

DEC 06 2012

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|-------------------------|---|----------|------------------|
| In re: |) | BAP Nos. | EC-11-1607-DJuKi |
| |) | | EC-11-1619-DJuKi |
| MARCOS ALONZO NIETO and |) | | EC-11-1643-DJuKi |
| HILDY JEAN ORTIZ, |) | | EC-12-1015-DJuKi |
| |) | | |
| Debtors. |) | Bk. No. | 11-26173 |

| | | | |
|-------------------------|---|----------|------------------|
| In re: |) | BAP Nos. | EC-11-1613-DJuKi |
| |) | | EC-12-1017-DJuKi |
| HARVEY P. MICKELSEN and |) | | EC-12-1018-DJuKi |
| STEPHANIE B. MICKELSEN, |) | | EC-12-1019-DJuKi |
| |) | | |
| Debtors. |) | Bk. No. | 09-42649 |

| | | | |
|---------------------------|---|----------|------------------|
| In re: |) | BAP Nos. | EC-11-1641-DJuKi |
| |) | | EC-12-1016-DJuKi |
| BEN LEANDO DYE and KAELYN |) | | |
| MARIE DYE, |) | | |
| |) | Bk. No. | 11-22020 |
| Debtors. |) | | |

| | | | |
|------------------------------|---|--|--|
| JAMES PATRICK CHANDLER; SEAN |) | | |
| GJERDE, |) | | |
| |) | | |
| Appellants, |) | | |

v. MEMORANDUM¹

| | | | |
|-------------------------------|---|--|--|
| J. MICHAEL HOPPER, Trustee; |) | | |
| JAN P. JOHNSON, Chapter 13 |) | | |
| Trustee; AUGUST BURDETTE |) | | |
| LANDIS, Acting United States |) | | |
| Trustee; MARCUS ALONZO NIETO; |) | | |
| HILDY JEAN ORTIZ; HARVEY P. |) | | |
| MICKELSEN; STEPHANIE B. |) | | |
| MICKELSEN; BEN LEANDO DYE; |) | | |
| KAELYN MARIE DYE; MICHAEL G. |) | | |
| PETERS; JENNIFER PETERS, |) | | |
| |) | | |
| Appellees. |) | | |

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.

1 Argued and Submitted on October 19, 2012
2 at Sacramento, California

3 Filed - December 6, 2012

4 Appeal from the United States Bankruptcy Court
5 for the Eastern District of California

6 Honorable Christopher M. Klein, Chief Bankruptcy Judge, Presiding

7 Appearances: Appellant James Patrick Chandler, appeared in pro
8 per; Appellant Sean Gjerde appeared in pro per;
9 Kristen A. Koo appeared for Appellee Jan P.
10 Johnson, Chapter 13 Trustee; Antonia G. Darling
11 appeared for Appellee, August B. Landis, Acting
12 United States Trustee.

13 Before: DUNN, JURY, and KIRSCHER, Bankruptcy Judges.

14 What all parties anticipated would be a relatively
15 straightforward no asset chapter 7² case spawned litigation
16 resulting in ten judgments in three different bankruptcy cases
17 now before the panel on appeal, all of which relate in some
18 fashion to sanctions against the debtors' counsel and his
19 partner. Because the judgments were entered on a default basis,
20 and because neither appellant sought relief from the default
21 judgments from the bankruptcy court in the first instance, we
22 DISMISS each of these appeals.

23 / / /

24 / / /

25 _____
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure
are referred to as "Civil Rules."

1 I. FACTUAL BACKGROUND

2 A. Setting the Stage: Bankruptcy Court Matters October 19, 2009
3 Through April 18, 2011.³

4 Harvey P. and Stephanie B. Mickelsen paid Attorney Sean P.
5 Gjerde \$2,000 to file a chapter 7 bankruptcy petition on their
6 behalf, which he did on October 19, 2009. Ultimately
7 dissatisfied with the services Mr. Gjerde had performed, the
8 Mickelsens retained substitute counsel ("Substitute Counsel") on
9 February 10, 2010. The Mickelsens thereafter sent Mr. Gjerde a
10 letter dated May 6, 2010, outlining why they believed he should
11 refund the \$2,000 in fees they had paid him. Mr. Gjerde
12 responded by letter dated May 11, 2010, stating that all problems
13 with the Mickelsens' case were caused by the chapter 7 trustee,
14 Prem N. Dhawan ("Chapter 7 Trustee"). In this letter, Mr. Gjerde
15 expressed his opinion that he did not think the Mickelsens would
16 "get much sympathy from the bankruptcy court," if they brought
17 the matter to its attention. As their response, the Mickelsens
18 amended their schedules on May 27, 2010 to exempt a claim against
19 Mr. Gjerde.

20 Substitute Counsel then sent a letter to Mr. Gjerde on
21 June 3, 2010, restating the Mickelsens' request for a refund, and
22 giving Mr. Gjerde explicit notice and opportunity to respond as
23 contemplated by Rule 9011(c). After Mr. Gjerde failed to
24 respond, on July 21, 2010, Substitute Counsel filed a Motion to
25

26 ³ A substantial portion of this Memorandum sets out facts
27 prior to the events actually involved in the pending appeals.
28 Nevertheless, the historic facts are important to a full
understanding of these appeals.

1 Disgorge Legal Fees ("Motion to Disgorge") and set the matter for
2 hearing to be held August 31, 2010 ("August 31 Hearing"). The
3 Motion to Disgorge sought the disgorgement of the attorneys fees
4 the Mickelsens had paid to Mr. Gjerde and an order compelling
5 Mr. Gjerde to pay the attorneys fees of Substitute Counsel
6 required to "repair [the] damage caused by [Mr.] Gjerde's
7 incompetent handling of [the Mickelsens'] case."

8 Mr. Gjerde timely filed his response under the local rules
9 of the Bankruptcy Court for the Eastern District of California
10 ("LBRs") on August 16, 2010. Notwithstanding his opposition to
11 the Motion to Disgorge, Mr. Gjerde did not appear at the
12 August 31 Hearing. At the August 31 Hearing, the bankruptcy
13 court continued the hearing on the Motion to Disgorge to
14 September 28, 2010 ("September 28 Hearing") and directed
15 Substitute Counsel to provide Mr. Gjerde notice of the
16 September 28 Hearing. Substitute Counsel served Mr. Gjerde with
17 notice of the September 28 Hearing via email and certified mail
18 on August 31, 2010, and via telecopier and regular mail on
19 September 1, 2010. Substitute Counsel filed a declaration of
20 service with the bankruptcy court on September 3, 2010.

21 Mr. Gjerde did not appear at the September 28 Hearing.
22 However, Mr. Gjerde ostensibly was represented at the
23 September 28 Hearing by attorney Matthew Pearson, who reported he
24 was appearing on behalf of Mr. Gjerde. The record suggests that
25 Mr. Pearson did not represent to the bankruptcy court at the
26 September 28 Hearing that he was acting as Mr. Gjerde's counsel.
27 Following the conclusion of the September 28 Hearing, on
28 October 5, 2010, the bankruptcy court entered on the docket an

1 unsigned civil minute order ("Minute Order"). The Minute Order
2 provided: "Findings of fact and conclusions of law having been
3 stated orally on the record and good cause appearing. IT IS
4 ORDERED that the motion is granted, fees disgorged in the amount
5 of \$2,000."

6 Substitute Counsel served the Minute Order on Mr. Gjerde via
7 telecopier, certified U.S. Mail, and First Class U.S. Mail, all
8 on October 7, 2010. Included with the Minute Order was a letter
9 ("Demand Letter") from Substitute Counsel requesting that
10 Mr. Gjerde send a check payable to the Mickelsens in care of
11 Substitute Counsel. Mr. Gjerde responded to the Demand Letter on
12 October 7, 2010, taking the position that because the Minute
13 Order did not refer to him by name, he intended to ignore it. He
14 also demanded that Substitute Counsel not contact him again
15 because he was represented by counsel, although Mr. Gjerde did
16 not state who was serving as his counsel. Substitute Counsel
17 then sent, via telecopier, e-mail, and U.S. Mail, a copy of the
18 Minute Order and a letter requesting the disgorged fees to
19 Mr. Pearson on October 8, 2010, and when no response was
20 received, began calling Mr. Pearson's office on October 21, 2010,
21 to inquire regarding the status of payment of the disgorged fees.
22 Despite leaving five voice mail messages requesting a return
23 telephone call, Substitute Counsel received no call from
24 Mr. Pearson.

25 On November 3, 2010, Substitute Counsel filed a Motion to
26 Compel Sean P. Gjerde to Comply with Court Order and/or for
27 Coercive Contempt Sanctions ("Motion to Compel"), and set the
28 matter for hearing to be held November 23, 2010 ("November 23

1 Hearing"). The Motion to Compel sought an order compelling
2 Mr. Gjerde to disgorge the attorneys fees the Mickelsens had paid
3 him and the attorneys fees the Mickelsens had incurred for the
4 services performed by Substitute Counsel. The Motion to Compel
5 also sought an order granting coercive contempt sanctions against
6 Mr. Gjerde until he complied with the Minute Order. Substitute
7 Counsel served both the Motion to Compel and a notice of hearing
8 on the Motion to Compel on Mr. Gjerde and Mr. Pearson via first
9 class mail on November 3, 2010.

