

MAY 22 2013

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-12-1471-JuMkD
	)	BAP No. EC-12-1485-JuMkD
WEST COAST REAL ESTATE &	)	BAP No. EC-12-1493-JuMkD
MORTGAGE INC.,	)	BAP No. EC-12-1498-JuMkD
	)	(cross appeals)
Debtor.	)	
	)	Bk. No. 12-30686
<hr/>	)	
DON SMITH; HOWARD BROWN, III;	)	
WEST COAST REAL ESTATE &	)	
MORTGAGE INC.,	)	
	)	
Appellants/Cross-Appellees,	)	
	)	
v.	)	<b>M E M O R A N D U M*</b>
	)	
SA CHALLENGER, INC.,	)	
	)	
Appellee/Cross-Appellant,	)	
	)	
DOUGLAS M. WHATLEY, Trustee;	)	
UNITED STATES TRUSTEE,	)	
	)	
Appellees.	)	
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Argued and Submitted on March 22, 2013  
at Sacramento, California

Filed - May 22, 2013

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: Garland O'Bryan Bell, Jr., Esq. argued for  
Appellants Don Smith, Howard Brown, III, and West  
Coast Real Estate & Mortgage Inc.; Joshua D.  
Wayser, Esq. of Katten Muchin Rosenman LLP,  
argued for Appellee SA Challenger, Inc.

\* 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 Before: JURY, MARKELL and DUNN, Bankruptcy Judges.

2  
3 These appeals and cross-appeals arise from two sanctions  
4 orders in favor of Appellee, SA Challenger, Inc. (SACI), and  
5 against Appellants, Don Smith (Smith), Howard Brown, III (Brown)  
6 and chapter 11<sup>1</sup> debtor, West Coast Real Estate & Mortgage Inc.  
7 (West Coast)(collectively, Appellants), in the amount of \$20,000  
8 to be paid jointly and severally.

9 Appellants argue that the bankruptcy court abused its  
10 discretion in awarding the sanctions under § 105 because the  
11 \$20,000 award was punitive in nature and the amount arbitrary  
12 and lacking evidentiary support. SACI cross-appeals,<sup>2</sup> also  
13 arguing that the bankruptcy court abused its discretion in  
14 determining the amount of the sanctions. According to SACI, the  
15 record supports an award of \$134,885.82, which includes  
16 \$33,459.82 in attorneys' fees and \$101,436.00 in missing rents  
17 that were unaccounted for and constituted SACI's cash  
18 collateral.

19 We agree with Appellants that the sanctions award appears  
20 arbitrary because the bankruptcy court did not explain how it  
21 arrived at the \$20,000 amount which it based on SACI's  
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24 <sup>1</sup> Unless otherwise indicated, all chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
26 "Rule" references are to the Federal Rules of Bankruptcy  
27 Procedure and "Civil Rule" references are to the Federal Rules of  
28 Civil Procedure.

<sup>2</sup> Appellees, Douglas M. Whatley, the chapter 7 trustee for  
West Coast, and the United States Trustee (UST) have not  
participated in these matters.

1 reasonable attorneys' fees. As a result, we are unable to  
2 determine how the court exercised its discretion and thus cannot  
3 conduct a meaningful review of the award. We therefore VACATE  
4 the sanctions orders and REMAND to the bankruptcy court so that  
5 it can make additional findings and explain its conclusions  
6 regarding the amount of the award. We do not express any  
7 opinion whether the amount of the sanctions previously awarded  
8 based on SACI's attorneys' fees should or should not be changed.

9 Because of our remand, we conclude that SACI's cross-  
10 appeals challenging the amount of the sanctions awarded based on  
11 its attorneys' fees are moot. However, on the issue of  
12 sanctions based on the missing rents, we AFFIRM the bankruptcy  
13 court's decision for the reasons discussed below.

#### 14 I. FACTS AND PROCEDURAL BACKGROUND

15 The facts leading up to the entry of the sanctions orders  
16 are a textbook example of bad faith. Appellants' conduct that  
17 gave rise to the sanctions involved the transfer of real  
18 property owned by chapter 11 debtor, Sundance Eldorado Self-  
19 Storage LP (Sundance). Sundance, through Brown, transferred the  
20 property by grant deed to West Coast after U.S. Bank (Bank)  
21 obtained relief from the automatic stay in Sundance's bankruptcy  
22 and on the eve of the Bank's foreclosure. The transfer of the  
23 property was immediately followed by West Coast's filing of a  
24 chapter 11 petition, signed by Smith, the 100% owner of West  
25 Coast and its president. Needless to say, West Coast's  
26 bankruptcy filing halted the Bank's efforts to foreclose on the  
27 property due to the imposition of the automatic stay. The facts  
28 relating to the transfer of the real property are not disputed

1 on appeal<sup>3</sup> and are as follows.

2 Sundance was a self storage business located in Eldorado  
3 Hills, California. On January 12, 2007, Pacific National Bank  
4 (PNB) loaned \$5.95 million (Loan) to Sundance. The Loan was  
5 secured by a deed of trust, assignment of rents, security  
6 agreement, and fixture filing recorded against Sundance's real  
7 property. At Sundance's request, PNB modified the Loan three  
8 times over two years. After the last modification, the Federal  
9 Deposit Insurance Corporation placed PNB into receivership and  
10 the assets of PNB, including the Loan, were sold to the Bank.  
11 Sundance defaulted on the Loan in February 2010.

12 **Sundance's First Bankruptcy Case**

13 On May 31, 2010, Sundance filed a chapter 11 petition. The  
14 bankruptcy court dismissed the case because Sundance did not  
15 file the required documents. After dismissal, the Bank filed a  
16 Notice of Default and Election to Sell Under Deed of Trust with  
17 respect to the property.

18 **Sundance's Second Bankruptcy Case**

19 On June 25, 2010, Sundance filed a second chapter 11  
20 petition, Case No. 10-36676 (Second Sundance Bankruptcy). Smith  
21 signed the petition as manager of operations. On July 19, 2010,  
22 the Bank filed its first motion for relief from the automatic  
23 stay.

