

FEB 04 2016

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

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

5	In re:	)	BAP No.	NC-15-1149-JuKuW
6	FAROUK E. NAKHUDA,	)	Bk. No.	14-41156-RLE
7	Debtor.	)		
8	_____	)		
9	ANDREW W. SHALABY,	)		
10	Appellant,	)		
11	v.	)	<b>O P I N I O N</b>	
12	PAUL J. MANSDORF, Trustee,	)		
13	Appellee.	)		
14	_____	)		

Argued and Submitted on January 21, 2016  
at San Francisco, California

Filed - February 4, 2016

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Andrew W. Shalaby argued pro se; Dennis D. Davis  
of Goldberg, Stinnett, Davis & Linchey, argued  
for appellee Paul J. Mansdorf, chapter 7 trustee.

Before: JURY, KURTZ, and WANSLEE,\* Bankruptcy Judges.

\* Hon. Madeleine C. Wanslee, United States Bankruptcy Judge  
for the District of Arizona, sitting by designation.

1 JURY, Bankruptcy Judge:  
2

3 The bankruptcy court issued an Order to Show Cause (OSC)  
4 directing Andrew W. Shalaby (Shalaby), the attorney for chapter  
5 7<sup>1</sup> debtor Farouk E. Nakhuda, to show cause why he should not be  
6 required to disgorge fees he had been paid and sanctioned for  
7 violations of Rule 9011. After a hearing, the bankruptcy court  
8 issued a Memorandum Decision finding that Shalaby asserted  
9 numerous positions in filed documents without an adequate basis  
10 in law or fact. As a result, the court imposed sanctions  
11 consisting of: (1) non-compensatory monetary sanction for \$8,000  
12 payable to the bankruptcy court for violations of Rule 9011(b);  
13 (2) disgorgement of \$4,000 that was paid to Shalaby by debtor  
14 under § 329; (3) suspension from the practice of law in the  
15 bankruptcy courts for the Northern District of California until  
16 he had completed 24 hours of continuing legal education in  
17 bankruptcy law and 3 hours of continuing legal education in  
18 ethics (except for those cases which he had already appeared);  
19 and (4) suspension of his electronic case filing (ECF)  
20 privileges until he had completed the ECF training provided by  
21 the clerk's office.<sup>2</sup> The bankruptcy court entered an Order On  
22 Memorandum Decision Re Order To Show Cause (Sanctions Order).

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

<sup>2</sup> Subsequent to the filing of this appeal, Shalaby paid the  
sanctions, was reinstated to practice before the bankruptcy court  
in the Northern District, and had his e-filing privileges  
restored.

1 Thereafter, Shalaby moved to amend the Sanctions Order which the  
2 bankruptcy court denied (Amendment Order). Shalaby appeals from  
3 the Sanctions Order and the Amendment Order.

4 We AFFIRM in part and REVERSE in part. We AFFIRM the  
5 court's decision as to disgorgement under § 329 and suspension  
6 of Shalaby's ECF filing privileges. We REVERSE the bankruptcy  
7 court's decision finding that Shalaby's conduct violated 9011(b)  
8 and imposing sanctions of \$8,000 payable to the clerk of the  
9 bankruptcy court. When the court initiates sanctions under Rule  
10 9011(c) (1) (B), the party ordered to show cause is afforded no  
11 "safe harbor" opportunity to correct his or her conduct.  
12 Because there is no "safe harbor," the Ninth Circuit has  
13 instructed courts to apply a higher "akin to contempt" standard  
14 than in the case of party-initiated sanctions when applying Rule  
15 9011(b). United Nat'l Ins. Co. v. R & D Latex Corp., 242 F.3d  
16 1102, 1116 (9th Cir. 2001). Here, the bankruptcy court applied  
17 a "reasonableness" standard to Shalaby's conduct, which is the  
18 appropriate standard for party-initiated sanctions, but not for  
19 court-initiated sanctions. Moreover, the court's factual  
20 findings do not support the heightened "akin to contempt"  
21 standard.

## 22 I. FACTS<sup>3</sup>

23 On March 16, 2014, Shalaby filed a skeletal chapter 7 case  
24 for debtor. Paul Mansdorf was appointed the chapter 7 trustee  
25 (Trustee).

26 At the time of his filing, debtor was operating five

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27  
28 <sup>3</sup> The facts leading up the OSC are comprehensively set forth in the bankruptcy court's Memorandum Decision dated April 27, 2015.

1 laundromats in the San Francisco and Vallejo area, either as  
2 sole proprietorships or as partnerships. The petition listed no  
3 trade names for debtor and indicated the debts were primarily  
4 consumer debts rather than business debts. The Schedules listed  
5 no executory leases, no interests in partnerships and no  
6 payments to landlords.

7 On March 31, 2014, Shalaby filed the first version of the  
8 Schedules and Statement of Financial Affairs (SOFA). Schedule A  
9 listed a house valued at \$433,000 and encumbered with secured  
10 debt of approximately \$380,000. Schedule B listed personal  
11 property consisting of \$600 in debtor's wallet, \$4,000 in a  
12 checking account, and \$211 in a Fidelity Investments account  
13 (Fidelity Account). Schedule B did not list any accounts  
14 receivable or interests in partnerships, but did list certain  
15 office equipment valued at \$900 and inventory of detergents and  
16 sodas valued at \$300. Schedule C claimed a homestead exemption  
17 and an exemption in office equipment and inventory under  
18 California Code of Civil Procedure (Cal. Civ. Proc.) § 704.760  
19 (tools of the trade). Schedule I stated debtor was married with  
20 two adult children and was self-employed with \$4,359 monthly net  
21 income from operating a business.

22 Question no. 18 in the SOFA listed five laundromat  
23 businesses in San Francisco and Vallejo. Question no. 21  
24 identified two of the laundromats as partnerships in which  
25 debtor owned a 50% interest and two as sole proprietorships.<sup>4</sup>

26 On April 10, 2014, Shalaby filed the first amendments to  
27 the Schedules. Schedule B listed the same cash and bank

28 \_\_\_\_\_  
<sup>4</sup> The fifth laundromat was evidently closed.

1 accounts and now listed a \$15,000 account receivable. Amended  
2 Schedule B also listed debtor as the 50% owner of the  
3 partnership laundromats valued at \$45,000 and added laundry  
4 machines valued at \$437,485, but did not list the sole  
5 proprietorship laundromats. Schedule C listed the same  
6 homestead exemption and the same exemptions in the office  
7 equipment and inventory and added an exemption valued at \$0 for  
8 the partnership laundromats (erroneously referring to Cal. Civ.  
9 Proc. § 704.010, the exemption for motor vehicles). Schedule D  
10 added a secured creditor owed \$437,485 with a lien on the  
11 laundry machines.

12 Before the meeting of creditors took place, Shalaby and  
13 Trustee exchanged emails. The April 7, 2014 email from Trustee  
14 to Shalaby asked about the laundromats' entity status and  
15 requested Shalaby to confirm that any sole proprietorship  
16 businesses were not operating and that no estate property was  
17 being used. Shalaby replied that the sole proprietorship  
18 laundromats were still in business. In response, Trustee  
19 informed Shalaby that debtor could not operate a sole  
20 proprietorship business while he was in chapter 7.