10 Under the LBRs, because the motion was set for hearing on
11 less than 28 days' notice, Mr. Gjerde had until the time of the
12 November 23 Hearing to file or to present his opposition to the
13 Motion to Compel. See LBR 9014-1(f)(2)(C). Mr. Gjerde neither
14 filed an opposition nor appeared at the November 23 Hearing to
15 present one.

16 At the conclusion of the November 23 Hearing, an unsigned
17 civil minute order ("Second Minute Order") was entered on the
18 bankruptcy court docket. The Second Minute Order provided:
19 "Findings of fact and conclusions of law having been stated
20 orally on the record and good cause appearing. IT IS ORDERED
21 that the motion is granted. IT IS FURTHER ORDERED, Sean Gjerde
22 (California State Bar 217467) shall appear before the undersigned
23 Judge on December 14, 2010 at 9:30 a.m., to explain why he has
24 not complied with this Court's order. FURTHER: Chambers to
25 issue Order to Show Cause regarding electronic filing
26 privileges."

27 On November 24, 2010, the bankruptcy court entered its Order
28 to Appear ("Show Cause Order"), which provided:

1 IT IS ORDERED that Sean P. Gjerde (State Bar No.
2 217467) shall appear before the undersigned judge on
3 December 14, 2010, at 9:30 a.m. and explain why he has
4 not complied with this court's order to disgorge \$2,000
5 pursuant to 11 U.S.C. § 329.

6 IT IS FURTHER ORDERED that Mr. Gjerde shall show cause
7 why his electronic filing privilege should not be
8 terminated.

9 The deputy clerk's certificate of service attached to the Show
10 Cause Order states that on November 29, 2010, she served the Show
11 Cause Order by placing true and correct copies in postage paid
12 envelopes addressed to Mr. Gjerde and to Substitute Counsel and
13 by depositing the envelopes in the U.S. Mail or by placing the
14 copies in an interoffice delivery receptacle located in the
15 Clerk's Office.

16 Mr. Gjerde did not appear at the hearing on the Order to
17 Show Cause. At the conclusion of the hearing on the Order to
18 Show Cause, an unsigned civil minute order ("Third Minute Order")
19 was entered on the bankruptcy court docket on December 14, 2010.
20 The Third Minute Order provided: "Findings of fact and
21 conclusions of law having been stated orally on the record and
22 good cause appearing. The Court finds Mr. Sean P. Gjerde held in
23 contempt of court." The Third Minute Order directed that an
24 order be prepared by Chambers.

25 On January 10, 2011, the bankruptcy court entered its Order
26 of Contempt ("Contempt Order"), which states in its entirety:

27 Sean P. Gjerde having failed to explain why he has not
28 disgorged \$2,000 as ordered by this court on October 5,
29 2010, which order has not been appealed by Sean P.
30 Gjerde or the Northern California Law Center, and
31 having failed to appear before the undersigned on
32 December 14, 2010,

IT IS ORDERED that Sean P. Gjerde is held in contempt
of court.

1 IT IS FURTHER ORDERED that all filing privileges of
2 Sean P. Gjerde, Northern California Law Center, or any
3 attorney associated with Northern California Law Center
4 are revoked.

5 IT IS FURTHER ORDERED that no case may be filed in the
6 Eastern District of California by Sean P. Gjerde,
7 Northern California Law Center, or any attorney
8 associated with Northern California Law Center without
9 prior permission from the Chief Judge of this court.

10 The deputy clerk's certificate of service attached to the
11 Contempt Order states that on January 11, 2011, she served the
12 Contempt Order by placing true and correct copies in postage paid
13 envelopes addressed to Mr. Gjerde and to Substitute Counsel and
14 by depositing the envelopes in the U.S. Mail or by placing the
15 copies in an interoffice delivery receptacle located in the
16 Clerk's Office.

17 The next day, Mr. Gjerde directed a letter to the attention
18 of the bankruptcy judge who issued the Contempt Order. In this
19 letter, Mr. Gjerde asserted that his primary problem with the
20 Minute Order was the correct amount. He asserted he should not
21 have been required to disgorge \$2,000, when only \$1,701 was paid
22 for or on account of his attorneys fees. The remaining \$299 was
23 paid to him by the Mickelsens as the court filing fee in the
24 case, and he had used the funds for that purpose. Mr. Gjerde
25 stated in the letter that he had offered to pay the \$1,701 amount
26 without success, but that he now "would be willing to pay the
27 \$2,000 to have my filing privileges reinstated." He explained
28 the hardship the Contempt Order had placed on his other clients.
He also informed the bankruptcy court that, absent reinstatement
of his filing privileges, "there would appear little reason to
pay out this money which I assume was your intention."

1 Mr. Gjerde further took the bankruptcy court to task for
2 suspending the filing privileges of Mr. Gjerde's partner, James
3 Chandler, asserting that because Mr. Chandler had no notice of
4 the proceedings, Mr. Chandler's privileges were removed in
5 violation of his due process rights.

6 The bankruptcy court deemed Mr. Gjerde's letter to be a
7 motion for reconsideration of the Minute Order and the Order of
8 Contempt, and entered a further order on January 14, 2011, which
9 set a hearing on the motion for reconsideration to be held
10 January 25, 2011 ("January 25 Hearing"). When Mr. Gjerde did not
11 appear at the January 25 Hearing, the bankruptcy court continued
12 the hearing to February 1, 2011 ("February 1 Hearing"). Notably,
13 the United States Trustee ("UST") joined in the proceedings
14 beginning with the January 25 Hearing, signaling that broader
15 concerns were developing with respect to Mr. Gjerde's bankruptcy
16 practice. On January 25, 2011, Substitute Counsel served a
17 notice of the February 1 Hearing on Mr. Gjerde via email,
18 telecopier, and first class mail.

19 Mr. Gjerde did appear at the February 1 Hearing. The civil
20 minutes of the February 1 Hearing reflect only that the hearing
21 was continued to April 5, 2011 ("April 5 Hearing"). What was
22 discussed at the February 1 Hearing we do not know, as we have
23 not been provided a transcript of those proceedings. What is
24 clear from the record that has been presented to us is that after
25 the February 1 Hearing the proceedings expanded significantly in
26 scope.

27 On March 8, 2011, Substitute Counsel filed a motion
28 ("Prevailing Party Fees Motion"), seeking \$6,582.52, an amount

1 which purported to represent the reasonable expenses and
2 attorneys fees incurred in presenting the earlier Motion to
3 Compel and participating in the resulting contempt proceedings
4 against Mr. Gjerde. Substitute Counsel scheduled the Prevailing
5 Party Fees Motion to be heard at the April 5 Hearing, and on
6 March 8, 2011, served the Prevailing Party Fees Motion and the
7 notice of its scheduled hearing on Mr. Gjerde via U.S. Mail.

8 Declarations in support of the underlying Motion for
9 Contempt were filed by Substitute Counsel ("Substitute Counsel
10 Declaration") on March 22, 2011, by the Chapter 7 Trustee
11 ("Chapter 7 Trustee Declaration")(at the direction of the UST) on
12 March 22, 2011, by an assistant UST ("UST Declaration") on
13 March 28, 2011, and by the Chapter 13 Trustee for the Eastern
14 District of California, Sacramento Division ("Chapter 13 Trustee
15 Declaration"). Pared to their essences, the respective
16 declarations stated:

17 Substitute Counsel Declaration - Substitute Counsel had been
18 attempting since the spring of 2010 to assist the Mickelsens to
19 obtain a refund of the monies they paid in conjunction with their
20 bankruptcy filing. Those funds were paid either to Sean P.
21 Gjerde and Associates, the Law Office of Sean P. Gjerde, or the
22 Northern California Law Center, P.C. ("NCLC"). In May 2010,
23 Mr. Gjerde acknowledged in writing that both he and Mr. Chandler
24 comprised the NCLC. Mr. Gjerde initially took the position that
25 because the Minute Order did not name him personally, it was not
26 directed to him. Beginning in January, 2011, Mr. Gjerde began to
27 assert that notice had not been given to "the firm." Despite
28 Mr. Gjerde's claim to the contrary in his January 12, 2011 letter

1 to the bankruptcy court, Mr. Gjerde had made no attempt to meet
2 with Substitute Counsel to resolve the dispute. The last
3 communication Substitute Counsel received from Mr. Gjerde was a
4 letter dated March 9, 2011, which stated that his counsel had
5 advised him not to communicate with the Mickelsens so he would
6 not be able to "resolve the money issue" at that time.

7 Chapter 7 Trustee Declaration - The UST requested that the
8 Chapter 7 Trustee apprise the bankruptcy court of his experience
9 regarding the quality of Mr. Gjerde's work, and of Mr. Gjerde's
10 attitude in dealing with the issues in the Mickelsens' case.

11 The Chapter 7 Trustee determined that the Mickelsens had
12 improperly asserted federal exemptions, rather than California
13 state exemptions, in assets. Most significantly, Mr. Gjerde had
14 listed on Schedule B two life insurance policies with a total
15 value of \$175,000, and then fully exempted those policies under
16 § 522(d)(7). Mr. Gjerde was unresponsive to the Chapter 7
17 Trustee's efforts to contact him regarding the improper use of
18 federal exemptions. The failure to cite the proper exemptions
19 required the Chapter 7 Trustee to retain counsel to preserve the
20 bankruptcy estate's interest in the insurance policies.