24 Sundance then filed a motion to use the Bank's cash  
25 collateral. Because Sundance was in the process of finding a  
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27 <sup>3</sup> Many of the facts are taken from the bankruptcy court's  
28 written rulings dated June 27, 2012, and August 29, 2012.

1 buyer for the property, the Bank agreed that Sundance could use  
2 its cash collateral with the qualification that such use  
3 terminated if the Bank obtained relief from stay. The Bank also  
4 required Sundance to pay 60% of its monthly interest payment on  
5 its Loan. Sundance could not secure a buyer.

6 After an unsuccessful second motion for relief from stay,  
7 the Bank sought relief from stay for a third time on June 15,  
8 2011. The latter motion was continued several times to give  
9 Sundance the opportunity to reorganize the property.

10 On January 17, 2012, Sundance filed its third amended plan  
11 and disclosure statement. Peninsula Capital Group Inc.  
12 (Peninsula) was the general partner for Sundance and a joint  
13 proponent of the plan along with Brown, who was the owner and  
14 sole officer of Peninsula. Peninsula was seen as a potential  
15 source of new funding and guarantor of the plan.

16 On March 28, 2012, the bankruptcy court held an evidentiary  
17 hearing on plan confirmation and took the matter under  
18 submission.

19 On April 12, 2012, the bankruptcy court issued a Memorandum  
20 Decision granting the Bank relief from stay and denying  
21 confirmation of Sundance's plan of reorganization. In granting  
22 the Bank relief from stay, the court found, among other things,  
23 that: (1) Sundance defaulted under the terms of the Loan  
24 documents; (2) Sundance's plan was not feasible and likely would  
25 be followed by liquidation; and (3) Sundance lacked equity in  
26 the property, a plan was unlikely to be confirmed, and the  
27 property was not necessary to an effective reorganization. The  
28 court entered the order granting the Bank relief from stay on

1 April 12, 2012.

2 The Bank scheduled the foreclosure sale on June 5, 2012.

3 On April 23, 2012, the UST filed a motion to dismiss or  
4 convert Sundance's case to chapter 7. Brown filed a response in  
5 favor of dismissal and opposing conversion and Sundance  
6 submitted declarations asking the bankruptcy court to stop the  
7 Bank's foreclosure.

### 8 **The State Court Lawsuit**

9 On April 30, 2012, two weeks after the bankruptcy court  
10 entered its Memorandum Decision, Sundance filed a complaint and  
11 application for injunctive relief in the El Dorado County  
12 Superior Court (State Court) to enjoin the Bank's then-scheduled  
13 June 5, 2012 foreclosure sale. Smith filed a declaration in  
14 support of the application and served as Sundance's  
15 representative at the related hearings. Following two hearings,  
16 on May 24, 2012, the State Court denied injunctive relief.<sup>4</sup> The  
17 Bank continued with its foreclosure efforts.

### 18 **The Transfer of Sundance's Property**

19 On May 24, 2012, the same day that the State Court denied  
20 Sundance injunctive relief, Sundance transferred its real  
21 property by grant deed to West Coast. Brown, in his individual  
22 capacity, signed the grant deed on Sundance's behalf. The grant  
23 deed was recorded on May 29, 2012, in the County of El Dorado as

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25 <sup>4</sup> In their opening brief, Appellants contend that the  
26 injunction was not granted because their attorney was unable to  
27 obtain the documents and declarations that would have shown that  
28 the Bank had "probably" made misrepresentations of the Loan  
obligation to Sundance and the bankruptcy court. None of those  
documents or declarations are in the record on appeal.

1 DOC-2012-0025784-00.

2 **The Conversion Hearing**

3 On May 30, 2012, the bankruptcy court heard the UST's  
4 motion to dismiss or convert the Second Sundance Bankruptcy  
5 case. The court granted the UST's request for conversion.  
6 Although Brown's attorney appeared at the hearing, he did not  
7 inform the bankruptcy court, the Bank, or the UST's office that  
8 the property had been transferred.<sup>5</sup> The bankruptcy court  
9 entered a minute order dated June 4, 2012, converting the case  
10 to chapter 7.

11 **West Coast's Bankruptcy Case**

12 The same day that Sundance's case was converted, West Coast  
13 filed a chapter 11 petition, which Smith signed as President.  
14 Smith was also the 100% owner of West Coast. The schedules  
15 listed the property transferred by Sundance as West Coast's only  
16 asset and listed as creditors only the Bank and a few others  
17 with minor debts. The income listed in the past two years was  
18 "Debtor Loss on Property." West Coast described the nature of  
19 its business as real estate and mortgage without mentioning a  
20 self-storage facility or relationship to the Second Sundance  
21 Bankruptcy.

22 The next day, the Bank filed a Notice of Claim to Rents,  
23 alerting all interested parties that the rents from the property  
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25 <sup>5</sup> Brown's attorney, Mr. Isley, later stated at the  
26 August 29, 2012 sanctions hearing that at the time of the hearing  
27 on the dismissal or conversion of Sundance's Second Bankruptcy  
28 case, he had "no clue" that "any of this stuff had happened" and  
that he "didn't hear about it until probably several weeks  
later." Hr'g Tr. 8/29/12 at 11:15-23.

1 could not be used for any purpose.

2 On June 8, 2012, the Bank filed an Expedited Motion for  
3 Relief From the Automatic Stay and For Sanctions Against Don  
4 Smith and West Coast. The motion sought relief from the  
5 automatic stay based upon the transfer of the property followed  
6 by West Coast's bad faith bankruptcy filing. The Bank sought  
7 sanctions against Smith and West Coast, with the amount left for  
8 later determination, on the grounds that Smith had willfully  
9 disobeyed the bankruptcy court's relief from stay order in the  
10 Second Sundance Bankruptcy case when he transferred the property  
11 outside the ordinary course to West Coast one week before the  
12 foreclosure and West Coast then, in bad faith, filed the  
13 bankruptcy to hinder and delay the Bank's foreclosure. The Bank  
14 also sought dismissal of West Coast's case under the bankruptcy  
15 court's inherent power to sanction.

