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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

FILED  
APR 23 2018  
UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

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4 In re: ) Case No. 16-23787-B-7  
5 THOMAS OLIVER BROWN, ) Adversary No. 16-2132  
6 )  
7 Debtor(s). ) DC No. KP-1  
8 )  
9 RICHARD A. BIAMA, )  
10 Plaintiff(s), )  
11 v. )  
12 THOMAS OLIVER BROWN, )  
13 )  
14 Defendant(s). )

ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANT'S MOTION IN LIMINE

INTRODUCTION

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20 The court has before it a motion in limine filed by  
21 defendant Thomas Oliver Brown. Docket 76. Defendant moves "to  
22 preclude Plaintiff [Richard A. Biama] from offering any testimony  
23 in his case in chief-via Alternative Direct Testimony  
24 Declarations and Exhibits, or through live oral testimony as a  
25 result of Plaintiff's violation of this Court's January 18, 2018,  
26 Order and United States Bankruptcy Court, Eastern District of  
27 California, Local Rule 9017-1." Id. at 1:22-25. Basically,  
28 defendant contends that plaintiff should not be permitted to  
present direct testimony-written or oral-of any witness or offer

1 any exhibits because plaintiff failed to timely deliver alternate  
2 direct testimony declarations and marked exhibits as the court  
3 ordered on January 18, 2018, and as required by Local Bankruptcy  
4 Rule 9017-1.

5 Plaintiff opposes defendant's motion in limine. Docket 87.  
6 Plaintiff asserts that witnesses and exhibits were timely  
7 disclosed in a list that was emailed to defendant over a year  
8 ago, in March of 2017, and updated on April 16, 2018. Plaintiff  
9 does not dispute that alternate direct testimony declarations  
10 were not timely delivered to the defendant. Nevertheless,  
11 plaintiff suggests that alternate direct testimony declarations  
12 and properly marked exhibits are not necessary-and that the  
13 failure to timely deliver either or both is immaterial-because  
14 defendant knows how plaintiff will testify and is familiar with  
15 the exhibits that plaintiff intends to offer. Plaintiff also  
16 suggests that an exclusionary sanction for any court order or  
17 local rule violation is too harsh and that if a sanction is  
18 ordered for noncompliance a lesser sanction must be imposed.  
19

20 The court heard defendant's motion in limine prior to  
21 scheduled start of trial on April 23, 2018. Appearances were  
22 noted on the record.

23 This order constitutes the court's findings of fact and  
24 conclusions of law pursuant to Federal Rule of Civil Procedure  
25 ("Civil Rule") 52(a) (applicable by Federal Rule of Bankruptcy  
26 Procedure ("Bankruptcy Rule")) 7052. This order also supplements  
27 the court's oral statements and the summary of this decision  
28

1 placed on the record in open court on April 23, 2018.<sup>1</sup> For the  
2 reasons explained below, defendant's motion in limine will be  
3 GRANTED IN PART AND DENIED IN PART: (1) GRANTED as to sanctions  
4 for plaintiff's violation of the court's January 18, 2018, order  
5 and Local Bankruptcy Rule 9017-1; and (2) DENIED as to the  
6 request for an exclusionary sanction.  
7

8 **BACKGROUND**

9 An order filed on January 18, 2018, set an April 23, 2018,  
10 trial date. Docket 73. That order also imposed two independent  
11 but related obligations on the parties: (1) it required the  
12 parties to *disclose* witnesses and exhibits under Civil Rule  
13 26(a)(3)(A); and (2) it also required the parties to prepare and  
14 *deliver* to opposing counsel alternate direct testimony  
15 declarations and marked trial exhibits under Local Bankruptcy  
16 Rule 9017-1.<sup>2</sup>  
17

18 Plaintiff was ordered to disclose witnesses and exhibits and  
19 to deliver alternate direct testimony declarations and marked  
20 exhibits to the defendant by April 9, 2018. Id. Defendant was  
21 ordered to disclose witnesses and exhibits and to deliver  
22 alternate direct testimony declarations and marked exhibits to  
23 the plaintiff by April 16, 2018. Id. Defendant timely complied.  
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25 <sup>1</sup>If there are any conflicts between the court's oral  
26 statements and this written decision, this written decision  
27 controls. See Playmakers LLC v. ESPN, Inc., 376 F.3d 894, 896  
(9th Cir. 2004) (citation omitted).

