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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. EC-14-1204-JuFD
)	
RONALD DAVID SUTTON and)	Bk. No. 12-35623
KIMBERLY ANN SUTTON,)	
)	Adv. No. 12-02590
Debtors.)	
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ANDREW KOSTECKI; ALLOY STEEL)	
NORTH AMERICA, INC.,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M*
)	
RONALD DAVID SUTTON,)	
)	
Appellee.)	
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Argued and Submitted on November 19, 2015
at Sacramento, California

Filed - December 3, 2015

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

Honorable David E. Russell, Bankruptcy Judge, Presiding**

Appearances: Michael W. Thomas of Thomas & Associates argued
for appellants Andrew Kosteck and Alloy Steel
North America, Inc.; Brian Crone of Berry & Block
argued for appellee Ronald David Sutton.

* 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 8024-1.

** The Honorable Michael S. McManus was assigned to the
underlying bankruptcy case and heard all pretrial matters in this
adversary. Judge Russell entered the order on appeal.

1 Before: JURY, FARIS, and DUNN, Bankruptcy Judges.

2 Appellants Andrew Kostecki (Kostecki) and Alloy Steel North
3 America, Inc. (Alloy Steel) (collectively, Plaintiffs) filed an
4 adversary proceeding against chapter 7¹ debtor, Ronald David
5 Sutton (Debtor), seeking to have their unliquidated prepetition
6 debts declared nondischargeable under § 523(a)(2)(A). Prior to
7 trial, Debtor filed a motion in limine (MIL) seeking to strike
8 Plaintiffs' alternate direct testimony (ADT) declarations and
9 exhibits at trial because they were not timely served, in
10 violation of Local Bankruptcy Rule (LBR) 9017-1.

11 The bankruptcy court commenced the trial by first hearing
12 Debtor's MIL. The court granted the motion, finding that
13 Plaintiffs' untimely served ADT declarations and exhibits in
14 violation of LBR 9017-1 caused extreme prejudice to Debtor and
15 the court. The court then invited Plaintiffs' counsel to
16 proceed with the trial. Counsel did not do so, contending that
17 he had nothing to proceed with in light of the court's ruling on
18 the MIL. The bankruptcy court subsequently entered judgment in
19 Debtor's favor on the ground that Plaintiffs had presented no
20 evidence to support their fraud claims against Debtor. This
21 appeal followed.

22 For the reasons stated below, we REVERSE the bankruptcy
23 court's order granting Debtor's MIL, VACATE the judgment and
24 REMAND this matter to the bankruptcy court for further

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 proceedings not inconsistent with this memorandum disposition.

2 **I. FACTS**

3 **A. Prepetition Events**

4 Debtor and his company, Ron Sutton's Winners Circle, Inc.
5 (RSWC), operated a race car driver development program in
6 Roseville, California. The program trained young drivers for a
7 professional career in stock car racing, including races
8 sanctioned by the National Association of Stock Car Auto Racing
9 (NASCAR).

10 Kostecky's minor son, Brodie, was an accomplished midget
11 race car driver in Australia. Kostecky learned about Debtor and
12 RSWC through RSWC's website. There, Debtor used the NASCAR
13 trademark, stating that he was a Top NASCAR Talent Scout and
14 operated an annual NASCAR Talent Search Shootout. The website
15 also contained photographs of NASCAR Team Drivers. Debtor
16 further represented that RSWC had received a \$210,000 cash
17 sponsorship from K&N Filters (K&N)² in 2011.

18 Kostecky, an Australian citizen living in Australia at the
19 time, met with Debtor, who allegedly told Kostecky that he would
20 send emails to NASCAR sanctioned Sprint Cup Teams to discuss
21 where to place Brodie. Kostecky eventually enrolled Brodie in
22 the program and they moved from Australia to Roseville,
23 California. Kostecky sought and received a sponsorship for
24 Brodie's racing from Alloy Steel.³

26 ² K&N Filters is sometimes interchangeably referred to in
27 the record as K&N Engineering.

28 ³ Kostecky apparently was an employee of Alloy Steel.

1 A dispute subsequently arose between the parties and Debtor
2 pertaining to Debtor's and RSWC's affiliation or association
3 with NASCAR. Thereafter, Debtor terminated Kostecki's son from
4 the program. Sometime in 2011, Plaintiffs filed a state court
5 lawsuit against Debtor and RSWC alleging, among other things,
6 that Debtor misrepresented in advertising and other promotional
7 materials that he and RSWC had an affiliation or association
8 with NASCAR and had obtained a \$210,000 cash sponsorship from
9 K&N.⁴

10 **B. Bankruptcy Events**

11 Debtor filed his chapter 7 petition on August 27, 2012. In
12 Schedule F, he listed Plaintiffs as creditors with unsecured
13 claims arising out of a 2011 state court lawsuit against Debtor
14 and RSWC in an unknown amount.