16 In support of its motion, the Bank submitted the  
17 declaration of Jessica M. Mickelsen. Mickelsen – one of the  
18 attorneys representing the Bank – declared that as a result of  
19 West Coast's filing, the Bank had incurred approximately \$15,000  
20 in attorneys' fees and costs.

21 On June 12, 2012, West Coast filed a motion to use the  
22 Bank's cash collateral. The motion did not mention the history  
23 of Sundance's previous use of the Bank's cash collateral nor did  
24 it mention that the Bank's permission to use the cash collateral  
25 had expired when the bankruptcy court granted the Bank's motion  
26 for relief from stay in the Second Sundance Bankruptcy. The  
27 motion also failed to disclose the transfer of the real property  
28 from Sundance to West Coast.



1           The Bank opposed the cash collateral motion on several  
2 grounds: (1) the bad faith transfer of the property; (2) West  
3 Coast's bad faith failure to account for at least \$23,895.82 of  
4 cash collateral as of June 2012, which West Coast apparently  
5 acquired from Sundance as a result of the transfer of the  
6 property; and (3) the flawed budget that West Coast submitted,  
7 including substantially decreased payments to the Bank (from  
8 \$23,500 per month, which is what Bank received before Sundance  
9 stopped paying, to \$13,167 per month).

10           In the end, the Bank argued that West Coast's bad faith  
11 acts in hiding cash collateral warranted sanctions under § 105,  
12 including the dismissal of the case. In support of this latter  
13 request and allegations regarding the missing rents, the Bank  
14 submitted Mickelsen's declaration which stated that Sundance had  
15 not filed monthly operating reports since March 2012.

16           On June 27, 2012, the bankruptcy court heard the Bank's  
17 expedited motion for relief from stay and sanctions and West  
18 Coast's motion to use cash collateral.<sup>6</sup> Prior to the hearing,  
19 the court had issued a tentative ruling granting the motion.  
20 After hearing oral argument, the bankruptcy court adopted its  
21 tentative ruling and issued an amended written ruling. There,  
22 the court concluded that the attempted transfer of the property  
23 by Sundance to West Coast was in bad faith as to the Bank and  
24 the other creditors and renters of Sundance. The court found  
25 that as to the Bank, the purported transfer was an attempt to  
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28           <sup>6</sup> The bankruptcy court denied West Coast's cash collateral  
motion by minute order entered July 2, 2012.

1 hinder and delay its foreclosure proceeding after Sundance's  
2 two-year attempt to confirm a plan while under the protection of  
3 the automatic stay. As to the renters, the bankruptcy court  
4 observed that the transfer of the property put those parties in  
5 a position of owing rent to Sundance's bankruptcy estate, while  
6 at the same time, West Coast would be attempting to collect  
7 their rent. As to the other creditors, the court found the  
8 transfer was an attempt to retain the property and its benefits  
9 while divesting the property owner of any obligations to those  
10 creditors. Finally, the bankruptcy court found West Coast's  
11 failures to give notice of its case to any of the renters or  
12 creditors as further indicia of bad faith.

13 In addition, the court did not overlook Smith's role in  
14 facilitating the transfer of the property. The court observed  
15 that Smith was the president of West Coast while simultaneously  
16 acting as operations manager for Sundance and had full knowledge  
17 that Sundance was a chapter 11 debtor-in-possession when he  
18 orchestrated the transfer.

19 For all these reasons, the bankruptcy court found it  
20 appropriate to issue sanctions against West Coast and Smith in  
21 the amount of the Bank's reasonable attorneys' fees and costs  
22 incurred in connection with West Coast's case. In the end, the  
23 court stated that it would also award sanctions against Brown  
24 for his complicity in these acts. The bankruptcy court set a  
25 further hearing to determine the amount of the sanctions for  
26 August 29, 2012.

27 After the Bank obtained relief from stay, it assigned the  
28 deed of trust and loan documents to SACI, a related entity to

1 the Bank.<sup>7</sup> SACI foreclosed on the property by credit bid on  
2 June 29, 2012.

3 On July 31, 2012, Smith filed opposition to the Bank's  
4 motion for sanctions. Smith admitted that the transfer took  
5 place but claimed that he did not know that the property could  
6 not be sold subject to existing financing without court  
7 approval. Smith also maintained that he paid expenses from his  
8 private funds to run the business so as not to use any cash  
9 collateral. As further justification for his conduct, Smith  
10 contended that he believed the transfer of the property was the  
11 only way to bring the Bank's fraudulent actions before the  
12 court. Finally, Smith asserted that there was no competent  
13 evidence before the bankruptcy court to support an award of  
14 attorneys' fees to the Bank. Smith filed a separate pleading  
15 objecting to Mickelsen's declaration on the grounds that  
16 (1) there was no foundation to support her assertion that the  
17 Bank had incurred approximately \$15,000 in fees and (2) her  
18 statement was hearsay.

19 On August 1, 2012, SACI filed a motion for sanctions in  
20 West Coast's bankruptcy against Brown for his complicity in the  
21 bad faith transfer of the property based on the bankruptcy  
22 court's inherent authority under § 105. SACI alleged that Brown  
23 (1) signed the grant deed that documented the transfer of the  
24 property from Sundance to West Coast on the same day that the  
25 State Court denied Sundance's request to enjoin the foreclosure  
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28 <sup>7</sup> Hereinafter when we refer to the Bank such references  
apply equally to SACI and vice versa.

1 of the property and six days before the UST's motion to dismiss  
2 or convert hearing in the Second Sundance Bankruptcy; (2) failed  
3 to disclose the transfer to the bankruptcy court at the  
4 dismissal/conversion hearing, despite the facts that the  
5 transfer occurred six days earlier, was recorded the day before  
6 the hearing, and counsel for Brown appeared at the hearing and  
7 presented argument; and (3) failed to seek approval from the  
8 bankruptcy court before transferring the property. Based on  
9 these acts, SACI sought sanctions against Brown in the amount of  
10 \$147,078.82 that consisted of its legal fees and costs and  
11 missing rents for the months of June, July, and August 2012,  
12 which constituted its cash collateral.

