

APR 06 2012

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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NOT FOR PUBLICATION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

| | | | | |
|----|-----------------|---|--------------------|------------------|
| 5 | In re: |) | BAP No. | CC-11-1248-MkHKi |
| | |) | | |
| 6 | EDWARD GILLIAM, |) | Bk. No. | RS 08-26743-CB |
| | |) | | |
| 7 | Debtor. |) | Adv. Nos. | RS 09-01091-CB |
| | |) | | RS 09-01145-CB |
| 8 | _____ |) | | |
| | MINON MILLER, |) | | |
| 9 | |) | | |
| | Appellant, |) | | |
| 10 | |) | | |
| | v. |) | MEMORANDUM* | |
| 11 | |) | | |
| | EDWARD GILLIAM, |) | | |
| 12 | |) | | |
| | Appellee. |) | | |
| 13 | _____ |) | | |

Argued and Submitted on February 24, 2012
at Pasadena, California

Filed - April 6, 2012

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellant Minon Miller, in propria persona, argued
on her own behalf; Todd Turoci of The Turoci Firm
argued on behalf of Appellee Edward Gilliam.**

*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.

**At oral argument, appellant Miller orally requested a
continuance. She argued that, if she had known that Turoci was
going to appear and argue on behalf of appellee Gilliam, she
would have sought counsel to represent her at oral argument.
This Panel denied Miller's continuance request. Unlike hearings
that take place in the bankruptcy court, oral argument before
(continued...)

1 Before: MARKELL, HOLLOWELL and KIRSCHER, Bankruptcy Judges.
2

3 **INTRODUCTION**

4 Appellant Minon Miller ("Miller") sued debtor Edward Gilliam
5 ("Gilliam") to have his debt declared nondischargeable under
6 § 523(a)(2)(B)¹ and to revoke his discharge under § 727(d)(1) and
7 (2). The bankruptcy court granted summary judgment in favor of
8 Gilliam on the § 523(a)(2)(B) claim and on the § 727(d)(2) claim,
9 and granted judgment after trial in favor of Gilliam on the
10 § 727(d)(1) claim. The bankruptcy court also granted Gilliam's
11 request for fees pursuant to § 523(d). We AFFIRM.

12 **FACTS**

13 This matter is the latest installment of a long-running and
14 ugly dispute between the parties. Both sides apparently believe
15

16 ^{**}(...continued)
17 this Panel is not considered a formal hearing of record at which
18 evidence may be taken and arguments made for the first time. In
19 deciding appeals, this Panel generally relies on the parties'
20 papers rather than on oral argument. In light of the above, we
21 confirm that Miller's lack of counsel at oral argument did not
22 affect her appeal in any material way.

23 In any event, on March 16, 2012, Turoci filed a motion to
24 withdraw as counsel. Miller has not objected, and thus we will
25 grant that motion. As a consequence, Gilliam will hereafter be
26 noted on the BAP's docket as representing himself, and his name,
27 address and telephone number as provided by his former counsel
28 will be listed on the BAP docket. Gilliam's name, address and
telephone number shall henceforth be used in this appeal for
service of notice and other papers on Gilliam.

¹Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure, and all "Evidence Rule"
references are to the Federal Rules of Evidence.

1 that good advocacy is measured by the amount of words used.
2 Hundreds upon hundreds of mostly irrelevant pages of invective
3 and philippic have been filed, some of which were improper.²
4 While we have reviewed the entire record, we must note the
5 obvious: this form of advocacy is, at best, counterproductive.

6 The parties' internecine fighting has affected this appeal.
7 To maintain order, this Panel entered an order before oral
8 argument barring the parties from filing unauthorized and
9 successive briefs, and from filing "new" evidence to support
10 their claims and contentions.³ We continue that order with the
11 entry of this memorandum; other than a motion for rehearing under
12 rule 8015, any opposition to that motion, and any notice of
13 appeal, the parties may not file anything further in this appeal.
14 And any paper that is filed must not exceed 15 pages of argument,
15 and may not have more than 25 pages in the aggregate of exhibits
16 (not counting any necessary attachments to any notice of appeal).
17 Any papers not complying with these restrictions will be returned
18 to that party unfiled.

19 As to the merits, the facts are relatively simple. The

20
21 ²On November 29, 2011, the Panel issued an order requiring
22 that the excerpts of the record would be imaged by the BAP Clerk
23 and made available for public view on the electronic docket. A
24 review of these excerpts indicated that they contained sensitive
25 personal information, including bank account numbers. See BAP
26 Docket at 22. The Panel has a duty to protect against
unauthorized use of this information. See Rule 9037.
Accordingly, appellant's excerpts of the record at BAP docket
number 22 will be locked on the electronic docket and will not be
available for public view.

27 ³As might be expected, Gilliam moved to reconsider that
28 motion as well, and included arguments on the merits of his
appeal in that brief.

1 dispute between Miller and Gilliam arises from a "Lease with
2 Purchase Option" agreement ("Agreement") they entered into in
3 March 2007. Under the Agreement, Miller was to rent from
4 Gilliam, for a period of one year, a single-family residence
5 located in Carson, California ("Carson Property"). The agreed
6 monthly rent was \$3,300. The Agreement also gave Miller the
7 option to purchase the Carson Property for \$825,000 or "market
8 price," whichever was lower.

9 Miller had learned of the Carson Property from a newspaper
10 advertisement ("Advertisement"), which identified the Carson
11 Property as follows:

12 **GORGEOUS 5-BEDROOM 3 BATH** CARSON Home. Lease Option.
13 Fireplace. Portion Rental Payment goes toward Down
Payment.

14 Declaration of Minon Miller ("Miller Decl.") (Sep. 28, 2010) at
15 Ex. 1 (emphasis in original).

16 But all was not well at the Carson Property. According to
17 Miller, within a few weeks after she signed the Agreement, she
18 discovered that the property was in "bad condition." Among other
19 things, she complained that there was no heat, no thermostat,
20 inadequate hot water, missing door knobs, a broken toilet and a
21 broken front door lock.⁴

22 More serious problems existed. For instance, one of the
23 five bedrooms was an unpermitted addition that, according to
24 Miller, was poorly constructed, ill-maintained and
25 uninhabitable.

26 _____
27 ⁴Miller met with Gilliam at the Carson Property before she
28 entered into the Agreement, but she claimed that she did not
notice the problems until she moved in.

1 Notwithstanding all the problems, Miller still sought to
2 exercise her option to purchase the Carson Property. In November
3 2007, she sent a letter attempting to exercise the option for a
4 strike price of \$578,000, claiming that \$578,000 was the market
5 value of the property. She also, however, added conditions to
6 her attempted exercise of the option. Among other things, the
7 conditions included: (1) Gilliam fixing the preexisting problems,
8 (2) Miller obtaining financing, and (3) satisfactory reports on
9 the property's condition from a home inspector and the City of
10 Carson. In December 2007, Gilliam sent a letter to Miller
11 rejecting her November 2007 purchase offer, claiming that her
12 purchase offer did not comply with the option in the Agreement.

13 According to Miller, Gilliam never intended to sell the
14 Carson Property to her, that the Agreement with the purchase
15 option was just a scam to induce her to rent a substandard
16 property at an inflated price. Miller further contended that, at
17 the time Gilliam was supposedly bound by the option, he
18 nonetheless continued to market and list the Carson Property for
19 sale.