15 On October 1, 2012, Plaintiffs filed this adversary
16 proceeding against Debtor seeking to have their unliquidated
17 debts declared nondischargeable under § 523(a)(2)(A).
18 Plaintiffs alleged, among other things, that Debtor had made
19 misrepresentations about his affiliation and association with
20 NASCAR and a \$210,000 cash sponsorship obtained from K&N.

21 Debtor filed a motion for summary judgment (MSJ).
22 Plaintiffs opposed and submitted six declarations in support of
23 their opposition. Those declarations included Kostecki's and
24 the declaration of Plaintiffs' attorney, Michael Thomas
25 (Thomas).

26
27 ⁴ K&N Engineering is a manufacturer of washable performance
28 air filters and air intake systems. K&N has a racing contingency
program that affiliates with NASCAR and other similar entities.

1 Kostecky testified as to how he learned about RSWC and that
2 he enrolled his son in the RSWC program based on the
3 representations on RSWC's website and from Debtor that his
4 driver development program was affiliated with NASCAR and that
5 he had obtained a \$210,000 cash sponsorship from K&N.
6 Attached to Kostecky's declaration was an email from Debtor
7 about Brodie's selection to participate in the 2010 NASCAR
8 Talent Search Shootout and a follow-up email stating that Brodie
9 was a finalist for a spot in the NASCAR focused driver career
10 development program. Attached to the follow-up email were full
11 season budgets that Debtor had prepared. There, Debtor stated
12 that he had worked out two full season race plans, with costs,
13 and worked in \$10,000 of K&N sponsorship funds. Also attached
14 to Kostecky's declaration was a flyer for the NASCAR Racing
15 Career Development Program which stated that the program
16 included, among other things, connections to NASCAR Cup Teams.

17 Attached to Thomas' declaration were relevant portions of
18 Debtor's and Kostecky's deposition transcripts and various
19 exhibits. Also attached was the deposition of Anthony Yorkman,
20 who was an employee and Sports Marketing Director of K&N
21 Engineering. Yorkman testified, among other things, that K&N
22 did not award \$210,000 in sponsorships to selected drivers in
23 connection with the 2010 Talent Search Shootout and gave no more
24 than \$9,246.60 in products to Debtor in 2011.

25 Also included in opposition to the MSJ was the declaration
26 of Jason Houghtaling, an employee of RSWC. Houghtaling declared
27 that Debtor had discussed the status of the litigation between
28 him and Kostecky, and that at one point in 2011, Debtor had him

1 and other employees cover up or remove any and all references to
2 NASCAR. He further declared that although Debtor and RSWC
3 advertised as a NASCAR Driver Development Program and as a Top
4 NASCAR Talent Scout, he was not aware of any driver enrolled in
5 Debtor's program ever having been placed on a NASCAR
6 professional team.

7 In addition, Plaintiffs included the declarations of Danny
8 Cristiani and Michael Thompson, both of whom had enrolled their
9 sons in Debtor's program based on their belief that Debtor and
10 RSWC were affiliated with NASCAR. Eventually, both fathers
11 withdrew their sons from the program.

12 Finally, Plaintiffs submitted the declaration of Rosalie
13 Nestore, a paralegal in the legal department of NASCAR.
14 Attached to her declaration was a letter dated April 27, 2011,
15 sent by NASCAR to Debtor and RSWC telling them to stop using
16 NASCAR's intellectual property rights. In response, Debtor
17 sought guidance from NASCAR seeking approval to use the phrase
18 "NASCAR **focused** Driver Career Development Program" in their
19 advertising material. (Emphasis added.) In a May 6, 2011,
20 letter to Debtor, NASCAR requested that Debtor cease and desist
21 its use of the NASCAR trademark as part of its advertising.

22 The bankruptcy court denied Debtor's MSJ, finding that
23 material facts were in dispute.

24 On May 13, 2013, the bankruptcy court scheduled a trial to
25 commence on September 25-26, 2013, before Judge David R.
26 Russell.

27 On August 21, 2013, the bankruptcy court issued an Order
28 Setting Trial, which stated that the proceeding was governed by

1 LBR 9017-1. Under that rule, Plaintiffs were required to submit
2 their ADT declarations and related exhibits fourteen days before
3 trial.⁵

4 On August 30, 2013, Plaintiffs filed a motion seeking a
5 continuance of the trial because Kostecki's father had been
6 diagnosed with cancer (Continuance Motion). A few days later,
7 Plaintiffs filed a motion seeking to shorten time for a hearing
8 on the Continuance Motion. The bankruptcy court issued an order
9 shortening time, and the hearing on the Continuance Motion,
10 originally scheduled for October 7, 2013, was scheduled for
11

12 ⁵ LBR 9017-1 provides in relevant part:

13
14 (a) (1) Purpose. The purpose of this procedure is to
15 streamline the adducement of direct testimony in trials
16 and contested matters requiring an evidentiary hearing,
17 so as to reduce trial time without sacrificing due
18 process and a fair trial. This procedure shall be
19 known as the Alternate Direct Testimony Procedure.