13 SACI submitted the declaration of Joshua D. Wayser, counsel  
14 for SACI, in conjunction with its motion. Wayser declared that  
15 he reviewed his firm's bills for the months of June and July  
16 2012 and as of July 27, 2012, the fees totaled \$33,459.82.  
17 Attached to Wayser's declaration were redacted bills evidencing  
18 the charges. Wayser further sought as sanctions the missing  
19 rents in the estimated amount of \$113,619. That amount was  
20 subsequently reduced to \$101,436 based upon \$12,183 SACI  
21 received after taking possession of the property on August 6,  
22 2012. Wayser declared that SACI was seeking the missing rents  
23 as sanctions because it otherwise would have been entitled to  
24 collect the rents for those months had the transfer of the  
25 property and subsequent bankruptcy not occurred and had SACI  
26 been allowed to timely foreclose on the property.

27 On August 13, 2012, the UST filed a statement regarding the  
28 Bank's motion for sanctions and related declaration of Smith.

1 The UST stated that the unauthorized transfer of the property  
2 was an egregious breach of duty on the part of the responsible  
3 representatives of Sundance. Beyond this, the UST did not take  
4 a position on the motion. However, the UST pointed out that  
5 Smith's declaration should not be read to imply that Smith did  
6 not know that the transfer of the property had been recorded at  
7 the time he met with the UST. Smith declared that he learned  
8 about the recording on the afternoon of May 30, 2012, but he met  
9 with the UST after that date and did not inform counsel for the  
10 UST about the transfer of the property. Attached to the UST's  
11 statement of position was the declaration of Jason Blumberg  
12 which verified the meeting date between Smith and the UST.

13 On the same date, SACI filed a reply in support of the  
14 motion for sanctions against Smith. SACI pointed out that Smith  
15 continued to thwart SACI's exercise of ownership rights over the  
16 foreclosed property. SACI maintained that due to Smith's  
17 actions, it filed an adversary proceeding against him seeking a  
18 temporary restraining order (TRO) and preliminary injunction  
19 which the bankruptcy granted on August 1, 2012, and August 13,  
20 2012, respectively. Based on Smith's conduct, SACI argued that  
21 significant sanctions were warranted to deter his conduct.  
22 According to SACI, there were no mitigating factors - Smith had  
23 been through two personal bankruptcies and thus plainly had  
24 knowledge of the bankruptcy process and the necessity for  
25 obtaining court approval for certain transactions. In the end,  
26 SACI requested the bankruptcy court to award it not only the  
27 full amount of its attorneys' fees and costs, but also the  
28 amount for the missing rents.

1           On August 15, 2012, Brown filed an opposition to SACI's  
2 motion for sanctions. Brown asserted that the bankruptcy court  
3 should abstain from exercising jurisdiction over the tort  
4 (sanctions) claim of SACI. Brown argued that he and Peninsula  
5 were outside third parties and had no involvement with the West  
6 Coast proceedings and that a judgment against Brown would have  
7 no possible effect on West Coast's rights or the handling of its  
8 estate. According to Brown, the third party action should be  
9 taken in state court. He further argued that the sanctions  
10 motion required an adversary proceeding because SACI sought to  
11 essentially have Brown turn over all income from the property  
12 allegedly received by Sundance and West Coast for the months of  
13 June, July and August 2012. Brown also maintained that he did  
14 not have any personal involvement because he signed the grant  
15 deed in his capacity as president of Peninsula.

16           Finally, Brown argued that there was no evidence submitted  
17 to support SACI's claim of damages for the missing rents nor was  
18 SACI entitled to assert a cash collateral claim after the  
19 trustee's sale which extinguished the note and deed of trust.  
20 With respect to the attorneys' fees, Brown complained that  
21 Wayser's hourly rate of \$675 was far above sums awarded to  
22 attorneys in the Eastern District of California. Brown further  
23 pointed out that the billing statements were improper because  
24 the services were lumped together, the descriptions insufficient  
25 to understand what services were performed, and the hours were  
26 not revised despite some entries being redacted.

27           On August 15, 2012, West Coast also filed opposition to the  
28 Bank's sanctions motion. West Coast's opposition simply

1 incorporated Smith's and Brown's arguments set forth in their  
2 memoranda.

3 On August 20, 2012, Smith filed a sur-reply to the Bank's  
4 motion for sanctions. Smith argued that Wayser's declaration  
5 should be stricken because Wayser had not stated facts that  
6 would establish a foundation for the estimated attorneys' fees  
7 and furthermore, the declaration constituted hearsay. Smith  
8 also reiterated some of Brown's arguments; i.e., that Wayser's  
9 hourly rate was too high and the billing statements did not have  
10 detailed time and expense entries. In addition, Smith contended  
11 that SACI's claim of missing rents was a "new matter" because it  
12 was not contained in the Bank's original motion for sanctions  
13 and thus should be stricken. On the same day, Smith filed a  
14 separate pleading containing his evidentiary objections to  
15 Wayser's declaration.

16 The bankruptcy court then issued a tentative ruling  
17 finding, among other things, that SACI incurred attorneys' fees  
18 of at least \$20,000 due to Smith's and Brown's actions, and that  
19 such amount should be payable jointly and severally by Smith,  
20 Brown and the debtor.

21 At the August 29, 2012 sanctions hearing, Smith's attorney,  
22 Mr. Bell, requested the bankruptcy court to rule on Smith's  
23 evidentiary objections. Bell also maintained that Smith was  
24 unable to pay the \$20,000 award due to Smith's personal  
25 bankruptcy which he had filed a few years before. Finally, Bell  
26 asserted that \$5,000 would be appropriate due to the lack of  
27 evidence supporting the larger award and the circumstances of  
28 the case. Brown's attorney, Isley, essentially reiterated the

1 arguments set forth in Brown's pleadings as mentioned above.