21 Following a subsequent request for documentation concerning
22 the insurance policies, Mr. Gjerde asserted the policies had no
23 cash value and offered to amend the Mickelsens' schedules to so
24 reflect. After the Chapter 7 Trustee and his counsel reviewed
25 the insurance policy documentation, they determined that the
26 combined cash surrender value was approximately \$22,116.63. The
27 Chapter 7 Trustee requested confirmation of this cash surrender
28 value from the insurance companies. In response, Mr. Gjerde

1 filed an amended schedule C asserting \$11,070 of the value exempt
2 pursuant to Cal. Code Civ. P. § 703.140(b). Following the filing
3 of the amendment, the Chapter 7 Trustee obtained turnover of the
4 full cash value of the insurance policies from the insurance
5 companies, subject to the Mickelsens' allowed exemption in the
6 amount of \$11,070.

7 Thereafter the Mickelsens retained Substitute Counsel, who
8 amended schedule C to claim the entire life insurance proceeds as
9 exempt under the "wild card exemption." Ultimately, the
10 Chapter 7 Trustee was required to turn over all of the life
11 insurance proceeds to the Mickelsens.

12 As a second matter, the Chapter 7 Trustee wrote to instruct
13 the Internal Revenue Service ("IRS") to forward the Mickelsens'
14 scheduled (and exempted) 2009 federal income tax refund to the
15 Chapter 7 Trustee. Mr. Gjerde questioned the Chapter 7 Trustee's
16 counsel about the legal authority under which the Chapter 7
17 Trustee was asserting that the 2009 refund was property of the
18 bankruptcy estate. Chapter 7 Trustee's counsel had to write to
19 Mr. Gjerde to provide the authority.

20 Finally, the Mickelsens had been involved in a prepetition
21 automobile accident, resulting in (1) a personal injury claim
22 that was neither scheduled nor exempted, and (2) loss of their
23 vehicle which was not disclosed in their Statement of Financial
24 Affairs. A recent sale by the Mickelsens of their prior Arizona
25 residence also was not disclosed in their bankruptcy documents.
26 These errors were corrected by Substitute Counsel.

27 The Chapter 7 Trustee conducted a total of three § 341(a)
28 meetings in the Mickelsens' case. The first, on November 24,

1 2009, was continued by the Chapter 7 Trustee, because Mr. Gjerde
2 failed to appear with the Mickelsens. While Mr. Gjerde's
3 partner, Mr. Chandler, did appear, Mr. Chandler admitted he knew
4 nothing about the Mickelsens' bankruptcy petition, schedules and
5 statement of financial affairs. As a result, the Chapter 7
6 Trustee believed the Mickelsens were not well represented at the
7 first § 341(a) meeting. Mr. Gjerde did attend the second
8 § 341(a) meeting on December 9, 2009, at which time, Mr. Gjerde
9 misrepresented to the Chapter 7 Trustee that the insurance
10 policies had no cash surrender value. Mr. Gjerde also admitted
11 his lack of experience with bankruptcy matters, leading the
12 Chapter 7 Trustee to continue the § 341(a) meeting again to
13 provide Mr. Gjerde with time to correct problems with the
14 asserted exemptions and to provide additional documentation to
15 the Chapter 7 Trustee.

16 The Chapter 7 Trustee emphasized that, because of a lack of
17 adequate disclosures, improperly asserted exemptions, and a lack
18 of cooperation and communication from Mr. Gjerde, the Chapter 7
19 Trustee believed it was necessary to engage legal counsel to
20 assist him in administering the Mickelsens' case.

21 Mr. Gjerde wrote to the Chapter 7 Trustee and his counsel on
22 February 1, 2010, demanding that the Mickelsens' case be closed,
23 and threatening to file a motion against the Chapter 7 Trustee
24 and his counsel for "holding up this case" and "for wasting the
25 time and resources of the United States, of the Court and of
26 [Mr. Gjerde's] time." The gist of Mr. Gjerde's complaint was
27 that the Chapter 7 Trustee and his counsel were making excessive
28 demands and had no right to all the "needless information"

1 requested. In the letter, Mr. Gjerde implied he would file a
2 motion to have the Chapter 7 Trustee removed; Mr. Gjerde had made
3 a similar, more specific, threat in the case of another of his
4 clients also being administered by the Chapter 7 Trustee.

5 The Chapter 7 Trustee next discussed his experience with
6 Mr. Gjerde in the other case. The Chapter 7 Trustee was
7 appointed in that case on August 29, 2009, following conversion
8 of the case from chapter 13 to chapter 7. In that case,
9 Mr. Gjerde also improperly used federal rather than California
10 exemptions, requiring the Chapter 7 Trustee to retain counsel to
11 object to the exemptions.

12 In addition, the Chapter 7 Trustee advised Mr. Gjerde that
13 chapter 7 debtors were not authorized to operate a business
14 without court approval and requested that Mr. Gjerde provide
15 evidence of insurance and instruct his clients to close their
16 business. Mr. Gjerde was not responsive. Mr. Gjerde did not
17 appear at the § 341(a) meeting. The substitute attorney who did
18 appear was unfamiliar with the case. At this § 341(a) meeting,
19 the debtors stated under oath that the fair market value of the
20 business was \$100,000. The debtors and Mr. Gjerde failed to
21 appear at the continued § 341(a) meeting. Instead, Mr. Gjerde
22 sent correspondence to counsel for the Chapter 7 Trustee, stating
23 that unless the Chapter 7 Trustee concluded the § 341(a) meeting
24 and either closed the case as a no asset case, thereby abandoning
25 the business to the debtors, or agreed to the dismissal of the
26 case, he would file a motion to remove the Chapter 7 Trustee.
27 Ultimately, the bankruptcy court entered an order requiring the
28 debtors to attend a continued § 341(a) meeting; the order also

1 provided that no discharge would be entered in the case until
2 thirty days after the § 341(a) meeting was concluded.

3 Rather than comply with any of the requests of the Chapter 7
4 Trustee, Mr. Gjerde filed a motion to dismiss the case, proposing
5 that the debtors would re-file it at a later date. When advised
6 that the Chapter 7 Trustee intended to object to the dismissal,
7 Mr. Gjerde wrote to the Chapter 7 Trustee and his counsel stating
8 that the Chapter 7 Trustee had no standing to object to dismissal
9 of the case, and that he would take legal action against the
10 Chapter 7 Trustee if the Chapter 7 Trustee objected to dismissal.
11 After the bankruptcy court denied the debtors' motion to dismiss,
12 the debtors retained substitute counsel.

13 UST Declaration - The UST reviewed the bankruptcy court files of
14 all 77 bankruptcy cases filed in the Eastern District of
15 California by Mr. Gjerde and summarized the issues or problems in
16 those cases. Most notably, the UST stated that in only four of
17 the 77 cases were no "issues seen." Thirty of the cases were
18 chapter 13 cases; only two of those cases reached plan
19 confirmation. Twenty-seven of the cases were dismissed before
20 confirmation, and one case had plan confirmation denied in
21 December, 2010, with no new plan filed as of the date of the UST
22 Declaration. Forty-seven of the cases were chapter 7 cases.
23 Eleven of the cases were dismissed for failure to file documents.
24 Mr. Gjerde either quit or was fired in five of the cases.
25 Twenty-four cases resulted in debtor discharge. One case was
26 closed without a discharge and has not been reopened. Six cases
27 were pending.

28 The UST chronicled the most common errors and issues seen in

1 Mr. Gjerde's filings: incomplete social security number
2 declarations submitted with the petition in 20 cases; no master
3 address list filed with the petition in 15 cases; no Exhibit D
4 and certificate filed with the petition in 25 cases; no plan was
5 filed in 21 chapter 13 cases; Mr. Gjerde failed to appear at
6 least once at a § 341(a) meeting in 10 cases; the § 341(a)
7 meeting was continued in 11 cases for corrections or for late
8 submitted documents; and blank documents were filed in three
9 cases. The UST also pointed out that 14 of the cases were repeat
10 filings where Mr. Gjerde or his firm were counsel in the prior
11 cases as well, but where the prior cases were not listed on the
12 petition.

13 To ensure that the analysis of Mr. Gjerde's work was fair,
14 the UST also reviewed the cases of two other attorneys in
15 practice since 2008. After setting out the results of that
16 review, the UST concluded that Mr. Gjerde was incompetent to
17 practice law. The UST further stated that Mr. Gjerde had shown
18 no interest in improving his skills, despite being told by many
19 trustees that his work was substandard.

20 Chapter 13 Trustee Declaration - The Chapter 13 Trustee provided
21 in detail a chronicle of the problems in each of the
22 17 chapter 13 cases in which he was the trustee and Mr. Gjerde
23 served as counsel for the debtor(s).

24 Mr. Gjerde filed pleadings in preparation for the April 5
25 Hearing as follow:

26 - Sean P. Gjerde's Brief Re: Reconsideration of [the Contempt
27 Order]. Mr. Gjerde asserted that the NCLC accepted \$2,000 from
28 the Mickelsens, which constituted a payment of \$1,701 toward

1 attorneys fees and \$299 toward the filing fee for the Mickelsens'
2 case. Mr. Gjerde therefore requested that the bankruptcy court
3 modify the Order of Contempt to provide that only \$1,701 be
4 disgorged. Mr. Gjerde asserts that on March 22, 2011, he paid
5 the Mickelsens \$1,701 by transmitting payment to Substitute
6 Counsel. The ultimate sentence of this brief stated: "With
7 regard to the suspension of filing rights in the [Contempt
8 Order], Gjerde wishes to inform the Court that he is withdrawing
9 from practicing before the Eastern District Bankruptcy Court at
10 this time."