20 (2) Applicability. If ordered by the Court, the
21 Alternate Direct Testimony Procedure shall be used
22 in a trial or contested matter requiring an evidentiary
23 hearing. . . .

24
25 (b) Submission of Alternate Direct Testimony
26 Declarations, Exhibits, and Objections. Unless
27 otherwise ordered by the Court, copies of all alternate
28 direct testimony declarations by witnesses and exhibits
that are intended to be presented at trial or hearing
shall be furnished to opposing counsel as follows:

(1) Plaintiff's Declarations and Exhibits. The
plaintiff shall submit to opposing counsel all
such declarations and exhibits comprising the
plaintiff's case in chief fourteen (14) days before
trial.

1 September 16, 2013. Based on the September 25th trial date,
2 under LBR 9017-1, Plaintiffs were to provide all ADT
3 declarations and trial exhibits to Debtor's counsel by
4 September 11, 2013, which they did not do. The bankruptcy court
5 granted Plaintiffs' Continuance Motion on September 16, 2013.

6 On November 21, 2013, the bankruptcy court scheduled a new
7 trial date for March 10-11, 2014, before Judge Russell.

8 On December 18, 2013, the bankruptcy court issued its
9 formal order scheduling the trial date for March 10-11, 2014,
10 which again stated that LBR 9017-1 applied to the proceeding.
11 Plaintiffs were thus required to submit all ADT declarations and
12 trial exhibits no later than February 24, 2014 (i.e., 14 days
13 before trial). They failed to do so. Debtor timely filed his
14 ADT declarations and exhibits.

15 On February 25 and 26, 2014, Plaintiffs and Debtor
16 submitted deposition testimony each respective side intended to
17 use at trial under the parties' Stipulation and Order for Use of
18 Deposition Transcripts in Lieu of Live Testimony.

19 Plaintiffs complied with LBR 9017-1 - albeit late - by
20 submitting the ADT declarations and exhibits they intended to
21 use in their case to Debtor's counsel on March 3, 2014 - seven
22 days before trial.

23 On March 3, 2014, Debtor filed the MIL seeking to strike
24 any ADT declarations and exhibits that Plaintiffs intended to
25 use at trial as a sanction for failing to obey the bankruptcy
26 court's scheduling order and LBR 9017-1. To support his motion,
27 Debtor cited numerous cases that stand for the proposition that
28 courts have discretion to strike untimely filings. Debtor also

1 maintained that the late-filed declarations prejudiced his case
2 because he was not afforded adequate time to determine which
3 witnesses to subject to cross-examination and prepare for that
4 cross-examination. Debtor further requested that the court
5 reject Plaintiffs' request to submit the substance of any
6 proposed declaration via live witnesses.

7 Plaintiffs opposed, asserting that they failed to comply
8 with LBR 9017-1 because they had difficulty obtaining the signed
9 declarations from the declarants for various reasons.

10 Plaintiffs' excuse for not submitting the timely declaration of
11 Kostecki was that he lived in North Carolina and was traveling
12 in his capacity as Vice-President for Alloy Steel, such that it
13 was difficult to track him down and get documents to him for
14 review and signature. As for Mr. Thompson, Plaintiffs
15 maintained that he lived in the Bay Area and due to his work
16 schedule, there was a delay in getting his signature. Finally,
17 as to Mr. Cristiani, Plaintiffs stated that he lived in Ukiah,
18 California, and had recently acquired a new email address which
19 caused a delay in getting his declaration to him and the signed
20 declaration back.

21 Plaintiffs also argued that there was no prejudice to
22 Debtor or surprise since the ADT declarations were substantially
23 the same as those filed in opposition to Debtor's MSJ.

24 Plaintiffs further asserted that all of the exhibits submitted
25 were either previously produced by Debtor or by third parties at
26 depositions.

27 The MIL was set to be heard on March 10, 2014, the day of
28 the trial.

1 On March 10, 2014, the bankruptcy court commenced the trial
2 by first hearing Debtor's MIL. After concluding that
3 Plaintiffs' failure to comply with LBR 9017 caused extreme
4 prejudice to Debtor in his trial preparation, the court granted
5 the motion. As a result, Plaintiffs could not use the ADT
6 declarations or exhibits at trial to show that Debtor had made
7 misrepresentations to Kostecki about his race car driver
8 development program and affiliation with NASCAR or that Debtor
9 had never received a \$210,000 cash sponsorship from K&N.