21 Despite this prior communication, when debtor appeared with  
22 Shalaby at the § 341 meeting of creditors on April 16, 2014  
23 (§ 341 meeting), he testified that he was still operating the  
24 laundromats. Trustee's counsel advised debtor that he could  
25 not continue to use business income to pay rent to the landlords  
26 and could not operate the businesses. Shalaby responded: "I am  
27 not sure you are right about that . . . it is not so black and  
28 white." Shalaby requested Trustee to provide him with authority

1 for this position and give him an opportunity to respond.

2 **A. The Turnover Order**

3 On April 17, 2014, Trustee filed an Ex Parte Application to  
4 Cease Debtor's Operations and Turnover Non-Exempt Funds and  
5 Records. Attached to the application was the supporting  
6 declaration of Trustee's counsel describing debtor's  
7 post-petition use of estate assets and continued operation of  
8 the sole proprietorship laundromats.

9 On the same date, the bankruptcy court signed an order  
10 granting the application, which required debtor to (1) turnover  
11 all of his bank account proceeds; (2) shut down the sole  
12 proprietorship laundromats and give the keys to Trustee;  
13 (3) stop using estate assets for the operation of any business;  
14 and (4) provide Trustee with bank records for all post-petition  
15 activity.

16 Instead of advising debtor to comply with the Turnover  
17 Order, on April 17, 2014, Shalaby filed an Ex Parte Application  
18 for Briefing and Hearing Schedule for Motion to Remove Trustee  
19 and Motion to Set Aside Turn-Over Order or Direct Turn-Over to  
20 New Trustee. The application sought to remove Trustee because  
21 of the way he had conducted the § 341 meeting. Shalaby also  
22 asserted that the Turnover Order suffered from a "due process  
23 problem" as it had been granted without debtor being given an  
24 opportunity to respond. Shalaby further argued: "The  
25 [T]rustee's proposal is simply to wipe out those businesses and  
26 shut them down immediately, which will cause irreparable harm to  
27 debtor as well as to potential creditors." The bankruptcy court  
28 denied the application on April 18, 2014.

1           On April 21, 2014, Shalaby filed an Ex Parte Application to  
2 Set Aside Turnover Order for Failure to Notice Hearing. The  
3 application argued that the Turnover Order was issued in  
4 violation of the Fifth and Fourteenth Amendments. Shalaby  
5 further asserted that the "laundry machines that are not  
6 exempted as tools of the trade are secured by liens and there is  
7 no equity" and the "two businesses themselves are upside-down  
8 with secured liens. It appears they are exempted." This  
9 application did not cite the Bankruptcy Code or any relevant  
10 case law (although it did cite the Fourteenth Amendment and case  
11 law regarding due process).

12           On April 22, 2014, Shalaby filed an amended application.  
13 The amended application repeated his previous arguments and  
14 proposed that the bankruptcy court amend its Bankruptcy Local  
15 Rule (BLR) 9014-1 to provide for hearings on ex parte matters.  
16 In Shalaby's own words:

17           Even if laws do in fact exist that mandate the closure  
18 of a business upon filing of a Chapter 7, there is a  
19 fundamental due process violation insofar as there is  
20 no notice given to the debtor of any such law in  
21 existence. Even to the extent that if such a law  
22 should exist, ignorance of the law is no excuse, the  
23 debtor would still be entitled to challenge any such  
24 law under the 5th Amendment or otherwise if he  
25 believes it to be unconstitutional. The point is,  
26 however, that the debtor has been entirely deprived of  
27 any and all opportunity to respond to the [T]rustee's  
28 application.

24           In connection with this amended application, Shalaby filed  
25 a Notice of Ex Parte Motion and Motion to Set Aside Turnover  
26 Order for Failure to Notice Hearing which purported to give  
27 notice that a hearing would be held two days later. The  
28 bankruptcy court denied this application on April 22, 2014.

1           On May 6, 2014, Shalaby filed a Motion for Return of  
2 Exempted Property and Removal of Trustee which was set for  
3 hearing on June 4, 2014. In the motion, Shalaby sought the  
4 return of the sole proprietorship laundromats and the "working  
5 capital and other exempted funds" held by Trustee. He also  
6 sought removal of Trustee on the grounds "exempted property does  
7 not belong to the Trustee." Shalaby asserted that Trustee had  
8 "taken control of two exempted assets, laundromats, and has  
9 terminated and destroyed those businesses without any benefit to  
10 the estate, maliciously, and in retaliation." Trustee opposed  
11 and, in an accompanying declaration, Trustee's counsel detailed  
12 numerous examples of Shalaby's ignorance of fundamental chapter  
13 7 practice and incompetent representation of debtor. He also  
14 declared that "to date," debtor has never turned over any funds  
15 to Trustee despite the bankruptcy court's order.

16           Shalaby responded by withdrawing as "moot" the part of the  
17 motion requesting a return of the cash in the checking account  
18 and the sole-proprietorship laundromats. However, Shalaby  
19 withdrew this reply two days later and then filed another  
20 document entitled Withdrawal of Moot Portions of Motion and  
21 Reply to Opposition to Motion to Remove Trustee. Shalaby  
22 withdrew this motion in its entirety one day before the June 4th  
23 hearing "on grounds of obsolescence."

24 **B. Turnover Order Appeal**

25           On April 24, 2014, Shalaby filed a Notice of Appeal to this  
26 Panel, purporting to appeal the Turnover Order, the order  
27 denying his request to stay the Turnover Order, and the order  
28 denying his request to set aside the Turnover Order. On the

1 same day that Shalaby filed his designation of the record on  
2 appeal, he filed another document in the bankruptcy court  
3 captioned Objection to Turnover Motion. This objection repeated  
4 his prior arguments and again requested the bankruptcy court to  
5 hold a hearing on the turnover issue.

6 On May 1, 2014, Shalaby filed a motion to have the appeal  
7 decided by the Ninth Circuit on the basis that the question of  
8 law presented (i.e., whether the bankruptcy court can issue a  
9 turnover order on an ex parte basis) was "of national importance  
10 with no other authority in existence in any jurisdiction."

11 Following briefing, the Panel heard oral argument on  
12 February 19, 2015. The day after oral argument, Shalaby filed a  
13 motion to dismiss the Turnover Order appeal.

14 On March 3, 2015, the Panel issued its Memorandum and  
15 Judgment affirming the Turnover Order and denying the late  
16 motion to dismiss the appeal. In its decision, the Panel  
17 confirmed the applicable provisions of the Bankruptcy Code which  
18 provide that a chapter 7 debtor is required to cease operation  
19 of a business upon filing for bankruptcy and which required  
20 debtor to surrender the business assets to Trustee.

21 On March 9, 2015, Shalaby filed Debtor's motion for  
22 rehearing of the BAP ruling affirming the Turnover Order, which  
23 the Panel denied on March 19, 2015. Shalaby then filed a notice  
24 of appeal of the BAP ruling to the Ninth Circuit. That appeal  
25 was subsequently dismissed on debtor's request due to a  
26 settlement with Trustee.