11 - Sean P. Gjerde's Opposition to Debtors' Motion for Attorneys
12 Fees and Costs. Mr. Gjerde asserted that "it is clear" that
13 Substitute Counsel took the Mickelsens' request for disgorgement
14 of fees "as a 'make-work' project" for which they now sought
15 \$6,534 fees and \$48.62 costs for a motion that requested
16 disgorgement of only \$1,701, making the amount of Substitute
17 Counsel's attorneys fees unreasonable. He complained as to the
18 amount in part because the "case has long been closed and the
19 [Mickelsens] have been discharged for over 6 months." Mr. Gjerde
20 pointed out that because the original Motion to Disgorge
21 contained a request for Substitute Counsel fees that were not
22 granted, it was not appropriate to grant those fees in the
23 context of a separate motion. Finally, he asserted that
24 Substitute Counsel's Declaration "coyly" stated that the fees
25 were supported by a billing report, not that the fees had been,
26 or were expected to be, paid by the Mickelsens.

27 - Rebuttal of [Substitute Counsel Declaration]. Mr. Gjerde
28 asserted that the Substitute Counsel Declaration supported the

1 point he had made from the beginning of the controversy: the
2 Mickelsens hired Sean P. Gjerde, such that any disgorgement order
3 should be directed to Sean P. Gjerde, not to the NCLC. He
4 protested that he had never refused to disgorge the fees paid by
5 the Mickelsens, but rather had repeatedly asserted the order
6 should be directed to him personally and he would disgorge the
7 fees accordingly. He contended that the statement he had made in
8 his initial brief regarding reconsideration of the Contempt Order
9 that "[the NCLC] accepted a total of \$2,000 from the Mickelsens"
10 was inaccurate, because the money was paid to him. He stated
11 that even where cases were filed by him under the name of the
12 NCLC, in reality, his practice as to bankruptcy cases always was
13 kept separate from those bankruptcy cases filed and administered
14 by the co-owner of the NCLC, Mr. Chandler. Mr. Gjerde then urged
15 the bankruptcy court to avoid prejudicing Mr. Chandler's clients,
16 stating that Mr. Chandler's ability to represent his clients in
17 pending matters has been hampered significantly by the bankruptcy
18 court's termination of Mr. Chandler's electronic filing rights by
19 way of the Contempt Order, with which Mr. Chandler never had been
20 served.

21 While the vast majority of his clients were, in Mr. Gjerde's
22 view, "pleased with his services," repeated mistakes and actual
23 misconduct by his former assistants made his continued practice
24 impractical, and responding to the "false and unsubstantiated
25 accusations of Trustee Jan P. Johnson, the false accusations of
26 the [UST] and Ms. Antonia G. Darling of the Department of Justice
27 [had] become too onerous a burden to justify continuing to
28 practice before this court."

1 Notwithstanding the written opposition to the matters to be
2 determined at the April 5 Hearing, no appearance was made by or
3 on behalf of Mr. Gjerde at the April 5 Hearing. At the
4 conclusion of the April 5 Hearing, the bankruptcy court entered
5 civil minutes to the effect that findings of fact and conclusions
6 of law were stated orally on the record, that the Prevailing
7 Party Fees Motion was granted, and that the order was to be
8 prepared by Substitute Counsel. On April 11, 2011, Substitute
9 Counsel filed a supplemental declaration ("Supplemental
10 Declaration") (1) to advise the bankruptcy court that on April 5,
11 2011, two cashier's checks were delivered to her office - one in
12 the amount of \$2,000 and one in the amount of \$3,000, the
13 remitter of both having been Mr. Chandler; and (2) to support, as
14 directed by the bankruptcy court at the April 5 Hearing,
15 additional attorneys fees and costs incurred between the period
16 March 5, 2011 and April 5, 2011.

17 On April 14, 2011, the bankruptcy court entered an order
18 ("Prevailing Party Fee Order") "pursuant to [§ 105(a)] and [the]
19 court's inherent authority to prevent abuse," granting the
20 Prevailing Party Fees Motion and requiring Mr. Gjerde and the
21 NCLC to pay the Mickelsens the sum of \$10,072.62 in addition to
22 the \$2,000 previously ordered disgorged in the Minute Order.
23 Recognizing the \$3,000 paid on April 5, 2011, the Prevailing
24 Party Fee Order directed that Mr. Gjerde and the NCLC remit,
25 forthwith, the remaining balance due of \$7,072.62 to Substitute
26 Counsel.

27 On April 18, 2011, the bankruptcy court entered a civil
28 minute order which denied Mr. Gjerde's Motion for Reconsideration

1 ("Fourth Civil Minute Order").

2 On April 28, 2011, Mr. Gjerde filed his document entitled
3 Motion for Stay of Attorney Fee Award, Request to Have Online
4 Access Reinstated Pending Appeal ("Stay Motion"). Mr. Gjerde
5 contended that the April 5 Hearing should not have proceeded
6 without the presence of either himself or his attorney,
7 Mr. Pearson, in light of the notation on the April 4 pre-hearing
8 disposition calendar which stated that no appearance was
9 necessary. He asserted he was deprived of due process when the
10 court conducted the April 5 Hearing because, in reliance on the
11 "posting of no appearance" he "made plans to appear in another
12 court." He asserted that he was prejudiced by what he considered
13 the "late filings" of the UST Declaration and the Chapter 13
14 Trustee Declaration. Mr Gjerde contended that the fee award was
15 unconscionable where it was for an amount more than five times
16 the amount of the disgorgement itself.

17 A substantial portion of the Stay Motion is
18 incomprehensible. Mr. Gjerde noticed the hearing on the Stay
19 Motion for June 21, 2011. Before the hearing could take place,
20 Mr. Gjerde filed, on May 9, 2011, a notice of appeal ("First
21 Appeal"), stating that he was appealing the bankruptcy court's
22 order entered April 18, 2011, and all interlocutory orders that
23 gave rise to that order, including but not limited to the Minute
24 Order, the Contempt Order, and the Prevailing Party Fee Order.
25 The Notice of Appeal was dated April 21, 2011.

26 The bankruptcy court transmitted the First Appeal to this
27 panel on May 11, 2011, and the First Appeal was assigned BAP
28 No. EC-11-1227. On May 13, 2011, our motions panel issued a

1 "Notice of Deficient Appeal and Impending Dismissal" ("BAP
2 Deficiency Notice") on the basis that the First Appeal was
3 untimely, having been filed more than fourteen days after entry
4 of the Fourth Minute Order, which denied Mr. Gjerde's motion for
5 reconsideration. The BAP Deficiency Notice required that
6 Mr. Gjerde, within fourteen days, provide an adequate legal
7 explanation as to why the First Appeal should not be dismissed.
8 See Docket #3 in BAP Case No. EC-11-1227. On June 16, 2011, the
9 panel received from the bankruptcy court a notice indicating that
10 Mr. Gjerde had failed to file a designation of record, a
11 statement of issues, a reporter's transcript, and/or a notice
12 regarding the transcript. In addition, the notice indicated
13 Mr. Gjerde had not paid the filing fee for the First Appeal. See
14 Docket #6 in BAP Case No. EC-11-1227. On June 20, 2011, our
15 motions panel dismissed the First Appeal (1) for non-payment of
16 the appeal filing fee, and (2) for lack of jurisdiction, noting
17 that Mr. Gjerde had failed to respond to the BAP Deficiency
18 Notice. See Docket #7 in BAP Case No. EC-11-1227.

19 On June 27, 2011, Mr. Gjerde filed a motion for
20 reconsideration of the dismissal order entered in the First
21 Appeal. See Docket #8 in BAP Case No. EC-11-1227. In that
22 motion, Mr. Gjerde asserted he had been unable to file the First
23 Appeal properly because the Contempt Order entered January 10,
24 2011 "made it impossible to file anything with the court in any
25 proper fashion." He also asserted that prior attempts to file
26 the First Appeal had been rejected by the bankruptcy court on two
27 separate occasions. On August 1, 2011, the motions panel entered
28 a limited remand to the bankruptcy court to issue findings of

1 fact regarding the timeliness of the notice of appeal that
2 initiated the First Appeal. See Docket #14 in BAP Case
3 No. EC-11-1227.

4 On remand, the bankruptcy court conducted an evidentiary
5 hearing on the issue of whether Mr. Gjerde had attempted to file
6 a timely notice of appeal that had been rejected by the Clerk of
7 the Bankruptcy Court ("Court Clerk"). The bankruptcy court
8 determined that neither Mr. Gjerde nor his paralegal, Shaun
9 Smith, were credible witnesses. Each testified he had received a
10 notice from the Court Clerk returning a notice of appeal tendered
11 through the mail on April 26, 2011, yet neither could produce the
12 writing to evidence this communication from the Court Clerk or
13 the envelope in which it had been mailed. In contrast, a deputy
14 Court Clerk testified regarding the bankruptcy court's internal
15 procedure for returning documents that were tendered but not
16 accepted for filing. This procedure included (1) preparation of
17 a memorandum to accompany the document returned, and (2) notation
18 of the memorandum on the court's administrative docket. The
19 administrative docket in the case reflected that no such
20 memorandum had been prepared.

