NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-08-1273-DMkPa
MYRNA JACOBSON,	Bk. No. SA 06-10093-RK
Debtor.	
LARRY CUNNINGHAM,	
Appellant,	
v.	**M E M O R A N D U M**[1]
GREGORY MORSE; MYRNA JACOBSON,	
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.

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[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.

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

FACTS[4]

There has been bad blood between Cunningham and the debtor for years. It began more than twenty years ago, when Cunningham bought a home in Seal Beach, California, with the debtor acting as real estate broker for Cunningham.[5]

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

[3] Jeffrey Vanderveen, who represents the debtor in the present appeal, later substituted in as counsel for the debtor.

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

[5] 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.

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

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

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[6] Cunningham named all members of the partnership as defendants in the state court complaint.

[7] Cunningham actually alleged that one or more members of the partnership had forged and recorded the note and second deed of trust.

[8] Cunningham asserted the following causes of action solely against the debtor individually: negligent and intentional broker malpractice. He asserted the following causes of action against all members of the partnership: fraud, slander of title, intentional interference with prospective economic opportunity, breach of warranty, breach of fiduciary duty, constructive fraud, and conspiracy.

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

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

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

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

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

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[9] On November 25, 1996, the chapter 13 trustee moved to reconvert the case from chapter 13 to chapter 7. At the February 12, 1997 hearing on the chapter 13 trustee's motion to reconvert, 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.

[10] Cunningham earlier filed two complaints against the debtor and her husband, one to determine nondischargeability of a 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.

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

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

Retrial of the state court action took place on June 19, 2000. The jury found in favor of Cunningham as to his causes of action for fraud, intentional interference with prospective economic opportunity, breach of warranty, and negligent broker malpractice. The trial court then, on August 11, 2000, awarded judgment in favor of Cunningham against the debtor in the amount of $98,700, plus $143,052 in interest. The trial court further

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[11] The bankruptcy court found that the debtor concealed assets, knowingly and with fraudulent intent, by transferring her monthly income to her daughter's bank account to prevent attachments by Cunningham to enforce the November 1989 judgment. 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.

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

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

On January 25, 2006, the debtor met with Morse and retained him as her bankruptcy attorney. Morse had not represented the debtor in either of her two prior bankruptcy cases. At the time she met with Morse, the debtor was 77 years old.[12]

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

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

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[12] At the time Cunningham filed the sanctions motion in October 2007, the debtor was 78 years old. Declaration of Myrna Jacobson in Opposition to Cunningham's Motion for Sanctions, 8:7.

to the petition filed in the debtor's current bankruptcy case.[13] The debtor's prior bankruptcy cases also were listed on the petition and on the Statement of Related Cases.[14]

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

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

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

[14] The Statement of Related Cases is a form, known as Local Form 1015-2.1, that is required under Rule 1015-2(b) of the Local Bankruptcy Rules for the United States Bankruptcy Court, Central District of California.

[15] 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.

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

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

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

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

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

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

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

In the meantime, Cunningham and the debtor continued to negotiate. By January 23, 2007, they had reached a tentative settlement.[16]

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

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

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[16] At a status conference on January 23, 2007, Cunningham and the debtor reported to the bankruptcy court that they had negotiated a settlement but needed additional time to finalize the settlement agreement.

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

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

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

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

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

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

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

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

Cunningham opposed the debtor's motion for fairness. He argued that "the deal was off" because the debtor, not Cunningham, failed to comply with the conditions of the settlement agreement.[17] He contended that the debtor failed to make the first installment payment and to provide a promissory note and trust deed against her husband's property as security, as required under the settlement agreement.

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

Following the bankruptcy court's cue, on May 29, 2007, the debtor filed a motion to enforce the settlement agreement ("motion to enforce settlement"). A month later, she filed a motion to approve the settlement agreement ("motion to approve settlement"). In both the motion to enforce settlement and the motion to approve settlement (collectively, "settlement motions"),[18] the debtor advanced essentially the same arguments

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[17] Cunningham rescinded the settlement agreement in a letter dated April 27, 2007. Cunningham, through Lanier, informed the debtor that, because she failed to comply with the terms of the settlement agreement, "the [settlement] agreement [was] repudiated."

