

MAY 30 2017

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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.	CC-16-1318-KuFL
		)		
6	AHMAD J. TUKHI,	)	Bk. No.	8:15-bk-14015-MW
		)		
7	Debtor.	)	Adv. No.	8:15-ap-01449-MW
		)		
8	_____	)		
		)		
9	ABDUL HABIB OLOMI,	)		
		)		
10	Appellant,	)		
		)		
11	v.	)	<b>OPINION</b>	
		)		
12	AHMAD J. TUKHI,	)		
		)		
13	Appellee.	)		
		)		
	_____	)		

Argued and Submitted on March 23, 2017  
at Pasadena, California

Filed - May 30, 2017

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

Honorable Mark S. Wallace, Bankruptcy Judge, Presiding

Appearances: Nikolaus W. Reed argued for appellant; Randal Paul Mroczynski of Cooksey, Toolen, Gage, Duffy & Woog argued for appellee.

Before: KURTZ, FARIS and LAFFERTY, Bankruptcy Judges.

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1 KURTZ, Bankruptcy Judge:  
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3 **INTRODUCTION**

4 Abdul Habib Olomi appeals from a judgment dismissing his  
5 nondischargeability action against chapter 7<sup>1</sup> debtor Ahmad J.  
6 Tukhi. The bankruptcy court dismissed the action because Olomi  
7 appeared for a pretrial conference without having filed or served  
8 a pretrial stipulation as required by the bankruptcy court's  
9 Local Rule 7016-1(b) and (c). According to the bankruptcy court,  
10 Olomi's noncompliance was the result of the "fault" of his  
11 counsel but was neither willful nor done in bad faith.

12 Even though this one-time act of noncompliance would have  
13 resulted merely in several weeks of delay in the pretrial  
14 proceedings, the bankruptcy court held that dismissal was  
15 appropriate either under its Local Rule 7016-1(f) sanctioning  
16 authority or as a failure to prosecute under Civil Rule 41(b)  
17 (made applicable in adversary proceedings by Rule 7041). The  
18 bankruptcy court's dismissal order was an abuse of discretion.  
19 The bankruptcy court did not apply the correct legal standard  
20 before imposing the sanction of dismissal based on a Local Rule  
21 violation. Furthermore, the facts in the record do not support  
22 dismissal either based on the Local Rule violation or based on a  
23 failure to prosecute.

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24  
25 <sup>1</sup> Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure, and all "Local Rule"  
references are to the Local Rules of the United States Bankruptcy  
Court for the Central District of California.



1 held immediately before the scheduling order was issued, the  
2 bankruptcy court stated as follows:

3 THE COURT: And the Court wishes to advise the  
4 parties that the Court applies the Local Bankruptcy  
5 Rules relating to pretrial conferences very strictly.  
6 The Court views the pretrial conference as an  
7 indispensable part of the resolution of this matter and  
8 probably the second most important proceeding after the  
9 trial itself.

10 And for that reason, it's the Court's practice  
11 that if there is a material default by the plaintiff in  
12 compliance with the Local Bankruptcy Rules relating to  
13 pretrial conferences, the most likely outcome is that  
14 the Court will grant judgment of dismissal in favor of  
15 the defendant and, on the other hand, if there's a  
16 material default by the defendant, the Court's most  
17 likely outcome is that the Court would strike the  
18 answer and enter a default.

19 These consequences are in the nature of  
20 terminating sanctions. The Court believes that those  
21 types of -- that that type of sanction is appropriate  
22 in connection with pretrial conferences because to  
23 allow a material breach of those rules and to simply  
24 impose a monetary sanctions it could be viewed as  
25 setting up a situation where there's simply a toll  
26 charge for violating the Local Bankruptcy Rules and I  
27 don't think that's appropriate. So the parties are on  
28 notice of the Court's intentions in this regard and the  
29 Court will certainly be looking to the parties to fully  
30 comply with those Local Bankruptcy Rules.