27 **C. Contested Exemptions**

28 Between April 10 and April 25, 2014, Shalaby filed several

1 amendments to the Schedules. On May 6, 2014, Shalaby filed  
2 fourth amended Schedules B and C. This version of Schedule B  
3 listed the same cash, bank accounts, account receivable, and the  
4 partnership laundromats. This Schedule C claimed the same  
5 exemptions in the office equipment and inventory, added an  
6 exemption for \$3,719 in the business checking account under Cal.  
7 Civ. Proc. § 704.060 (tools of the trade), and also claimed the  
8 partnership laundromats exempt, valuing the exemption at \$0  
9 under Cal. Civ. Proc. § 704.010 (motor vehicles). It did not  
10 exempt the \$15,000 account receivable or the \$600 cash in  
11 debtor's wallet.

12 On May 7, 2014, Trustee filed an objection to this version  
13 of Schedule C on the grounds that (1) money in a checking  
14 account does not qualify as a tool of the trade under Cal. Civ.  
15 Proc. § 704.060; (2) the \$0 exemption in the partnership  
16 laundromats appeared to be an admission that there was no claim  
17 of exemption in these; and (3) the entire Schedule C was  
18 objectionable because it had not been signed by debtor.  
19 Trustee also stated that his investigation concerning these  
20 matters was continuing and that these objections would be set  
21 for hearing when that investigation concluded.

22 On June 2, 2014, Shalaby filed fifth amended Schedules B  
23 and C. This version of Schedule B listed the same cash,  
24 checking account, and account receivable. It added the sole  
25 proprietorship laundromats with an "unknown" value. This  
26 Schedule C again exempted as tools of the trade (Cal. Civ. Proc.  
27 § 704.060) the office equipment, inventory, the \$3,719 in the  
28 checking account, and – for the first time – the \$600 cash in

1 debtor's wallet. It also added an exemption based on Cal. Civ.  
2 Proc. § 706.050 (exempt earnings) for the account receivable,  
3 now characterizing it as "income not yet paid." The values in  
4 this version of Schedule B and C were cut in half under the  
5 theory that not all community property was property of the  
6 estate. Thus, for example, the checking account balance became  
7 \$1,971 and the account receivable became \$7,350.

8 On June 3, 2014, Trustee filed an Amended Objection to  
9 Debtor's Claim of Exemptions, incorporating his prior objection  
10 to exemptions and objecting to the exemption in alleged earnings  
11 due to debtor from a company named Borismetrics because they  
12 were the same account receivable previously listed in Schedule  
13 B. Trustee also objected to the 50% valuations of community  
14 property assets as violating § 541(a)(2).

15 On June 12, 2014, Shalaby filed yet another version of  
16 Schedules B and C, which increased the amount claimed in  
17 connection with the account receivable from \$7,350 to \$8,930.56  
18 as exemptible earnings.

19 On July 10, 2014, Trustee filed an Amended and Supplemental  
20 Objections to Exemptions. It incorporated the prior objections  
21 and said:

22 Debtor continues to claim a portion of his bank  
23 account proceeds exempt under California Code of Civil  
24 Procedure § 704.060 [sic] but has increased the amount  
25 of exemption from \$7,350 to \$8,930.56. The Trustee  
objects to said amended claim of exemption on the  
ground that it has no factual or legal basis as a  
claim of exemption in debtor's bank account proceeds.

#### 26 **D. Exemption Disputes and Turnover Compliance**

27 On July 22, 2014, the Trustee filed Memorandum of Points  
28 and Authorities in Support of Notice of Status Conference

1 Regarding Objections to Claims of Exemption and Request for  
2 Turnover of Assets (July Motion), along with a Notice setting a  
3 hearing for September 3, 2014. There was no motion accompanying  
4 the pleadings. In the points and authorities, Trustee sought  
5 turnover of cash which debtor had, on advice of Shalaby, refused  
6 to turn over to Trustee (i.e., \$600 cash, \$3.12 in savings  
7 account, \$3,719 in checking account, \$2,471 accounts receivable  
8 collected post-petition, and \$211 in the Fidelity Account, for a  
9 total of \$7,274.41). It also restated Trustee's objections to  
10 the claimed exemptions in the account receivable recharacterized  
11 as exempt wages and the exemptions claimed in bank accounts as  
12 tools of the trade. The July Motion was supported by Trustee's  
13 counsel's declaration attaching excerpts from debtor's  
14 deposition at which debtor testified that he was not an employee  
15 of Borismetrics, the entity owing the accounts receivable.

16 The day before the hearing on the July Motion, Shalaby  
17 filed an Opposition and Objection to Procedurally Defective  
18 Motion. This opposition described the July Motion as  
19 procedurally defective because it was "not a status conference,"  
20 but "facially a motion on a contested matter that is up on  
21 appeal, fully briefed, and awaiting a ruling." Shalaby further  
22 contended that the "motion" was contested and thus it should be  
23 denied for failure to comply with BLR 9013 or 9014. Because  
24 the bankruptcy court wanted to afford the parties an opportunity  
25 to address whether the pending appeal of the Turnover Order  
26 precluded a ruling on all or part of the July Motion, the court  
27 continued the hearing from September 3, 2014, to October 1,  
28 2014, and set a briefing schedule regarding whether the pending

1 appeal affected the court's jurisdiction. The bankruptcy court  
2 also allowed Shalaby an opportunity to file a brief regarding  
3 the validity of his claimed exemptions.

4 On September 10, 2014, Shalaby filed his brief on the  
5 merits of the exemption issues, supported by the declarations of  
6 debtor and Shalaby. Shalaby claimed that Trustee's objections  
7 to the exemption in the wages paid by Borismetrics to debtor and  
8 in the bank accounts was untimely. With respect to the bank  
9 account exemption, Shalaby argued that Trustee failed to  
10 identify any assets in dispute. He further asserted that it was  
11 correct to cut the amount of the Borismetrics receivable to  
12 \$8,930 to reflect debtor's non-filing spouse's community  
13 property share, citing Cal. Family Code § 760, but failed to  
14 explain why § 541(a)(2) did not control. Shalaby also  
15 maintained that the Borismetrics payment of \$8,930 was exempt as  
16 wages, but he failed to address debtor's prior deposition  
17 testimony that he was not an employee of Borismetrics.

18 In addition, Shalaby raised a new issue regarding debtor's  
19 unchallenged \$100,000 homestead exemption. The bankruptcy court  
20 had previously entered an order approving the estate's  
21 compromise with debtor through which debtor had paid \$30,000 to  
22 purchase the non-exempt equity in his house from the estate  
23 (Sale Order). Shalaby now argued that the Sale Order should be  
24 vacated "in the interest of justice" because – months after the  
25 fact – he had obtained an appraisal from which he had concluded  
26 that the house was worth less than Trustee's broker had said it  
27 was worth. He asked the bankruptcy court to enter an order  
28 directing Trustee to return this \$30,000 (plus a \$600 appraisal

1 fee) to debtor.

2 Trustee filed a supplemental brief on the merits of the  
3 exemptions. Trustee largely repeated his prior arguments and  
4 pointed out that debtor had agreed to the compromise embodied in  
5 the Sale Order and this belated attack on it was procedurally  
6 and substantively inappropriate. Trustee also maintained that  
7 debtor had amended his Schedules a number of times and, each  
8 time, Trustee filed a new set of objections to debtor's claims  
9 of exemption within thirty days of the amendments.