10 After granting the MIL, the bankruptcy court invited
11 Plaintiffs' counsel to proceed with the trial. Counsel
12 responded by saying that he had nothing to proceed with. The
13 bankruptcy court stated: "So if you do not wish to proceed then
14 I will grant judgment for the defendant."

15 The bankruptcy court entered the order granting Debtor's
16 MIL on March 20, 2014. Plaintiffs filed a notice of appeal from
17 the order on March 31, 2014.

18 The bankruptcy court issued a judgment in Debtor's favor on
19 March 20, 2014, which stated: "Findings of fact and/or
20 conclusions of law having been stated orally on the record and
21 good cause appearing, IT IS ORDERED that the judgment is for the
22 defendant."

23 The bankruptcy court issued an amended judgment on
24 November 12, 2014, which states: "IT IS ORDERED, that Judgment
25 for the Debtor Defendant against both Plaintiffs Andrew Kostecki
26 and Allow[sic] Steel North America, Inc. for failure to present
27 evidence or examine the Debtor[s]."

1 the range of discretion is narrowed and the losing party's
2 non-compliance must be due to willfulness, fault, or bad faith."
3 Fjelstad v. Am. Honda Motor Co., Inc., 762 F.2d 1334, 1337 (9th
4 Cir. 1985).

5 To determine whether the bankruptcy court abused its
6 discretion, we conduct a two-step inquiry: (1) we review de novo
7 whether the bankruptcy court "identified the correct legal rule
8 to apply to the relief requested" and (2) if it did, whether the
9 bankruptcy court's application of the legal standard was
10 illogical, implausible or "without support in inferences that
11 may be drawn from the facts in the record." United States v.
12 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

13 Underlying findings of fact are reviewed for clear error.
14 Halaco Eng'g Co., 843 F.2d at 379.

15 We must inquire de novo whether judgment was properly
16 entered in favor of Debtor once Plaintiffs' ADT declarations and
17 exhibits had been excluded. Fireman's Fund Ins. Cos. v. Grover
18 (In re Woodson Co.), 813 F.2d 266, 270 (9th Cir. 1987)
19 (bankruptcy court's conclusions of law are reviewed de novo).

20 **V. DISCUSSION**

21 The underlying basis of this appeal appears to be the
22 considerable effect the bankruptcy court's ruling had on
23 Plaintiffs' case. Plaintiffs characterize the court's ruling as
24 a case-terminating sanction akin to dismissal, while Debtor
25 contends that the ruling was merely an evidentiary ruling which
26 did not amount to the dismissal of Plaintiffs' case as there was
27 other evidence that they could have used to prove their case.
28 Therefore, Debtor asserts that the case law cited by Plaintiffs

1 that addresses the standards for imposing case-terminating
2 sanctions under the Civil Rules is inapplicable. However,
3 according to Debtor, even if those standards apply, they have
4 been met in this case.

5 Under similar facts, the district court in In re Reimers
6 concluded that the bankruptcy court's granting of a motion in
7 limine which resulted in the exclusion of declarations at trial
8 was tantamount to a sanction. 2013 WL 9994337 (C.D. Cal.
9 Feb. 12, 2013). We agree with the reasoning set forth in
10 Reimers and adopt its analysis and conclusion for purposes of
11 this threshold issue. Similar to the Reimers court, in our
12 view, the bankruptcy court's ruling here was "tantamount to a
13 sanction." Id. at *1. The MIL sought to strike Plaintiffs'
14 ADT declarations and exhibits because they were untimely filed
15 in violation of LBR 9017-1.⁶ Such an exclusion is analogous to
16 sanctions under Civil Rule 37(c)(1). As explained in Reimers:

17 Under Rule 37(c)(1), a party who fails to disclose
18 discovery materials may not use those materials as
19 evidence at trial. The Ninth Circuit has repeatedly
20 referred to this consequence as a sanction. See,
21 e.g., Hoffman v. Constr. Protective Services, Inc.,
22 541 F.3d 1175, 1180 (9th Cir. 2008) (referring to
23 Rule 37(c)(1) as "a self-executing, automatic sanction
24 ..."); see also R & R Sails, Inc. v. Ins. Co. of
Pennsylvania, 673 F.3d 1240, 1247 (9th Cir. 2012)
(noting that "evidence preclusion is, or at least can
be, a harsh sanction," and finding that because the
evidentiary sanction "dealt a fatal blow" to the
claim, "in practical terms, the sanction amounted to

25 ⁶ Generally, the proper purpose of an in limine motion is
26 not to accuse opposing counsel of engaging in sanctionable
27 conduct, but "to aid the trial process by enabling the Court to
28 rule in advance of trial on the relevance of certain forecasted
evidence, as to issues that are definitely set for trial, without
lengthy argument at, or interruption of, the trial." Palmieri v.
Defaria, 88 F.3d 136, 141 (2d Cir. 1996).

