcy court  
7 therefore did not err in refusing to consider all of the papers  
8 filed by the debtor and Morse in the bankruptcy case in its  
9 analysis under Rule 9011.

10 Cunningham also contends that the bankruptcy court erred in  
11 applying a subjective standard, rather than an objective  
12 standard, in determining whether Morse conducted a reasonable  
13 inquiry into the facts and the law before filing the bankruptcy  
14 petition.

15 Under Rule 9011(b), an attorney has "an affirmative duty to  
16 conduct a reasonable inquiry into the facts and the law before  
17 filing . . . ." Business Guides, Inc. v. Chromatic Commc'ns  
18 Enter., Inc., 498 U.S. 533, 551 (1991). An appropriate inquiry  
19 is one that is reasonable under the circumstances. See id.  
20 Accord Townsend, 929 F.2d at 1364. That is, the bankruptcy court  
21 should "assess the attorney's conduct in light of 'the situation  
22 which existed when the paper was filed.'" Hamer v. Career  
23 College Ass'n, 979 F.2d 758, 759 (9th Cir. 1992) (quoting Golden

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25 <sup>28</sup> Although he does not refer to them in his opening brief,  
26 Cunningham's letters, dated July 20, 2007 and August 23, 2007, do  
27 not comply with the safe harbor requirements of Rule  
28 9011(c)(1)(A). The letters failed to provide the debtor and  
Morse the 21-day time period to withdraw or correct the allegedly  
offending papers before Cunningham filed the sanctions motion.

1 Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th  
2 Cir. 1986)). Accord Shmavonian v. Lewis (In re Lewis), 79 B.R.  
3 893, 896 (9th Cir. BAP 1987) (“[A]n attorney’s conduct is measured  
4 by an objective standard – the attorney’s conduct must have been  
5 reasonable under the circumstances. The reasonable man against  
6 which conduct is tested is a competent attorney admitted to  
7 practice before the district court.”) (internal quotations and  
8 citations omitted). A determination of reasonableness under Rule  
9 9011 is “an intensely fact-bound inquiry.” See Townsend, 929  
10 F.2d at 1364-65.

11       Based on our review of the record, we conclude that the  
12 bankruptcy court used an objective standard to measure the  
13 reasonableness of Morse’s inquiry into the facts and the law.  
14 The bankruptcy court had Morse testify as to the circumstances  
15 extant when he prepared and filed the bankruptcy petition on the  
16 debtor’s behalf. In determining that Morse made a reasonable  
17 inquiry, the bankruptcy court expressly considered the conditions  
18 under which Morse operated at the time. It highlighted the facts  
19 that the foreclosure sale was imminent, which gave Morse little  
20 time to conduct his inquiry, that Morse could not obtain detailed  
21 information about the debtor’s prior bankruptcy cases on PACER  
22 because certain older bankruptcy cases, such as the debtor’s  
23 prior bankruptcy cases, had limited records available on PACER,  
24 and that Morse interviewed the debtor about prior lawsuits and  
25 contacted Ayscough to obtain further information, both of whom  
26 did not mention the September 1999 discharge denial judgment.  
27 The bankruptcy court evaluated the reasonableness of Morse’s  
28 inquiry, not by considering what Morse himself believed was

1 reasonable, but by examining the circumstances at the time that  
2 Morse conducted his inquiry. The bankruptcy court did not err in  
3 its interpretation of Rule 9011 legal standards.

4  
5 2. The bankruptcy court did not clearly err in its  
6 assessment of the evidence

7 Cunningham claims that the bankruptcy court erred in its  
8 assessment of the evidence in determining that the debtor's  
9 bankruptcy petition was not frivolous. He points out that Morse  
10 had attached a copy of the PACER query to the bankruptcy  
11 petition, which revealed the debtor's prior bankruptcy cases.  
12 Having become aware of these prior bankruptcy cases, Cunningham  
13 continues, any reasonable attorney would have inquired further  
14 into the disposition of the prior bankruptcy cases - that is,  
15 whether a discharge had been entered. Appellant's Opening Brief  
16 at 26. Having knowledge of these prior bankruptcy cases, Morse  
17 could and should have inquired into the disposition of those  
18 cases and accessed the September 1999 discharge denial judgment  
19 through PACER. Appellant's Opening Brief at 3. Had Morse  
20 inquired further, Cunningham argues, he would have "had all the  
21 information he needed to counsel [the debtor] against filing  
22 another Chapter 7 petition regarding the same claims previously  
23 held to be nondischargeable in bankruptcy." Id.