10 At the hearing on October 1, 2014, the bankruptcy court  
11 sustained Trustee's objections to the claimed exemptions and  
12 denied debtor's belated attack on the Sale Order. The court  
13 also indicated it intended to issue an OSC directed at Shalaby  
14 for the positions he had taken during the case. The court then  
15 issued an order sustaining Trustee's objection to the  
16 exemptions, denying debtor's request for return of the \$30,000  
17 in connection with the Sale Order, and ordering debtor to turn  
18 over (1) \$600 in cash; (2) \$2,741 account receivable collected  
19 post-petition; and (3) \$211.29 from the Fidelity Account to  
20 Trustee within ten days of the order (October 2 Order).

21 The day after this hearing, Shalaby filed a request that  
22 the court order a settlement conference. In the request,  
23 Shalaby stated: "Unfortunately, I must agree with the court,  
24 largely, that with a bit more effort and legal research, many of  
25 the problems and matters disputed could have and would have been  
26 avoided." He then quoted Rule 9011(b) and said:

27 [W]hile a matter may explain the reason I admittedly  
28 failed to diligently research some of my legal  
contentions and presented incorrect interpretations of

1 applicable law (e.g. community property interest being  
2 irrelevant to exemptions, misapplication of 11 U.S.C.  
3 § 542(a), and other matters), that matter is quite  
personal and difficult to disclose on the record  
and/or in pleadings on an OSC hearing.

4 It went on to state "I do in fact recognize my mistakes, and  
5 appreciate the court's frustration." Shalaby suggested that the  
6 "practical thing" to do was to try to "settle the OSC/sanction  
7 by negotiating a reasonable payment to the trustee." The  
8 bankruptcy court declined to order a settlement conference.

9 **E. The OSC**

10 On November 4, 2014, the bankruptcy court issued the OSC.<sup>5</sup>  
11 The OSC describes seven specific factual and legal positions  
12 taken by Shalaby in connection with the issues that culminated  
13 in the October 1 hearing: (1) he argued that Trustee's  
14 objections to exemptions were not timely when they were; (2) he  
15 argued that the value of assets was reduced by 50% as non-estate  
16 property ignoring § 541(a)(2); (3) he reclassified the  
17 Borismetrics account receivable as exemptible wages without  
18 factual or legal support (ignoring debtor's deposition testimony  
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20 <sup>5</sup> Creditor Mercy Commercial California (MCC) also responded  
21 to the OSC. MCC received relief from stay on May 29, 2014, to  
22 enforce the lease and recover the premises at 1305 Polk Street,  
23 San Francisco, California and that order was final. Relying on  
24 the order, counsel for MCC served a non-default notice of  
25 termination of the occupancy on debtor and then filed and served  
26 an unlawful detainer action in the San Francisco Superior Court.  
27 MCC alleged that debtor, through Shalaby's office, filed a Notice  
28 of Stay of Proceedings, which blocked the state court action from  
proceeding. This conduct, MCC asserted, was a misuse of the  
bankruptcy process and falsely stated to the state court that  
there was a stay when the opposite was true. As a result of this  
tactic, MCC incurred additional legal fees and expenses and  
delay. MCC urged the bankruptcy court to examine this particular  
act of debtor and counsel.

1 that he was not an employee); (4) he argued that Trustee's  
2 objections had not identified any assets in dispute; (5) he  
3 argued that a bank account was exempt as a tool of the trade  
4 with no supporting legal authority; (6) he attacked the Sale  
5 Order which was a final order; and (7) he argued debtor had no  
6 obligation to turn over assets based on his assertion that the  
7 scheduled values were inconsequential.

8 The OSC directed Shalaby to appear and show cause why he  
9 should not be required to disgorge the fees he had been paid or  
10 should not be otherwise sanctioned for his conduct in the case.  
11 Based on the seven illustrative factual and legal positions that  
12 Shalaby had taken, the specific violations described in the OSC  
13 were: (1) making arguments not warranted by existing law or  
14 non-frivolous arguments for its extension, modification or  
15 reversal; (2) failing to ensure that allegations and factual  
16 contentions had evidentiary support; (3) his inability or  
17 unwillingness to obtain the most basic knowledge of bankruptcy  
18 law or engage in the legal analysis necessary to competently  
19 represent debtor; (4) harming the estate by forcing Trustee to  
20 use limited estate assets to respond to the frivolous arguments  
21 and positions; and (5) failing to obtain original signatures on  
22 documents filed with the court. The court identified its  
23 authority for issuance of the OSC and possible sanctions as the  
24 court's inherent powers and § 105, § 329(b), Rule 9011(b) and  
25 (c), and paragraphs 8 and 9 of the ECF Procedures for the  
26  
27  
28

1 bankruptcy court.<sup>6</sup>

2 Immediately after the OSC was issued, Shalaby filed an Ex  
3 Parte Application to advance the December 4, 2014 hearing date  
4 to November 20, 2014, due to a scheduling conflict. Shalaby  
5 proposed that the OSC response deadline be advanced to November  
6 14, 2014. The bankruptcy court granted his request and reset  
7 the OSC hearing date and response deadline.

8 On November 6, 2014, Shalaby filed an Ex Parte Application  
9 for Order Directing Disgorgement in Discharge of the OSC.  
10 There, Shalaby moved the court for an order directing him to  
11 disgorge \$4,000 in discharge of the OSC. Shalaby further said:  
12 "This counsel is very sorry that the bankruptcy has gone so  
13 awry, and hopes that his offer of voluntarily disgorgement of  
14 the fees will be to the Court's satisfaction." Trustee filed an  
15 objection to the application asserting that the damages to the  
16 estate were in excess of \$30,000. The bankruptcy court  
17 subsequently denied the application.

18 Shalaby then responded to the OSC on the merits supported  
19 by his and debtor's declarations. Shalaby asserted that  
20 sanctions should not be imposed in the case because there was a  
21 good faith disagreement as to the interpretation of law and that  
22 imposing sanctions would chill his First Amendment rights. He  
23 further argued that (1) there was improper notice of a hearing  
24 for the July Motion; (2) Trustee's exemption objections should  
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26 <sup>6</sup> These paragraphs contain the requirements for signatures  
27 on electronically filed documents and retention requirements.  
28 Under BLR 5005-2(d), a debtor's counsel must obtain and retain  
wet signatures of debtor for ECF.

1 have been overruled; (3) § 541(a)(2) did not prevent him from  
2 taking the position that the non-filing spouse's community  
3 property share of non-exempt assets was not property of the  
4 estate and that the bankruptcy court should have held a trial on  
5 that issue; (4) the court should hold a trial on whether the  
6 Borismetrics payment was exemptible wages; (5) Trustee had not  
7 identified specific assets in dispute; (6) funds in a bankruptcy  
8 account could be exempted as tools of the trade; (7) the Sale  
9 Order could be challenged after the fact because a trustee  
10 should not be allowed to collect money or property from a debtor  
11 based on an artificially high valuation; and (8) his advice to  
12 debtor that he did not need to turn over assets to Trustee was  
13 justified because:

14 [A]s a matter of logic, a property that has very low  
15 value, or a 'negative' value, is not an asset of the  
16 estate due to the lack of a value. This belief is  
17 based on an understanding of the trustee's statutory  
18 [duty] as specified in 11 U.S.C. § 704. Generally,  
19 the trustee's duty is to collect only assets of value  
20 that exceed the exemptions and to distribute those  
21 assets to the creditors.