2 Wayser responded by first noting that his firm gave a 15%  
3 discount on all the fees so that the \$675 hourly rate was not  
4 accurate. Next, Wayser argued that as to the amount of the  
5 fees, they provided the bills and did not seek any of the  
6 attorneys' fees in the related adversary proceeding against  
7 Smith.<sup>8</sup>

8 The bankruptcy court stated that none of the arguments had  
9 changed its previous view of the case. The court took the  
10 matter under submission and, on the same day, issued final  
11 rulings in the matters. With respect to Brown, the bankruptcy  
12 court found: (1) Brown's conduct in signing the grant deed in  
13 favor of West Coast constituted bad faith and willful misconduct  
14 sufficient to justify an award of sanctions against him under  
15 the court's inherent power; (2) Brown breached his fiduciary  
16 duties to the Sundance bankruptcy estate and its creditors; and  
17 (3) no adversary proceeding was needed because the matter did  
18 not involve turnover of funds, but was instead a request for an  
19 award of sanctions under the court's inherent power. The  
20 bankruptcy court granted SACI's motion in part by awarding its  
21 reasonable attorneys' fees in the sum of \$20,000 against  
22 Appellants, jointly and severally. The court stated that the  
23 fees incurred were for the Bank's motion for relief from stay  
24 and to dismiss West Coast's case, for seeking sanctions against

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26 <sup>8</sup> Recall that the adversary related to SACI's motion for a  
27 TRO and preliminary injunction against Smith who continued to  
28 thwart SACI's attempts to gain possession of the property after  
SACI foreclosed.



1 West Coast and Smith, and for SACI's motion for sanctions  
2 against Brown. The bankruptcy court did not further elaborate  
3 as to how it arrived at the \$20,000 amount.

4 In a separate ruling concerning West Coast and Smith, the  
5 bankruptcy court found: (1) Smith's explanations regarding the  
6 transfer of the property were not credible; (2) West Coast's and  
7 Smiths' conduct in initiating and completing the transfer of the  
8 property and the filing of the chapter 11 petition constituted  
9 bad faith and willful misconduct sufficient to justify an award  
10 of sanctions against them; and (3) the amount of \$20,000 to be  
11 paid jointly and severally with Brown was an appropriate  
12 sanction.

13 In addressing SACI's request for sanctions in the amount of  
14 the missing rents, the bankruptcy court noted that after the  
15 foreclosure, the real property and rights to its rents were no  
16 longer property of the estate. Due to this fact and relying on  
17 Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th  
18 Cir. 1988), the bankruptcy court stated it was not persuaded  
19 that it had jurisdiction to award sanctions for conduct that  
20 interfered with SACI's rights to the real property and the  
21 rental income post-foreclosure.

22 However, the bankruptcy court, assuming for the purpose of  
23 ruling that it had jurisdiction, denied SACI's request for  
24 sanctions in the amount of the missing rents. The court  
25 reasoned that any damages arising from post-foreclosure conduct  
26 were between SACI, on the one hand, and West Coast, Smith and  
27 Brown, on the other, and any connection with the bankruptcy  
28 estate was tangential at best. The bankruptcy court's decision

1 was without prejudice to SACI's right to seek, in another court,  
2 an award of additional amounts on account of rents lost as a  
3 result of West Coast's and Smith's post-foreclosure conduct, and  
4 without prejudice to SACI's right to seek, in another court, an  
5 award of damages or other relief on any other basis.

6 The bankruptcy court entered the two orders granting  
7 sanctions in favor of SACI and against Appellants on August 30,  
8 2012.<sup>9</sup> The order entered in connection with the Bank's motion  
9 awarded sanctions against West Coast and Smith (Smith Order).  
10 The order entered with respect to SACI's motion awarded  
11 sanctions against Brown (Brown Order). Both orders indicate  
12 that a single sanction in the amount of \$20,000 was imposed  
13 against the Appellants and is payable jointly and severally.

14 Appellants filed a single notice of appeal for both the  
15 sanctions orders on September 12, 2012. The Smith Order was  
16 assigned BAP No. EC-12-1471 and the Brown Order was assigned BAP  
17 No. EC-12-1485.

18 SACI filed a notice of cross-appeal from both orders on  
19 September 26, 2012. The cross-appeal of the Smith Order was  
20 assigned BAP No. EC-12-1493 and the cross-appeal of the Brown  
21 Order was assigned BAP No. EC-12-1498.

## 22 II. JURISDICTION

23 The bankruptcy court had jurisdiction over this proceeding  
24 under 28 U.S.C. §§ 1334 and 157(a) and (b)(1). We have

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25  
26 <sup>9</sup> The orders provided that the sanctions were payable no  
27 later than September 20, 2012. It does not appear that  
28 Appellants obtained a stay pending appeal and there is no  
indication in the record that any of the sanctions award has been  
paid by either Smith or Brown.

1 jurisdiction under 28 U.S.C. § 158.

2 **III. ISSUES**

3 A. Whether the bankruptcy court abused its discretion in  
4 awarding sanctions in the amount of \$20,000 against Appellants;  
5 and

6 B. Whether the bankruptcy court abused its discretion in  
7 denying SACI's request for sanctions based on the amount of  
8 missing rents which constituted SACI's cash collateral.

9 **IV. STANDARDS OF REVIEW**

10 An award or denial of sanctions under § 105(a) is reviewed  
11 for abuse of discretion. Nash v. Clark Cnty. Dist. Attorney's  
12 Office (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012). The  
13 appropriateness of the amount of the sanctions imposed also is  
14 reviewed for an abuse of discretion. Asher v. Film Ventures  
15 Int'l, Inc. (In re Film Ventures Int'l, Inc.), 89 B.R. 80, 83  
16 (9th Cir. BAP 1988).

17 We review the bankruptcy court's evidentiary rulings for an  
18 abuse of discretion. Latman v. Burdette, 366 F.3d 774, 786 (9th  
19 Cir. 2004). To reverse on the basis of an erroneous evidentiary  
20 ruling, we must conclude not only that the bankruptcy court  
21 abused its discretion, but also that the error was prejudicial.  
22 Id.

23 A bankruptcy court abuses its discretion if it applied the  
24 wrong legal standard or its findings were illogical,  
25 implausible, or without support in the record.  
26 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
27 Cir. 2011).