20 The dispute over the Carson Property spawned a number of
21 state court lawsuits. Miller filed two small claims lawsuits
22 against Gilliam (Case Nos. COM 08S01715 and COM 08S01716) ("Small
23 Claims Cases"). She also filed a complaint in Los Angeles
24 Superior Court for, among other things, breach of contract,
25 fraud, and intentional and negligent infliction of emotion
26 distress, all allegedly arising from the parties' dealings in
27 relation to the Carson Property (LASC Case No. BC382802).
28 Meanwhile, Gilliam filed his own Los Angeles Superior Court

1 action against Miller for breach of contract, intentional
2 interference with prospective economic advantage, and intentional
3 interference with contractual relationship (LASC Case No.
4 BC398630). Gilliam also filed two unlawful detainer actions
5 against Miller (Case Nos. 08Q01024 and 08Q02108) ("Unlawful
6 Detainer Cases").⁵

7 Gilliam filed his current chapter 7 bankruptcy case (Case
8 No. 08-26743) in November 2008, and Christopher Barclay was
9 appointed to serve as trustee ("Trustee"). Gilliam filed his
10 initial bankruptcy schedules and statement of financial affairs
11 in December 2008 ("December Schedules"), and filed amendments to
12 some of his schedules in January 2009 ("January Schedules"). On
13 January 26, 2009, the Trustee concluded Gilliam's § 341(a)
14 meeting of creditors, and on February 3, 2009, the Trustee filed
15 a no-asset report in which he certified that he had performed his
16 duties as trustee and had concluded there were no estate assets
17 for him to administer for the benefit of creditors. The
18 bankruptcy court entered Gilliam's discharge pursuant to § 727(b)

22 ⁵It is not clear from the record whether the parties fully
23 advised the bankruptcy court of the status or outcome (if any) of
24 these state court actions at or before the time the court entered
25 the orders on appeal. Although the parties' papers characterized
26 the status and supposed outcomes of some of these actions, the
27 characterizations often conflicted. Despite these conflicts,
28 neither party appears to have given the bankruptcy court
authoritative documentation corroborating their respective
characterizations. In any event, the status/outcomes of the
state court actions are not essential to our analysis and
resolution of this appeal.

1 on March 9, 2009.⁶

2 In his December Schedules, Gilliam disclosed that he owned
3 four parcels of real property, as follows:

4 Property Located at: 716 West 123rd Street, Los Angeles, CA
Current Value: \$434,000; Encumbrances: \$711,892

5 Property Located at: (Duplex) 1146 & 1148 East 21st, Long
6 Beach, CA
Current Value: \$411,000; Encumbrances: \$517,000

7 Primary Residence located at: 19426 Via Del Caballo, Yorba
8 Linda, CA
Current Value: \$2,273,500; Encumbrances: \$2,723,057

9 Property Located at: 19002 Kemp Avenue, Carson, CA [the
10 Carson Property]
Current Value \$480,500; Encumbrances: \$659,472

11
12 Schedule A listing of real property (Dec. 10, 2008) at p. 1.⁷

13
14 _____
15 ⁶Notwithstanding the voluminous record provided by the
16 parties, we obtained some of the basic information regarding
17 Gilliam's bankruptcy case by accessing the bankruptcy court's
18 electronic docket and reviewing the imaged documents attached
thereto. We can take judicial notice of the filing and contents
of these items. See Barnes v. Belice (In re Belice), 461 B.R.
564, 569 n.2 (9th Cir. BAP 2011).

19 ⁷The Trustee evidently was aware of the existence of all of
20 these properties. However, nothing in the record indicates what
21 the Trustee knew about Gilliam's efforts to rent some of these
22 properties. Presumably, the Trustee would have inquired about
23 them at the § 341(a) meeting of creditors, and possibly contacted
24 Gilliam outside the meeting of creditors about them, but
25 conspicuously absent from the record is any indication about the
26 Trustee's discussions regarding these properties, their potential
27 rental value, and their worth (if any) to the estate. We do know
28 that the Trustee in his no asset report concluded that there were
no assets of value for him to administer for the benefit of
creditors. We also know from Gilliam's Statement of Intention
Regarding Debts Secured by Property of the Estate that he
intended to retain each of the properties and to make the
mortgage payments owed on each of them. Various filings in the
bankruptcy case suggest that most of the properties were subject
to foreclosure proceedings at or around the time of Gilliam's
bankruptcy filing.

1 Also in his December Schedules, Gilliam represented he was
2 the sole shareholder of two corporations, Gold Diamond
3 Enterprises, Inc. and ERG Community Care, Inc. Gilliam further
4 represented that Gold Diamond owned two automobiles, each with
5 roughly 50,000 miles on it. Otherwise, Gilliam indicated that
6 these corporations held no assets of significant value. In his
7 January Schedules, in addition to Gold Diamond and ERG Community
8 Care, Gilliam listed fourteen additional corporations he owned
9 (collectively, "Business Affiliates"). According to Gilliam,
10 none of the fourteen additional Business Affiliates had any
11 assets or value, nor had they done any business.

12 On February 27, 2009, Miller filed a complaint seeking a
13 determination of nondischargeability of debt
14 ("Nondischargeability Complaint"), and on March 30, 2009, a
15 complaint to revoke Gilliam's discharge ("Complaint to Revoke").
16 The bankruptcy court consolidated these two adversary proceedings
17 by order entered October 27, 2009. The Nondischargeability
18 Complaint was based on the dispute over the Carson Property and
19 contained a single claim for relief under § 523(a)(2)(B).
20 Meanwhile, in the Complaint to Revoke, Miller alleged that
21 Gilliam misrepresented and omitted certain assets and income in
22 his schedules and statement of financial affairs. More
23 specifically, Miller alleged that, under § 727(d)(1) and (2),
24 Gilliam's discharge should be revoked, based in part on the
25 following alleged facts:

- 26 1. Debtor declared under false oaths, that he had "No
27 Assets" including income or cash to pay any Creditor
28 yet he purchased a Builders Permit to remove an
 unpermitted upstairs bedroom and build a gable roof for
 [the Carson] property . . . before discharge was

1 issued.

2 2. Debtor declared "No Assets" including income or
3 cash to pay Creditors yet debtor restored property of
4 the estate [the Carson Property], solicited new tenant,
5 collected deposit and rent from new tenants [later
6 identified as Frieda and William Jordon].

7 3. Statements submitted by Debtor as well as
8 testimony, states all property is in foreclosure with
9 no payment given to any lender yet Debtor has collected
10 deposits and rents without permission of the Court or
11 the Trustee.

12 4. Debtor intentionally concealed income from Sports
13 Entertainment Business, under Gold Diamond Enterprises,
14 LLC.

15 5. Debtor intentionally concealed income as a Sports
16 Agent under Gold Diamond Enterprises, LLC.

17 6. Debtor intentionally misstated income (\$23,000.00)
18 a month generated from Gold Diamond Enterprise Inc.
19 derive from "Property Management that consist of
20 collecting rent from one property located at 716 E
21 123rd St., Los Angeles, CA 90746, which is a single
22 family home.

23 7. Debtor intentionally submitted false Statement of
24 Financial Affairs.

25 8. Debtor submitted false testimony and submitted
26 false schedules that income source is from Gold Diamond
27 Enterprises Inc. (Property Mgmt) and Non Profit Shelter
28 (ERG Community Care, Inc.).

9. On February 12, 2009 while awaiting discharge of
"No Asset" Chapter 7, debtor paid for and obtained a
Builder's Permit Extension from the City of Carson to
remove unpermitted bedroom and build gable roof [for
the Carson Property].