19 Trustee responded to Shalaby with the declaration of his  
20 counsel which attached multiple exhibits evidencing alleged  
21 frivolous positions asserted by Shalaby. Shalaby objected to  
22 the declaration arguing that every matter therein was a  
23 privileged First Amendment communication pursuant to Cal. Civ.  
24 Code § 47, and that the declaration was the "equivalent of a  
25 SLAPP suit." Shalaby also argued that the declaration was an  
26 "undisguised attempt to circumvent the safe harbor provisions"  
27 of Rule 9011(c)(1)(A).

28 On November 20, 2014, the bankruptcy court held a hearing

1 on the OSC. At the conclusion of the hearing, the court  
2 requested a supplemental declaration from Trustee's counsel  
3 regarding attorney's fees incurred for the matters identified in  
4 the OSC. Trustee's counsel subsequently filed a declaration  
5 showing total fees and expenses of \$58,679.89 through December  
6 8, 2014, of which \$14,231 were attributable to dealing with the  
7 issues outlined in the OSC.

8 Shortly after, Shalaby filed a motion to recuse Judge  
9 Efremsky based on alleged impartiality due to the fact Shalaby  
10 indicated an intent to file a lawsuit against Trustee. In the  
11 motion, Shalaby discussed numerous incidents where, in his  
12 opinion, the bankruptcy judge showed bias and prejudice against  
13 debtor and his counsel. In reaching his opinion, Shalaby  
14 stated:

15 [H]e has now spoken with several attorneys and non-  
16 attorneys after they had listened to the audio of the  
17 OSC hearing and that every one expressed an  
18 unequivocal belief and conclusion that Judge Efremsky  
19 appears very biased and prejudiced in favor of the  
20 trustee and against the debtor and his counsel.

21 The bankruptcy court denied the recusal motion.

22 On April 27, 2015, the bankruptcy court issued its  
23 Memorandum Decision finding that Shalaby asserted numerous  
24 positions during debtor's case without an adequate basis in law  
25 or fact in violation of Rule 9011. Accordingly, the court  
26 imposed sanctions consisting of: (1) non-compensatory monetary  
27 sanction for \$8,000 payable to the bankruptcy court;  
28 (2) disgorgement of \$4,000 that was paid to him by debtor;  
(3) suspension from the practice of law in the bankruptcy courts  
for the Northern District of California until he had completed

1 24 hours of continuing legal education in bankruptcy law and 3  
2 hours of continuing legal education in ethics (except for those  
3 cases which he had already appeared); and (4) suspension of his  
4 e-filing privileges until he had completed the ECF training  
5 provided by the clerk's office. On the same day, the court  
6 entered the Sanctions Order.

7 On April 30, 2015, Shalaby filed an application to amend  
8 the Memorandum Decision and Sanctions Order. The bankruptcy  
9 court denied that application.

10 Shalaby filed a timely appeal from the Sanctions Order and  
11 Amendment Order.<sup>7</sup>

## 12 II. JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
14 §§ 1334 and 157(b)(2)(A). See In re Nguyen, 447 B.R. 268, 275  
15 (9th Cir. BAP 2011) (en banc) (citing In re Brooks-Hamilton, 400  
16 B.R. 238, 244 (9th Cir. BAP 2009) (acts leading to suspension  
17 occurred in matter central to administration of bankruptcy  
18 case). We have jurisdiction under 28 U.S.C. § 158.

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22 <sup>7</sup> Shalaby's notice of appeal (NOA) states that he also  
23 appeals from the Memorandum Decision. The Memorandum Decision  
24 does not contain a judgment, order or decree. See Rule 8001(a).  
25 The NOA also does not mention the bankruptcy court's order  
26 denying Shalaby's motion for recusal. As a result, the recusal  
27 order is not before us in this appeal. In addition, as Shalaby  
28 has not asserted any arguments on appeal that relate to the  
bankruptcy court's denial of his application to amend, those  
arguments are waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th  
Cir. 1999).



1 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). If  
2 so, we then determine under the clearly erroneous standard  
3 whether the bankruptcy court's factual findings and its  
4 application of the facts to the relevant law were  
5 "(1) 'illogical,' (2) 'implausible,' or (3) 'without support in  
6 inferences that may be drawn from the facts in the record.'" Id.  
7 at 1262. Findings of fact are given great deference in this  
8 context. DeLuca v. Seare (In re Seare), 515 B.R. 599, 614 (9th  
9 Cir. BAP 2014).

10 We may affirm on any ground supported by the record.  
11 Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

## 12 V. DISCUSSION

### 13 A. The Bankruptcy Court's Authority To Issue Sanctions

14 A bankruptcy court has the inherent authority to regulate  
15 the practice of attorneys who appear before them. Chambers v.  
16 NASCO, Inc., 501 U.S. 32, 43 (1991); Caldwell v. Unified Capital  
17 Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284-85 (9th  
18 Cir. 1996). "Inherent powers are the exception, not the rule,"  
19 and, therefore, "must be exercised with great caution."  
20 Chambers, 501 U.S. at 64. "A specific finding of bad faith  
21 . . . must 'precede any sanction under the court's inherent  
22 powers.'" United States v. Stoneberger, 805 F.2d 1391, 1393  
23 (9th Cir. 1986). The bankruptcy court also has express power to  
24 impose sanctions pursuant to Rule 9011 and its local rules. See  
25 In re Nguyen, 447 B.R. 380-81. A bankruptcy court may suspend  
26 an attorney from the practice of law for violations of Rule  
27 9011. In re Brooks-Hamilton, 400 B.R. at 249.

1 **B. Rule 9011**

2 The initial basis for imposing sanctions on Shalaby is Rule  
3 9011, the bankruptcy counterpart to Civil Rule 11. Case law  
4 interpreting Rule 11 is applicable to Rule 9011. Marsch v.  
5 Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir. 1994).

6 Rule 9011(b) requires parties and their attorneys to ensure  
7 papers filed before a bankruptcy court are "warranted by  
8 existing law or by a nonfrivolous argument for the extension,  
9 modification, or reversal of existing law or the establishment  
10 of new law" and that "allegations and other factual contentions  
11 have evidentiary support . . . ." Rule 9011(b) (2) and (3).  
12 Rule 9011(b) incorporates a reasonableness standard which  
13 focuses on whether a competent attorney admitted to practice  
14 before the involved court could believe in like circumstances  
15 that his actions were legally and factually justified. See  
16 Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir.  
17 1986).

18 When assessing sanctions *sua sponte* under Rule  
19 9011(c) (1) (B) and under the law of this Circuit, the bankruptcy  
20 court is required to issue an order to show cause to provide  
21 notice and an opportunity to be heard and to apply a higher  
22 standard "akin to contempt" than in the case of party-initiated  
23 sanctions. R&D Latex Corp., 242 F.3d at 1115-16. The reason  
24 behind the heightened standard is because, unlike party-  
25 initiated motions, court-initiated sanctions under Rule  
26 9011(c) (1) (B) do not involve the 21-day safe harbor provision  
27 for the offending party to correct or withdraw the challenged  
28 submission. Id. at 1116 (citing Barber v. Miller, 146 F.3d 707,

1 711 (9th Cir. 1998)).