31 Hr'g Tr. (Mar. 2, 2016) at 4:14-5:15.<sup>2</sup>

32 There were similar warnings about the importance of the  
33 pretrial procedures in form instructions accompanying the summons  
34 and in the presiding judge's supplemental procedures set forth on  
35 the court's website. Indeed, the form instructions accompanying

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36 <sup>2</sup> Neither party included in their excerpts of record a copy  
37 of the transcript from the March 2, 2016 status conference.  
38 Nonetheless, we can consider the contents of this transcript,  
39 which we obtained by accessing the bankruptcy court's electronic  
40 docket. See Franklin High Yield Tax-Free Income Fund v. City of  
41 Stockton, Cal. (In re City of Stockton, Cal.), 542 B.R. 261, 265  
42 n.2 (9th Cir. BAP 2015).

1 the summons stated:

2 **11. Joint Pre-Trial Order. Failure to timely file a**  
3 **Joint Pre-Trial order may subject the responsible party**  
4 **and/or counsel to sanctions, which may include**  
5 **dismissal of the adversary proceeding. The failure of**  
6 **either party to cooperate in the preparation of timely**  
7 **filing of a Joint Pre-Trial Conference [sic] or appear**  
8 **at the Joint Pre-Trial Conference may result in the**  
9 **imposition of sanctions under LBR 7016-1(f) or (g).**

10 Early meeting of Counsel and Status Conference Instructions (Nov.  
11 19, 2015) at ¶ 11 (emphasis in original).

12 Notwithstanding all of these warnings, and the unequivocal  
13 requirement set forth in Local Rule 7016-1(b) and (c) for the  
14 preparation, service and filing of a joint pretrial stipulation  
15 in advance of the pretrial conference, Olomi attended the  
16 pretrial conference without having first served or filed the  
17 requisite pretrial stipulation. When the court asked Olomi's  
18 counsel where his pretrial stipulation was, counsel explained  
19 that he had mistakenly prepared and filed instead a joint status  
20 report because he was inexperienced in practicing before the  
21 bankruptcy court and had misread what the "statute" required.  
22 The bankruptcy court seemed to credit counsel's explanation for  
23 his noncompliance but nonetheless concluded that dismissal was  
24 appropriate under Local Rule 7016-1(f)(4). The court reasoned  
25 that dismissal was justified because: (1) the pretrial  
26 conference and the pretrial procedures were very important;  
27 (2) Olomi had been warned of that importance and of the  
28 consequences for failure to comply; and (3) lesser sanctions in  
the form of monetary sanctions would amount to nothing more than  
a "toll charge" for violating the very important pretrial  
procedures. The bankruptcy court reiterated the same reasoning

1 in its written order of dismissal.

2 Within a few days of the bankruptcy court's dismissal  
3 ruling, Olomi simultaneously filed both a notice of appeal and a  
4 motion for reconsideration. Olomi explicitly based his  
5 reconsideration motion on Civil Rule 60(b)(1), as made applicable  
6 in bankruptcy cases pursuant to Rule 9024. Olomi maintained that  
7 the court should grant him relief from his excusable neglect  
8 under the factors set forth in Pioneer Investment Services v.  
9 Brunswick Assocs., 507 U.S. 380, 395 (1993).

10 Olomi's counsel filed a declaration in support of the  
11 reconsideration motion in which he elaborated on his efforts to  
12 comply with the court's pretrial procedures. As Olomi's counsel  
13 put it, he and his paralegal "discussed and reviewed" the Local  
14 Rules in July 2016 and prepared a draft joint pretrial  
15 stipulation as well as a draft joint status report at the time.  
16 However, in September 2016, when it came time to submit these  
17 documents, he asserts that he only found the draft joint status  
18 report on his computer, and he did not recall the Local Rule  
19 requirement to file and serve the draft joint pretrial  
20 stipulation. According to Olomi's counsel, he carefully reviewed  
21 the March 2016 scheduling order and also reviewed the docket, and  
22 neither mentioned any deadline for filing or serving a joint  
23 pretrial stipulation, so he (erroneously) thought that filing and  
24 serving the joint status report would comply with the relevant  
25 pretrial procedures.

26 After full briefing and a hearing, the bankruptcy court took  
27 the matter under submission and ultimately issued a nine-page  
28 memorandum decision and order denying the reconsideration motion.