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**V. DISCUSSION**

Bankruptcy courts have inherent sanction power under § 105(a) which states in relevant part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. . . ." See also Miller v. Cardinale (In re DeVille), 361 F.3d 539 (9th Cir. 2004); Caldwell v. Unified Capital Corp. (In re Rainbow Magazine), 77 F.3d 278, 284 (9th Cir. 1996). "The court's inherent authority to sanction includes not only the authority to sanction a party, but also the authority to sanction the conduct of a nonparty who participates in abusive litigation practices, or whose actions or omissions cause the parties to incur additional expenses." In re Avon Townhomes Venture, 433 B.R. 269, 304 (Bankr. N.D. Cal. 2010) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 50-51 (1991) (affirming imposition of sanctions on an individual for conduct before other tribunals that constituted an abuse of process, even though the individual was not a party when the misconduct occurred); and In re Rainbow Magazine, Inc., 77 F.3d at 278 (upholding sanctions levied under the court's inherent powers against corporate debtor's principal who orchestrated the bad faith filing of the bankruptcy petition)).

The bankruptcy court's inherent sanction power allows it to deter and provide compensation for bad faith litigation. See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003). Before the bankruptcy court imposes sanctions under its inherent power, it must make an explicit finding of bad faith or willful misconduct. Id. "[B]ad faith or willful misconduct

1 consists of something more egregious than mere negligence or  
2 recklessness." Id.

3       Once a finding of bad faith or willful misconduct has been  
4 made, a court may award attorneys' fees and costs as a sanction  
5 to compensate the prevailing party for expenses incurred by his  
6 or her opponent's bad faith litigation tactics. Chambers,  
7 501 U.S. at 45-46. However, the long-settled rule is that  
8 inherent powers must be exercised with restraint and discretion.  
9 Id. at 44. Thus, the "court should be cautious in exerting its  
10 inherent power and 'must comply with the mandates of due  
11 process, both in determining that the requisite bad faith exists  
12 and in assessing fees.'" Id. at 50.

13 **A. The Merits: Appeals EC-12-1471 and EC-12-1485**

14       Here, the bankruptcy court made express findings regarding  
15 Appellants' bad faith and willful misconduct which is the  
16 primary prerequisite for sanctions under the court's inherent  
17 power. In re Dyer, 322 F.3d at 1196. Indeed, the sanctionable  
18 conduct of West Coast, Smith and Brown included complicity in  
19 transferring Sundance's property to West Coast followed by West  
20 Coast's bankruptcy filing on the eve of the Bank's scheduled  
21 foreclosure. According to the bankruptcy court, these acts were  
22 part of a scheme to harass, delay and increase the Bank's and  
23 SACI's litigation costs. Appellants do not challenge any of the  
24 bankruptcy court's bad faith findings on appeal, instead  
25 complaining that the sanctions award was punitive in nature,  
26 arbitrary in amount and lacked evidentiary support.

27 **The Punitive Nature of the Sanctions**

28       Because the court lifted the stay and voided the transfer

1 of the property, Appellants assert that this was a sufficient  
2 sanction against Smith and West Coast. Therefore, any sanctions  
3 beyond this, Appellants argue, were punitive and thus exceeded  
4 the bankruptcy court's inherent authority.

5 Smith had made this same argument in the bankruptcy court,  
6 which the court rejected noting that the order lifting the stay  
7 operated in conjunction with the Bank's foreclosure to deprive  
8 Smith and West Coast of property that should not have been  
9 theirs in the first place. We agree with the bankruptcy court's  
10 conclusion that nothing of value was taken from Smith or West  
11 Coast and, therefore, their asserted "loss" did not operate as a  
12 sanction against them.

13 Moreover, the bankruptcy court explicitly stated that the  
14 sanctions award was based on SACI's attorneys' fees incurred as  
15 a result of Appellants' bad faith conduct. Sanctions based on  
16 attorneys' fees are compensatory and within the bankruptcy  
17 court's inherent authority. In re DeVille, 361 F.3d at 546;  
18 see also Chambers, 501 U.S. at 44 (the less severe sanction of  
19 an assessment of attorneys' fees is undoubtedly within a court's  
20 inherent power). Furthermore, compensatory sanctions are not  
21 considered criminal penalties: "Civil penalties must either be  
22 compensatory or designed to coerce compliance." In re Dyer,  
23 322 F.3d at 1192 (citing F.J. Hanshaw Enters., Inc. v. Emerald  
24 River Dev., Inc., 244 F.3d 1128, 1137-38 (9th Cir. 2001)); see  
25 also Lasar v. Ford Motor Co., 399 F.3d 1101, 1110 (9th Cir.  
26 2005) (sanctions that compensate for harm caused are civil).  
27 Accordingly, the sanctions awarded based on SACI's attorneys'  
28 fees were compensatory and not punitive in nature.



1           least \$20,000 were reasonably incurred as a direct  
2           result of Smith[']s unconscionable actions detailed  
3           above.

4           Moreover, at the very least, the bankruptcy court was aware of  
5           the objections at the August 29, 2012 hearing and implicitly  
6           overruled them when it stated that "I didn't hear anything today  
7           that changed my position in regards to the tentative."

8           We thus conclude that the objections were overruled and the  
9           evidence was admitted.

10           Fed. Rule Evid. 602 states that "[a] witness may not  
11           testify to a matter unless evidence is introduced sufficient to  
12           support a finding that the witness has personal knowledge of the  
13           matter." See also United States v. Dibble, 429 F.2d 598, 602  
14           (9th Cir. 1970) ("The foundation is laid for receiving a  
15           document in evidence by the testimony of a witness with personal  
16           knowledge of the facts who attests to the identity and due  
17           execution of the document and, where appropriate, its  
18           delivery."). In his declaration, Wayser stated that he was one  
19           of the attorneys at his firm responsible for representing SACI  
20           in the bankruptcy case and the adversary proceeding. He further  
21           stated that based on that responsibility, he had personal  
22           knowledge of the facts contained in his declaration. Wayser  
23           also summarized the services that his firm performed in the West  
24           Coast bankruptcy case and stated that he reviewed the firm bills  
25           for the months of June and July 2012. These statements  
26           sufficiently show that Wayser "actually perceived or observed  
27           that which he testified to." Latman, 366 F.3d at 786.