2 In Barber v. Miller, the Ninth Circuit emphasized the  
3 distinctions between a party-initiated motion for sanctions  
4 under Civil Rule 11 and sanctions imposed upon the court's own  
5 initiative, finding they were not the equivalent. There, the  
6 district court granted the defendant's motion to dismiss the  
7 plaintiff's complaint with prejudice. The order granting the  
8 motion indicated that the district court would retain  
9 jurisdiction to consider sanctions. After dismissal, the  
10 defendant notified the attorney for the plaintiff by letter that  
11 it would be seeking sanctions and then it filed the motion. The  
12 district court granted the motion, awarding the defendant \$2,500  
13 in sanctions against the attorney. The attorney appealed and  
14 the defendant cross-appealed on the amount. The Ninth Circuit  
15 reversed the award of sanctions because the motion for sanctions  
16 did not comply with the safe harbor provision under Civil Rule  
17 11.

18 The court then considered whether the district court's  
19 retention of jurisdiction for purposes of a sanctions motion  
20 could be equated to an election by the court to impose sanctions  
21 on its own motion. The Ninth Circuit concluded that it was not  
22 the equivalent, noting the distinction between a party-initiated  
23 motion for sanctions and sanctions awarded on the court's own  
24 initiative. The Ninth Circuit observed that the district court  
25 awarded sanctions to a party under circumstances which did not  
26 meet the standard for court-initiated sanctions. The court also  
27 noted that "the fact the district court exercised its discretion  
28 to award sanctions on motion of a party does not necessarily

1 mean that the court would exercise its discretion to impose  
2 sanctions on its own motion for the same conduct" since show  
3 cause orders "will ordinarily be issued only in situations that  
4 are akin to a contempt of court. . . ." 146 F.3d at 711 (citing  
5 Civil Rule 11, Adv. Comm. Notes to 1993 Amend.).<sup>9</sup>

6 Here, the bankruptcy court expressly applied the objective  
7 reasonableness standard to Shalaby's numerous violations of Rule  
8 9011. The court dismissed Shalaby's contentions that his "good  
9 faith belief" or "opinion" supported his positions on the basis  
10 that his subjective intent was irrelevant since his conduct is  
11 measured against a reasonableness standard which consists of a  
12 competent attorney admitted to practice law before the court.  
13 With respect to each violation of Rule 9011(b) set forth in the  
14 OSC, the bankruptcy court expressly applied this standard to  
15 each of its factual findings.

16 The evidence in the record supports the bankruptcy court's

17  

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18 <sup>9</sup> Civil Rule 11, Adv. Comm. Notes to 1993 Amend., states  
19 in relevant part:

20 The power of the court to act on its own initiative is  
21 retained, but with the condition that this be done  
22 through a show cause order. . . . Since show cause  
23 orders will ordinarily be issued only in situations  
24 that are akin to a contempt of court, the rule does not  
provide a 'safe harbor' to a litigant for withdrawing a  
claim, defense, etc., after a show cause order has been  
issued on the court's own initiative.

25 Rule 9011, Adv. Comm. Notes to 1997 Amend. states:

26 This rule is amended to conform to the 1993 changes to  
27 [Civil Rule] 11. For an explanation of these  
28 amendments, see the advisory committee note to the 1993  
amendments to [Civil Rule] 11.

1 ruling; it certainly shows that Shalaby's legal positions and  
2 arguments were objectively frivolous under the reasonableness  
3 standard. In fact, Shalaby admitted as much when he requested  
4 the court to order a settlement conference. There, he  
5 acknowledged that with a bit more effort and legal research,  
6 many of the problems and matters disputed could have and would  
7 have been avoided. He further stated that there was a "personal  
8 matter" which may explain why he admittedly failed to diligently  
9 research some of his legal contentions and presented incorrect  
10 interpretations of applicable law (e.g. community property  
11 interest being irrelevant to exemptions, misapplication of  
12 § 542(a), and other matters), but the record does not show what  
13 that "personal matter" was or whether it was a legitimate excuse  
14 for Shalaby's admitted digressions. Finally, Shalaby went on to  
15 say that he recognized his mistakes, and appreciated the  
16 "court's frustration." Therefore, at least then, Shalaby seemed  
17 to acknowledge that he had a duty to conduct a reasonable  
18 inquiry into the law and underlying facts before filing the  
19 documents, and that had he done so, many of the problems could  
20 have been avoided.<sup>10</sup>

21 But even if Shalaby's positions were frivolous under the  
22 reasonableness standard, the standard for court-initiated  
23 sanctions in the Ninth Circuit is "akin to contempt." Although  
24 we considered remand so that the bankruptcy court could apply

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25  
26 <sup>10</sup> In his brief, Shalaby has not directed us to any clearly  
27 erroneous facts which would warrant disturbing the bankruptcy  
28 court's decision based on its application of the reasonableness  
standard. Instead, he continues to assert that his positions  
were correct under the guise of zealously representing his  
client.

1 the proper legal standard, we ultimately conclude that certain  
2 factual findings made by the bankruptcy court foreclose that  
3 consideration.

4 Admittedly, the "akin to contempt" standard is neither  
5 well-developed nor consistently applied. However, case law  
6 makes it clear the alleged transgressions must exceed those for  
7 party-initiated sanctions. In United National Insurance Company  
8 v. R & D Latex Corporation, 242 F.3d 1102, the Ninth Circuit  
9 reversed the district court's imposition of *sua sponte* sanctions  
10 after examining the sanctioned attorneys' statements made in a  
11 Notice of Related Cases (Notice) they filed in connection with a  
12 removed action. Looking at all the circumstances, the court  
13 found the attorneys' actions "not so egregious as to merit *sua*  
14 *sponte* sanctions," and concluded that the "Notice was in neither  
15 purpose nor substance 'akin to contempt.'" Id. at 1116, 1118.

16 Accordingly, at bottom, the "akin to contempt" standard  
17 seems to require conduct that is particularly egregious and  
18 similar to conduct that would be sanctionable under the  
19 standards for contempt. See MyMedicalRecords, Inc. v. Jardogs,  
20 LLC, 2015 WL 5445987, at \*2 (C.D. Cal. 2015) (finding that bad  
21 faith analysis applied to court-initiated sanctions under Civil  
22 Rule 11); Brown v. Royal Power Mgt., Inc., 2012 WL 298315, at \*4  
23 (N.D. Cal. Feb. 1, 2012) (finding that assertion of a position  
24 knowing that it is baseless "constituted bad faith and lacked  
25 forthrightness with the court" and thus was "akin to  
26 contempt."); Stone v. Wolff Properties LLC, 135 Fed.Appx. 56,  
27 2005 WL 1389893, at \*2 (9th Cir. June 13, 2005) (reversing  
28 district court's imposition of *sua sponte* sanctions, finding

1 that appellant's "conduct, though perhaps not laudable, was not  
2 so 'egregious' as to be considered 'beyond the pale.'" (citing  
3 R & D Latex Corp., 242 F.3d at 1116-18); Sanai v. Sanai, 408  
4 Fed.Appx. 1, 2010 WL 2782636, at \*3 (9th Cir. July 12, 2010)  
5 (affirming *sua sponte* sanction award by district court which  
6 issued OSC, gave appellants an opportunity to be heard, and  
7 expressly found they acted in bad faith); Lynch v. Cal. Ct. of  
8 Appeal, Third Dist., 2008 WL 2811197, at \*7 (July 14, 2008)  
9 (noting that prior to a *sua sponte* imposition of sanctions under  
10 Civil Rule 11, the court must find that counsel's conduct was  
11 particularly egregious, i.e., "akin to a contempt of court");  
12 compare Darulis v. Iaria, 2008 WL 5101932, at \*4 (S.D. Cal. Dec.  
13 1, 2008) (finding conduct was not of the nature of a violation  
14 of a court order and therefore could not be punished *sua sponte*  
15 under Civil Rule 11).