28 <sup>2</sup>The parties were informed on two earlier occasions that the  
court would require alternate direct testimony declarations for  
trial. Dockets 52, 71.

1 Dockets 75, 79. Plaintiff did not.

2 Plaintiff did not deliver alternate direct testimony  
3 declarations or properly marked trial exhibits to defendant by  
4 April 9, 2018. Plaintiff confirmed that direct testimony  
5 declarations were not delivered to the defendant any time prior  
6 to the start of trial on April 23, 2018. See also Dockets 77 at  
7 2:2-3, 3:3-6, 4:17-18, 83 at 5:11-12, 87 at 2:7-15. Plaintiff  
8 provided defendant with marked trial exhibits on January 16,  
9 2018, as a purported "update" to a March 2017 email that included  
10 an attachment with some 600 pages of unmarked or improperly-  
11 marked documents. Dockets 83 at 5:13-16, 6:13-15; 87 at 2:1-6.  
12

#### 13 DISCUSSION

14  
15 Civil Rule 26(a)(3)(A) governs pretrial disclosures and  
16 includes a requirement that each party "provide to the other  
17 party and promptly file . . . the name and, if not previously  
18 provided, the address and telephone number of each witness" as  
19 well as "an identification of each document or other exhibit[.]"  
20 Fed. R. Civ. P. 26(a)(3)(A)(i), (iii). Civil Rule 26(a)(3)(A) is  
21 enforced through Civil Rule 37(c)(1) which "forbid[s] the use at  
22 trial of any information required to be disclosed by Rule 26(a)  
23 that is not properly disclosed." Hoffman v. Constr. Protective  
24 Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008) (internal  
25 quotation marks and citations omitted). More precisely, Civil  
26 Rule 37(c)(1) states as follows:

27 If a party fails to provide information or identify a  
28 witness as required by Rule 26(a) or (e), the party is  
not allowed to use that information or witness to  
supply evidence on a motion, at a hearing, or at a  
trial, unless the failure was substantially justified

1 or is harmless.

2 Fed. R. Civ. P. 37(c)(1).

3 Civil Rule 37(c)(1) is self-executing, and an automatic  
4 sanction designed to provide a strong inducement for disclosure.  
5 Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 827  
6 (9th Cir. 2011) (citations omitted). There are two ways to avoid  
7 the automatic and self-executing exclusionary sanction of Civil  
8 Rule 37(c)(1), *i.e.*, by establishing that a failure to timely  
9 disclose is (i) substantially justified or (ii) harmless. The  
10 party facing exclusion bears the burden of proving either. R & R  
11 Sails, Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1246 (9th Cir.  
12 2012) (citations omitted); Yeti by Molly, Ltd. v. Deckers Outdoor  
13 Corp., 259 F.3d 1101, 1107 (9th Cir. 2001).

14  
15 The court has particularly wide latitude to issue sanctions  
16 under Civil Rule 37(c)(1). Yeti by Molly, 259 F.3d at 1106.  
17 However, if the exclusionary sanction amounts to dismissal of a  
18 claim or a terminating sanction, the court is required to also  
19 consider whether noncompliance involves willfulness, fault, or  
20 bad faith. R & R Sails, 673 F.3d at 1247 (citation omitted).  
21 Willfulness, bad faith, and fault are defined to mean  
22 "disobedient conduct not shown to be outside the control of the  
23 litigant." Fjelstad v. Am. Honda Motor Co., Inc., 762 F.2d 1334,  
24 1341 (9th Cir. 1985).