10. While in bankruptcy awaiting discharge, and
declaring "No Assets", Debtor repaired vacant property
and prepared to enter into new lease agreement. Vacant
property required major repairs that are deemed
inhabitable due to unpermitted unsafe bedroom, visible
cracks in the walls and ceiling, leaks, inadequate
plumbing, and slow drains [again, apparently talking
about the Carson Property].

11. While in bankruptcy debtor negotiated new tenants,
collected deposit and rent from the new tenants (the
Jordons) before obtaining discharge.

1 12. On March 20, 2009 debtor arrived at newly repaired
2 [Carson] property driving a Black Mercedes that was not
3 included in Bankruptcy schedules to give his tenants
4 (the Jordons) the key to the [Carson] property . . .
5 and sign lease agreement which was later signed March
6 23, 2009.

7 Complaint (Mar. 30, 2009) at pp. 2-4.⁸

8 The discovery process was highly contentious. The parties
9 filed numerous discovery motions, and the discovery deadline was
10 continued several times. Some (but certainly not all) of the
11 papers relating to the parties' discovery motions are included in
12 the excerpts of record. We have reviewed those papers, as well
13 as others, by accessing the bankruptcy court's electronic docket.
14 In addition, transcripts from a few of the discovery hearings are
15 available. Neither party has challenged on appeal the court's
16 rulings on their respective discovery motions, so the specifics
17 of each discovery motion are not material to our resolution of
18 this appeal.⁹

19 In September 2009, Gilliam filed a separate summary judgment

20 ⁸Miller filed both of the complaints in pro se, but she
21 retained counsel by no later than April 2009, and she was
22 represented by counsel throughout the remainder of the bankruptcy
23 court litigation, including all discovery disputes, during the
24 summary judgment proceedings, and at all hearings.

25 ⁹Miller argues on appeal that her ability to prosecute her
26 case and collect evidence was hampered by Gilliam's obstructive
27 discovery tactics. In addition, Miller contends that the court
28 did not adequately take into account Gilliam's obstructive
discovery tactics in assessing the reasonableness of his request
for fees under § 523(d). But the outcome of the discovery
motions tells a slightly different story. Looking at all of them
as a whole, Miller lost more than she won, which suggests, at a
minimum, that both parties at times were less than reasonable in
their discovery practices.

1 motion in each adversary proceeding. Both were continued from
2 time to time and eventually taken off calendar pending the
3 completion of discovery. In June 2010, after the court's
4 consolidation of the two adversary proceedings, Gilliam filed a
5 new summary judgment motion, covering the claims alleged in both
6 adversary proceedings.

7 By June 2010, discovery was substantially completed.
8 Gilliam's deposition was completed that same month, and the only
9 discovery outstanding after that were subpoenas for various
10 records that Miller served on Gilliam's banks and his Business
11 Affiliates. Gilliam brought several motions to quash these
12 subpoenas, and the court granted all but one: Miller's subpoena
13 to Bank of America seeking Gilliam's bank records was not
14 quashed. According to Miller, she did not receive Gilliam's bank
15 records from Bank of America ("Bank Records") until September 21,
16 2010, the day before her opposition to Gilliam's summary judgment
17 motion was due, and fifteen days before the hearing on the
18 summary judgment motion. The court denied Miller's motion to
19 further continue the summary judgment hearing.

20 Miller belatedly filed her opposition to the summary
21 judgment motion on September 28, 2010,¹⁰ and the court held its
22

23 ¹⁰In her excerpts of record, Miller did not provide us with
24 the 800-page request for judicial notice she filed in the
25 bankruptcy court in support of her summary judgment opposition.
26 By order entered October 7, 2010, the bankruptcy court restricted
27 public access to the judicial notice request presumably because
28 of concerns raised at the October 6, 2010 hearing, and in a
motion to strike filed by Gilliam, that the judicial notice
request might contain unredacted information to which Gilliam
might be entitled to some measure of privacy.

(continued...)

1 initial hearing on the summary judgment motion on October 6,
2 2010. At the hearing, the court ruled against Miller on her
3 § 523(a)(2)(B) claim, primarily because neither of the two
4 documents on which Miller based her § 523(a)(2)(B) claim - the
5 Advertisement and the Agreement - constituted a statement
6 respecting the debtor's financial condition within the meaning of
7 § 523(a)(2)(B). The court indicated that it was inclined to
8 grant the remainder of the summary judgment motion, but that it
9 would give Miller ten more days to file a supplemental brief of
10

11 ¹⁰(...continued)

12 Miller apparently misinterpreted the court's order
13 restricting public access as somehow restricting her from
14 providing us with a copy. Further, we have not been able to
15 obtain a copy of the judicial notice request by simply accessing
16 the bankruptcy court's electronic adversary proceeding docket
17 (presumably because of the bankruptcy court's order restricting
18 access to this document).

19 Nonetheless, we have reviewed Miller's comments regarding
20 the contents of the judicial notice request included in her
21 appeal brief and in her September 28, 2010 Declaration in support
22 of her summary judgment opposition. These comments indicate that
23 many (if not most) of the documents attached to the judicial
24 notice request were documents that the bankruptcy court could not
25 properly take judicial notice of under Evidence Rule 201. Among
26 other things, the judicial notice request contained the 363 pages
27 of Bank Records produced by Bank of America. Miller has made all
28 of the Bank Records available to us elsewhere in the Excerpts of
Record, as they also were part of her submissions at the time of
trial. The judicial notice request also apparently contained:
(1) a declaration filed by Gilliam in a state court lawsuit;
(2) excerpts from Gilliam's deposition testimony; (3) A notice of
default on the Carson Property; (4) a history of Gilliam's
mortgage payments on the Carson Property; and (5) various other
documents from the state court litigation between Miller and
Gilliam.

Based on our review of the Bank Records and on Miller's
description of the other documents, we conclude that none of them
would alter our analysis and disposition of the court's summary
judgment rulings.

1 no more that 25 pages (including exhibits) pinpointing the
2 disputed facts and Miller's evidence demonstrating that there
3 were genuine issues concerning her § 727(d) claims. On
4 October 22, 2010, the court entered an order consistent with its
5 October 6, 2010 oral rulings.¹¹

6 After the parties filed their supplemental briefs, the court
7 entered an order on November 3, 2010, granting summary judgment
8 against Miller on her § 727(d)(2) claim. As the court put it,
9 "Gilliam met his burden of proving no genuine issue of material
10 fact that Gilliam acquired and failed to disclose property to the
11 Trustee, and Miller has failed to provide any evidence showing a
12 genuine issue of material fact." Order Granting Summary Judgment
13 In Part (Nov. 3, 2010) at 2:28-3:2.

14 Indeed, Miller's only fact related to the alleged
15 postpetition acquisition of estate assets was Gilliam's apparent
16 receipt of \$3,000 in rent from Frieda and William Jordon - the
17 subsequent renters of the Carson Property. Significantly, Miller
18 did not refer to any issue of fact regarding whether Gilliam
19 attempted to conceal the \$3,000 in rent from the Trustee, nor did
20 Miller present any evidence pertaining to this issue.

21 The court held an additional hearing on the summary judgment
22 motion on November 29, 2010, specifically concerning Miller's
23 sole remaining claim, the § 727(d)(1) claim. At the hearing, the
24 court heard testimony regarding whether Gilliam had a fraudulent
25

26 ¹¹The court further suggested at the October 6, 2010 hearing
27 that "res judicata" might be an alternate basis for its ruling on
28 the § 523(a)(2)(B) claim. In light of our analysis and
disposition of this appeal, we do not reach that issue.