1 Even though Olomi specifically asked for relief under Rule 9024  
2 and Civil Rule 60(b), the bankruptcy court treated Olomi's motion  
3 as a motion to alter or amend the judgment under Rule 9023 and  
4 Civil Rule 59(e). In relevant part, the bankruptcy court ruled  
5 that it did not commit any manifest error of law when it  
6 dismissed Olomi's adversary proceeding. Interestingly, in making  
7 this ruling, the court analyzed the dismissal as if it were based  
8 on a failure to prosecute under Rule 7041 and Civil Rule 41(b);  
9 in contrast, at the time of the pretrial conference, the court  
10 had based the dismissal on violation of Local Rule 7016-1(c) and  
11 (e) - sanctionable pursuant to Local Rule 7016-1(f).

12 In any event, after considering the additional evidence  
13 submitted in support of the postjudgment motion, identifying the  
14 five-part test for dismissals for failure to prosecute and  
15 enhancing its findings in support of its dismissal ruling, the  
16 bankruptcy court concluded that the dismissal did not constitute  
17 a manifest injustice and that the postjudgment motion should be  
18 denied.

19 Olomi timely appealed the judgment of dismissal, but he did  
20 not file a new or amended notice of appeal from the order denying  
21 his postjudgment motion.

#### 22 **JURISDICTION**

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
24 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under 28  
25 U.S.C. § 158 to review the bankruptcy court's judgment of  
26 dismissal.

27 We do not have jurisdiction to review the bankruptcy court's  
28 order denying Olomi's postjudgment motion. As the governing Rule

1 specifies:

2 If a party intends to challenge an order disposing of  
3 any motion listed in subdivision (b)(1) . . . the party  
4 must file a notice of appeal or an amended notice of  
5 appeal. The notice or amended notice must . . . be  
6 filed within the time prescribed by this rule, measured  
7 from the entry of the order disposing of the last such  
8 remaining motion.

9 Rule 8002(b)(3). An appellant's failure to comply with the  
10 appeal filing deadlines set forth in Rule 8002 typically deprives  
11 us of jurisdiction. See Slimick v. Silva (In re Slimick), 928  
12 F.2d 304, 306 (9th Cir. 1990).

13 That being said, in reviewing the bankruptcy court's  
14 judgment of dismissal, we have jurisdiction (and a duty) to  
15 review any enhanced findings or "new factual determinations" the  
16 bankruptcy court made in support of its original ruling - even if  
17 those enhanced findings were part of the court's ruling on a  
18 postjudgment motion that never was appealed and even if the court  
19 considered and relied upon evidence that was not presented until  
20 after the bankruptcy court made its original ruling. Moldo v.  
21 Ash (In re Thomas), 428 F.3d 1266, 1268-69 (9th Cir. 2005) ("The  
22 BAP erred in concluding that it lacked jurisdiction to review the  
23 bankruptcy court's amended findings"); see also Ash v. Moldo (In  
24 re Thomas), 2006 WL 6811032 at \*4-7 (9th Cir. BAP 2006) (on  
25 remand from Circuit, holding that bankruptcy court's amended  
26 findings were clearly erroneous based on evidence submitted to  
27 the court as part of postjudgment proceedings).

28 **ISSUE**

Did the bankruptcy court abuse its discretion when it  
dismissed Olomi's nondischargeability action?





1 This Panel has held that dismissal sanctions based on local  
2 rule violations must be supported by a finding of a degree of  
3 culpability higher than mere negligence or fault, such as  
4 "willfulness, bad faith, recklessness, or gross negligence" or a  
5 "repeated disregard of court rules." In re Roessler-Lobert, \_\_\_  
6 B.R. \_\_\_, 2017 WL 2189520, \*10; see also Kostecki v. Sutton (In  
7 re Sutton), 2015 WL 7776658, at \*8 (Mem. Dec.) (9th Cir. BAP Dec.  
8 3, 2015); Taylor v. Singh (In re Singh), 2016 WL 770195, at \*4-5  
9 (Mem. Dec.) (9th Cir. BAP Feb. 26, 2016).

10 In so holding, In re Roessler-Lobert relied on Zambrano v.  
11 City of Tustin, 885 F.2d 1473, 1480 (9th Cir. 1989). In addition  
12 to requiring the above-referenced finding assessing the  
13 culpability and/or state of mind of the rule violator, Zambrano  
14 indicated that any sanctions order based on a local rule  
15 violation needed to be "proportionate to the offense and  
16 commensurate with principles of restraint and dignity inherent in  
17 judicial power." Zambrano, 885 F.2d at 1480. The bankruptcy  
18 court also needed to consider: "(1) the public's interest in  
19 expeditious resolution of litigation; (2) the court's need to  
20 manage its docket; (3) the risk of prejudice to the defendants;  
21 (4) the public policy favoring disposition of cases on their  
22 merits[;] and (5) the availability of less drastic sanctions."  
23 In re Roessler-Lobert, \_\_\_ B.R. \_\_\_, 2017 WL 2189520, \*5, 10  
24 (citing Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.  
25 1986)).