24 Cunningham does not provide any evidence, however,  
25 demonstrating that Morse could have obtained information  
26 regarding the September 1999 discharge denial judgment through  
27 PACER. Morse testified that the debtor's prior bankruptcy cases  
28 had limited records available on PACER when he prepared and filed

1 the bankruptcy petition. Although Cunningham contends that Morse  
2 could have "downloaded" the September 1999 discharge denial  
3 judgment from PACER, he has not submitted evidence showing how  
4 Morse could have done so at the time he conducted his PACER  
5 query. Morse further testified that he tried other means of  
6 obtaining more information about the debtor's prior bankruptcy  
7 cases - namely, by interviewing the debtor and collecting  
8 documentation from her and by contacting Ayscough - that proved  
9 unsuccessful.<sup>29</sup> The record before the Panel contains sufficient  
10 evidence to support the bankruptcy court's determination that  
11 Morse did not file a frivolous bankruptcy petition, as he  
12 conducted a reasonable inquiry into the facts and law under the  
13 circumstances at the time.

14 Cunningham also contends that the bankruptcy court erred in  
15 its assessment of the evidence in determining whether the debtor  
16 filed the bankruptcy petition for an improper purpose. The  
17 bankruptcy court found that the debtor filed the bankruptcy  
18 petition because she owed debts to creditors other than  
19 Cunningham and she wanted to try to negotiate a settlement with  
20 him. Cunningham complains, however, that filing the bankruptcy  
21 petition in an attempt to settle is not a proper purpose. He  
22 alleges that the debtor filed the bankruptcy petition to invoke  
23 the automatic stay "as leverage for settlement negotiations."  
24

---

25 <sup>29</sup> Cunningham does not challenge the bankruptcy court's  
26 determination as to the credibility of the testimony given by  
27 Morse and the debtor. We give particular deference to findings  
28 of fact based on credibility. Price v. Lehtinen (In re  
Lehtinen), 332 B.R. 404, 416 (9th Cir. BAP 2005) (citing Anderson,  
470 U.S. at 575), aff'd 564 F.3d 1052 (9th Cir. 2009).



1 Appellant's Opening Brief at 26. He cites the debtor's schedules  
2 and long history of concealing assets in her prior bankruptcy  
3 cases as evidence of her intent to hinder and delay his execution  
4 of the August 2000 judgment.

5 Under certain circumstances, filing a bankruptcy petition in  
6 an attempt to force settlement may qualify as an improper purpose  
7 under Rule 9011. Cf. Leeds Bldg. Prods., Inc. v. Moore-Handley,  
8 Inc. (In re Leeds Bldg. Prods., Inc.), 181 B.R. 1006, 1012

9 (Bankr. N.D. Ga. 1995) ("[U]nder the right circumstances, filing a  
10 complaint to force a settlement may qualify as improper conduct  
11 prohibited by Rule 9011."); In re Grossinger, 268 B.R. 386

12 (Bankr. S.D.N.Y. 2001) (filing an involuntary petition as a tactic  
13 to extract settlement of a disputed claim is an improper purpose  
14 under Rule 9011). But the bankruptcy court here found that the  
15 debtor had other grounds, in addition to her desire to negotiate  
16 a settlement with Cunningham, that warranted filing her  
17 bankruptcy petition. As evidenced by her schedules and disclosed  
18 in her testimony, the debtor filed for bankruptcy protection  
19 because she owed debts, other than those to Cunningham, that she  
20 could not pay. The debtor testified that she also filed for  
21 bankruptcy because her stepson threatened her with legal action.

22 Moreover, the debtor did not try to prevent Cunningham from  
23 executing on the August 2000 judgment; she did not oppose his  
24 stay motion and even filed a motion to dismiss her bankruptcy  
25 case. Although she filed an opposition to Cunningham's summary  
26 judgment motion, she did not contest it on the merits, but  
27 challenged the balance of the judgment owed, which the bankruptcy  
28

1 court determined to be a legitimate argument, though ultimately  
2 unsuccessful.

3 Based on her testimony and her conduct in the bankruptcy  
4 case, the bankruptcy court found that the debtor "was making an  
5 honest attempt to deal with her debts." We conclude that the  
6 bankruptcy court did not clearly err in its assessment of the  
7 evidence in deciding not to impose sanctions against the debtor  
8 under Rule 9011.