1 intent when he omitted or misrepresented certain information in
2 his bankruptcy schedules. The court also heard at this same
3 hearing Gilliam's § 523(d) request for fees.

4 Ultimately, the court denied Gilliam's motion for summary
5 judgment with respect to Miller's § 727(d)(1) claim, concluding
6 that there were disputed issues of fact that needed to be tried.
7 However, the court granted Gilliam's § 523(d) fee request for the
8 full amount requested - \$27,788.24. The court based its fee
9 award on its finding that Miller's § 523(a)(2)(B) claim was not
10 well founded and its finding that the amount of fees requested
11 were reasonable.

12 On December 20, 2010, the court entered an order setting
13 March 22, 2011 as the trial date and setting forth certain trial
14 procedures. In pertinent part, the order required the parties to
15 submit all direct testimony by declaration, and to have all
16 witnesses giving testimony by declaration available at trial for
17 cross-examination.

18 The court ruled against Miller on her § 727(d)(1) claim
19 after a trial held on March 22, 2011. The primary basis for the
20 court's ruling was its finding that Miller did not prove by a
21 preponderance of the evidence that Gilliam had any fraudulent
22 intent with respect to any errors or omissions in his bankruptcy
23 schedules or in his statement of financial affairs. But the
24 court also found it significant that there was no testimony or
25 other evidence from the Trustee or anyone else demonstrating that
26 any of the so-called errors or omissions would have impacted the
27 administration of the estate or caused the Trustee to seek denial
28 of Gilliam's discharge.

1 Finally, the court stated:

2 Just a little bit of a follow up, there was no
3 foundation laid for Exhibit 1 [the Bank Records] to the
4 extent that they are bank records. There was no
5 connection made between any of these numbers in
6 anything that I could pinpoint to indicate what it
7 meant. I mean there was no connection made between
8 certain numbers in this Exhibit 1 and anything that
9 would lead me to believe there was fraud.

10 Hr'g Tr. (Mar. 22, 2011) at 62:7-14.

11 The court entered its final judgment on April 19, 2011, and
12 Miller timely appealed on May 18, 2011.¹²

13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 § 157(b)(2)(I) and (J), and we have jurisdiction under 28 U.S.C.
16 § 158.

17 ISSUES

18 1. Did the bankruptcy court commit reversible error in its
19 summary judgment rulings?

20 2. Did the bankruptcy court commit reversible error in its
21 rulings at and after trial?

22 3. Did the bankruptcy court commit reversible error when it
23 awarded Gilliam attorneys fees under § 523(d)?

24 STANDARDS OF REVIEW

25 We review the bankruptcy court's decision to grant summary
26 judgment de novo. Fichman v. Media Ctr., 512 F.3d 1157, 1159
27 (9th Cir. 2008).

28 ¹²A motions panel of this Panel previously issued an order
concluding that, by operation of Civil Rule 58(c)(2)(B) (made
applicable in adversary proceedings by Rule 7058), Miller timely
filed her notice of appeal.

1 Factual findings made by the bankruptcy court after trial on
2 a discharge revocation claim are reviewed under the clearly
3 erroneous standard of review. See Rule 8013; Bowman v. Belt
4 Valley Bank (In re Bowman), 173 B.R. 922, 924 (9th Cir. BAP
5 1994). A factual finding is clearly erroneous if the appellate
6 court determines that it is "illogical, implausible, or without
7 support in the record." Retz v. Samson (In re Retz), 606 F.3d
8 1189, 1196 (9th Cir. 2010) (citing United States v. Hinkson,
9 585 F.3d 1247, 1261-62 & n. 21 (9th Cir. 2009) (en banc)). If
10 two views of the evidence are possible, the trial judge's choice
11 between them cannot be clearly erroneous. Anderson v. Bessemer
12 City, N.C., 470 U.S. 564, 574 (1985).

13 We review the bankruptcy court's evidentiary rulings and its
14 imposition of discovery sanctions for abuse of discretion. See
15 Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101,
16 1105-06 (9th Cir. 2001). "We afford broad discretion to a
17 district court's evidentiary rulings. To reverse such a ruling,
18 we must find that the district court abused its discretion and
19 that the error was prejudicial. A reviewing court should find
20 prejudice only if it concludes that, more probably than not, the
21 lower court's error tainted the verdict." Harper v. City of Los
22 Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008)(citations and
23 internal quotation marks omitted).

24 Section 523(d) awards also are reviewed for abuse of
25 discretion. First Card v. Hunt (In re Hunt), 238 F.3d 1098, 1101
26 (9th Cir. 2001) (citing First Card v. Carolan (In re Carolan),
27 204 B.R. 980, 984 (9th Cir. BAP 1996)).

28 Under the abuse of discretion standard of review, we first

1 "determine de novo whether the [bankruptcy] court identified the
2 correct legal rule to apply to the relief requested." Hinkson,
3 585 F.3d at 1262. And if the bankruptcy court identified the
4 correct legal rule, we then determine under the clearly erroneous
5 standard whether its factual findings and its application of the
6 facts to the relevant law were: "(1) illogical, (2) implausible,
7 or (3) without support in inferences that may be drawn from the
8 facts in the record." Id. (internal quotation marks omitted).

9 DISCUSSION

10 I. The Bankruptcy Court Did Not Commit Reversible Error in its 11 Summary Judgment Rulings.

12 A. General Summary Judgment Standards

13 "Summary judgment is proper if the pleadings, depositions,
14 answer to interrogatories, and admissions on file, together with
15 the affidavits, if any, show that there is no genuine issue as to
16 any material fact and that the moving party is entitled to a
17 judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S.
18 317, 322 (1986) (internal quotation marks omitted); see also
19 Sluimer v. Verity, Inc., 606 F.3d 584, 586 (9th Cir. 2010).

20 Under this standard, the moving party is entitled to summary
21 judgment if the nonmoving party "after adequate time for
22 discovery . . . fails to make a showing sufficient to establish
23 the existence of an element essential to that party's case, and
24 on which that party will bear the burden of proof at trial."
25 Celotex Corp., 477 U.S. at 322; see also Ilko v. Cal. St. Bd. Of
26 Equalization (In re Ilko), 651 F.3d 1049, 1052 (9th Cir. 2011)
27 (applying Celotex summary judgment standard to bankruptcy court
28 adversary proceeding). As explained in Celotex, all other facts

1 are immaterial when the nonmoving party fails to submit
2 sufficient proof of an essential element of its case. Id. at
3 323.

4 A mere "scintilla of evidence" is not sufficient; "there
5 must be evidence on which the jury could reasonably find for the
6 [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S.
7 242, 252 (1986). Thus, the moving party does not need to negate
8 or disprove matters on which the nonmoving party will have the
9 burden of proof at trial. Celotex Corp., 477 U.S. at 325.
10 Rather, the moving party need only point out that there is an
11 absence of evidence to support an element of the nonmoving
12 party's case. Id.

13 In deciding a motion for summary judgment, the evidence is
14 viewed in the light most favorable to the nonmoving party, "and
15 all justifiable inferences are to be drawn in his favor."
16 Anderson, 477 U.S. at 255 (emphasis added). "Credibility
17 determinations, the weighing of the evidence, and the drawing of
18 legitimate inferences from the facts are jury functions, not
19 those of a judge [when] he is ruling on a motion for summary
20 judgment" Id. (emphasis added); see also Sluimer,
21 606 F.3d at 586-87. In sum, evidence of an essential element is
22 sufficient to defeat summary judgment only if a jury reasonably
23 could infer from that evidence the existence of that element.

