

APR 21 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. WW-10-1156-HJuMk
) WW-10-1175-HJuMk
ERWIN M. KRAEMER and) (Cross Appeals)
CHRISTINE M. KRAEMER,)
)
Debtors.) Bk. No. 08-40066

Adv. Pro. No. 08-04047

NWAS OKLAHOMA, INC.; WATER
LOCATORS, LLC; TOBIAS TAYLOR;
REGINA TAYLOR; LORRIE GRUBBS;
TORREY GRUBBS; DAN HOLT;
SHANNON HOLT; JANE SCOTT;
DALE SCOTT; JESSE PIKE;
RICHARD KEATING; RICHARD
KEATING, JR.; ERIC KEATING,

Appellants/Cross-Appellees,)

v.)

MEMORANDUM¹

ERWIN M. KRAEMER; CHRISTINE M.)
KRAEMER, aka Christine)
Wolliscroft-Kraemer,)
)
Appellees/Cross-Appellants.)

Argued and Submitted on January 21, 2011
at Seattle, Washington

Filed - April 21, 2011

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Philip H. Brandt, Bankruptcy Judge, Presiding

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 Appearances: Laurin S. Schweet of Schweet, Ricke & Linde, PLLC
2 for Appellants/Cross-Appellees;
3 Deirdre P. Glynn Levin for Appellees/Cross-
4 Appellants.

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Before: HOLLOWELL, JURY and MARKELL, Bankruptcy Judges.

This is an appeal by judgment creditors of an order entered by the bankruptcy court dismissing their § 523(a)(2)(A)² nondischargeability complaint. The bankruptcy court found that the debtors did not intend to deceive the creditors, who bought a groundwater surveying franchise, by misrepresenting the surveying equipment's accuracy. The debtors have cross-appealed the bankruptcy court's admission of deposition testimony that supported the creditors' case. We AFFIRM and decline to address the issues raised by the cross-appeal because the debtors were not prejudiced by the bankruptcy court's ruling.

I. FACTS

A. Background

Ervin and Christine Kraemer (the Debtors) owned Northwest Aquifer Surveying, Inc. (NWAS), a groundwater surveying business. The Debtors' business utilized Electro-Kinetic System (EKS) technology to locate ground water and areas where wells could be drilled at the least possible depth and with the greatest yield. EKS was created in England and marketed by a company named Ground Flow. The Debtors became involved with EKS in late 1999, and thereafter became certified by Ground Flow to use the technology

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

1 and equipment (the EKS System). In 2001, NWAS was the exclusive
2 distributor of the EKS System in the United States. In 2002,
3 NWAS began selling the EKS System as franchises. In the course
4 of doing so, they created written marketing materials,³ which
5 advertised the EKS System as having the:

6 Proven Ability to Accurately Estimate Well Yield Within
7 a 25% Margin and The Ability to Estimate Well Depth
8 Within a 10%-20% Margin!

9 Richard Keating Sr., Richard Keating Jr., Eric Keating, and
10 Jessie Pike (the Appellants) are among fourteen corporate and
11 individual parties who purchased EKS System franchises from the
12 Debtors but later became dissatisfied with the EKS System (the
13 Franchisees). In 2006, the Franchisees brought an American
14 Arbitration Association (AAA) action against the Debtors for
15 false representations in the sale of a franchise under
16 Washington's Franchise Investment Protection Act (FIPA), RCW
17 19.100 et. seq., which provides a civil cause of action for
18 franchisees harmed by false statements or omissions in the sale
19 of a franchise. As part of the AAA proceedings, the Debtors'
20 depositions were taken (the Depositions).

21 The Franchisees obtained a summary judgment ruling by the
22 AAA panel. The AAA panel determined that the Debtors violated
23 RCW 19.100.170(2), under which it is:

24 unlawful for any person in connection with the offer,
25 sale, or purchase of any franchise . . .
26 (2) To sell or offer to sell by means of any written or

27 ³ There are ostensibly other written marketing materials;
28 however, they are not contained in the record.

1 oral communication which includes an untrue statement
2 of a material fact or omits to state a material fact
3 necessary in order to make the statements made in light
4 of the circumstances under which they were made not
5 misleading.