1 dismissal of a claim."). And, as happened in this
2 case, exclusion under Rule 37 of undisclosed materials
3 is generally sought via a motion in limine. See
4 Hoffman, 541 F.3d at 1180 (Rule 37(c)(1) exclusion
5 sanction requested in a motion in limine). Thus, that
6 Appellees here sought exclusion through a motion in
7 limine does not mean that the result was a mere
8 evidentiary ruling as opposed to a sanction. Ninth
9 Circuit case law clearly treats such rulings as
10 sanctions.

11 2013 WL 9994337, at *2-3.

12 In addition, like Reimers, we conclude that the bankruptcy
13 court's ruling amounted to the dismissal of Plaintiffs' fraud
14 claims based upon their failure to comply with the local rule.
15 See Thompson v. Hous. Auth. of City of L.A., 782 F.2d 829, 831
16 (9th Cir. 1986) (describing court's inherent authority to issue
17 sanctions for non-compliance with procedures and orders).

18 Without the excluded evidence, it would be extremely
19 difficult, if not impossible, for Plaintiffs to prove their
20 case. To establish nondischargeability as a result of fraud
21 under § 523(a)(2)(A), courts in the Ninth Circuit employ the
22 following five-part test: (1) misrepresentation, fraudulent
23 omission or deceptive conduct by the debtor; (2) knowledge of
24 the falsity or deceptiveness of his statement or conduct; (3) an
25 intent to deceive; (4) justifiable reliance by the creditor on
26 the debtor's statement or conduct; and (5) damage to the
27 creditor proximately caused by its reliance on the debtor's
28 statement or conduct. Harmon v. Kobrin (In re Harmon), 250 F.3d
1240, 1246 (9th Cir. 2001).

Here, the record shows that the underlying issues were
complex because there were multiple alleged misrepresentations
made by Debtor orally and in RSWC promotional materials.

1 Further, the intent to deceive is a factual question and largely
2 depends upon the credibility of witnesses and the weight to be
3 given to their testimony. See generally Lazaron v. Lucas
4 (In re Lucas), 386 B.R. 332 (Bankr. D.N.M. 2008) ("Rarely is it
5 appropriate to grant summary judgment on a claim for
6 nondischargeability based on 11 U.S.C. § 523(a)(2)(A) because
7 intent to defraud often depends on the credibility of
8 witnesses."). It was the bankruptcy court's role to make the
9 necessary credibility determinations. However, because the
10 bankruptcy court excluded Plaintiffs' late-filed declarations
11 and exhibits, they had no opportunity to establish their
12 credibility in either the first instance or through cross-
13 examination.

14 We also give little credence to Debtor's suggestion that
15 Plaintiffs could have sought leave of court to put on live
16 testimony. Debtor specifically requested in the MIL that the
17 bankruptcy court deny any request from Plaintiffs to present
18 live testimony and the bankruptcy court's comments in its ruling
19 essentially foreclosed that possibility.

20 In any event, even if the exclusion of evidence in this
21 case does not amount to a case-terminating sanction, preclusion
22 of evidence is a "drastic measure." Taylor v. Illinois,
23 484 U.S. 400, 417 n.23 (1988); see also R & R Sails, Inc.,
24 673 F.3d at 1247 (noting that "evidence preclusion is, or at
25 least can be, a harsh sanction"). Accordingly, we next consider
26 the underlying authority for the bankruptcy court's action de
27 novo and whether its imposition of sanctions under that
28 authority was an abuse of discretion. Halaco, 843 F.2d at 379;

1 see also Zambrano v. City of Tustin, 885 F.2d 1473, 1476 (9th
2 Cir. 1989) ("In determining the validity of any judicial
3 sanction, we must first consider the underlying authority for
4 the court's action."). "'For a sanction to be validly imposed,
5 the conduct in question must be sanctionable under the authority
6 relied on.'" Cunningham v. Cnty. of L.A., 879 F.2d 481, 490
7 (9th Cir. 1988); United States v. Stoneberger, 805 F.2d 1391,
8 1392 (9th Cir. 1986).

9 The bankruptcy court's power to sanction derives from
10 several sources: its inherent power, Local Rules of Court, and
11 Federal statute. Here, we can only speculate as to what
12 authority the bankruptcy court relied upon since the authority
13 was neither briefed in the MIL nor mentioned in the court's
14 ruling. Ultimately we conclude that regardless of the authority
15 relied upon, the bankruptcy court's decision to exclude
16 Plaintiffs' late-filed declarations and exhibits at trial was an
17 abuse of discretion.