24 **B. Ruling on Section 523(a)(2)(B) Claim**

25 Miller asserts that the bankruptcy court erred when it
26 granted summary judgment against her on the § 523(a)(2)(B)
27 nondischargeability claim. Under that section, when the debtor
28 uses a materially false written statement "respecting the

1 debtor's . . . financial condition" with the intent to deceive,
2 and thereby incurs a debt, that debt is nondischargeable.
3 § 523(a)(2)(B); see also Field v. Mans, 516 U.S. 59, 64 (1995).
4 To lead to nondischargeability under § 523(a)(2)(B), the creditor
5 must reasonably rely on the false written financial statement,
6 and the statement must induce the creditor to give the debtor
7 money, property or services, or to extend credit. Id. at 64-66.
8 Here, in granting summary judgment, the bankruptcy court
9 concluded as a matter of law that neither of the two documents on
10 which Miller founded the § 523(a)(2)(B) claim - the Advertisement
11 and the Lease - constituted a statement "respecting the debtor's
12 . . . financial condition" within the meaning of § 523(a)(2)(B).
13 According to Miller, the bankruptcy court erred in so concluding.
14 But we agree with the bankruptcy court. As we recently held in
15 In re Belice, 461 B.R. at 577-79, the phrase "statement
16 respecting financial condition" as used in § 523(a)(2)(B) should
17 be narrowly construed to apply only to statements reflecting
18 debtors' net worth, overall cash flow, or overall financial
19 condition. Simply put, given the content of the Advertisement
20 and the Lease, we cannot conceive of either document as a
21 "statement respecting the debtor's . . . financial condition"
22 within the meaning of that phrase as we determined in Belice.

23 Consequently, the bankruptcy court did not err when it
24 granted summary judgment against Miller on the § 523(a)(2)(B)
25 claim.

26 **C. Ruling on § 727(d)(2) Claim**

27 Miller also asserts that the bankruptcy court erred when it
28 granted summary judgment against her on the § 727(d)(2)

1 revocation of discharge claim. A debtor's discharge will be
2 revoked under that section when the debtor (1) acquired or became
3 entitled to acquire estate property, and (2) knowingly and
4 fraudulently failed to report or turnover that property to the
5 trustee. § 727(d)(2); In re Bowman, 173 B.R. at 925 (citing In
6 re Yonikus, 974 F.2d 901, 905 (7th Cir. 1992)). Miller bore the
7 burden of proof to establish by a preponderance of evidence the
8 elements supporting the § 727(d)(2) claim. Id. at 925-26.

9 Here, the only evidence Miller presented of Gilliam
10 acquiring postpetition an asset of the estate was \$3,000 in rent
11 from the Carson Property. More importantly, however, Miller
12 presented no evidence at all that the Trustee was unaware of the
13 \$3,000 in rent. Given the complete absence of evidence to
14 demonstrate that Gilliam attempted to conceal the rent,¹³ and the
15 complete absence of evidence to demonstrate that Gilliam acquired
16 or became entitled to acquire any other estate assets
17 postpetition, the bankruptcy court properly granted summary
18 judgment against Miller on the § 727(d)(2) claim.

19 **D. Other Summary Judgment-Related Issues**

20 Miller's other arguments attacking the court's summary
21 judgment rulings lack merit. Miller argues that she was not
22 given enough time to oppose Gilliam's summary judgment motion.
23 In particular, she points out that she only received the Bank
24

25 ¹³A similar absence of evidence in Bowman led us to reverse
26 a bankruptcy court judgment after trial revoking the debtor's
27 discharge under § 727(d)(2). Id. at 926. As we explained
28 there, without some evidence that Bowman attempted to conceal the
subject insurance proceeds from the trustee, there simply was no
basis to revoke Bowman's discharge under § 727(d)(2). Id.

1 Records from Bank of America the day before her summary judgment
2 opposition was due. However, Gilliam's summary judgment motions
3 already had been continued numerous times. Moreover, no amount
4 of additional time would have improved Miller's legal argument
5 that the Lease and the Advertisement were financial statements
6 within the meaning of § 523(a)(2)(B). As for her § 727(d)(2)
7 claim, Miller learned no later than June 2010, when she completed
8 Gilliam's deposition, that Gilliam received \$3,000 in rent from
9 the Jordons when he rented the Carson Property to them
10 postpetition. Miller has not explained why, when over three
11 months elapsed between the completion of the Gilliam deposition
12 and her filing of her opposition to the summary judgment motion,
13 she did not have sufficient time to seek from the Trustee some
14 sort of statement regarding whether he was aware of the \$3,000 in
15 rent from the Carson Property. To the contrary, our review of
16 the record indicates that Miller had more than ample time to
17 gather the evidence she needed to support her § 727(d)(2) claim,
18 but she simply failed to do so.

19 Miller also argues that the bankruptcy court unduly
20 restricted her when it limited her to a 25-page supplemental
21 brief to shore up her opposition to Gilliam's summary judgment
22 motion. We disagree. The court already had ruled against Miller
23 on her § 523(a)(2)(B) claim, and the court made clear that the
24 purpose of the supplemental brief was to afford Miller with an
25 additional opportunity to simply point to what evidence supported
26 her claims under § 727(d)(1) and (2). Moreover, this
27 supplemental brief was in addition to the voluminous materials
28 that Miller submitted in her original opposition papers. In any

1 event, Miller has offered no credible explanation why she was not
2 afforded a sufficient opportunity to present all evidence that
3 would have supported her § 727(d)(2) claim. The record reflects
4 that the bankruptcy court provided Miller with an adequate
5 opportunity to present the evidence in support of her § 727(d)(2)
6 claim, but that Miller simply did not have any evidence to submit
7 in support of one of the essential elements of that claim -
8 evidence that the Trustee was unaware of \$3,000 in rent that
9 Gilliam apparently received.¹⁴

10 Miller makes reference to several other arguments
11 challenging the court's summary judgment rulings. She complains:
12 (1) that the court expressly refused to read the entirety of the
13 voluminous papers she submitted in opposition to the summary
14 judgment motion; (2) that the court denied her due process;
15 (3) that the court improperly excluded some of the Bank Records
16 she sought to submit in opposition to the summary judgment

17
18 ¹⁴Together with her Reply Brief on appeal, Miller attempts
19 to offer new evidence, which she claims demonstrates additional
20 instances when Gilliam postpetition may have acquired or become
21 entitled to acquire additional assets of the estate. See Miller
22 Reply (Dec. 22, 2011) at pp. 12-13; Miller Supplemental Excerpts
23 of Record in Support of Reply (Dec. 22, 2011) at Tabs 65A, 67A,
24 etc. However, it is clear on the face of the documents Miller
25 attempts to offer as new evidence that she acquired these
26 documents well after the bankruptcy court entered its final
27 judgment against Miller. We cannot and will not consider
28 Miller's new evidence because it was not presented to the
bankruptcy court at or before the time the bankruptcy court
entered its judgment. See Oyama v. Sheehan (In re Sheehan),
253 F.3d 507, 512 n.5 (9th Cir. 2001) ("[E]vidence that was not
before the lower court will not generally be considered on
appeal."); Kirschner v. Uniden Corp. of Am., 842 F.2d 1074,
1077-78 (9th Cir. 1988) (papers not filed or admitted into
evidence by the trial court prior to judgment on appeal were not
part of the record on appeal and thus stricken).