6 The AAA panel granted the Franchisees damages and rescission
7 under RCW 19.100.190(2):

8 Any person who sells or offers to sell a franchise in
9 violation of this chapter shall be liable . . . for
10 damages In the case of a violation of RCW
11 19.100.170 rescission is not available to the plaintiff
12 if the defendant proves that the plaintiff knew the
13 facts concerning the untruth or omission or that the
14 defendant exercised reasonable care and did not know or
15 if he had exercised reasonable care would not have
16 known of the untruth or omission.

17 The final AAA award was issued on November 26, 2006, and
18 reduced to judgment in the District Court for the Western
19 District of Washington (the District Court) on July 24, 2007 (the
20 AAA Judgment).

21 On January 9, 2008, the Debtors filed a chapter 7 petition.
22 The Franchisees, originally split into two separate groups of
23 plaintiffs, filed complaints against the Debtors, which were
24 consolidated into one adversary proceeding (Adv. Proc. No. 08-
25 4047), alleging that the AAA Judgment was nondischargeable under
26 § 523(a)(2)(A) (the Complaint).

27 On February 6, 2009, the Appellants filed a motion for
28 summary judgment (MSJ) asserting that under the principles of
issue preclusion the AAA Judgment established that their claims
were nondischargeable. The bankruptcy court held a hearing on

1 the MSJ on March 25, 2009.⁴ At the hearing, the bankruptcy court
2 asked the parties to provide additional briefing on whether the
3 rescission remedy of RCW 19.100.190(2) was available if there had
4 been only a negligent misrepresentation by a franchisor. The
5 hearing was continued to April 22, 2009.

6 At the continued hearing on the MSJ, the bankruptcy court
7 stated, "It seems to me pretty obvious that we've got issue
8 preclusion on all of the elements except the intent-related
9 ones." The bankruptcy court considered the parties' arguments
10 regarding whether the issue of intent was actually litigated and
11 resolved when the AAA panel granted the rescission remedy of RCW
12 19.100.190(2). It concluded that an award of rescission under RCW
13 19.100.190(2) was only available for intentional violations of
14 the FIPA, and therefore, the requisite intent to defraud under
15 § 523(a)(2)(A) was established. The bankruptcy court entered an
16 order granting the MSJ on June 3, 2009, and a judgment of
17 nondischargeability in favor of the Appellants in the amount of
18 \$175,260.65 on June 9, 2009.

19 The Debtors appealed.⁵ On September 1, 2009, the District
20 Court entered an order that reversed and remanded the matter to
21 the bankruptcy court. The District Court held that the
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23 ⁴ We have taken judicial notice of the pleadings and
24 transcripts filed in the underlying bankruptcy case by accessing
25 the electronic docketing system. See O'Rourke v. Seaboard Sur.
26 Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1989) (noting that the appellate court may take judicial notice
of items of record).

27 ⁵ The Appellants filed an election to the District Court
28 pursuant to Rule 8001(e)(1) and 28 U.S.C. § 158(c)(1).

1 bankruptcy court erred in deciding that the AAA Judgment had
2 preclusive effect on the issue of intent when it was not clear
3 from the limited arbitration record that it had been actually
4 litigated. The District Court specifically made "no other
5 findings in regard to the motion for summary judgment."

6 B. Renewed Motion For Summary Judgment And Trial On Complaint

7 On October 28, 2009, the Appellants filed a renewed motion
8 for summary judgment (Renewed MSJ) contending that the issue of
9 intent to deceive had been factually established through the
10 Depositions. The Appellants argued that the Debtors'
11 representation of the EKS System's accuracy was false, and
12 because that representation was included in advertisements to
13 promote the sale of the EKS System franchises, the Debtors
14 necessarily intended to deceive potential buyers for their own
15 gain. The Debtors filed a response on October 30, 2009, in
16 which they argued that there was a genuine issue of fact
17 regarding intent because the statements made by the Debtors
18 about the EKS System were made honestly without an intent to
19 harm the Appellants.

20 A hearing on the Renewed MSJ was held on November 18,
21 2009. The bankruptcy court denied the Renewed MSJ on
22 December 3, 2009, and entered an Order Setting Trial on
23 Remaining Issue, setting the trial date for December 15, 2009
24 (the Trial Order). The Trial Order compelled the parties to
25 file (1) trial briefs, (2) any motions in limine, and (3)
26 actual trial exhibits by December 11, 2009.