18 **Inherent Powers.** A bankruptcy court's inherent powers are
19 "governed not by rule or statute but by the control necessarily
20 vested in courts to manage their own affairs so as to achieve
21 the orderly and expeditious disposition of cases." Chambers v.
22 NASCO, Inc., 501 U.S. 32, 43 (1991). In appropriate cases, a
23 court may select from the menu of sanctions available under its
24 inherent powers the draconian sanction of dismissal to "the
25 'less severe sanction' of an assessment of attorney's fees,"
26 Chambers, 501 U.S. at 44-45, to an intermediate sanction of the
27 exclusion of some evidence or testimony, see Dillon v. Nissan
28 Motor Co., 986 F.2d 263, 266-69 (8th Cir. 1993).

1 Because "inherent powers are shielded from direct
2 democratic controls, they must be exercised with restraint and
3 discretion." Roadway Express Inc. v. Peper, 447 U.S. 752, 764
4 (1980). There, the Supreme Court stated:

5 Similarly, the trial court did not make a specific
6 finding as to whether counsel's conduct in this case
7 constituted or was tantamount to bad faith, a finding
8 that would have to precede any sanction under the
9 court's inherent powers.

10 Id. at 764. To insure that restraint is properly exercised, the
11 Ninth Circuit has routinely insisted upon a finding of bad faith
12 before sanctions may be imposed under the court's inherent
13 power. For example, in Stoneberger the district court imposed
14 sanctions on a chronically late attorney. Reversing the
15 imposition of sanctions, the Ninth Circuit held that mere
16 tardiness does not demonstrate the improper purpose or intent
17 required for inherent power sanctions. 805 F.2d at 1393.
18 Rather, "[a] specific finding of bad faith . . . must 'precede
19 any sanction under the court's inherent powers.'" Id. (quoting
20 Roadway, 447 U.S. at 767). The Ninth Circuit again reversed
21 sanctions due to a lack of intent in Zambrano, 885 F.2d 1473.
22 There, the plaintiff's counsel negligently failed to comply with
23 local court rules that required admission to the district court
24 bar. The Ninth Circuit vacated the sanctions, holding that the
25 district court may not sanction mere "inadvertent" conduct. Id.
26 at 1485; see also id. at 1483 ("Nothing in the record indicates
27 that their failure to request admission to the district bar was
28 anything more than an oversight or ordinary negligence on their
part."); id. at 1484 ("Willful or reckless disregard of court
rules justifies punitive action."). Similarly, in Yagman v.

1 Republic Insurance, 987 F.2d 622, 628 (9th Cir. 1993), the Ninth
2 Circuit vacated the imposition of sanctions where there was no
3 evidence that the attorney had "acted in bad faith or intended
4 to mislead the court."

5 Accordingly, to the extent the bankruptcy court's decision
6 to exclude Plaintiffs' late-filed declarations and exhibits was
7 based on its inherent powers, we must reverse. The record does
8 not show that Debtor satisfied the high burden necessary for the
9 preclusion of evidence under the bankruptcy court's inherent
10 power, and there is no finding of bad faith.

11 **Local Rules.** Although a bankruptcy court may sanction an
12 attorney for violating local rules, Miranda v. S. Pac. Transp.
13 Co., 710 F.2d 516, 519 (9th Cir. 1983), the Ninth Circuit has
14 required sanctions under local rules to meet strict criteria.
15 Zambrano, 885 F.2d at 1477. In addition to being consistent
16 with the Federal rules, other statutes, and principles of "right
17 and justice," the sanctions order must be

18 **necessary** for the court to 'carry out the conduct of
19 its business.' There must be a **close connection**
20 between the sanctionable conduct and the need to
21 preserve the integrity of the court docket or the
22 sanctity of the federal rules. Finally, any sanction
23 imposed must be **proportionate to the offense** and
commensurate with principles of restraint and dignity
inherent in judicial power. This last principle
includes **a responsibility to consider the usefulness**
of more moderate penalties before imposing a monetary
sanction.

24 Id. at 1480 (emphasis added). Finally, there must be a finding
25 of recklessness, repeated disregard of court rules, gross
26 negligence, or willful misconduct. Id.; see also Wehrli v.
27 Pagliotti, 1991 WL 143815, at *2 (9th Cir. Aug. 1, 1991) ("The
28 district court's authority to impose sanctions for violation of

1 local rules should be reserved for 'serious breaches,' not
2 thoughtless conduct."); In re Colville Confederated Tribes,
3 980 F.2d 736 (9th Cir. 1992) (Table) (noting that sanctions for
4 violation of local rules are subject to the limits upon the
5 court's inherent power and statutory authority, and that
6 "[t]hese limits require at a minimum that the sanctions order be
7 supported with an explicit finding of an attorney's bad faith,
8 and that the misconduct amount to more than a negligent
9 transgression of the local rules.").