1 motion; (4) that the court improperly restricted public access to
2 her request for judicial notice submitted in opposition to the
3 summary judgment motion; (5) that the court improperly allowed
4 Gilliam's counsel to argue on Gilliam's behalf at various
5 hearings even after he purported to withdraw as Gilliam's
6 counsel; and (6) that the court improperly allowed Gilliam's
7 counsel to draft proposed orders, findings of fact and
8 conclusions of law. But most of these complaints are derivative
9 of Miller's other arguments, discussed and rejected above. More
10 importantly, none of these complaints, even if they were valid,
11 would alter or ameliorate the infirmities and gaps in Miller's
12 case that properly caused the court to grant summary judgment
13 against her § 523(a)(2)(B) and § 727(d)(2) claims. In other
14 words, any actual error of the court relating to Miller's above-
15 referenced complaints was harmless, and we must ignore harmless
16 error. See Litton Loan Serv'g, LP v. Garvida (In re Garvida),
17 347 B.R. 697, 704 (9th Cir. BAP 2006) (citing 28 U.S.C. § 2111,
18 Rule 9005, Civil Rule 61, and Donald v. Curry (In re Donald),
19 328 B.R. 192, 203-04 (9th Cir. BAP 2005)).

20 **II. The Bankruptcy Court Did Not Commit Reversible Error in its**
21 **Rulings at and After Trial.**

22 **A. Ruling on § 727(d)(1) Claim**

23 Even though a discharge in bankruptcy is reserved for the
24 "honest but unfortunate debtor," Grogan v. Garner, 498 U.S. 279,
25 286-87 (1991), revocation of discharge nonetheless is considered
26 an extraordinary remedy that runs counter to the Bankruptcy
27 Code's cornerstone policy of giving debtors a "fresh start." In
28 re Bowman, 173 B.R. at 924; see also Tighe v. Valencia (In re

1 Guadarrama), 284 B.R. 463, 469 (C.D. Cal. 2002); In re Poole,
2 177 B.R. 235, 239 (Bankr. E.D. Pa. 1995). Accordingly, the power
3 to revoke the discharge is construed narrowly "in favor of the
4 debtor and strictly against those objecting to discharge."
5 Bowman, 173 B.R. at 925 (citing First Beverly Bank v. Adeeb
6 (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986)).

7 Under § 727(d)(1), the trustee or a creditor may seek
8 revocation of the debtor's discharge if: (1) the debtor obtained
9 the discharge through fraud, and (2) the creditor or trustee
10 seeking to revoke the discharge did not learn of the fraud until
11 after the discharge was granted. To revoke the debtor's
12 discharge pursuant to this statute, the plaintiff must prove by a
13 preponderance of the evidence that the debtor procured the
14 discharge through actual fraud, as opposed to constructive fraud,
15 and that debtor's discharge would not have been granted but for
16 the fraud. See Hopkins v. Hugues (In re Hugues), 349 B.R. 72, 78
17 (Bankr. D. Idaho 2006) (citing White v. Nielsen (In re Nielsen),
18 383 F.3d 922, 925 (9th Cir. 2004), Bowman 173 B.R. at 925, and
19 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751,
20 753-54 (9th Cir. 1985)); In re Guadarrama, 284 B.R. at 469.
21 Thus, a finding of fraud in the procurement requires evidence of
22 some conduct that under § 727(a) would have been sufficient
23 grounds for denying a discharge in the first instance, such as
24 debtor knowingly and fraudulently making a false oath in
25 connection with his bankruptcy case. See 727(a)(4)(A); In re
26 Hugues, 349 B.R. at 78.

27 In this case, Miller offered little evidence from which the
28 bankruptcy court could infer that Gilliam harbored a fraudulent

1 intent in the process of obtaining his discharge. Instead of
2 calling Gilliam as a hostile witness as part of her case in
3 chief, Miller only elicited testimony from Gilliam on cross-
4 examination, after Gilliam offered his direct testimony by
5 declaration as part of his defense.¹⁵

6 In his trial declaration, Gilliam discussed: (1) his receipt
7 shortly before his bankruptcy filing of some payments from the
8 Compton Unified School District ("School District Payments");
9 (2) his ownership of several bank accounts not disclosed in his
10 bankruptcy schedules; and (3) his ownership of several of the
11 Business Affiliates - The Watershed, Inc., Pro Sports Now, Gold
12 Diamond Enterprises, and Eirne Consolidated. Gilliam's
13 statements in his trial declaration regarding these Business
14 Affiliates are consistent with his January Schedules. As for the
15 bank accounts, Gilliam represented that he did not disclose them
16 because each held only a few dollars, or no money at all, at the
17 time of his bankruptcy filing. Finally, with respect to the
18 School District Payments, Gilliam explained that they were either
19 disability payments or reimbursement for medication he purchased.
20 According to Gilliam, he disclosed them in his bankruptcy
21 petition but did not list them as income, because in his view
22 they were not income.

23 Miller's cross-examination of Gilliam focused heavily on the
24 Bank Records, but Miller failed to tie any of the Bank Records to
25

26 ¹⁵By not calling Gilliam as a witness as part of her case in
27 chief, Miller effectively limited the scope of her examination of
28 Gilliam to the scope allowed for cross-examination. See Evidence
Rule 611(b).

1 any specific conduct by Gilliam from which the bankruptcy court
2 could infer fraud in the procurement of Gilliam's discharge. In
3 other words, Miller's questions and assertions regarding the Bank
4 Records ultimately did not adduce any evidence tending to prove
5 any particular misconduct on the part of Gilliam in connection
6 with his bankruptcy case.

7 Miller also cross-examined Gilliam regarding the unreported
8 bank accounts, the School District Payments, and Gilliam's claim
9 that the above-referenced Business Affiliates were inactive and
10 had no assets at the time of his bankruptcy filing. While it was
11 not discussed in Gilliam's declaration, Miller also cross-
12 examined Gilliam regarding his state court lawsuit against a man
13 by the name of Wendell White seeking roughly \$24,000 ("White
14 Lawsuit").

15 In sum, the alleged instances of fraudulent
16 misrepresentation or omission covered during Miller's cross-
17 examination of Gilliam at trial related to: (1) the School
18 District Payments, (2) the unreported bank accounts, (3) some of
19 Gilliam's Business Affiliates, and (4) the White Lawsuit.

20 Based on the evidence presented at trial, the bankruptcy
21 court found in relevant part that any errors or omissions that
22 Gilliam made in his bankruptcy schedules, in his statement of
23 financial affairs or in his other bankruptcy disclosures, were
24 made without the requisite fraudulent intent. As mentioned
25 above, Miller heavily relied on the Bank Records in support of
26 her position at trial, but the best evidence in this record
27 regarding Gilliam's intent was his trial testimony. Intent is a
28 question of state of mind, which often is determined based on the

1 trier of fact's assessment of the litigant's credibility, which
2 in turn largely depends on the in-court statements of the person
3 whose state of mind is at issue. See, e.g., Hernandez v. New
4 York, 500 U.S. 352, 364-65 (1991); Batson v. Kentucky, 476 U.S.
5 79, 98 & n.21 (1986).

6 Gilliam's testimony enabled the bankruptcy court to make an
7 informed assessment of his credibility. While the bankruptcy
8 court did not expressly state that Gilliam's testimony was
9 credible, that finding was subsumed within the court's finding
10 that Gilliam did not have a fraudulent intent to the extent his
11 bankruptcy disclosures contained any errors or omissions. We
12 must give particular deference to the bankruptcy court's findings
13 that turn on witness credibility. See Anderson, 470 U.S. at 574-
14 75; Rule 8013.