28           In addition, although reasonable minds could differ,  
Wayser's testimony was sufficient to establish the accuracy and



1 trustworthiness of the billing statements for purposes of the  
2 business records exception to hearsay under Fed. R. Evid.  
3 803(6). See United States v. Bonallo, 858 F.2d 1427, 1435 (9th  
4 Cir. 1988) (The business records exception to hearsay under Fed.  
5 R. Evid. 803(6) is available where the record is "(1) made or  
6 based on information transmitted by a person with knowledge at  
7 or near the time of the transaction; (2) made in the ordinary  
8 course of business; and (3) trustworthy, with neither the source  
9 of information nor method or circumstances of preparation  
10 indicating a lack of trustworthiness.").

11 In sum, "[i]n non-jury cases, the [bankruptcy] judge is  
12 given great latitude in the admission or exclusion of evidence."  
13 Holliger v. United States, 651 F.2d 636, 640 (9th Cir. 1981).  
14 Accordingly, we discern no reversible error on the evidentiary  
15 grounds asserted by Appellants.

16 However, we agree with Appellants that the record is  
17 insufficient for us to conduct a meaningful review of the  
18 court's decision to award the amount of \$20,000 in sanctions  
19 based on SACI's attorneys' fees. In Padgett v. Loventhal,  
20 706 F.3d 1205 (9th Cir. 2013), the Ninth Circuit recently  
21 reminded us that courts must show their work when calculating  
22 attorneys' fees. See also Chalmers v. City of L.A., 796 F.2d  
23 1205, 1213 (9th Cir. 1986), amended by 808 F.2d 1373 (9th Cir.  
24 1987) (vacating fee award when the order contained no  
25 explanation of how the court arrived at the award). That was  
26 not done by the bankruptcy court here.

27 Where monetary sanctions are awarded, "the amount of the  
28 monetary sanctions must be 'reasonable.'" Leon v. IDX Sys.

1 Corp., 464 F.3d 951, 961 (9th Cir. 2006) (citing Brown v. Baden  
2 (In re Yagman), 796 F.2d 1165, 1184 (9th Cir. 1986), amended by  
3 803 F.2d 1085 (1986)).

4 When the sanctions award is based upon attorney's fees  
5 and related expenses, an essential part of determining  
6 the reasonableness of the award is inquiring into the  
7 reasonableness of the claimed fees. Recovery should  
8 never exceed those expenses and fees that were  
9 reasonably necessary to resist the offending action  
10 . . . the court must make some evaluation of the fee  
11 breakdown submitted by counsel.

12 In re Yagman, 796 F.2d at 1184. The Ninth Circuit has held in  
13 other contexts that the lodestar approach is a proper method for  
14 determining the reasonableness of attorneys' fees. Ballen v.  
15 City of Redmond, 466 F.3d 736, 745-46 (9th Cir. 2006)  
16 (characterizing the lodestar figure as the "presumptively  
17 accurate measure of reasonable fees" when calculating  
18 permissible fees under 42 U.S.C. § 1988); see also Gisbrecht v.  
19 Barnhart, 535 U.S. 789, 801 (2002) ("The 'lodestar' figure has,  
20 as its name suggests, become the guiding light of our  
21 fee-shifting jurisprudence."). The starting point for computing  
22 the lodestar amount is to multiply the number of hours the  
23 prevailing party reasonably expended on the litigation by a  
24 reasonable hourly rate. Caudle v. Bristow Optical Co., Inc.,  
25 224 F.3d 1014, 1028 (9th Cir. 2000). The hourly rates used must  
26 be "in line with those prevailing in the community for services  
27 by lawyers of reasonably comparable skill, experience and  
28 reputation." Blum v. Stenson, 465 U.S. 886, 895 (1984).

Another factor for determining reasonableness is the  
sanctioned party's ability to pay. In re Yagman, 796 F.2d at  
1184; see also Haynes v. City and Cnty. of S.F., 688 F.3d 984,

1 987 (9th Cir. 2012) (awards under 28 U.S.C. § 1927 are  
2 discretionary such that the court may permissibly take ability  
3 to pay into account, although courts are not required to limit  
4 an award to the amount that the sanctioned attorney is able to  
5 pay); and White v. Gen. Motors Corp., Inc., 908 F.2d 675, 684-85  
6 (10th Cir. 1990) (factors relevant to determine an appropriate  
7 amount of monetary sanctions include the reasonableness of the  
8 amount requested, the minimum necessary to deter a repetition of  
9 the conduct, and the ability to pay the sanction.).

10 Here, there is no indication in the record as to how the  
11 bankruptcy court calculated the \$20,000 amount. The court does  
12 not state the number of hours that it found reasonable for the  
13 work performed nor does it set forth the hourly rate which it  
14 applied. See Tutor-Saliba Corp. v. City of Hailey, 452 F.3d  
15 1055, 1065 (9th Cir. 2006) (vacating fee award when order failed  
16 to state, among other things, the number of hours being  
17 compensated or the hourly rate applied). The mandate that  
18 courts show their work is all the more important in cases where,  
19 as here, some of the entries have been redacted and Wayser's  
20 hourly rate appears to be far above the prevailing community  
21 rates even though discounted.<sup>12</sup> Finally, although attorney Bell  
22 argued that Smith had little ability to pay significant  
23 sanctions because Smith filed bankruptcy in 2009 and 2010, it is  
24 unclear whether the bankruptcy court took this factor into

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28 <sup>12</sup> The record does not contain any competent evidence on  
what is a reasonable rate for the community.