10 Although it is undisputed that Plaintiffs violated
11 LBR 9017-1 by filing their ADT declarations and exhibits late,
12 the rule itself does not expressly authorize the imposition of
13 sanctions. In fact, it does not give warning of the possible
14 consequence if the rules are not strictly followed. We look
15 instead to LBR 1001-1(g) which authorizes the bankruptcy court
16 to impose sanctions for noncompliance with the local rules:

17 Failure of counsel or of a party to comply with these
18 Rules, with the Federal Rules of Civil Procedure or
19 the Federal Rules of Bankruptcy Procedure, or with any
20 order of the Court may be grounds for imposition of
21 any and all sanctions authorized by statute or rule or
22 within the inherent power of the Court, including,
23 without limitation, dismissal of any action, entry of
24 default, finding of contempt, imposition of monetary
25 sanctions or attorneys' fees and costs, and other
26 lesser sanctions.

23 This rule gives fair warning to an attorney or party that a
24 violation of the local rules will subject him or her to a
25 variety of sanctions, including dismissal of any action and
26 "other lesser sanctions."

27 However, contrary to the strict requirements set forth in
28 Zambrano, the record does not indicate that the bankruptcy court

1 considered a more moderate penalty before imposing what was
2 essentially a case-terminating sanction. For example, the court
3 could have granted a continuance to allow Debtor's attorney more
4 time to prepare and impose a monetary sanction to compensate
5 Debtor's attorney for the wasted appearance. A continuance is
6 the preferred sanction. See United States v. Golyansky,
7 291 F.3d 1245, 1249 (10th Cir. 2002) ("It would be a rare case
8 where, absent bad faith, a district court should exclude
9 evidence rather than continue the proceedings."). Here, the
10 bankruptcy court discussed no alternatives.

11 The bankruptcy court also did not explicitly find that
12 Plaintiffs' late filing was reckless or willful, or involved
13 repeated disregard of court rules or gross negligence. Although
14 Debtor complains that Plaintiffs did not comply with LBR 9017-1
15 in connection with the first trial date, their failure to do so
16 does not demonstrate repeated disregard of court rules when
17 their Continuance Motion was pending prior to the time their
18 declarations were due. There is also nothing in the record that
19 shows Plaintiffs' conduct was reckless or willful. While their
20 conduct shows a lack of diligence, that does not make it
21 sanctionable under Ninth Circuit case law cited above.

22 Accordingly, to the extent the bankruptcy court's decision
23 to exclude Plaintiffs' late-filed declarations and exhibits was
24 based on its sanction power under LBR 1001-1(g), we must
25 reverse; the requirements under Zambrano were not met.

26 **Civil Rules.** Although the bankruptcy court's decision to
27 exclude the late-filed declarations and exhibits is analogous to
28 Civil Rule 37(c)(1), that rule is inapplicable by its very

1 terms. Civil Rule 37(c) (1) provides:

2 (1) Failure to Disclose or Supplement. If a party
3 fails to provide information or identify a witness as
4 required by Rule 26(a) or (e), the party is not
5 allowed to use that information or witness to supply
6 evidence on a motion, at a hearing, or at a trial,
7 unless the failure was substantially justified or is
8 harmless. In addition to or instead of this sanction,
9 the court, on motion and after giving an opportunity
10 to be heard:

11 (A) may order payment of the reasonable expenses,
12 including attorney's fees, caused by the failure;

13 (B) may inform the jury of the party's failure; and

14 (C) may impose other appropriate sanctions, including
15 any of the orders listed in Rule 37(b) (2) (A) (i)-(vi).

16 Civil Rule 37 does not appear implicated in this case because
17 there was no discovery or disclosure violation.

18 Generally, the Ninth Circuit has limited application of
19 Civil Rule 37 to its literal scope. Halaco, 843 F.2d at 380
20 n.1. Since there was no discovery-related misconduct,
21 Plaintiffs' conduct does not fall within the literal language of
22 Civil Rule 37(c) (1), or for that matter any other part of the
23 rule. The bankruptcy court thus did not possess the power to
24 exclude Plaintiffs' late-filed declarations and exhibits as a
25 sanction under Civil Rule 37.

26 Even if the Civil Rule was applicable, under Ninth Circuit
27 law, the court must weigh five factors in determining whether it
28 is appropriate to exclude evidence as a sanction: (1) the
29 public's interest in expeditious resolution of litigation;
30 (2) the court's need to manage its docket; (3) the risk of
31 prejudice to the defendants; (4) the public policy favoring
32 disposition of cases on their merits; and (5) the availability
33 of less drastic sanctions. Thompson, 782 F.2d at 831; Malone v.

1 U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987). And,
2 where a sanction amounts to a case-terminating sanction, the
3 court must also consider whether the noncompliance involved
4 willfulness, fault, or bad faith. See R & R Sails, Inc.,
5 673 F.3d at 1247 ("sanction amounted to dismissal of a claim,
6 [so] the district court was required to consider whether the
7 claimed noncompliance involved willfulness, fault, or bad faith,
8 . . . and also to consider the availability of lesser
9 sanction"); Fjelstad, 762 F.2d at 1337. If the bankruptcy court
10 fails to make explicit findings for each of these factors, the
11 appellate court must review the record independently to
12 determine whether the dismissal was an abuse of discretion.
13 Malone, 833 F.2d at 130.