25 And even upon a finding of willfulness, bad faith, or fault  
26 the court must still weigh: (i) the public's interest in the  
27 expeditious resolution of litigation; (2) the court's need to  
28 manage its docket; (3) the risk of prejudice to the party seeking  
sanctions; (4) the public policy favoring disposition of cases on

1 their merits; and (5) the availability of less drastic sanctions.  
2 Thompson v. Housing Auth. of City of Los Angeles, 782 F.2d 829,  
3 831 (9th Cir. 1986). "The subparts of the fifth factor are  
4 whether the court has considered lesser sanctions, whether it  
5 tried them, and whether it warned the recalcitrant party about  
6 the possibility of case dispositive sanctions." Conn. Gen. Life  
7 Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th  
8 Cir. 2007) (citations omitted).

9 The delivery obligation under Local Bankruptcy Rule 9017-1  
10 is similar to the disclosure obligation under Civil Rule  
11 26(a)(3)(A). Local Bankruptcy Rule 9017-1 states as follows:  
12 "Unless otherwise ordered by the Court, copies of all alternate  
13 direct testimony declarations by witnesses and exhibits that are  
14 intended to be presented at trial or hearing shall be furnished  
15 to opposing counsel[.]" Local Bankr. R. 9017-1(b). And like  
16 Civil Rule 37(c)(1), Local Bankruptcy Rule 9017-1 permits the  
17 court to sanction a party for noncompliance (or untimely  
18 compliance):  
19

20 If a party fails to comply with the provisions of this  
21 Rule or an order for the timely exchange and lodging  
22 with the court of Alternative Direct Testimony  
23 Statements, exhibits, or other evidence as ordered by  
24 the court, the court may issue appropriate sanctions.  
25 The sanctions may include the court excluding such  
26 Direct Testimony Statement(s) and the live direct  
27 testimony of the witness(es) giving such statements,  
28 exhibits, or other evidence presented which were not  
timely exchanged or presented, or such lesser sanction  
as appropriate and reasonable.

26 Local Bankr. R. 9017-1(d).

27 Sanctions under Local Bankruptcy Rule 9017-1 are analogous  
28 to the Civil Rule 26(a)(3)(A) sanctions available through Civil  
Rule 37(c)(1). Bank of Stockton v. Dugo (In re Dugo), 2016 WL

1 4126757, \*4 (E.D. Cal. 2016). Thus, "a bankruptcy court must  
2 consider whether the claimed noncompliance involved willfulness,  
3 fault, or bad faith and the availability of less severe sanctions  
4 before imposing sanctions for violations of Bankruptcy Rule 9017-  
5 1 that effectively terminate the adversary proceeding." Id.  
6 This court is also guided by Kostecki v. Sutton (In re Sutton),  
7 2015 WL 7776658 (9th Cir. BAP 2015). Inasmuch as Sutton involved  
8 an appeal of a decision by a different bankruptcy judge in this  
9 district it is instructive.

10 In Sutton, the plaintiffs violated Local Bankruptcy Rule  
11 9017-1 by submitting their alternate direct testimony  
12 declarations and exhibits seven days prior to trial. Id. at \*2-  
13 4. The plaintiffs claimed they had difficulty obtaining the  
14 signed declarations from the declarants because they lived far  
15 away or were traveling and hard to track down. Id. at \*4. The  
16 bankruptcy court concluded that the plaintiffs' failure to comply  
17 with Local Bankruptcy Rule 9017-1 caused extreme prejudice to the  
18 debtor in his trial preparation, granted the debtor's motion in  
19 limine to exclude the evidence, and entered judgment in favor of  
20 the debtor. Id. at \*4-5.

22 On appeal, the BAP in Sutton found that the bankruptcy  
23 court's exclusion of the plaintiffs' declarations and exhibits  
24 was "analogous to sanctions under Civil Rule 37(c)(1)" and  
25 "amounted to the dismissal of Plaintiffs' fraud claims based upon  
26 their failure to comply with" Local Bankruptcy Rule 9017-1. Id.  
27 at \*6. The BAP concluded that the bankruptcy court's case  
28 terminating sanction was an abuse of discretion because the court  
failed to make a finding of bad faith, willfulness, or fault and

1 did not consider a more moderate penalty, such as continuing the  
2 trial to allow the debtor's attorney more time to prepare or a  
3 monetary sanction to compensate the debtor's attorney for an  
4 unnecessary appearance. Id. at \*7-9. Additional factors also  
5 were not weighed before the exclusionary sanction was imposed.  
6 Id. at 10.