27 On December 7, 2009, the Debtors filed a list of witnesses
28 and their exhibits. The Debtors listed themselves and two

1 other franchisees as witnesses. On December 11, 2009, the
2 Debtors filed their trial brief.

3 The Appellants filed a trial brief that asserted the
4 Depositions would be used to demonstrate the Debtors' reckless
5 disregard of the truth and a motion in limine objecting to the
6 testimony of the franchisees as being irrelevant to the
7 Debtors' intent. However, the Appellants did not file exhibits
8 or a witness list.

9 The Debtors filed a motion to exclude the Depositions
10 (Motion to Exclude) based on their contention they were not
11 admissible under Federal Rule of Civil Procedure (FRCP)
12 32(a)(8) (made applicable in bankruptcy proceedings by Rules
13 7032 and 9014), regarding the use of depositions in a later
14 action. They also argued that the Depositions were replete
15 with inadmissible hearsay. On December 14, 2009, the
16 Appellants objected to the Debtors' Motion to Exclude and filed
17 several objections to the Debtors' exhibits.

18 At the December 15, 2009 trial, the Debtors did not appear
19 in person, but only through counsel. The record of the
20 December 15, 2009 hearing is not included in the record (nor
21 available on the bankruptcy court's electronic docketing
22 system); however, according to the Appellants, they offered the
23 Depositions as evidence. The Debtors objected to the use of
24 the Depositions, arguing that they "had no notice" they would
25 be introduced at trial since they were not included in any
26 exhibits submitted to the bankruptcy court. The Debtors
27 contended that there was no evidence properly before the
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1 bankruptcy court to support the Appellants' case and orally
2 moved to dismiss the Complaint (Motion to Dismiss).

3 At the hearing, the bankruptcy court granted the
4 Appellants' motion in limine, and denied the Debtors' Motion to
5 Exclude.⁶ The bankruptcy court did not admit the Depositions
6 but requested further briefing on the Motion to Dismiss. It
7 continued the Trial to February 5, 2010. Orders granting the
8 motion in limine and denying the Motion to Exclude were entered
9 on December 31, 2009.⁷

10 On January 5, 2010, the Appellants filed a motion for
11 entry of judgment on the merits (Motion for Judgment).⁸ The
12 Appellants argued that the Depositions were admissible and
13 authorized under FRCP 32. The Appellants also argued that
14 because the Debtors did not personally appear at the Trial, the
15 Depositions were un rebutted and proved their case. The
16 Appellants argued they were entitled to a default judgment as a
17 sanction for the Debtors' "intentional disobedience of the
18 Court's [Trial Order]" when they failed to appear at the Trial.

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20 ⁶ The bankruptcy court's electronic docket minute entry of
21 the hearing on December 15, 2009, states that the Appellants'
22 motion in limine and objections to testimony and evidence was
23 granted for the reasons stated on the record and that the
24 Debtors' Motion to Exclude was denied for the reasons stated on
25 the record.

26 ⁷ The Debtors argue that the bankruptcy court abused its
27 discretion in denying the Motion to Exclude. The Panel has no
28 record of the December 15, 2009 hearing at which the bankruptcy
court stated its reasons for denying that motion.

⁸ The accompanying memorandum to support the motion was
filed on January 19, 2010.

1 On January 6, 2010, the Debtors filed a brief in support
2 of the Motion to Dismiss. The Debtors argued that because the
3 Appellants failed to subpoena the Debtors to provide testimony
4 at Trial, and submitted no other evidence to support their
5 case, they failed to prove the elements of § 523(a)(2)(A). On
6 January 15, 2010, the Debtors also filed a motion for
7 reconsideration of the order denying the Motion to Exclude (the
8 Reconsideration Motion), contending that the bankruptcy court
9 erred in its analysis regarding the admissibility of the
10 Depositions.

11 On February 5, 2010, the bankruptcy court heard arguments
12 on the Motion for Judgment, the Motion to Dismiss and the
13 Reconsideration Motion. It denied the Reconsideration Motion
14 and admitted the Depositions subject to specific objections of
15 the Debtors. It also denied the Motion to Dismiss and the
16 Motion for Judgment⁹ and continued the Trial to March 5, 2010.