15 Furthermore, as we stated at the outset, we will not reverse
16 the bankruptcy court's factual findings unless those findings
17 were illogical, implausible or without support in the record.
18 In re Retz, 606 F.3d at 1196; see also Anderson, 470 U.S. at 574
19 (stating that trial judge's choice between two permissible views
20 of the evidence cannot be clearly erroneous). Miller has not
21 demonstrated on appeal that the bankruptcy court's finding
22 concerning Gilliam's intent met any of the criteria identified in
23 Retz. To the contrary, based on our review of the record, we
24 affirmatively and expressly conclude that the bankruptcy court's
25 intent finding was logical, plausible and adequately supported by
26 the record.

27 In light of our determination upholding the bankruptcy
28 court's finding that Gilliam did not have a fraudulent intent,

1 and given that fraudulent intent was an element essential to
2 Miller's § 727(d)(1) claim, we decline to discuss any of the
3 court's other findings of fact concerning the § 727(d)(1) claim.
4 The court's finding of lack of fraudulent intent was sufficient
5 by itself to support the court's judgment against Miller on the
6 § 727(d)(1) claim.

7 **B. Ruling Excluding Miller's Expert Witness**

8 Miller also challenges the bankruptcy court's decision to
9 exclude the direct testimony of her expert witness Shari Yaros, a
10 forensic accountant. The bankruptcy court excluded Yaros'
11 testimony essentially because Miller did not comply with Civil
12 Rule 26(a)(2), which required advance disclosure of Yaros as an
13 expert and advance production of Yaros' expert report. In her
14 declaration, Yaros reviewed the Bank Records, outlined their
15 contents, and rendered an extremely limited expert opinion
16 regarding what the Bank Records showed in terms of Gilliam's
17 financial activities and his relationship to some of the Business
18 Affiliates. In essence, Yaros summarized the flow of funds into
19 and out of Bank of America Account Number 1801, and identified
20 some of the sources and recipients of funds from Account Number
21 1801 as some of Gilliam's Business Affiliates. But,
22 significantly, Yaros did not render any opinion that the funds
23 flowing into or out of Account No. 1801 somehow demonstrated any
24 type of bankruptcy-related misconduct on the part of Gilliam.

25 We cannot conclude that the bankruptcy court abused its
26 discretion in excluding Yaros' expert testimony. Civil
27 Rule 26(a)(2) required Miller to disclose Yaros as her expert and
28 provide a report disclosing Yaros' expert opinion no later than

1 90 days before the date set for trial. At trial, Miller admitted
2 that she did not comply with Civil Rule 26(a)(2). At one point,
3 Miller admitted that Yaros' testimony was not disclosed until the
4 parties' exchanged exhibits and witness declarations on or about
5 March 14, 2011, eight days before trial. At another point,
6 Miller insisted that Yaros was identified as her expert witness
7 on March 8, 2011, fourteen days before trial.¹⁶

8 Civil Rule 37(c)(1) makes clear that the court should
9 exclude such expert testimony when the proponent does not comply
10 with the requirements of Civil Rule 26(a) or (e), unless the
11 proponent establishes that the failure to comply was justified or
12 was harmless. See Daniel v. Coleman Co., Inc., 599 F.3d 1045,
13 1049 (9th Cir. 2010); Torres v. City of Los Angeles, 548 F.3d
14 1197, 1212-13 (9th Cir. 2008). The purpose of this exclusionary
15 rule is to give teeth to the disclosure requirements of Civil
16 Rule 26(a) "by forbidding the use at trial of any information
17 required to be disclosed . . . that is not properly disclosed."
18 Yeti by Molly, Ltd., 259 F.3d at 1106.

19 Here, when the bankruptcy court confronted Miller about her
20 noncompliance with the disclosure requirements regarding her
21 expert witness, Miller's only defense was that the disclosure
22 requirements under Civil Rule 26(a)(2) should not apply at all,
23

24 ¹⁶Presumably, Miller is relying on her unilateral proposed
25 pretrial order, filed on March 8, 2011, which identified Yaros as
26 her expert witness and referred the reader to Yaros' declaration
27 (signed on March 7, 2011) for the subject matter of Yaros'
28 testimony. It is not entirely clear precisely when Yaros'
declaration was first made available to the court or to Gilliam,
as it was not attached to the proposed pretrial order, but
certainly it was made available no earlier than March 8, 2011.

1 because the court issued its trial setting order on December 20,
2 2010, which was roughly ninety days before the March 22, 2011
3 hearing date. While the length of time between the trial setting
4 order and the date of trial likely justified some leeway on the
5 deadline for complying with Civil Rule 26(a)(2) disclosures, we
6 agree with the bankruptcy court that this length of time did not
7 justify Miller's complete disregard of Civil Rule 26(a)(2). Nor
8 did Miller attempt to make any showing at all that her failure to
9 comply was harmless.

10 As a separate and independent ground for affirmance, Miller
11 has not established that she was prejudiced by the exclusion of
12 Yaros' testimony. Yaros' testimony contained no opinions that
13 reasonably could have affected the court's finding on the
14 dispositive issue regarding Gilliam's alleged intent to defraud.
15 To the contrary, her testimony for the most part merely
16 summarized the contents of the Bank Records and drew a handful of
17 insignificant inferences regarding the flow of funds into and out
18 of Account Number 1801. The types of inferences that Yaros drew
19 from the records likely did not even necessitate expert
20 testimony. The bankruptcy court was capable of drawing most of
21 these inferences itself, to the extent they were even relevant to
22 the issues presented at trial. Because the exclusion of Yaros'
23 testimony was unlikely to have caused any harm to Miller's
24 litigation position, the exclusion does not constitute reversible
25 error under any circumstances. See Daniel, 599 F.3d at 1048-49
26 (citing Harper, 533 F.3d at 1030).

27 **C. Ruling Excluding Custodian of Records Testimony**

28 In an attempt to authenticate the Bank Records, Miller

1 offered at trial the declaration of Jennifer Long, who stated
2 that she was the custodian of records for Bank of America and who
3 further stated, in a pro forma manner, that the subject records
4 were bank records produced in response to a subpoena served on
5 the Bank.

6 The court excluded the Long Declaration for two reasons.
7 First, it did not state the perjury law (California's, the United
8 States' or some other jurisdiction) under which the declarant was
9 asserting that her statements were true. Second and more
10 importantly, the court had ordered each party to ensure that each
11 witness whose direct testimony they offered by declaration was
12 present in person at the time of trial so that they would be
13 available for cross-examination. According to Miller, she had
14 issued a trial subpoena for Bank of America's custodian of
15 records, who she thought would be Jennifer Long. But Bank of
16 America sent someone other than Jennifer Long to the hearing, a
17 different custodian of records by the name of Jeffrey Jackson.
18 Because Jeffrey Jackson's direct testimony had not been submitted
19 in advance of the hearing by declaration, as required by the
20 court, the court refused to let Jeffrey Jackson testify.

21 Miller asserts that the bankruptcy court erred by refusing
22 to let Jeffrey Jackson testify to authenticate the Bank Records.
23 To some extent, we agree with Miller on this point. The record
24 suggests that Miller might not have had any means to control who
25 Bank of America sent to act as custodian of records at the
26 hearing. We understand the bankruptcy court's desire to have all
27 direct testimony submitted in the form of declaration, but that
28 might not always be a realistic demand to place on the parties

1 when a party subpoenas for testimony at trial a third party
2 custodian of records who is an employee of an institution over
3 whom that party has little or no control.