26 The bankruptcy court, here, did not consider the three-part  
27 Zambrano test. Prejudgment, the court did not consider the  
28 culpability or state of mind of Olomi or his counsel, nor did the

1 court apply the traditional five-factor dismissal sanctions  
2 standard originating from Henderson. In addition, nothing in the  
3 court's comments indicated that it ever considered, pre- or  
4 postjudgment, whether the dismissal sanction was proportionate to  
5 the offense.

6 Zambrano and In re Roessler-Lobert indicate that we may  
7 review the record ourselves and independently determine whether  
8 the record supported the bankruptcy court's sanctions ruling.  
9 Zambrano, 885 F.2d at 1484 & n.32; In re Roessler-Lobert, \_\_\_  
10 B.R. \_\_\_, 2017 WL 2189520, \*5. But the prejudgment record is  
11 inadequate to support dismissal under Zambrano and In re  
12 Roessler-Lobert. At the time of the pretrial conference, there  
13 was no prior history in the adversary proceeding of any delay or  
14 noncompliance, and Olomi's counsel only stated that he had not  
15 filed the required pretrial stipulation because he had misread  
16 the rules and had thought a joint status report would be  
17 sufficient. Thus, absent a finding that Olomi's counsel's  
18 explanation was not credible, the record as it existed at that  
19 time essentially precluded a finding of culpability sufficient to  
20 support dismissal under Zambrano and In re Roessler-Lobert. The  
21 same record limitations effectively would have made it impossible  
22 to find that dismissal was proportionate to the offense or  
23 commensurate with judicial restraint.

24 Postjudgment, in the process of denying Olomi's  
25 reconsideration motion, the bankruptcy court specifically  
26 considered whether Olomi's noncompliance was the result of  
27 willfulness, bad faith or fault, and the court explicitly  
28 determined that "Plaintiff's failure [was] due to fault." Mem.

1 Dec. (Nov. 10, 2106) at 6:25. As stated above, mere "fault" is  
2 insufficient under Zambrano and In re Roessler-Lobert to justify  
3 sanctions for violation of a Local Rule. Nor does the additional  
4 evidence in the record regarding Olomi's attempts to comply with  
5 pretrial procedures persuade us that the record could have  
6 supported a gross negligence, recklessness or willfulness  
7 finding.

8 In short, the prejudgment record was insufficient under  
9 Zambrano and In re Roessler-Lobert to support the bankruptcy  
10 court's dismissal sanction based on a local rule violation, and  
11 none of the additional evidence presented or enhanced findings  
12 made postjudgment cured that insufficiency.

#### 13 **B. Dismissal Based On A Delay In Prosecution**

14 As stated in the facts section, supra, the bankruptcy court  
15 offered a different legal basis for its dismissal sanction when  
16 it ruled on Olomi's reconsideration motion. According to the  
17 court's ruling denying the reconsideration motion, dismissal was  
18 appropriate under Civil Rule 41(b) as made applicable in  
19 adversary proceedings by Rule 7041. The elements for a Civil  
20 Rule 41(b) dismissal for failure to prosecute are different than  
21 those set forth above for a dismissal for violation of local  
22 court rules. See In re Roessler-Lobert, \_\_\_ B.R. \_\_\_, 2017 WL  
23 2189520, \*5, 10. Dismissal for failure to prosecute must be  
24 supported by a showing of unreasonable delay and by consideration  
25 of the five Henderson factors. Id. While no showing of  
26 heightened culpability is required, the delaying party's mental  
27 state typically is relevant, and the bankruptcy court should  
28 consider any excuse offered by the delaying party in the process

1 of determining whether the delay was unreasonable and whether  
2 there is a risk of prejudice to the adverse party. Id. at \*5 &  
3 n.8.