17 On February 19, 2010, the Debtors filed evidentiary
18 objections to the Depositions, to which the Appellants
19 responded on February 25, 2010. At the continued Trial on
20 March 5, 2010, the bankruptcy court reviewed the Debtors'
21 evidentiary objections to the Depositions, but overruled them.
22 The Depositions were admitted in support of the Appellants'
23 case. The Debtors chose not to testify or enter any other
24 exhibits or evidence. The bankruptcy court announced its
25 findings of fact and conclusions of law orally at a continued
26 Trial date of March 16, 2010. On April 21, 2010, it entered an

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28 ⁹ The orders were entered March 1, 2010.

1 order holding that the AAA Judgment was dischargeable and
2 dismissing the Complaint (Order Dismissing Complaint). The
3 Appellants timely appealed, and the Debtors filed a timely
4 cross-appeal.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 § 157(b)(2)(1). We have jurisdiction under 28 U.S.C. § 158.

8 **III. ISSUES**

9 (1) Did the bankruptcy court err in finding that the
10 Debtors did not intend to deceive the Appellants?

11 (2) Did the bankruptcy court abuse its discretion in
12 admitting the Depositions?

13 **IV. STANDARDS OF REVIEW**

14 Whether a claim is dischargeable presents mixed issues of
15 law and fact, which we review de novo. Peklar v. Ikerd (In re
16 Peklar) 260 F.3d 1035, 1037 (9th Cir. 2001). The Ninth Circuit
17 has held that the bankruptcy court's findings made in the
18 context of the dischargeability analysis, including the court's
19 findings with respect to intent to defraud, are factual
20 findings reviewed under the clearly erroneous standard.

21 Candland v. Ins. Co. of N. Am (In re Candland), 90 F.3d 1466,
22 1469 (9th Cir. 1996). Thus, whether there has been proof of an
23 essential element of a cause of action under § 523(a)(2)(A) is
24 a factual determination reviewed for clear error. Am. Express
25 Travel Related Servs. Co., Inc. v. Vee Vinhnee (In re Vee
26 Vinhnee), 336 B.R. 437, 443 (9th Cir. BAP 2005); Cossu v.
27 Jefferson Pilot Sec. Corp. (In re Cossu), 410 F.3d 591, 595-96
28 (9th Cir. 2005). A finding is clearly erroneous when "although

1 there is evidence to support it, the reviewing court on the
2 entire evidence is left with the definite and firm conviction
3 that a mistake has been committed." Anderson v. City of
4 Bessemer City, N.C., 470 U.S. 564, 573 (1985); see also United
5 States v. Loew, 593 F.3d 1136, 1139 (9th Cir. 2010); United
6 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en
7 banc) (holding that a court's factual determination is clearly
8 erroneous if it is illogical, implausible, or without support
9 in the record).

10 Evidentiary rulings are reviewed for an abuse of
11 discretion. Kulas v. Flores, 255 F.3d 780, 783 (9th Cir.
12 2001); In re Vee Vinhnee, 336 B.R. at 442-43. A bankruptcy
13 court's denial of a motion for reconsideration is also reviewed
14 for an abuse of discretion. Zimmerman v. City of Oakland,
15 255 F.3d 734, 737 (9th Cir. 2001). A bankruptcy court abuses
16 its discretion when it applies the incorrect legal rule or its
17 application of the correct legal rule is "(1) illogical,
18 (2) implausible, or (3) without support in inferences that may
19 be drawn from the facts in the record." United States v. Loew,
20 593 F.3d at 1139 (quoting United States v. Hinkson, 585 F.3d
21 1247 at 1261-62); see also Anderson v. City of Bessemer City,
22 N.C., 470 U.S. 564, 577 (1985).

23 V. DISCUSSION

24 A. The Bankruptcy Court Did Not Err In Entering The Order 25 Dismissing Complaint.

26 The Bankruptcy Code excepts from discharge any debt for
27 money, property, services, or credit obtained by false
28 pretenses, a false representation, or actual fraud. 11 U.S.C.