[18] 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...)

she had made in the motion for fairness.

Cunningham opposed the debtor's motion to enforce settlement.[19] He argued that it simply was a motion for reconsideration of the bankruptcy court's denial of her earlier motion for fairness. He further alleged that the debtor was acting in bad faith by failing to keep him informed of the progress of the escrow and by refusing to disclose details of the sale of her residence.

He further alleged that, even though Cunningham had selected a specific escrow company, Godfrey Escrow, to process the payment of his claim through the refinance, the debtor used another escrow company.[20] Because the debtor did not comply with the terms of the settlement agreement, Cunningham "called off" the settlement.

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

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[18](...continued)
debtor managed to find a buyer for her residence and proposed to pay Cunningham his claim in full with the sale proceeds, but he again failed to release his liens against her residence, preventing escrow from closing.

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

[20] The debtor claimed that the buyer had selected the escrow and the title insurance company.

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

After the bankruptcy court entered its order denying the settlement motions, Cunningham proceeded to execute on the August 2000 judgment, selling the debtor's residence at a sheriff's sale on August 2, 2007.[21]

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

After receiving no response from the debtor to his proposal,[22] in a letter dated August 23, 2007, Lanier advised

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[21] In his declaration in support of the sanctions motion, according to Lanier, Cunningham purchased the debtor's residence for $765,000.

[22] Morse sent to Lanier an e-mail correspondence, dated July 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.

Morse that he intended to file a motion for sanctions against Morse and the debtor under § 105 and Rule 9011, based on their conduct in the main bankruptcy case and the adversary proceeding, which included their refusal to withdraw the answer in the adversary proceeding. Lanier suggested that the debtor and Morse "mitigate [their] financial exposure" by withdrawing the answer in the adversary proceeding and stipulating to a judgment of nondischargeablity of the August 2000 judgment.

Despite this warning, on October 5, 2007, the debtor filed an opposition to the summary judgment motion, admitting that Cunningham had a judgment against her, but disputing the amount that remained owing on the judgment. After holding a hearing, the bankruptcy court granted Cunningham's summary judgment motion. It later entered judgment against the debtor on March 21, 2008, finding the August 2000 judgment nondischargeable under § 523(a)(6) and (a)(10) ("March 2008 nondischargeability judgment").[23]

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

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[23] The adversary proceeding closed on July 28, 2008.

Specifically, Cunningham called for imposing sanctions against the debtor and Morse under Rule 9011 on the ground that they filed the bankruptcy petition for the improper purpose of frustrating his attempt to execute judgment against the debtor.[24] Cunningham further argued that filing the bankruptcy petition was frivolous, as the debtor had no dischargeable debts as a result of the September 1999 discharge denial judgment.

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

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

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

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[24] At the November 28, 2008 hearing, Cunningham, through Ayscough, also contended that the debtor violated Rule 9011 by 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.

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

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

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

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

> (1) What was the basis for the debtor's statements in her declarations in opposition to the [sanctions] motion that she had other debts owed to creditors other than Cunningham to rebut the contentions that the petition was filed in bad faith;

(2) Did Morse know of the debtor's prior bankruptcy cases and the court's judgment denying debtor's discharge in the prior bankruptcy case, and if not, why not;
(3) What was the urgent need for the debtor to file this bankruptcy case when she did;
(4) How long did Morse have to prepare the bankruptcy petition for filing before the case was filed;
(5) Did Ayscough refuse to discuss a possible resolution of the debt owed by the debtor to Cunningham with Morse and hang up on Morse when Morse contacted A&M, Cunningham's attorneys, before the petition was filed, and did Ayscough use inappropriate language in his conversation with Morse;
(6) Should the attorney's fees and costs claimed by A&M be reduced as excessive, or allowed as reasonable.

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

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

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

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[25] According to the debtor's Schedule D, Alvin and Barbara Fink had a second position lien of $32,500 against the debtor's residence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cunningham appeals.