4 Even though Olomi did not appeal the bankruptcy court's  
5 order denying his reconsideration motion, we will look at the  
6 bankruptcy court's postjudgment findings on each of the five  
7 Henderson factors, and we will consider all of the evidence  
8 before the court at the time those findings were made. See In re  
9 Thomas, 428 F.3d at 1268-69.

10 **1. The Public's Interest In Expeditious Resolution of**  
11 **Litigation**

12 The bankruptcy court found that the public's interest in the  
13 expeditious resolution of litigation lightly militated in favor  
14 of dismissal. The bankruptcy court acknowledged that the  
15 expeditious resolution of litigation was implicated by Olomi's  
16 noncompliance only to the extent that the noncompliance resulted  
17 in a delay in the resolution of the litigation. As the  
18 bankruptcy court explained, the pretrial conference would have  
19 been delayed by roughly four to six weeks, so the bankruptcy  
20 court determined that this amount of delay implicated the  
21 public's interest in expeditious litigation resolution only in a  
22 minor way.

23 While we admit to having some doubt that the noncompliant  
24 conduct at issue herein would have had any impact on the timing  
25 of the ultimate resolution of Olomi's action, the Ninth Circuit  
26 requires us to give significant deference to the bankruptcy  
27 court's assessment of whether the delay implicated the public  
28 interest because the bankruptcy court is in the best position to

1 determine what amount of delay reasonably can be endured. In re  
2 Eisen, 31 F.3d at 1451; Tenorio v. Osinga (In re Osinga), 91 B.R.  
3 893, 895 (9th Cir. BAP 1988).

4 Based on this deference, and on the undisputed fact that  
5 Olomi's failure to file and serve the pretrial stipulation would  
6 have delayed the pretrial conference by several weeks, we hold  
7 that the bankruptcy court's finding on the first Henderson factor  
8 was not clearly erroneous.

## 9 **2. The Court's Need To Manage Its Docket**

10 The bankruptcy court found that its need to manage its  
11 docket militated strongly in favor of dismissal. The court noted  
12 that material noncompliance with Local Rule 7016-1 was fairly  
13 common notwithstanding the routine warnings the court gave at  
14 status conferences and in scheduling orders regarding the  
15 importance of the pretrial procedures. In essence, the court  
16 reasoned that not issuing terminating sanctions when the litigant  
17 completely failed to file or serve a pretrial stipulation would  
18 encourage a relaxed and cavalier attitude towards the pretrial  
19 stipulation requirement, which in turn would materially  
20 contribute to additional congestion on the court's already busy  
21 docket.

22 Again, the Ninth Circuit has counseled that appellate courts  
23 generally should defer to the bankruptcy court's assessment of  
24 what action is needed to facilitate the court's management of its  
25 own docket. In re Eisen, 31 F.3d at 1452; see also Yourish v.  
26 Cal. Amplifier, 191 F.3d 983, 991 (9th Cir. 1999) ("Because the  
27 district judge was in a superior position to evaluate the effects  
28 of delay on her docket, . . . we find that this factor strongly

1 favors dismissal." ). Based on this deference and on the  
2 indisputable delay in the pretrial proceedings, we hold that the  
3 bankruptcy court's finding on the second Henderson factor was not  
4 clearly erroneous.

### 5           **3.    The Risk Of Prejudice To The Defendant**

6           The bankruptcy court found that the four- to six-week delay  
7 in the pretrial proceedings constituted a risk of prejudice to  
8 Tukhi because the delay in pretrial proceedings might impede  
9 Tukhi's enjoyment of his fresh start. The court essentially  
10 determined that the unreasonable delay caused by Olomi's failure  
11 to file and serve the pretrial stipulation created a risk of  
12 interference with Tukhi's ability quickly to go to trial and  
13 thereafter enjoy the full benefit of his chapter 7 discharge.  
14 Because the length of the delay was relatively minor, the  
15 bankruptcy court concluded that this factor only lightly  
16 militated in favor of dismissal.

17           We agree with the bankruptcy court to a point. We agree  
18 that a significant delay in resolution of litigation caused by a  
19 litigant's unreasonable conduct can cause prejudice to the  
20 adverse party under certain circumstances. See Malone v. United  
21 States Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987). This is  
22 particularly true in bankruptcy cases, when the litigation  
23 involves an exception to discharge claim, which clouds the  
24 debtor's fresh start by its mere existence. In re Osinga, 91  
25 B.R. at 895; see also Tong v. Sandwell (In re Sandwell), 2005 WL  
26 6960219, at \*5 (Mem. Dec.) (9th Cir. BAP June 13, 2005).