21 The bankruptcy court found that the notice of appeal was not
22 tendered to the Court Clerk until May 9, 2011, and that it was
23 accepted for filing on that date. The bankruptcy court also
24 noted that Mr. Gjerde failed to appear at the June 21, 2011
25 hearing he had set on his Stay Motion regarding the Prevailing
26 Party Fee Order. As a consequence, the bankruptcy court denied
27 the Stay Motion and awarded \$627.00 to Substitute Counsel, who
28 prepared for and attended the hearing on Mr. Gjerde's Stay

1 Motion. That order was entered July 8, 2011, and was never
2 appealed.

3 Based on the findings of the bankruptcy court, the motions
4 panel denied Mr. Gjerde's motion for reconsideration of the order
5 dismissing the First Appeal for lack of jurisdiction based on an
6 untimely filed notice of appeal. See Docket #21 in BAP Case
7 No. EC-11-1227. The motions panel thereafter denied Mr. Gjerde's
8 request for certification of the appeal directly to the Ninth
9 Circuit Court of Appeals. See Docket #24 in BAP Case
10 No. EC-11-1227.

11 These background facts are recited here to make clear that
12 no effective appeal was taken from any order of the bankruptcy
13 court in the Mickelsen case entered on or before April 18, 2011,
14 and that all such orders are final orders.

15 B. Facts Relating to the Current Appeals.

16 Currently before the panel are ten orders entered by the
17 bankruptcy court on or after October 25, 2011. Mr. Gjerde is the
18 appellant in three of the appeals. Mr. Chandler is the appellant
19 in the remaining seven appeals. We now turn to the facts
20 relating to these appeals.

21 Additional Facts

22 Mr. Chandler came to the attention of the UST indirectly as
23 a result of a new complaint against Mr. Gjerde. In January 2011,
24 the UST was contacted by Kimberley Jorgensen, one of the debtors
25 in Case No. 10-43436-E13L, with a complaint that her bankruptcy
26 case had been dismissed because her attorney, Mr. Gjerde, had
27 failed to perform the necessary services to maintain her case.
28 Ms. Jorgensen had located a new attorney, but needed her records

1 back as well as the money she had paid for Mr. Gjerde's
2 representation. Neither Mr. Gjerde nor his law office was
3 responding to her requests for her records and the return of
4 attorneys fees paid to Mr. Gjerde. In verifying the dismissal of
5 Ms. Jorgensen's case on PACER, the UST noted that Mr. Chandler,
6 not Mr. Gjerde, was the attorney of record in the case, despite
7 the fact that Ms. Jorgensen hired Mr. Gjerde and paid Mr. Gjerde
8 \$3,500 with her credit card. Ms. Jorgensen further advised the
9 UST that neither she nor her husband had ever met with
10 Mr. Chandler before their case was filed, nor had they signed any
11 of the documents filed in the case.

12 The UST faxed a letter to Mr. Chandler on January 24, 2011,
13 requesting that he fax to the UST copies of "all the wet
14 signatures in the case" by the close of the next business day,
15 and that he deliver the originals to the UST within three working
16 days. Mr. Chandler sent no return fax; nor did he respond to the
17 UST's telephone messages of January 26 and January 28, 2011, or
18 to her email communication of February 1, 2011. As of March 16,
19 2011, Mr. Chandler had not responded to any attempt by the UST to
20 obtain the wet signatures for the documents filed in the
21 Jorgensens' case.

22 In the February 1, 2011 email communication, the UST advised
23 Mr. Chandler that, as an attorney associated with the NCLC, the
24 Contempt Order entered in the Mickelsen case prohibited him from
25 filing any bankruptcy cases. Mr. Chandler was advised that if he
26 disputed the Order of Contempt he should challenge it rather than
27 ignore it.

28 On January 27, 2011, Mr. Chandler filed a chapter 13

1 petition on behalf of Ben and Kaelyn Dye ("Dye Case"). Although
2 the Dyes failed to appear at their § 341(a) meeting on March 3,
3 2011, Mr. Chandler did appear. At that time the Chapter 13
4 Trustee discussed with Mr. Chandler the fact that the Dye Case
5 had been filed after Mr. Chandler's privilege to file new cases
6 had been revoked through the Contempt Order entered January 10,
7 2011 in the Mickelsen case. The Chapter 13 Trustee personally
8 handed Mr. Chandler a copy of the Contempt Order at that time
9 because Mr. Chandler asserted he was not aware of the Contempt
10 Order.

11 Chapter 13 Trustee's Motions and Related Proceedings

12 On March 12, 2011, nine days after the Chapter 13 Trustee
13 delivered the Contempt Order to Mr. Chandler, Mr. Chandler filed
14 a joint chapter 13 case ("Nieto/Ortiz Case") for Marcus Alonzo
15 Nieto and Hildy Jean Ortiz. Two days later, on March 14, 2011,
16 the Chapter 13 Trustee filed a motion in the Nieto/Ortiz case
17 ("Chapter 13 Trustee Nieto/Ortiz Motion") seeking to have
18 Mr. Chandler's fees disgorged and for the imposition of sanctions
19 against Mr. Chandler, solely on the basis that he had filed the
20 Nieto/Ortiz case in violation of the Contempt Order. On
21 March 16, 2011, the Chapter 13 Trustee filed a motion in the Dye
22 case ("Chapter 13 Trustee Dye Motion") seeking to have
23 Mr. Chandler's fees disgorged and for the imposition of sanctions
24 against Mr. Chandler, solely on the basis that he had filed the
25 Dye case in violation of the Contempt Order. A hearing on both
26 of the Chapter 13 Trustee's motions was scheduled for
27 April 26, 2011 ("April 26 Hearing").

28 On April 6, 2011, Mr. Chandler filed an opposition to the

1 Chapter 13 Trustee Nieto/Ortiz Motion, on the basis that the
2 debtors had hired Mr. Chandler individually, not NCLC. The
3 opposition stated that the "current action," by which it appears
4 Mr. Chandler meant the Nieto/Ortiz Case, had been filed without
5 the approval of either the debtors or Mr. Chandler. Mr. Chandler
6 stated that an unnamed assistant in his office, an "independent
7 contractor" since terminated, had filed the petition without the
8 debtors' signatures and without presenting the documents to
9 Mr. Chandler for approval or direction. The "prayer" in the
10 opposition requested that the court deny the Chapter 13 Trustee
11 Nieto/Ortiz Motion, that the debtors be permitted to proceed in
12 the case "with their chosen attorney," and that a different
13 trustee be appointed "to avoid any potential prejudice against
14 Debtors." (Emphasis added.) Mr. Chandler filed a declaration in
15 support of the Opposition, in which he chronicled a history of
16 improper actions taken by two unnamed assistants over the course
17 of more than six months. Mr. Chandler denied that he willfully
18 had violated the Contempt Order, complaining that he did not have
19 adequate due process notice of the proceedings leading to the
20 entry of the Contempt Order. Nevertheless, having learned of the
21 Contempt Order on March 3, 2011, he "would have sought the
22 permission of the presiding judge" before filing the Nieto/Ortiz
23 Case, "if [he] had been given the opportunity to review and
24 approve the case before it was filed."

25 On April 13, 2011, Mr. Chandler filed with the bankruptcy
26 court an "Application for Reinstatement of Filing Privileges"
27
28

1 ("Chandler Application"),⁴ reciting that on March 16, 2011, the
2 bankruptcy court had revoked his filing privileges based on the
3 Contempt Order against Mr. Gjerde and the NCLC. Mr. Chandler did
4 not attach to the Chandler Application a copy of the March 16,
5 2011 action of the bankruptcy court from which he sought relief;
6 nor does it appear anywhere in the record before the panel.⁵

7 In his declaration incorporated into the Chandler
8 Application, Mr. Chandler faulted multiple unnamed employees for
9 any and all filing problems. He asserted that he and Mr. Gjerde

10 _____
11 ⁴ The Chandler Application was not filed with any caption
12 or in any particular case.

13 ⁵ The Chandler Application appears to relate to four
14 identical orders entered by the bankruptcy court on April 6,
15 2011, in four separate cases: (1) Joy Lynn Tabura, Case
16 No. 11-23433-C-7; (2) Sally Rose Kremere, Case No. 11-23434-C-7;
17 (3) Diane R. Britton, Case No. 11-23435-C-7; and (4) Sergy R.
Lakhno, Case No. 11-23436-C-7. Each order is entitled "Order on
Order to Show Cause re Dismissal." The text of each order reads
in its entirety:

18 This is a motion to dismiss a case where the filing fee
19 of \$299 was not paid. Debtor's counsel, [NCLC],
20 appeared and urged the case be dismissed as a duplicate
21 of another case. The case shall be dismissed. The
22 filing fee, however, remains due as a post-petition
23 debt in the duplicate case. Moreover, James C.
24 Chandler, Esq., and his colleague Sean P. Gjerde, who
25 have practiced law under the name [NCLC], have been
26 barred by this court from electronic filing privileges
27 for the reasons stated orally on the record April 5,
2011, in the case In re Mickelsen, No. 09-42649-C-7.
The filing privileges of Mr. Chandler, Mr. Gjerde, and
[NCLC], will not be eligible for consideration of
reinstatement unless and until the filing fee in this
case has been paid.