JURISDICTION

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

ISSUES

(1) Whether the bankruptcy court abused its discretion in declining to impose sanctions against the debtor and Morse under Rule 9011.

(2) Whether the bankruptcy court abused its discretion in declining to impose sanctions against the debtor and Morse under § 105(a) and its inherent authority.

STANDARDS OF REVIEW

We review the bankruptcy court's refusal to impose sanctions for abuse of discretion. See Classic Auto Refinishing v. Marino (In re Marino), 37 F.3d 1354, 1358 (9th Cir. 1994)(reviewing denial of sanctions under Rule 9011). The bankruptcy court abuses its discretion if it bases its decision on "'an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" Valley Nat'l Bank v. Needler (In re Grantham Bros.), 922 F.2d 1438, 1441 (9th Cir. 1991)(quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)). Under the abuse of discretion standard, we will not reverse the bankruptcy court unless we have a definite and firm conviction that it made a clear error in judgment. Valley Eng'rs, Inc. v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998)(reviewing imposition of discovery sanction). The bankruptcy court has "broad fact-finding powers with respect to sanctions, and its findings warrant great deference . . . ." Primus Auto. Fin. Serv., Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir. 1997)(quoting Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1366 (9th Cir. 1990)(en banc))(internal quotation marks omitted).

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

DISCUSSION

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

Under Rule 9011, the bankruptcy court may sanction litigants and attorneys who file a frivolous petition, written motion or other paper or file a petition, written motion or paper for an improper purpose.[26] Dressler v. The Seeley Co. (In re

[26] Rule 9011(b) provides, in relevant part:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney 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, –
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(continued...)

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

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

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

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[26](...continued)

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

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

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

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

[27] Rule 9011(c) provides, in relevant part: "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, 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.

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

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

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

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[27](...continued)

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . . . . The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other 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)."

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

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

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

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[28] Although he does not refer to them in his opening brief, Cunningham's letters, dated July 20, 2007 and August 23, 2007, do not comply with the safe harbor requirements of Rule 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.

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

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

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

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

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

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

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

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

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[29] Cunningham does not challenge the bankruptcy court's determination as to the credibility of the testimony given by Morse and the debtor. We give particular deference to findings 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).

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

Under certain circumstances, filing a bankruptcy petition in an attempt to force settlement may qualify as an improper purpose under Rule 9011. Cf. Leeds Bldg. Prods., Inc. v. Moore-Handley, Inc. (In re Leeds Bldg. Prods., Inc.), 181 B.R. 1006, 1012 (Bankr. N.D. Ga. 1995)("[U]nder the right circumstances, filing a complaint to force a settlement may qualify as improper conduct prohibited by Rule 9011."); In re Grossinger, 268 B.R. 386 (Bankr. S.D.N.Y. 2001)(filing an involuntary petition as a tactic to extract settlement of a disputed claim is an improper purpose under Rule 9011). But the bankruptcy court here found that the debtor had other grounds, in addition to her desire to negotiate a settlement with Cunningham, that warranted filing her bankruptcy petition. As evidenced by her schedules and disclosed in her testimony, the debtor filed for bankruptcy protection because she owed debts, other than those to Cunningham, that she could not pay. The debtor testified that she also filed for bankruptcy because her stepson threatened her with legal action.

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

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

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

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

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

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

inherent authority is recognized by implication in § 105(a).[30] Id.

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

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

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

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

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

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

sanctions.[31] Appellant's Opening Brief at 28. According to Cunningham, under Chambers, a bankruptcy court may consider all of a debtor's prior conduct outside of and before the bankruptcy court as evidence of bad faith. He further asserts that Chambers permits the bankruptcy court to award all of the attorney's fees and costs incurred over the course of the bankruptcy case as sanctions upon a finding of bad faith.[32]

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

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

[32] The bankruptcy court referred to Chambers, saying that "[u]nder Chambers, the Court can determine from looking at cases not before it whether a course of conduct is in bad faith and 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.

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

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

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

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

CONCLUSION

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