27           However, the record here does not support the bankruptcy  
28 court's risk of prejudice finding. The contents of the joint

1 status report presented to the court at the time of the pretrial  
2 hearing - and resubmitted to the court as part of Olomi's papers  
3 in support of his reconsideration motion - reflect that Tukhi was  
4 advocating for a continuance of the pretrial conference until at  
5 least January 2017 and for trial not to be set before February  
6 2017. The status report further indicates that Tukhi's  
7 scheduling issues were being driven by the congestion of his  
8 counsel's trial calendar. When, as here, the debtor Tukhi was  
9 advocating for even greater delay in the resolution of the  
10 nondischargeability action, it is illogical to conclude that  
11 Tukhi was at risk of being prejudiced by a brief delay resulting  
12 from the plaintiff Olomi's isolated incident of noncompliance  
13 with pretrial procedures.<sup>3</sup>

14 We therefore hold that the bankruptcy court's finding on the  
15 third Henderson factor was clearly erroneous.

16 **4. The Public Policy Favoring Disposition Of Cases On**  
17 **Their Merits**

18 The bankruptcy court conceded that this factor militated  
19 against dismissal, but the court posited that the force of this  
20 factor was attenuated because Olomi's conduct was impeding the  
21 progress of the case towards a merits resolution. The two  
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23 <sup>3</sup> For purposes of prejudice, it also is worth noting that  
24 Local Rule 7016-1(e)(2) prescribes procedures parties other than  
25 plaintiff must take when the plaintiff fails to comply with the  
26 pretrial stipulation requirement. It is undisputed here that  
27 Tukhi did not follow these procedures. If Tukhi had been  
28 concerned about potential prejudice arising from the delay caused  
by Olomi's failure to file and serve the pretrial stipulation,  
Tukhi could have helped to keep the matter on track by filing and  
serving the declaration prescribed in Local Rule 7016-1(e)(2).



1 decisions on which the bankruptcy court relied for this point  
2 involved severe obstacles to merits determinations caused by the  
3 plaintiff's noncompliant conduct over an extended period of time.  
4 Allen v. Bayer Corp. (In re Phenylpropanolamine (PPA) Prod. Liab.  
5 Litig.), 460 F.3d 1217, 1237 (9th Cir. 2006) ("failure to comply  
6 with [case management order] obligations brought these MDL  
7 actions to a standstill"); Alonzo v. City of L.A., No. CV  
8 14-05636-RGK (Minute Order) (C.D. Cal. July 24, 2015) ("Plaintiff  
9 failed to produce documents which are necessary for Defendant to  
10 adequately litigate this case."). Here, in contrast, Olomi's  
11 one-time act of neglect in failing to file and serve a pretrial  
12 stipulation did not present anything close to the type of severe  
13 impediment to litigation on the merits that was at issue in Allen  
14 and Alonzo. Simply put, there was nothing in the record to  
15 differentiate the case at bar from the majority of cases in which  
16 this factor militates decidedly against dismissal. See, e.g.  
17 Yourish, 191 F.3d at 992; Hernandez v. City of El Monte, 138 F.3d  
18 393, 399 (9th Cir. 1998); Malone, 833 F.2d at 133 n.2; see also  
19 Gonzalez v. Kitay (In re Kitay), 2015 WL 8550637 at \*9 (Mem.  
20 Dec.) (9th Cir. BAP Dec. 10, 2015) ("The fourth factor, whether  
21 public policy favors disposition of the case on the merits,  
22 normally weighs strongly against dismissal.").

23 Thus, the bankruptcy court's finding on the fourth Henderson  
24 factor was clearly erroneous. The policy in favor of litigation  
25 on the merits strongly militated against dismissal of Olomi's  
26 nondischargeability action, and the bankruptcy court's finding  
27 that this factor only weakly militated against dismissal was  
28 illogical and not supported by the record.