16 Here, the bankruptcy court's findings do not support the  
17 heightened standard. First, the court found that nothing in the  
18 record suggested that Shalaby had an improper purpose under Rule  
19 9011(b)(1). Next, in considering the sanctions to impose, the  
20 bankruptcy court cited the ABA standards which include an  
21 inquiry into whether the attorney acted intentionally, knowingly  
22 or negligently. The bankruptcy court did not find Shalaby acted  
23 knowingly or intentionally, but that at a minimum, his conduct  
24 was negligent. The heightened standard of "akin to contempt"  
25 requires more than ignorance or negligence on the part of  
26 Shalaby. See Barber, 146 F.3d at 711 (noting that bad faith in  
27 an analogous context requires more than mere negligence). While  
28 we do not condone Shalaby's conduct, these factual findings

1 demonstrate that his conduct was neither in purpose nor  
2 substance "akin to contempt."

3 In sum, the bankruptcy court erred in sanctioning Shalaby  
4 for his conduct under Rule 9011 because it applied the wrong  
5 legal standard for *sua sponte* sanctions and its factual findings  
6 do not support – and in fact foreclose – the heightened standard  
7 of "akin to contempt." Accordingly, the court abused its  
8 discretion in issuing sanctions under Rule 9011.

9 **C. Section 329**

10 Section 329(a) requires an attorney representing a debtor  
11 in a bankruptcy case to file a statement regarding the  
12 compensation agreed to be paid for services in the case and the  
13 source of the compensation. Section 329(b) provides in relevant  
14 part: "If such compensation exceeds the reasonable value of any  
15 such service, the court may cancel any such agreement, **or order**  
16 **the return of any such payment. . . .**" (Emphasis added.)  
17 Bankruptcy Code § 329 is implemented by Rules 2016 and 2017.  
18 Rule 2016(b) provides that every attorney for a debtor, whether  
19 or not the attorney applies for compensation, shall file the  
20 statement required by § 329 of the Code. Rule 2017(a) provides  
21 that on the court's own initiative, the court may determine  
22 whether any payment by the debtor, made directly or indirectly  
23 and in contemplation of the filing of a petition, to an attorney  
24 for services rendered or to be rendered, is excessive.

25 The standard applied under § 329(b) to determine the  
26 reasonable value of fees is set forth in § 330. Hale v. U.S.  
27 Trustee (In re Basham), 208 B.R. 926, 931 (9th Cir. BAP 1997).  
28 "The burden is upon the applicant to demonstrate that the fees

1 are reasonable." Id. at 931-32. Section 330(a)(3) states that  
2 in determining the amount of reasonable compensation, the court  
3 should consider the nature, extent, and value of the services  
4 rendered, taking into account all relevant factors, including  
5 (A) the time spent on the services; (B) the rates charged for  
6 the services; (C) whether the services were necessary or  
7 beneficial at the time the services were rendered; (D) whether  
8 the services were performed within a reasonable amount of time  
9 commensurate with the complexity, importance, and nature of the  
10 problem, issue, or task addressed; (E) whether the person  
11 demonstrated skill and experience in the bankruptcy field;  
12 (F) whether the compensation is reasonable based on the  
13 customary compensation charged by comparably skilled  
14 practitioners in cases other than bankruptcy cases.

15 The reasonable value of services rendered by a debtor's  
16 attorney "is a question of fact to be determined by the  
17 particular circumstances of each case. The requested  
18 compensation may be reduced if the court finds that the work  
19 done was excessive or of poor quality." In re Spickelmier, 469  
20 B.R. 903, 914 (Bankr. D. Nev. 2012); see also In re Basham, 208  
21 B.R. at 933 (disgorgement upheld for incomplete and inaccurate  
22 schedules, improperly claimed exemptions, improperly noticed  
23 plan confirmation hearing).

24 The bankruptcy court's OSC put Shalaby on notice of a  
25 potential disgorgement under this section. On appeal, Shalaby  
26 contends § 329 "could not, as a matter of law, apply in this  
27 case." Shalaby does not fully explain his position on this  
28 point, but presumably he contends that § 329 does not apply

1 since \$4,000 was disproportionate to the services rendered.  
2 Shalaby is mistaken. As noted by the bankruptcy court, the  
3 question is not how much time Shalaby spent on the case and what  
4 he believes his theoretical unpaid bill might be. Rather, the  
5 question is whether the \$4,000 he was paid was excessive for  
6 what he accomplished for debtor in this case.

7 The bankruptcy court properly considered the value of  
8 Shalaby's services under § 330(a)(3). Specifically, the court  
9 found factors (C) whether the services were necessary or  
10 beneficial and (E) skill and experience in the bankruptcy field  
11 "particularly important here." Applying those factors, the  
12 court found:

13 First, as the issues listed in the OSC and the above  
14 discussion show, his services were not necessary or  
15 beneficial to the debtor and they were costly and  
16 detrimental for the estate. Second, it is apparent  
17 that Mr. Shalaby lacked skill and experience in this  
18 field; he lacked competence in the relevant  
19 substantive and procedural areas required to handle  
20 this case.

21 His handling of this case showed he did not understand  
22 the implications of filing a chapter 7 case and did  
23 not understand the basic concepts, including the  
24 debtor's duties, the Trustee's duties, the nature of a  
25 bankruptcy estate, the duty to turn over assets, the  
26 rules regarding abandonment, the concept of rejection  
27 of an executory lease, or the importance of  
28 administrative rent. If he were competent, multiple  
amendments to the schedules would not have been  
necessary and he would have known he had to have the  
debtor sign them, as the applicable ECF rules require.

24 The record supports these findings and thus they are not clearly  
25 erroneous.

26 Shalaby also complains that of the \$4,000, \$306 was for the  
27 filing fee. According to Shalaby, § 329 cannot be used to  
28 direct a debtor's counsel to "disgorge" filing fees as this

1 would be a Fifth Amendment takings violation. Shalaby provides  
2 no analysis to support his conclusory statement nor does he  
3 bother to provide authority. The takings clause provides that  
4 "private property [shall not] be taken for public use without  
5 just compensation." U.S. CONST. amend. V. Suffice to say that  
6 a debtor's attorney does not have a property interest in his or  
7 her compensation that is protected under the Takings Clause of  
8 the Fifth Amendment.