9  
10 B. The bankruptcy court did not abuse its discretion in  
11 declining to impose sanctions against the debtor and Morse  
under § 105(a) and its inherent authority

12 Cunningham argues that the bankruptcy court abused its  
13 discretion in refusing to impose sanctions under § 105(a) and its  
14 inherent authority against the debtor and Morse for engaging in  
15 bad faith conduct. Cunningham asserts that the debtor filed her  
16 prior bankruptcy cases to hinder the state court action and to  
17 defraud her creditors and filed her present bankruptcy case to  
18 delay Cunningham from executing on the August 2000 judgment. He  
19 claims that the bankruptcy court abused its discretion in  
20 refusing to consider the debtor's prior bankruptcy cases in its  
21 decision to deny the sanctions motion, as her present bankruptcy  
22 case "was of a piece with her prior conduct [in the prior  
23 bankruptcy cases]." Appellant's Opening Brief at 29.

24 Bankruptcy courts have the inherent authority to sanction  
25 bad faith conduct. Caldwell v. Unified Capital Corp. (In re  
26 Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996). This

1 inherent authority is recognized by implication in § 105(a).<sup>30</sup>

2 Id.

3 “The inherent sanction authority allows a bankruptcy court  
4 to deter and provide compensation for a broad range of improper  
5 litigation tactics.” Knupfer v. Lindblade (In re Dyer), 322 F.3d  
6 1178, 1196 (9th Cir. 2003) (citing Fink v. Gomez, 239 F.3d 989,  
7 992-93 (9th Cir. 2001)). Before the bankruptcy court can impose  
8 sanctions under its inherent authority, however, it must make an  
9 explicit finding of bad faith or conduct tantamount to bad faith.  
10 Dyer, 322 F.3d at 1196 (citing Fink, 239 F.3d at 992-93).

11 Bad faith in this context “consists of something more  
12 egregious than mere negligence or recklessness.” Id. (citing  
13 Fink, 239 F.3d at 993-94). Where a litigant or an attorney “is  
14 substantially motivated by vindictiveness, obduracy, or mala  
15 fides, the assertion of a colorable claim will not bar the  
16 assessment of attorney’s fees [as sanctions].” Fink, 239 F.3d at  
17 992 (quoting In re Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir.  
18 1986)) (internal quotation marks omitted). Bad faith also is  
19 found when a litigant or an attorney acts recklessly, combined  
20 with an additional factor such as frivolousness, harassment or an  
21 improper purpose. Fink, 239 F.3d at 994. In short, bad faith  
22 includes a broad range of willful improper conduct. Id. at 992.

---

24 <sup>30</sup> Section 105(a) provides: “The court may issue any order,  
25 process, or judgment that is necessary or appropriate to carry  
26 out the provisions of this title. No provision of this title  
27 providing for the raising of an issue by a party in interest  
28 shall be construed to preclude the court from, sua sponte, taking  
any action or making any determination necessary or appropriate  
to enforce or implement court orders or rules, or to prevent an  
abuse of process.”

1           The bankruptcy court declined to consider the debtor's  
2 conduct in the prior bankruptcy cases, stating that it did not  
3 "seem to have the power [under § 105(a)] to award attorneys [sic]  
4 fees for conduct that's outside this case." Tr. of November 28,  
5 2007 Hr'g, 38:15-17. The bankruptcy court explicitly did find  
6 that the debtor and Morse did not engage in bad faith conduct in  
7 the present bankruptcy case.

8           The bankruptcy court determined that the debtor filed the  
9 bankruptcy petition to work out a deal with Cunningham and her  
10 other creditors. The bankruptcy court found that the debtor had  
11 been forthcoming with it and her creditors. She did not attempt  
12 to prevent Cunningham from executing on his judgment lien. With  
13 respect to Morse, the bankruptcy court found that he was "sincere  
14 and diligent in trying to resolve [the bankruptcy] case for [the  
15 debtor], through legitimate, nonfrivolous means . . . ." When he  
16 learned of the September 1999 discharge denial judgment, Morse  
17 tried to help the debtor "in making the best of a bad situation"  
18 by attempting to negotiate a settlement with Cunningham and by  
19 declining to oppose Cunningham's stay motion. Cunningham has not  
20 presented any evidence demonstrating that the bankruptcy court  
21 clearly erred in its fact findings.