1           **5.       Availability Of Less Drastic Sanctions**

2           In its memorandum decision denying Olomi's reconsideration  
3 motion, the bankruptcy court elaborated on its reasoning why  
4 alternative lesser sanctions were "unavailable." The court  
5 admitted that alternatives "are always available," but it  
6 considered such alternatives unwise, inappropriate and improper.  
7 The bankruptcy court engaged in a slippery-slope type of analysis  
8 in which it concluded that, if it imposed lesser, monetary  
9 sanctions against Olomi, pretty soon all litigants would be free  
10 to ignore the pretrial stipulation requirement, "knowing that the  
11 worst that would happen to them is that they would be required to  
12 pay a toll charge in the form of a monetary sanction for this  
13 privilege." Mem. Dec. (Nov. 10, 2016) at 8:13-15.

14           Aside from the logical fallacy evident in the court's  
15 reasoning, the court's analysis incorrectly emphasized the  
16 perceived systemic impact of a more lenient approach to  
17 sanctions, instead of focusing on the potential of alternative  
18 lesser sanctions to secure future compliance from Olomi. See In  
19 re Singh, 2016 WL 770195 at \*9-10 (rejecting a similar  
20 alternative lesser sanctions analysis that emphasized systemic  
21 concerns over what was needed on a case-specific basis to secure  
22 litigant compliance).

23           Here, Olomi had no prior history of noncompliance. While  
24 his efforts to ascertain and follow the court's pretrial  
25 procedures were clearly inadequate, there is nothing in the  
26 record to indicate that a monetary/compensatory sanction would  
27 have been insufficient to obtain his future compliance.  
28 Consequently, the bankruptcy court's finding on the fifth

1 Henderson factor was clearly erroneous.<sup>4</sup>

2        Additionally, the bankruptcy court's emphasis on the  
3 perceived systemic effect of a more lenient approach to sanctions  
4 rendered its dismissal sanction wholly disproportionate to  
5 Olomi's one-time act of noncompliance. A dismissal sanction  
6 cannot ever really satisfy the fifth Henderson factor without  
7 some thought given to the proportionality of the sanction to the  
8 misconduct. See In re Roessler-Lobert, \_\_\_ B.R. \_\_\_, 2017 WL  
9 2189520, \*10 & n.13 (noting that concept of proportionality is  
10 largely subsumed within the fifth Henderson factor).

11        **6. Results From Application Of The Henderson Factors**

12        Only the first two of the five Henderson factors militated  
13 in favor of dismissal. There was no demonstration of a genuine  
14 risk of prejudice to Tukhi, nor were effective alternative lesser  
15 sanctions shown to be unavailable. Furthermore, the policy  
16 favoring decisions on the merits strongly militated against  
17 dismissal.

18        At bottom, the bankruptcy court appears to have given  
19 inordinate weight to its concern over its overcrowded docket and  
20 the systemic effect a more lenient sanctions policy might have on

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21  
22        <sup>4</sup> Sometimes, a prior warning that noncompliance will result  
23 in dismissal can serve as a substitute to consideration of  
24 alternative lesser sanctions. Yourish, 191 F.3d at 992; see also  
25 Paqtalunan v. Galaza, 291 F.3d 639, 643 (9th Cir. 2002). This  
26 substitution theory apparently is based on the notion that the  
27 threat of dismissal is, itself, a form of alternative lesser  
28 sanction, and if that does not secure compliance, the trial court  
has discharged its duty to consider alternative lesser sanctions.  
Paqtalunan, 291 F.3d at 643. But this substitute to considering  
alternative lesser sanctions typically applies only when the  
dismissal warnings were made in response to prior noncompliance.  
Id.; Yourish, 191 F.3d at 992.

1 its ability quickly and efficiently to move cases on its docket  
2 towards resolution. We sympathize with the bankruptcy court's  
3 palpable frustration with litigants who do not pay adequate  
4 attention to court procedures and the very real impact their  
5 inattention has on the court's ability expeditiously to  
6 administer justice. Even so, that sympathy does not permit us to  
7 gloss over the established legal standards for imposing  
8 terminating sanctions on plaintiffs.

9 In sum, the bankruptcy court abused its discretion in  
10 dismissing Olomi's nondischargeability action based either on his  
11 violation of Local Rule 7016-1(b) and (c) or on his delay in  
12 prosecution of the adversary proceeding.

13 **CONCLUSION**

14 For the reasons set forth above, the bankruptcy court's  
15 judgment dismissing Olomi's adversary proceeding is VACATED, and  
16 this matter is REMANDED for completion of pretrial proceedings  
17 and the setting of a trial date.