1 § 523(a)(2)(A). To prevail on a claim under § 523(a)(2)(A), a
2 creditor must demonstrate five elements: (1) misrepresentation,
3 fraudulent omission or deceptive conduct by the debtor;
4 (2) knowledge of the falsity or deceptiveness of the debtor's
5 statement or conduct; (3) an intent to deceive; (4) justifiable
6 reliance by the creditor on the debtor's statement or conduct;
7 and, (5) damage to the creditor proximately caused by its
8 reliance on the debtor's statement or conduct. In re Candland,
9 90 F.3d at 1469; Turtle Rock Meadows Homewoners Ass'n v. Slyman
10 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000).

11 The creditor bears the burden of proving each element of
12 § 523(a)(2)(A) by a preponderance of the evidence. Grogan v.
13 Garner, 498 U.S. 279, 287 (1991). In order to strike a balance
14 between allowing debtors a fresh start and preventing a debtor
15 from retaining the benefits of property obtained by fraudulent
16 means, § 523(a)(2)(A) is strictly construed against creditors
17 and in favor of debtors. In re Slyman, 234 F.3d at 1085;
18 Ghomeshi v. Sabban (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP
19 2008), aff'd, 600 F.3d 1219, 1222 (9th Cir. 2010).

20 At issue in this case is whether the Appellants
21 established that the Debtors intended to deceive them when they
22 represented that the EKS System had a "Proven Ability to
23 Accurately Estimate Well Yield Within a 25% Margin and The
24 Ability to Estimate Well Depth Within a 10%-20% Margin!"

25 Because direct evidence of intent to deceive is rarely
26 available, "the intent to deceive can be inferred from the
27 totality of the circumstances, including reckless disregard for
28 the truth." Gertsch v. Johnson & Johnson, Fin. Corp. (In re

1 Gertsch), 237 B.R. 160, 167-68 (9th Cir. BAP 1999); Household
2 Credit Servs., Inc. v. Ettell (In re Ettell), 188 F.3d 1141,
3 1145 n.4 (9th Cir. 1999) ("reckless conduct could be sufficient
4 to establish fraudulent intent"); Houtman v. Mann (In re
5 Houtman), 568 F.2d 651, 656 (9th Cir. 1978)¹⁰("Reckless
6 indifference to the actual facts, without examining the
7 available source of knowledge which lay at hand, and with no
8 reasonable ground to believe that it was in fact correct is
9 sufficient to establish the knowledge element."). Thus, a
10 bankruptcy court may find the requisite intent "where there has
11 been a pattern of falsity or from a debtor's reckless
12 indifference to or disregard of the truth." Khalil v.
13 Developers Sur. and Indem. Co. (In re Khalil), 379 B.R. 163,
14 174-75 (9th Cir. BAP 2007) (discussing intent to deceive in the
15 context of § 727(a)).

16 The only evidence submitted at Trial was the Depositions.
17 The Appellants argued that the Depositions demonstrated the
18 Debtors knew that the EKS System had not been proven to perform
19 as represented and, therefore, they acted with reckless
20 disregard of the truth. The Debtors responded that they
21 qualified that representation by stating that, based on their
22 experiences with the EKS System, it had the ability to
23 accurately perform within the percentages stated in the
24 advertisement.

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27 ¹⁰ Houtman also held that collateral estoppel did not apply
28 in § 523 proceedings. This aspect of Houtman was overruled by
Grogan v. Garner, 498 U.S. 279, 284 (1991).

1 The bankruptcy court found that "it [was] clear from
2 Mr. Kraemer's deposition that the stated accuracy reflected his
3 understanding of how well the system could work based on his
4 own experience" and not on rigorous scientific or statistical
5 analysis. It determined, using a totality of the circumstances
6 analysis, that the representation alone was insufficient to
7 establish that the Debtors acted with a reckless disregard of
8 the truth to satisfy the scienter requirement of
9 § 523(a)(2)(A). Based on our review of the record, we cannot
10 say that the bankruptcy court's finding is illogical,
11 implausible, or without support in the record.

12 "Deciding when misrepresentations cross the line from
13 negligence to reckless disregard is an inherently subjective
14 process." Wolf v. McGuire (In re McGuire), 284 B.R. 481, 493
15 (Bankr. D. Colo. 2002). Even if we may have simply weighed the
16 evidence differently as the trier of fact, we may not reverse
17 the bankruptcy court's factual finding. Anderson v. City of
18 Bessemer City, N.A., 407 U.S. at 573-74.