9 In sum, the bankruptcy court applied the correct legal rule  
10 and its finding that the \$4,000 paid to Shalaby by debtor  
11 exceeded the reasonable value of his services was not illogical,  
12 implausible, or without support in the record. Therefore, the  
13 bankruptcy court did not abuse its discretion when it ordered  
14 disgorgement of all fees, including the filing fee within the  
15 total amount to be disgorged. See DeLuca v. Seare (In re  
16 Seare), 515 B.R. 599, 621 (9th Cir. BAP 2014) (finding court did  
17 not abuse its discretion in including filing and credit report  
18 fees within the total amount to be disgorged).

19 **D. Suspension of ECF filing privileges**

20 The bankruptcy court stated in the OSC that it was  
21 considering sanctions based on Shalaby's admitted failure to  
22 obtain debtor's signature on documents filed with the court  
23 through ECF. The court further observed that Shalaby had  
24 admitted that it was his practice to not have his debtor clients  
25 sign any of the papers filed on their behalf. In response to  
26 the OSC, Shalaby maintained that he could not locate the ECF  
27 procedures on the bankruptcy court's website. The bankruptcy  
28 court noted that the procedures were readily available on the

1 website and that Shalaby was required to know the rules and  
2 abide by them if he was going to practice in that bankruptcy  
3 court. Accordingly, the bankruptcy court determined that the  
4 remedy for Shalaby's "flagrant violation" was to suspend his e-  
5 filing privileges until he participated in the training provided  
6 by the clerk's office.

7 On appeal, Shalaby acknowledges his oversight regarding the  
8 requirements for wet signatures. He asserts, however, that such  
9 oversight is not sanctionable under any provision of Rule 9011  
10 nor § 105, especially since he rectified the error before the  
11 OSC hearing. He further argues that the bankruptcy court erred  
12 by not considering nonmonetary measures. We are not persuaded.

13 As noted by the bankruptcy court, Shalaby was a registered  
14 user of the bankruptcy court's CM/ECF system and thus bound by  
15 the procedures and rules governing electronic filings. The  
16 court's ECF Administrative Procedures ¶¶ 8 and 9 state in  
17 relevant part:

18 A Registered Participant who electronically files a  
19 document . . . shall be deemed to have certified under  
20 penalty of perjury that he or she has personally  
21 reviewed the document.

22 Pleadings . . . that are required to be verified . . .  
23 and all affidavits or other pleadings in which a person  
24 verifies, certifies, affirms or swears under oath or  
25 penalty of perjury concerning the truth of matters set  
26 forth in that pleading or document ('Verified  
27 Pleading') may be filed electronically . . . .  
28 The electronic filing of a Verified Pleading  
constitutes a representation by the Registered  
Participant . . . that the Registered Participant has  
in his or her possession at the time of filing the  
fully executed original, signed pleading/document.

BLR 5005-2(d) provides:

In the case of a Signatory who is not a Registered  
Participant, as in the case of documents requiring

1 multiple signatures or documents signed by a third  
2 party such as a debtor, the filing of the document  
3 constitutes the filer's attestation that the filer has  
4 possession of (i) an original ink signature, (ii) a  
5 copy of the original ink signature that has been  
6 electronically scanned, or (iii) a copy of the  
7 original ink signature transmitted by facsimile. The  
8 filer shall maintain records to support this  
9 attestation for subsequent production to the Court, if  
10 so ordered, or for inspection upon request by a party,  
11 until five years after the case or adversary  
12 proceeding in which the document was filed is closed.

13 Shalaby violated the ECF Administrative Procedures and BLR  
14 5005-2(d) – he admitted he did not have debtor's original  
15 signatures on the documents he filed.

16 The bankruptcy court possesses the inherent authority to  
17 manage attorney practices before it and to impose sanctions for  
18 violation of its local rules. See Singh v. Singh (In re Singh),  
19 2014 WL 842102, at \*8 (9th Cir. BAP March 4, 2011). BLR 9011-1  
20 states:

21 Any petition, schedule, statement, declaration, claim  
22 or other document filed and signed or subscribed under  
23 any method (digital, electronic, scanned) adopted  
24 under the rules of this Court shall be treated for all  
25 purposes (both civil and criminal, including penalties  
26 for perjury) in the same manner as though manually  
27 signed or subscribed.

28 Failure of counsel or of a party to comply with any  
provision of these rules or the Bankruptcy Rules shall  
be grounds for imposition by the Court of appropriate  
sanctions.

We can affirm the bankruptcy court's imposition of  
sanctions against Shalaby under this rule.

BLR 9011-1 authorized the bankruptcy court to use its  
authority to suspend Shalaby's e-filing privileges until he took  
further training. Moreover, contrary to Shalaby's contention,  
this remedy for the violation was a nonmonetary remedy and

1 Shalaby has already complied.<sup>11</sup> Finally, unlike the court in In  
2 re Singh, nowhere did the bankruptcy court purport to rely on  
3 § 105 for its sanctioning power in connection with Shalaby's  
4 violations of the ECF procedures. Thus, the issue of Shalaby's  
5 "bad faith" was irrelevant. In sum, the bankruptcy court did  
6 not abuse its discretion when it sanctioned Shalaby by  
7 suspending his e-filing privileges until he participated in the  
8 training session offered by the clerk's office.

9 **E. Request for Judicial Notice**

10 On August 30, 2015, Shalaby filed a request for judicial  
11 notice of the several documents pursuant to Fed. R. Evid. 201:

12 A cover email from Attorney Dennis Davis, received by  
13 Appellant on August 19, 2015, advising that the  
14 Chapter 7 trustee collected \$76,176.73 in funds in  
15 this bankruptcy case. Attached to the email is Mr.  
16 Davis' "First and Final Application" for compensation,  
17 document number 285, which sets forth the amount of  
18 fees he has claimed at \$62,627.50, and costs of  
19 \$2,983.00.

20 Judge Efremsky's order awarding fees of \$62,627.50 and  
21 costs of \$2,983.99 to Attorney Dennis Davis.

22 A letter dated December 12, 2014 acknowledging receipt  
23 of Appellant's complaint of judicial misconduct no.  
24 14-90182 pertaining to Judge Roger L. Efremsky.

25 These documents are not relevant to the disposition of this

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26 <sup>11</sup> Shalaby suggests that since he complied with the  
27 Sanctions Order by taking the ECF class, this portion of his  
28 appeal may be moot. We do not think Shalaby's compliance with  
the Sanctions Order renders this portion of his appeal moot as we  
have jurisdiction to consider the legal question of whether  
Shalaby's conduct was sanctionable. See Fleming & Assocs. v.  
Newby & Tittle, 529 F.3d 631, 640 (5th Cir. 2008) ("Any  
non-monetary portion of the sanctions not rendered moot by  
settlement is appealable for its residual reputational effects on  
the attorney."); Dailey v. Vought Aircraft Co., 141 F.3d 224, 226  
(5th Cir. 1998) ("This appeal is not moot because the [temporary]  
disbarment on the attorney's record may affect her status as a  
member of the bar and have other collateral consequences.").

1 appeal. As judicial notice is inappropriate where the facts to  
2 be noticed are irrelevant, see Ruiz v. City of Santa Maria, 160  
3 F.3d 543, 548 n. 13 (9th Cir. 1998), we deny the request for  
4 judicial notice.

5 **VI. CONCLUSION**

6 For the reasons stated, we AFFIRM in part and REVERSE in  
7 part.

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