28 SO ORDERED.

1 always had maintained separate bankruptcy practices even while
2 jointly using the NCLC name. He further asserted that effective
3 January 1, 2011, his staff had been directed to file all of his
4 new bankruptcy cases in the Eastern District of California
5 reflecting his affiliation with the Law Offices of James P.
6 Chandler, not with the NCLC.

7 Mr. Chandler conceded at oral argument that he never made
8 any attempt to obtain a hearing on the Chandler Application, or
9 that his filing privileges ever were reinstated despite his
10 assertion in the Chandler Application that he had paid the \$1,196
11 to cover unpaid filing fees in four cases apparently identified
12 in the March 16, 2011 action. To the extent the March 16, 2011
13 action of the bankruptcy court was an order, Mr. Chandler took no
14 appeal from that order.

15 The Bankruptcy Court's Order to Show Cause

16 At the April 26 Hearing, at which Mr. Chandler was present,
17 the bankruptcy court continued proceedings on the Chapter 13
18 Trustee motions to June 22, 2011 ("June 22 Hearing"). Following
19 the April 26 Hearing, the bankruptcy court issued an Order to
20 Show Cause ("April 27 Show Cause Order") directing both
21 Mr. Gjerde and Mr. Chandler to appear at the June 22 Hearing and
22 show cause why they should not be sanctioned pursuant to
23 Rule 9011 for filing petitions without first obtaining client
24 signatures. The April 27 Show Cause Order also consolidated the
25 proceedings on both motions of the Chapter 13 Trustee and set a
26 discovery schedule.

27 On May 3, 2011, the Chapter 13 Trustee propounded discovery
28 requests to Mr. Gjerde and to Mr. Chandler. When neither

1 Mr. Gjerde nor Mr. Chandler provided responses to the discovery
2 requests, other than to serve objections, the Chapter 13 Trustee
3 filed a motion on June 14, 2011, to compel discovery ("Discovery
4 Motion") pursuant to Civil Rule 37 and set it to be heard with
5 other pending matters at the June 22 Hearing.

6 On May 18, 2011, Mr. Gjerde filed a motion to strike
7 ("Gjerde Motion to Strike") the April 27 Show Cause Order on the
8 basis that it violated Rule 9011. In effect, he asserted that
9 the April 27 Show Cause Order served to join him improperly as a
10 party to the Chapter 13 Trustee motions in the Nieto/Ortiz and
11 Dye cases.

12 The June 22 Hearing

13 Both Mr. Chandler and Mr. Gjerde appeared at the June 22
14 Hearing. The bankruptcy court denied Mr. Gjerde's Motion to
15 Strike after reading the April 27 Show Cause Order into the
16 record and establishing through Mr. Gjerde's testimony under oath
17 that he had received and read the April 27 Show Cause Order.

18 In defending the Discovery Motion, Mr. Chandler asserted
19 that in light of the fact that the Chapter 13 Trustee motions
20 raised the issue of contempt, he had requested representation
21 from his insurance carrier that had not yet been provided. He
22 further asserted he simply had not had sufficient time to gather
23 the documents requested, in part because of a serious back
24 injury. He also complained that the Discovery Motion was filed
25 on shortened notice that gave him insufficient time to respond.

26 Mr. Gjerde also asserted that he had been attempting to
27 obtain representation through his insurance carrier. Mr. Gjerde
28 complained about needing to produce "wet signatures" for "every

1 single last file." He further asserted that the Bankruptcy Code
2 did not authorize a trustee to request the wet signatures,
3 although he did concede that the bankruptcy court could make the
4 request. Mr. Gjerde requested an additional four weeks to locate
5 all of his files.

6 The discovery propounded by the Chapter 13 Trustee also
7 requested identification of the employees whom Mr. Chandler and
8 Mr. Gjerde were blaming for improper filings. Mr. Chandler and
9 Mr. Gjerde had objected to providing that information, citing the
10 need to protect the privacy of third parties and their own
11 payroll matters. The bankruptcy court determined it was
12 appropriate to redact any social security information, but ruled
13 that the Chapter 13 Trustee was entitled to learn the names of
14 the persons accused of filing cases without authority and to
15 depose them, if appropriate.

16 The bankruptcy court set a further hearing for July 25, 2011
17 ("July 25 Hearing") to take evidence on an award of sanctions
18 under Civil Rule 37(a)(5). Because of the lack of discovery, the
19 hearing on the Chapter 13 Trustee motions and the April 27 Show
20 Cause Order were continued to the same date.

21 UST's Sanctions Motion

22 On June 14, 2011, the UST filed its Motion for Order of
23 Civil Contempt and Sanctions ("UST Sanctions Motion") against
24 both Mr. Gjerde and Mr. Chandler for (1) violating the Order of
25 Contempt, and (2) violating LBR 9004-1(c)(1)(C), which provides:

26 All pleadings and non-evidentiary documents shall be
27 signed by the individual attorney for the party
28 presenting them, or by the party involved if that party
is appearing in propria persona. Affidavits and
certifications shall be signed by the person offering

1 the evidentiary material contained in the document.
2 The name of the person signing the document shall be
3 typed underneath the signature.

4 (1) Signatures on Documents Submitted
5 Electronically

6 (C) The Use of "/s/ Name" or a Software Generated-
7 Electronic Signature. The use of "/s/ Name" or a
8 software-generated electronic signature on documents
9 constitutes the registered user's representation that
10 an originally signed copy of the document exists and is
11 in the registered user's possession at the time of
12 filing.

13 The UST Sanctions Motion was filed in the Mickelsen case,
14 notwithstanding that the case at issue involved debtors
15 Michael G. Peters and Jennifer L. Peters.⁶ In particular, the
16 UST alleged in the UST Sanctions Motion that three cases were
17 filed by or on behalf of Mr. Gjerde, Mr. Chandler, and/or the
18 NCLC as follows:

19 The Peters hired Mr. Gjerde to file a chapter 13 case for
20 them in May of 2010. The Peters met with Mr. Gjerde on May 4,
21

22 ⁶ The Mickelsen case had been closed by the court on
23 November 10, 2010. On June 15, 2011, the UST filed a motion to
24 reopen the Mickelsen case on the basis that further proceedings
25 were necessary on the Contempt Order previously entered in that
26 case. The bankruptcy court entered an order reopening the
27 Mickelsen case on June 17, 2011, and an amended order reopening
28 the case on June 24, 2011 ("Amended Reopening Order") in order to
clarify that no trustee need be appointed in the reopened case.
On July 7, 2011, Mr. Gjerde filed a notice of appeal ("Second
Appeal") from the Amended Reopening Order, on the basis that the
Mickelsen case currently was with the Ninth Circuit Court of
Appeals. The Second Appeal, BAP No. EC-11-1363, was dismissed by
our motions panel on October 11, 2011, because Mr. Gjerde had
failed to comply with the briefing schedule issued on July 19,
2011, and also had failed to respond to the panel's conditional
order of dismissal relating to the delinquent brief. The motions
panel further noted that the Second Appeal was interlocutory and
determined that leave to continue the appeal was not warranted.

1 2010, and he agreed to represent them. The Peters paid NCLC
2 \$1,000 by credit card on that date, and on September 30, 2010,
3 wrote a check to Mr. Gjerde in the amount of \$1,274. The Peters
4 also provided Mr. Gjerde a post-dated check for the balance of
5 his fees, which he deposited prior to its date with the result
6 that it was returned for insufficient funds. The Peters replaced
7 that check with cash. In total Mr. Peters believes he paid
8 \$3,226 plus the filing fee.

9 The Peters' first case ("Peters I") was filed by Mr. Gjerde
10 on October 21, 2010, but was dismissed because of the inadequacy
11 of the unconfirmed plan. In particular, the Chapter 13 Trustee
12 filed both an objection to confirmation and a motion to dismiss,
13 neither of which Mr. Gjerde addressed. Peters I was dismissed
14 on March 11, 2011. The Peters' second case ("Peters II") was
15 filed on March 14, 2011, after the Contempt Order had been
16 entered, in the face of a pending foreclosure. Peters II was
17 filed by Mr. Chandler, not by Mr. Gjerde or the NCLC. When
18 Mr. Chandler filed Peters II, he had not met with the Peters, nor
19 had he obtained the Peters' signatures on the Peters II petition
20 in violation of LBR 9004-1. Peters II was dismissed April 1,
21 2011, after Mr. Chandler failed to file missing documents in the
22 case.

23 After Peters II was filed, the Chapter 13 Trustee Dye Motion
24 was filed, seeking to sanction Mr. Chandler for filing new cases
25 in violation of the Contempt Order. Therefore, Mr. Chandler did
26 not file the Peters' third case ("Peters III"). Instead, the
27 documents for Peters III were prepared by NCLC, and the documents
28 were filed with the court on April 13, 2011, by NCLC's paralegal,

1 Shaun Smith. The Peters assert they did sign the petition for
2 Peters III before it was filed. Unbeknownst to the Peters, the
3 Peters III petition listed the Peters as filing in pro per. In
4 his affidavit in support of the UST Sanctions Motion, Mr. Peters
5 stated that when Peters III was filed, he and his wife still
6 believed they were being represented by Mr. Gjerde. They
7 confirmed with Mr. Gjerde's office that he would be representing
8 them at the § 341(a) meeting in Peters III. It was at that
9 § 341(a) meeting that the Peters realized they were
10 unrepresented. Although Mr. Gjerde appeared at the § 341(a)
11 meeting, he took the questionnaire the UST had given the Peters
12 as debtors not represented by counsel, he filled in the space for
13 attorney compensation to reflect the Peters had paid no fees to
14 him, and he had the Peters sign the questionnaire. The
15 Chapter 13 Trustee then refused to allow Mr. Gjerde to represent
16 the Peters at the § 341(a) meeting because he was not listed as
17 counsel of record.