14 Here, Debtor argues that even if the court were obligated
15 to apply these factors, the record amply supports the conclusion
16 that the bankruptcy court did not abuse its discretion by
17 excluding Plaintiffs' evidence. Without matching up the
18 factors to his argument, Debtor maintains that (1) the court
19 found "extreme prejudice" (factor three); (2) the court found
20 that Plaintiffs' failure to comply with LBR 9017-1 disrupted the
21 proceedings (factor two); and (3) there was no need for the
22 court to unilaterally consider continuing the trial in order to
23 cure Plaintiffs' failure to comply with LBR 9017-1 under these
24 circumstances (factor five?). Debtor also argues that it was
25 Plaintiffs' own fault for failing to timely submit the
26 declarations and exhibits, as their explanation for the delay
27 does not show circumstances beyond their control. Therefore,
28 according to Debtor, the requirement for a finding of

1 willfulness, bad faith, or **fault**, under R & R Sails has been
2 met.

3 First, even if we were to conclude that the bankruptcy
4 court implicitly found some factors that would support its
5 ruling, it is not evident from the record that other factors
6 were considered. The court did not take into account whether
7 less drastic sanctions could remedy the harm caused to Debtor's
8 ability to respond to and defend against Plaintiffs' fraud
9 claims. Nor is there any indication in the record that the
10 court considered the strong public policy favoring disposition
11 of cases on their merits. There was no egregious conduct in
12 this case that would override that policy. It is thus not
13 apparent from the record before us that a proper weighing of the
14 factors would necessarily result in the sanction of dismissal.

15 Second, as noted above, the bankruptcy court made no
16 findings of willfulness, bad faith, or fault. We are not
17 persuaded that the fault at issue here – really more like
18 negligence or oversight – can support the “drastic measure” of
19 excluding Plaintiffs' evidence. As noted before, while
20 Plaintiffs' conduct shows a lack of diligence and could be
21 construed as negligence, mere negligence without more is an
22 insufficient ground for imposing case-terminating sanctions.
23 See Zambrano, 885 F.2d at 1480 (“Thus, while we believe that
24 Congress authorized the federal courts to wield reasonable
25 authority over attorneys appearing before them, we do not think
26 that the imposition of financial sanctions for mere negligent
27 violations of the local rules is consistent with the intent of
28 Congress or with the restraint required of the federal courts in

1 sanction cases.”).

2 Finally, “[t]o support a finding of prejudice, the court
3 must determine that the delay impacted the defendant’s ability
4 to prepare or present its case.” Golyansky, 291 F.3d at 1250.
5 Although Debtor complained that the delay impacted his ability
6 to determine which witnesses to cross-examine and prepare for
7 that cross-examination, these complaints do not add up to
8 extreme prejudice. Granted, we do not have the late-filed
9 declarations before us in the record. However, Plaintiffs’
10 counsel made an offer of proof before the bankruptcy court and
11 on appeal that the ADT declarations were substantially similar
12 in substance to Plaintiffs’ summary judgment declarations.
13 Therefore, we have good reason to believe that months prior to
14 the trial, Debtor had a good understanding as to what the ADT
15 testimony was regarding the various misrepresentations. Plus,
16 Debtor had the ADT declarations and exhibits a full seven days
17 before trial was to commence. In short, although the
18 declarations in connection with the summary judgment were in a
19 different format and submitted for a different purpose, there is
20 nothing specific in the record from Debtor that suggests there
21 was any real surprise in the content of the late-filed
22 declarations.

23 Accordingly, while there may have been some prejudice to
24 Debtor, the record does not support the bankruptcy court’s
25 finding of “extreme prejudice.” Assuming that there was some
26 prejudice to Debtor, a short continuance of the trial could have
27 remedied the prejudice that concerned Debtor.

28 In sum, it appears that a lack of diligence on the part of

1 Plaintiffs or their counsel may have disrupted the court's
2 docket. Such conduct makes some sanction a realistic
3 possibility. However, to the extent the bankruptcy court had
4 authority to impose the sanction under its inherent powers, the
5 Local Court Rules, or the Civil Rules, the bankruptcy court
6 abused its discretion by granting the MIL and excluding the
7 evidence for the reasons discussed above. Therefore, we must
8 find the bankruptcy court erred in entering judgment in favor of
9 Debtor.

10 **VI. CONCLUSION**

11 For the reasons stated, we REVERSE the bankruptcy court's
12 order granting Debtor's MIL, VACATE the judgment and REMAND this
13 matter to the bankruptcy court for further proceedings not
14 inconsistent with this memorandum disposition.