22           Citing Chambers v. NASCO, Inc., 501 U.S. 32 (1991),  
23 Cunningham asserts that the bankruptcy court should have  
24 considered the debtor's conduct in her prior bankruptcy cases as  
25 indicative of bad faith in determining whether to impose  
26  
27  
28

1 sanctions.<sup>31</sup> Appellant's Opening Brief at 28. According to  
2 Cunningham, under Chambers, a bankruptcy court may consider all  
3 of a debtor's prior conduct outside of and before the bankruptcy  
4 court as evidence of bad faith. He further asserts that Chambers  
5 permits the bankruptcy court to award all of the attorney's fees  
6 and costs incurred over the course of the bankruptcy case as  
7 sanctions upon a finding of bad faith.<sup>32</sup>

8 In Chambers, the district court did not assess sanctions  
9 against the appellant until after the litigation had concluded.  
10 501 U.S. at 40-42. After holding a hearing, the district court  
11 imposed sanctions of \$996,644.65, representing the entire amount  
12 of the appellee's litigation costs over the course of the  
13 litigation. Id. at 40.

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16  
17 <sup>31</sup> Citing Mortgage Mart, Inc. v. Rechnitzer (In re Chisum),  
18 847 F.2d 597 (9th Cir. 1988), Cunningham further contends that  
19 successive filings of bankruptcy petitions in bad faith require  
20 the imposition of sanctions under § 105(a). The debtor filed her  
21 first two bankruptcy cases in 1995 and 1998 - almost ten years  
22 before she filed the present bankruptcy case. The debtor's  
23 bankruptcy cases do not qualify as "successive," at least in the  
24 sense set forth in Chisum, where the debtor filed four bankruptcy  
25 cases, each approximately two or six months apart. Chisum, 847  
26 F.2d at 598 (where the debtor filed his first bankruptcy case in  
27 February 1983, his second bankruptcy case in July 1983, his third  
28 bankruptcy case in December 1983, and his fourth bankruptcy case  
in February 1984).

25 <sup>32</sup> The bankruptcy court referred to Chambers, saying that  
26 "[u]nder Chambers, the Court can determine from looking at cases  
27 not before it whether a course of conduct is in bad faith and  
28 then it can impose the appropriate sanction that that conduct  
merits." Tr. of November 28, 2008 Hr'g, 39:6-9. It is unclear  
whether the bankruptcy court interpreted Chambers in this way or  
merely was paraphrasing Cunningham's interpretation of Chambers.

1           The appellant in Chambers argued that the district court  
2 should have imposed sanctions when the sanctionable conduct  
3 occurred, not after entry of the judgment concluding the  
4 litigation. Id. at 56. Moreover, the appellant contended, the  
5 district court tried to make an end run around the notice  
6 requirements of Rule 11 by relying on its inherent authority to  
7 impose sanctions for the entire amount of the appellee's  
8 attorney's fees. Id. at 55-56. The Supreme Court determined  
9 that the district court could impose sanctions years after a  
10 judgment on the merits. Id. at 56. More importantly, the  
11 Supreme Court continued, the bankruptcy court repeatedly had  
12 warned the appellant throughout the litigation that his conduct  
13 was sanctionable. Id.

14           In this appeal, unlike the appellant in Chambers, the debtor  
15 received no notice in the current case that her conduct in the  
16 prior bankruptcy cases was or would be sanctionable. Further,  
17 unlike the litigation in Chambers, the debtor filed three  
18 separate bankruptcy cases, each under varying circumstances.  
19 When the debtor filed her first two bankruptcy cases, the state  
20 court action had not concluded; Cunningham had not obtained the  
21 August 2000 judgment, and even filed an unsecured claim. Years  
22 later, at the time the debtor filed the present bankruptcy case,  
23 Cunningham had obtained the August 2000 judgment and was trying  
24 to execute it on the debtor's residence.

25           While in its totality of the circumstances review, the  
26 bankruptcy court could have considered the debtor's conduct in  
27 prior cases, we conclude that the bankruptcy court did not  
28 clearly err in refusing to consider the debtor's conduct prior to

1 the current case in determining whether to impose sanctions  
2 against the debtor and Morse under § 105(a) and its inherent  
3 authority.

4  
5 **CONCLUSION**

6 The bankruptcy court did not clearly err in its findings  
7 that the debtor and Morse did not file a bankruptcy petition that  
8 was frivolous and for an improper purpose, and that they did not  
9 act in bad faith. Reviewing the record before the Panel, we do  
10 not have a definite and firm conviction that the bankruptcy court  
11 erred in its view of the law and clearly erred in its assessment  
12 of the evidence, and we defer to its findings. See Primus Auto  
13 Fin. Serv., Inc., 115 F.3d at 649. We conclude that the  
14 bankruptcy court did not abuse its discretion in declining to  
15 impose sanctions against the debtor and Morse under Rule 9011 and  
16 § 105(a) and its inherent authority. We AFFIRM.