18 On June 22, 2011, Mr. Gjerde filed a request that the UST
19 Sanctions Motion be dismissed on the basis that it was filed in
20 violation of LBR 8020-1. In essence, Mr. Gjerde asserted that
21 the bankruptcy court was without jurisdiction over the Mickelsen
22 case, or any matter filed in that case, so long as the First
23 Appeal was pending. Mr. Gjerde filed an alternative pleading on
24 the same date, through which he demanded a jury trial and
25 appointment of counsel, pursuant to Fed. R. Crim. P. 42, if the
26 UST Sanctions Motion were allowed to proceed.

27 The hearing on the UST Sanctions Motion was scheduled for
28 July 25, 2011 ("July 25 Hearing"), at the same time as the

1 Chapter 13 Trustee motions, the Discovery Motion, and the court's
2 April 27 Show Cause Order.

3 The July 25 Hearing

4 Mr. Chandler did not appear at the July 25 Hearing. As a
5 consequence, the bankruptcy court entered default against him on
6 all pending matters, i.e., the Chapter 13 Trustee Nieto/Ortiz
7 Motion, the Chapter 13 Trustee Dye Motion, the Discovery Motion,
8 the UST Sanctions Motion, and the April 27 Show Cause Order.

9 Mr. Gjerde was represented at the July 25 Hearing by
10 Tom Johnson. Mr. Johnson advised the bankruptcy court that in
11 June 2010, Mr. Gjerde had been indicted in a criminal matter
12 involving his law practice and mortgage fraud. Although
13 Mr. Johnson had begun representing Mr. Gjerde while Mr. Gjerde
14 was under investigation prior to the indictment, he only recently
15 had been asked to represent Mr. Gjerde in the bankruptcy court
16 matters. Because the discovery requests involved matters
17 potentially related to the federal indictment, Mr. Johnson asked
18 for additional time to evaluate the discovery requests to protect
19 Mr. Gjerde from possible self-incrimination. Although skeptical
20 that the bankruptcy court matters could impact Mr. Gjerde's
21 rights with respect to the federal indictment, where the actions
22 concerned in the indictment took place before June 2010 and the
23 matters before the bankruptcy court took place beginning after
24 the Contempt Order was entered in January 2011, the bankruptcy
25 court nevertheless granted Mr. Gjerde a further continuance and
26 set the evidentiary hearing for September 8, 2011 ("September 8
27 Hearing").

28 / / /

1 The September 8 Hearing

2 Mr. Johnson's appearance for Mr. Gjerde at the September 8
3 Hearing was limited to the Chapter 13 Trustee Nieto/Ortiz Motion
4 and the Chapter 13 Trustee Dye Motion. Mr. Gjerde represented
5 himself with respect to the other matters.⁷

6 Once again Mr. Johnson requested a stay of the matters in
7 bankruptcy court, this time pending resolution of Mr. Gjerde's
8 trial in the federal case, which was then set to commence on
9 January 23, 2012. The UST and the bankruptcy court expressed
10 concern as to continuing harm to the public in the event
11 Mr. Gjerde and/or the NCLC still were filing bankruptcy cases.
12 The bankruptcy court continued all hearings to October 19, 2011
13 ("October 19 Hearing"), to permit the parties to determine
14 whether a stay of the proceedings would harm the public.

15 The October 19 Hearing.

16 At the October 19 Hearing, Kristy Kellogg "stood in" for
17 Mr. Johnson, who was unavailable because of a jury verdict just
18 received in a pending state court matter that required his
19 attendance. Ms. Kellogg stated that Mr. Johnson had filed a
20 substitution of counsel earlier in the day, and that she had a
21 written statement from Mr. Gjerde requesting that the bankruptcy
22 court allow Mr. Johnson to withdraw as his attorney of record,
23 and permitting Mr. Gjerde to represent himself in future matters.
24 Finally, when asked by the bankruptcy court where Mr. Gjerde was,
25 Ms. Kellogg stated: "I was informed that Mr. Gjerde was not

26
27 ⁷ These matters included the UST's Sanctions Motion and
28 the evidentiary hearing on the remand from the First Appeal.

1 going to be present at the hearing today." Colloquy with counsel
2 established that Mr. Gjerde had clearly signaled his intent not
3 to appear at any future hearings. In light of that intent, the
4 bankruptcy court proceeded on all matters pending against
5 Mr. Gjerde.

6 The record of the October 19 Hearing reflects that the
7 bankruptcy court had ordered a stay contingent on Mr. Gjerde
8 placing on his website and all advertisements a notification that
9 he was not allowed to accept any new cases for filing without
10 prior approval of the bankruptcy court. The UST reported that
11 Mr. Gjerde had made no such disclosure on his website.

12 The bankruptcy court admitted exhibits which established the
13 amounts paid to Mr. Gjerde and/or the NCLC by the debtors in the
14 Peters, Dye, and Nieto/Ortiz cases, and took testimony from the
15 UST and counsel for the Chapter 13 Trustee on their attorneys
16 fees. Thereafter, the bankruptcy court entered judgments on all
17 matters, and these appeals followed:

18 Nieto/Ortiz -

19 Mr. Gjerde and Mr. Chandler, identified as doing business as
20 the NCLC, were ordered jointly and severally to disgorge \$3,000
21 to the debtors. This judgment is before the panel as EC-11-1607
22 on Mr. Gjerde's Notice of Appeal and as EC-11-1643 on
23 Mr. Chandler's Notice of Appeal.

24 Mr. Gjerde and Mr. Chandler, identified as doing business as
25 the NCLC, were ordered jointly and severally to pay \$19,500 to
26 the Chapter 13 Trustee as the cost of "additional professional
27 services occasioned by their intentional civil contempt." This
28 judgment is before the panel as EC-11-1619 on Mr. Gjerde's Notice

1 of Appeal and as EC-12-1015 on Mr. Chandler's Notice of Appeal.

2 Dye -

3 Mr. Gjerde and Mr. Chandler, identified as doing business as
4 the NCLC, were ordered jointly and severally to disgorge \$2,000
5 to the debtors. This judgment is before the panel as EC-11-1641
6 on Mr. Chandler's Notice of Appeal.

7 Mr. Gjerde and Mr. Chandler, identified as doing business as
8 the NCLC, were ordered jointly and severally to pay \$19,500 to
9 the Chapter 13 Trustee as the cost of "additional professional
10 services occasioned by their intentional civil contempt." This
11 judgment is before the panel as EC-12-1016 on Mr. Chandler's
12 Notice of Appeal.

13 Peters -

14 Mr. Gjerde and Mr. Chandler, identified as doing business as
15 the NCLC, were ordered jointly and severally to disgorge \$2,274
16 to the debtors. This judgment is before the panel as EC-12-1018
17 on Mr. Chandler's Notice of Appeal.

18 Mickelsen -

19 Mr. Gjerde and Mr. Chandler, identified as doing business as
20 the NCLC, were ordered jointly and severally to pay \$16,020 to
21 the Chapter 13 Trustee as the cost of "additional professional
22 services occasioned by their intentional civil contempt." This
23 judgment is before the panel as EC-11-1613 on Mr. Gjerde's Notice
24 of Appeal and as EC-12-1017 on Mr. Chandler's Notice of Appeal.
25 However, it appears that this judgment was amended by the
26 bankruptcy court on October 27, 2011 to reflect that the
27 appropriate payee was the UST rather than the Chapter 13 Trustee.
28 This amended judgment is before the panel as EC-12-1019 on

1 Mr. Chandler's Notice of Appeal.

2 II. JURISDICTION

3 The bankruptcy court had jurisdiction under 28 U.S.C.
4 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
5 § 158.

6 III. ISSUES

7 The broad issue before us is whether the bankruptcy court
8 abused its discretion when it entered the default judgments now
9 on appeal. However, two preliminary issues exist. The first is
10 whether the panel may consider appeals from default judgments
11 where no motions to set aside either the entry of default or the
12 entry of the default judgment were first brought before the
13 bankruptcy court. The second is whether Mr. Gjerde and/or
14 Mr. Chandler have waived the issues on appeal.

15 IV. STANDARDS OF REVIEW

16 A trial court's decision to enter a default judgment is
17 reviewed for an abuse of discretion. See Estrada v. Speno &
18 Cohen, 244 F.3d 1050, 1056 (9th Cir. 2001). "We review sanctions
19 and the terms of a disciplinary order for abuse of discretion."
20 In re Nguyen, 447 B.R. 268, 276 (9th Cir. BAP 2011)(en banc).
21 The bankruptcy court's choice of sanction is reviewed for abuse
22 of discretion. U.S. Dist. Ct. for E.D. Wash. v. Sandlin, 12 F.3d
23 861, 865 (9th Cir. 1993).

24 We apply a two-part test to determine whether the bankruptcy
25 court abused its discretion. United States v. Hinkson, 585 F.3d
26 1247, 1261-62 (9th Cir. 2009)(en banc). First, we consider de
27 novo whether the bankruptcy court applied the correct legal
28 standard to the relief requested. Id. Then, we review the

1 bankruptcy court's fact findings for clear error. Id. at 1262 &
2 n.20. We must affirm the bankruptcy court's fact findings unless
3 we conclude that they are "(1) 'illogical,' (2) 'implausible,' or
4 (3) without 'support in inferences that may be drawn from the
5 facts in the record.'" Id.