19 Furthermore, recklessness alone does not equate to
20 fraudulent intent; it is only probative of intent. In re
21 Khalil, 379 B.R. at 174. "The essential point is that there
22 must be something about the adduced facts and circumstances
23 which suggests that the debtor intended to deceive" the
24 creditor. Id. at 175. As the court noted in In re McGuire,
25 the focus must be on "the totality of the circumstances and
26 whether they create the overall impression of a deceitful
27 debtor." 284 B.R. at 493.

1 We disagree with the Appellants that the Depositions
2 compel a singular conclusion of intent to deceive. Throughout
3 the Depositions, the Debtors stated their belief in the
4 accuracy of the EKS System based on their own research and
5 experience. They admitted the research was not scientific and
6 acknowledged that there were many variables that could skew the
7 results, such as improper operation of the equipment, improper
8 data collection, or substandard drilling conditions. Thus, the
9 Debtors stated they used the word "ability" in the
10 advertisement as a qualifier. The Debtors maintained their
11 position that the EKS System's accuracy was not misrepresented
12 because they believed the EKS System had the ability to
13 function within the percentages of accuracy that they
14 represented. Overall, the Depositions do not demonstrate that
15 the Debtors had no basis for their belief in the stated
16 accuracy of the EKS System. Neither do the Depositions
17 demonstrate that the Debtors knew critical facts concerning the
18 EKS System's lack of accuracy and knowingly made repeated false
19 representations or consciously withheld important information
20 about its accuracy in order to entice customers to purchase
21 franchises. See, e.g., Idaho v. Edwards (In re Edwards),
22 233 B.R. 461, 478-79 (Bankr. D. Idaho 1999); In re McGuire,
23 284 B.R. at 494.

24 We conclude that the bankruptcy court's finding that the
25 Debtors did not intend to deceive the Appellants when they made
26 the representation about the accuracy of the EKS System was
27 logical, plausible, and supported by the record. As a result,
28 the Appellants failed to prove all the elements needed under

1 § 523(a)(2)(A). Accordingly, we conclude that the bankruptcy
2 court did not err in entering the Order Dismissing Complaint.

3 The Appellants also assign error to the bankruptcy court's
4 denial of their Renewed MSJ and the denial of the Motion for
5 Judgment. These orders were interlocutory and merged into the
6 final order on the merits. However, the Appellants argue that
7 the Motion for Judgment was not based on the merits but instead
8 on a request for sanctions due to the Debtors' failure to
9 appear at Trial. The Trial Order did not require the Debtors
10 to appear; the Debtors did not intentionally disobey a
11 scheduling order. As a result, no default judgment or other
12 sanction was appropriate.

13 B. The Debtors Were Not Prejudiced By The Admission Of The
14 Depositions.

15 On cross-appeal, the Debtors assert that the bankruptcy
16 court abused its discretion in admitting the Depositions into
17 evidence. The Debtors assign error to the bankruptcy court's
18 denial of the Motion to Exclude, the Reconsideration Motion and
19 the Motion to Dismiss. To reverse an evidentiary ruling, we
20 must conclude that the bankruptcy court both abused its
21 discretion and that the error was prejudicial. Latman v.
22 Burdette, 366 F.3d 774, 786 (9th Cir. 2004); Fed. R. Evid.
23 103(a).

24 Like the orders denying the Renewed MSJ and the Motion for
25 Judgment, the Motion to Exclude, Reconsideration Motion and
26 Motion to Dismiss were interlocutory orders that merged into
27 the final decision on the merits. Therefore, we have
28 jurisdiction to review them. However, because we have

1 concluded that the Appellants did not establish the
2 nondischargeability of the AAA Judgment even with the use of
3 the Depositions, the Debtors were not prejudiced by their
4 admission. Accordingly, we need not determine whether the
5 bankruptcy court abused its discretion in admitting the
6 Depositions. Similarly, the bankruptcy court's denial of the
7 Reconsideration Motion did not prejudice the Debtors.
8 Therefore, we decline to review its merits.

9 **VI. CONCLUSION**

10 For the foregoing reasons we AFFIRM the bankruptcy court.
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