4 However, even if we were to assume that the court erred in
5 not letting Jeffrey Jackson testify in person to authenticate the
6 Bank Records or, alternately, erred by not admitting the
7 custodian of records declaration of Jennifer Long, once again,
8 there is no indication that these evidentiary rulings prejudiced
9 Miller's case against Gilliam. To the contrary, the bankruptcy
10 court admitted the Bank Records into evidence at the time of
11 trial. Moreover, the Bank Records were, at best, tangentially
12 related to the dispositive issue of Gilliam's intent. As
13 explained above, the best indication of Gilliam's intent was his
14 own trial testimony and the bankruptcy court's contemporaneous
15 assessment of his credibility. Nothing in the Bank Records under
16 any circumstances was likely to have altered the court's finding
17 regarding Gilliam's intent, regardless of whether someone from
18 Bank of America had formally authenticated the Bank Records,
19 either in person or by declaration. Simply put, any error
20 respecting the exclusion of the custodian of records testimony
21 did not prejudice Miller and thus does not constitute reversible
22 error. See Daniel, 599 F.3d at 1049; Harper, 533 F.3d at 1030.

23 **III. The Bankruptcy Court Did Not Commit Reversible Error When**
24 **it Awarded Gilliam Attorneys Fees Under § 523(d).**

25 Section 523(d) provides:

26 If a creditor requests a determination of
27 dischargeability of a consumer debt under subsection
28 (a)(2) of this section, and such debt is discharged,
 the court shall grant judgment in favor of the debtor
 for the costs of, and a reasonable attorney's fee for,

1 the proceeding if the court finds that the position of
2 the creditor was not substantially justified, except
3 that the court shall not award such costs and fees if
special circumstances would make the award unjust.

4 To support a request for attorneys fees under § 523(d), a
5 debtor needs to prove: (1) that the creditor sought to except a
6 debt from discharge under § 523(a)(2), (2) that the subject debt
7 was a consumer debt, and (3) that the subject debt ultimately was
8 discharged. Stine v. Flynn (In re Stine), 254 B.R. 244, 249 (9th
9 Cir. BAP 2000). "Once the debtor establishes these elements, the
10 burden shifts to the creditor to prove that its actions were
11 substantially justified." Id.

12 The bankruptcy court granted Gilliam's request for
13 \$27,788.24 in fees after simply finding that Miller's
14 § 523(a)(2)(B) claim "was not well founded." Hr'g Tr. (11/29/10)
15 at 93:14.

16 In her opposition to Gilliam's § 523(d) fee request, Miller
17 had argued that Gilliam's fee request should be denied because
18 her § 523(a)(2)(B) claim was substantially justified. Miller
19 also argued that the fees requested were unreasonably excessive.
20 In her appeal brief, Miller appears to raise essentially the same
21 arguments challenging the bankruptcy court's fee award that her
22 counsel argued in the bankruptcy court. We will consider each of
23 these arguments in turn.¹⁷

26 ¹⁷To the extent that Miller could have raised other
27 arguments challenging the fee award, she has waived them because
28 she did not raise them either in the bankruptcy court or on
appeal. See In re Belice, 461 B.R. at 569 n.4.

1 **A. Substantial Justification**

2 A creditor is "substantially justified" in bringing a
3 § 523(a)(2) claim if the claim has a "reasonable basis both in
4 law and in fact." In re Hunt, 238 F.3d at 1103. In challenging
5 the court's determination of no substantial justification, Miller
6 relies on the same grounds she relied on to challenge the
7 bankruptcy court's summary judgment ruling against her
8 § 523(a)(2)(B) claim.

9 As we previously explained, Miller argued that the
10 Advertisement and the Lease constituted statements respecting
11 Gilliam's financial condition for purposes of § 523(a)(2)(B), but
12 under the narrow interpretation of the phrase "statement
13 respecting the debtor's financial condition" we adopted in
14 Belice, both of those documents clearly are not statements
15 respecting financial condition.

16 Although Belice only recently construed the meaning of the
17 phrase "statement respecting financial condition," there can be
18 no doubt that the Lease and the Advertisement were not statements
19 respecting the debtor's financial condition under any reasonable
20 interpretation of that term. See generally In re Belice,
21 461 B.R. at 574 (describing scope of broad interpretation).
22 Simply put, neither the Lease nor the Advertisement purported to
23 describe any aspect of Gilliam's finances. As such, neither
24 document could qualify under any recognized standard as a
25 statement respecting the debtor's financial condition for
26 purposes of § 523(a)(2)(B).

27 Consequently, we perceive no error in the bankruptcy court's
28 determination that Miller was not substantially justified in

1 bringing her claim under § 523(a)(2)(B).

2 **B. Reasonableness of Fees Requested**

3 We begin our review of the bankruptcy court's finding on the
4 reasonableness of Gilliam's fees by noting that, under the abuse
5 of discretion standard, we may not "substitute our judgment for
6 that of the [bankruptcy] court." Hinkson, 585 F.3d at 1251; see
7 also Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S.
8 639, 642 (1976) (per curiam) (holding that, under abuse of
9 discretion standard, question is not what the appellate court
10 would have decided in the first instance but rather whether the
11 trial court abused its discretion in what it decided).
12 Furthermore, we reiterate that we may not reverse the bankruptcy
13 court's finding that Gilliam's fees were reasonable unless that
14 determination was "illogical, implausible, or without support in
15 the record." In re Retz, 606 F.3d at 1196.

16 According to Miller, Gilliam's fees were excessive because
17 Gilliam's counsel charged too much for his services in connection
18 with Gilliam's summary judgment motion, and because roughly
19 \$17,000 of the fees requested (by Miller's reckoning) were
20 attributable to discovery disputes caused by Gilliam's failure to
21 cooperate with the discovery process. However, in ruling on the
22 fee request, the court had before it only one declaration: the
23 declaration of Gilliam's counsel Todd Turoci, and attached to his
24 declaration was his itemized statement of the services provided
25 and time expended in defending against both the § 523(a)(2)(B)
26 claim and the § 727 claims, in the total amount of \$55,576.47.
27 Of this amount, Turoci estimated that at least half of the fees
28 were attributable to his defense against the § 523(a)(2)(B)

1 claim, and so he requested a fee award of \$27,788.24. In his
2 declaration, Turoci admitted that the cost of defending against
3 all of the claims went well beyond what it should have cost in an
4 ordinary case, but unlike Miller, he attributed the additional
5 cost to Miller's discovery practices and the manner in which she
6 prosecuted her claims. The bankruptcy court had first-hand
7 knowledge of the conduct of both parties in litigating the
8 underlying adversary proceeding. We thus give significant
9 deference to the bankruptcy court's assessment of the
10 reasonableness of the fees requested because the bankruptcy court
11 was in the best position, in light of its first-hand knowledge of
12 the litigation, to make that assessment. See Gill v. Wittenburg
13 (In re Fin. Corp. of America), 114 B.R. 221, 224 (9th Cir. BAP
14 1990).

15 Moreover, Miller's appeal brief has not pointed us to
16 anything demonstrating that the court's assessment of the
17 reasonableness of the fees was clearly erroneous. Nor can we
18 conclude, after conducting our own review of the record, that the
19 bankruptcy court's reasonableness finding was illogical,
20 implausible or not supported by the record. Accordingly, we
21 uphold the bankruptcy court's award of fees under § 523(d), in
22 the amount of \$27,788.24.

23 CONCLUSION

24 For all of the reasons set forth above, we AFFIRM the
25 bankruptcy court's summary judgment rulings, its judgment after
26 trial, and its award of fees under § 523(d).