6 We may affirm the bankruptcy court's ruling on any basis
7 supported by the record. See, e.g., Heilman v. Heilman
8 (In re Heilman), 430 B.R. 213, 216 (9th Cir. BAP 2010); FDIC v.
9 Kipperman (In re Commercial Money Center, Inc.), 392 B.R. 814,
10 826-27 (9th Cir. BAP 2008); see also McSherry v. City of Long
11 Beach, 584 F.3d 1129, 1135 (9th Cir. 2009).

12 Generally, we do not consider an issue that was raised but
13 thereafter conceded by the Appellant in the trial court. See
14 CDN, Inc. v. Kapes, 197 F.3d 1256, 1258-59 (9th Cir. 1999) ("The
15 withdrawal of an objection is tantamount to a waiver of an issue
16 for appeal.").

17 V. DISCUSSION

18 A. Mr. Gjerde's Appeals: EC-11-1607, EC-11-1613, EC-11-1610

19 We begin our examination of the record with a clarification
20 of what we will not be deciding in these appeals. The validity
21 of the Contempt Order is not before us. It is a final order that
22 was not timely appealed by Mr. Gjerde, as evidenced by the
23 dismissal of his First Appeal. Consequently, we do not address
24 the issues Mr. Gjerde raised in his Opening Brief on Appeal that
25 relate to the bankruptcy court's jurisdiction to enter the
26 Contempt Order or whether Mr. Gjerde was denied due process by
27 the entry of the Contempt Order.

28 What is left are the issues relating to the bankruptcy

1 court's enforcement of the Contempt Order, which were wrapped
2 together with the bankruptcy court's rulings relating to other
3 pleadings which sought the imposition of sanctions on other
4 bases, in particular, Mr. Gjerde's failure to comply with
5 LBR 9004-1(c)(1)(C). We are compelled to observe that any
6 argument Mr. Gjerde makes that he was not apprised of the actions
7 to be taken against him are specious. He contested his joinder
8 to the Chapter 13 Trustee Nieto/Ortiz Motion and the Chapter 13
9 Trustee Dye Motion. The April 27 Show Cause Order and the UST
10 Sanctions Motion both were explicitly addressed to the issue of
11 "wet signatures," and the Discovery Motion was brought in part
12 because of Mr. Gjerde's failure to produce "wet signatures."

13 At the June 22 Hearing, the bankruptcy court put Mr. Gjerde
14 under oath to establish that he had actual knowledge that the
15 proceedings related to the April 27 Show Cause Order went to the
16 issue of "wet signatures."

17 THE COURT: You have an order from me dated April 27?

18 MR. GJERDE: Yes.

19 . . .

20 THE COURT: Would it surprise you to know that the only
21 order issued on April 27 is the order that you're
looking at?

22 MR. GJERDE: That would surprise me, your Honor. I
23 thought there was an order to show cause that talked
about wet signatures. That's what I recall seeing.
24 But I don't see where it says wet signature. So I'm
somewhat confused, your Honor. But, yeah, I did
25 receive an order to show cause.

26 THE COURT: You don't see any reference to wet
signatures?

27 THE WITNESS: No, I don't, your Honor.

28 THE COURT: Would it surprise you to know that page 2,

1 lines 7 to 8, contain the clause "notwithstanding that
2 the debtors have not actually signed the petition"?

3 Tr. of June 22 Hearing at 12:8-13:3.

4 At the conclusion of the colloquy, the bankruptcy court made
5 the following finding: ". . . I find as fact that Mr. Gjerde has
6 seen [the April 27 Show Cause Order], and I so conclude." Id. at
7 14:19-20.

8 In the end, Mr. Gjerde's own actions preclude us from
9 reviewing the judgments on appeal. Specifically, Mr. Gjerde
10 failed to appear at the ultimate hearing on the proceedings that
11 resulted in the entry of the judgments he has appealed. As noted
12 by the bankruptcy court at the October 19 Hearing: "It appears
13 that it is established (A) that Mr. Gjerde is representing
14 himself and (B) that he does not intend to appear in this court
15 now or in the future in this case." Tr. of October 19 Hearing at
16 4:20-22. Accordingly, the proceedings that resulted in the
17 judgments were conducted "on a default basis." Id. at 4:24.

18 In light of Mr. Gjerde's default, the bankruptcy court was
19 entitled to assume as true the facts alleged in the outstanding
20 pleadings, except as to the amount of damages. Geddes v. United
21 Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977). As it was
22 required to do, before entering the default judgments, the
23 bankruptcy court took evidence as to "damages" in the form of
24 fees paid by Mr. Nieto and Ms. Ortiz, by the Dyes, and by the
25 Peters, and as to the attorneys fees incurred by the Chapter 13
26 Trustee and the UST based upon the improper conduct of Mr. Gjerde
27 as alleged. The actual damages found by the bankruptcy court
28 constitute an appropriate sanctions amount.

1 Only after the default judgments were entered did Mr. Gjerde
2 reassert his interest in the proceedings. Unfortunately, that
3 action, the filing of the appeals, was insufficient to entitle
4 Mr. Gjerde to relief from the default judgments.

5 First, whether Mr. Gjerde was entitled to relief from the
6 default judgments was a matter within the discretion of the
7 bankruptcy judge in the first instance. Madsen v. Bumb, 419 F.2d
8 4, 6 (9th Cir. 1969). Under Civil Rule 55(c), applicable in
9 bankruptcy contested matters pursuant to Rule 9014(c), the
10 bankruptcy court has discretion (1) to set aside an entry of
11 default "for good cause" and (2) to set aside a default judgment
12 under Rule 60(b). "Relief from a default judgment must be
13 requested by a formal application as required by Rule 60(b)."
14 10A Wright, Miller & Kane, Fed. Practice and Proc. 2d § 2692
15 (2010). "Relief under Rule 60(b) ordinarily is obtained by motion
16 in the court that rendered the judgment." 11 Wright, Miller &
17 Kane, Fed. Practice and Proc. 2d § 2865 (2010) (emphasis added).
18 "Motions to vacate default judgments . . . are addressed to the
19 broad equitable discretion of the court where the default was
20 taken." State Bank of India v. Chalasani (In re Chalasani),
21 92 F.3d 1300, 1307 (2d Cir. 1996), cited by Investors Thrift v.
22 Lam (In re Lam), 192 F.3d 1309, 1311 (9th Cir. 1999).

23 Mr. Gjerde did not seek relief from the default judgments in
24 the bankruptcy court. As an appellate body, our role with regard
25 to a Rule 60(b) motion is limited to reviewing the bankruptcy
26 court's decision to determine if there was an abuse of
27 discretion. First Beverages, Inc. v. Royal Crown Cola Co.,
28 612 F.2d 1164, 1172 (9th Cir. 1980). "An appeal to this court

1 cannot be used as a substitute for the timely procedure set forth
2 by Rule 60(b)." Rohauer v. Friedman, 306 F.2d 933, 937 (9th Cir.
3 1962).

4 The Ninth Circuit, when faced with a defaulted party who
5 appealed a default judgment rather than seek relief from the
6 trial court under Rule 60(b), dismissed the appeal, stating:

7 Federal courts are not run like a casino game in which
8 players may enter and exit on pure whim. A defaulted
9 party may not re-enter litigation, particularly on appeal,
on sheer caprice. It must follow proper procedure to set
aside the default.

10 In re Lam, 192 F.3d at 1311. Accord Consorzio del Prosciutto v.
11 Domain Name Clearing, 346 F.3d 1193, 1195 (9th Cir. 2003)(appeal
12 of default judgment dismissed where defaulting party had not
13 first moved the trial court to set aside entry of default or
14 relief from the default judgment).

15 Second, we deem the issues raised on appeal to have been
16 waived by Mr. Gjerde when he voluntarily absented himself from
17 the October 19 Hearing. CDN, Inc. v. Kapes, 197 F.3d at 1258-59
18 (9th Cir. 1999).

19 B. Mr. Chandler's Appeals: EC-11-1641, EC-11-1643, EC-12-1015,
20 EC-12-1016, EC-12-1017, EC-12-1018, EC-12-1019

21 Our analysis of the viability of Mr. Chandler's appeals is
22 similar to that stated above for Mr. Gjerde's appeals. We note
23 that Mr. Chandler asserted somewhat vigorously that the Contempt
24 Order was not enforceable against him where he was not a party to
25 the proceedings which led to its entry. In the end, Mr. Chandler
26 abandoned this position when he chose to absent himself from all
27 further proceedings beginning with the July 25 Hearing, at which
28 hearing the bankruptcy court noted Mr. Chandler's default on the

1 record. Because Mr. Chandler did not seek relief from the
2 bankruptcy court from the entry of default or the default
3 judgments subsequently entered against him, we have no basis upon
4 which to consider the issues Mr. Chandler raised in the seven
5 appeals pending before this panel. Further as an appellate
6 court, we will not consider an issue explicitly abandoned by an
7 appellant in the trial court proceedings.

8 VI. CONCLUSION

9 Consistent with Ninth Circuit precedent, we DISMISS each of
10 these appeals.

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