1 consideration when determining the reasonableness of the fees.<sup>13</sup>

2 See In re Yagman, 796 F.2d at 1184; Haynes, 688 F.3d at 987.

3 We also note that when a bankruptcy court imposes sanctions  
4 pursuant to its inherent power, the court "should limit  
5 sanctions to the opposing party's more 'direct' costs, that is,  
6 the costs of opposing the offending pleading or motion." Orange  
7 Blossom Ltd. P'ship v. S. Cal. Sunbelt Devs., Inc. (In re S.  
8 Cal. Sunbelt Devs., Inc.), 608 F.3d 456, 466 (9th Cir. 2010)  
9 (quoting Lockary v. Kayfetz, 974 F.2d 1166, 1178 (9th Cir.  
10 1992)). Under this precedent, fees and expenses incurred for  
11 preparing and prosecuting the sanctions motions are generally  
12 not authorized.<sup>14</sup>

13 In sum, because the bankruptcy court did not "show its  
14 work," we vacate the sanctions orders and remand to allow the  
15 court to explain its reasoning on the reasonableness of the  
16 fees.

17 **B. The Merits: Cross-Appeals EC-12-1493 and EC-12-1498**

18 Because of our decision to vacate and remand, SACI's cross-  
19 appeals on the amount of the sanctions based on its attorneys'  
20 fees are rendered moot. However, we still must address SACI's  
21 cross-appeals relating to the bankruptcy court's denial of  
22 sanctions in the amount of \$101,435.00 based on the missing  
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24 <sup>13</sup> Besides Smith's two bankruptcies, we found no financial  
25 statements or other evidence in the record which demonstrated  
26 Smith's current financial condition.

27 <sup>14</sup> The bankruptcy court stated in its written rulings that  
28 its award was based on reasonable fees and costs incurred for,  
among other things, the motions for sanctions against West Coast,  
Smith and Brown.

1 rents.

2 SACI maintains that it would have received this amount in  
3 rent for the months of June, July and August 2012 (at the rate  
4 of \$37,873 per month) had it been able to take possession of the  
5 property at the beginning of June 2012; as it would have without  
6 Appellants' bad faith acts. Because of Appellants' conduct,  
7 SACI contends that it was not able to foreclose until June 29,  
8 2012, and, even then, it was unable to gain possession of the  
9 property until August 6, 2012, allegedly due to Smith's post-  
10 foreclosure conduct. SACI argues that due to the outrageousness  
11 of Appellants' conduct, the bankruptcy court abused its  
12 discretion by awarding a de minimis amount in sanctions which  
13 failed to make it whole or deter repeat conduct. We are not  
14 persuaded.

15 We mention first that generally a bankruptcy court has the  
16 inherent power to regulate the conduct of those before it, even  
17 in the absence of subject matter jurisdiction. Willy v. Coastal  
18 Corp., 503 U.S. 131, 137-38 (1992) (upholding Rule 11 sanctions  
19 before court of appeals determined district court lacked subject  
20 matter jurisdiction); 5A Charles Alan Wright & Arthur R. Miller,  
21 Federal Practice and Procedure: Civil § 1336, at 632 (3d ed.  
22 2005). Here, the bankruptcy court assumed it had subject matter  
23 jurisdiction to award SACI sanctions in the amount of the  
24 missing rents and, in the exercise of its discretion, denied  
25 SACI's request.

26 Reversal on abuse of discretion grounds is not proper  
27 unless we have "a definite and firm conviction that the  
28 bankruptcy court committed a clear error of judgment in the

1 conclusion it reached after weighing the relevant factors.”  
2 United States v. Gould (In re Gould), 401 B.R. 415, 429 (9th  
3 Cir. BAP 2009), aff’d on other grounds, 603 F.3d 1100 (9th Cir.  
4 2010). By the same token though, “a bankruptcy court  
5 necessarily abuses its discretion if it bases its decision on an  
6 erroneous view of the law or clearly erroneous factual  
7 findings.” Id.; TrafficSchool.com, Inc., 653 F.3d at 832.

8 In denying SACI’s request for sanctions in the amount of  
9 the missing rents, the bankruptcy court considered the following  
10 factors: (1) SACI’s claim for the missing rents against West  
11 Coast, Smith and Brown was essentially a “two party” dispute  
12 with little, or no, effect on West Coast’s bankruptcy estate;  
13 (2) there were few, if any, remaining assets belonging to West  
14 Coast’s estate after SACI obtained relief from stay; and  
15 (3) SACI could pursue its damage claim against Smith and Brown  
16 for the missing rents in the state court. After carefully  
17 weighing these factors, the bankruptcy court could reasonably  
18 conclude that SACI had not made a strong enough showing for the  
19 imposition of sanctions under the court’s inherent power based  
20 on the amount of the missing rents.

21 SACI does not argue in its cross-appeals that the  
22 bankruptcy court’s findings were illogical, implausible, or  
23 without support in the record. Indeed, the relationship between  
24 SACI’s damage claim for the missing rents and SACI’s direct  
25 costs in opposing the transfer of the property and West Coast’s  
26 bad faith filing became tenuous at best after SACI foreclosed.  
27 In addition, although sanctions under § 105 serve the dual  
28 purposes of compensation and deterrence, we are not convinced

1 that SACI's citations to In re Simmons, 2011 WL 3957439, at \*1  
2 (Bankr. N.D. Cal. 2011), In re Avon Townhomes Venture, 433 B.R.  
3 at 304, or Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389,  
4 399-400 (6th Cir. 2009), compel a different result. These cases  
5 are factually distinguishable and simply reiterate the general  
6 premise that under certain circumstances an award in the full  
7 amount of the attorneys' fees incurred may be warranted to serve  
8 the dual purpose of deterrence and making the party which  
9 incurred the fees whole. None of these cases addresses an award  
10 of sanctions for missing rents under § 105 nor do they discuss  
11 any factors relevant to such an inquiry.

12 In sum, SACI has not convinced us that the bankruptcy court  
13 abused its discretion by basing its decision on an erroneous  
14 view of the law. Accordingly, we discern no error with the  
15 bankruptcy court's exercise of restraint and discretion not to  
16 impose sanctions in the amount of the missing rents under the  
17 facts and circumstances of this case.

## 18 VI. CONCLUSION

19 For the reasons stated, we VACATE the sanctions orders and  
20 REMAND on the amount of the sanctions based on SACI's attorneys'  
21 fees so that the bankruptcy court can show its work. We AFFIRM  
22 the denial of SACI's request for sanctions in the amount of the  
23 missing rents as within the bankruptcy court's broad discretion.  
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