7 Turning to this case, plaintiff was ordered on January 18,  
8 2018, to *disclose* witnesses and exhibits under Civil Rule  
9 26(a)(3)(A) and to *deliver* alternate direct testimony  
10 declarations and marked exhibits to the defendant under Local  
11 Bankruptcy Rule 9017-1. Plaintiff was further ordered to comply  
12 with both obligations by April 9, 2018.<sup>3</sup>

13 Plaintiff did not *deliver* alternate direct testimony  
14 declarations to the defendant by April 9, 2018. Apparently that  
15 remained unchanged up to the April 23, 2018, trial date.  
16 Plaintiff also delivered properly marked trial exhibits to the  
17 defendant seven days late on April 16, 2018. Consequently, the  
18 court has little difficulty concluding that plaintiff violated  
19 the court's January 18, 2018, order and Local Bankruptcy Rule  
20 9017-1.

21  
22 Plaintiff's court order and local rule violations are not  
23 substantially justified. There is no substantial justification  
24

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25 <sup>3</sup>The court assumes that the list and documents plaintiff  
26 emailed to defendant in March of 2017 is a Civil Rule 26(a)(3)(A)  
27 compliant *disclosure*. The court notes that disclosure was made  
28 after discovery closed on December 21, 2016. Docket 14.  
However, defendant did not raise that issue. Moreover, the court  
need not address the extent of plaintiff's compliance with the  
*disclosure* obligation based on its determination, *infra*, that the  
plaintiff violated the *delivery* obligation under the court's  
January 18, 2018, order and Local Bankruptcy Rule 9017-1.



1 for the failure to comply with a federal court order. Crystal  
2 Palace Gambling Hall, Inc. v. Mark Twain Indus. (In re Crystal  
3 Palace Gambling Hall, Inc.), 817 F.2d 1361, 1365 (9th Cir. 1986)  
4 (no exceptional circumstances exception to compliance with a  
5 federal court order); Anderson v. Comptois, 109 F. 971 (9th Cir.  
6 1901) (unacceptable for attorney to instruct client and others to  
7 disobey order disagreed with). Plaintiff's suggestion that  
8 timely delivered alternate direct testimony declarations and  
9 marked exhibits are unnecessary-and that trial may proceed  
10 without either or both because defendant is familiar with  
11 plaintiff's evidence in this adversary proceeding based on  
12 evidence admitted in the parties' prior arbitration proceeding-is  
13 also without merit and borders on the frivolous. As to the  
14 alternate direct testimony declarations specifically, plaintiff  
15 was informed on multiple occasions they were required for trial.  
16 And it is not up to the plaintiff to unilaterally determine the  
17 necessity of complying with a local bankruptcy rule obligation  
18 incorporated into the court's pre-trial order. Plaintiff is  
19 obligated to comply with this court's order-and thence with the  
20 local bankruptcy rule obligation-whether or not he agrees with  
21 it. Maness v. Meyers, 419 U.S. 449, 458-459 (1975).<sup>4</sup>

23 Plaintiff's court order and local rule violations are also  
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26 <sup>4</sup>There are also ethical considerations involved when an  
27 attorney-such as plaintiff's attorney-decides to disobey an  
28 order. As the California Supreme Court stated in In re Anna Lou  
Kelley, 52 Cal. 3d 487 (1990): "Disobedience of a court order,  
whether as a legal representative or as a party, demonstrates a  
lapse of character and a disrespect for the legal system that  
directly relate to an attorney's fitness to practice law and  
serve as an officer of the court." Id. at 495.

1 prejudicial and therefore not harmless. See Padilla v. Beard,  
2 2017 WL 1354565, \*3 (E.D. Cal. 2017). Plaintiff's violations are  
3 prejudicial to the court because the court must now expend  
4 judicial resources to address the violations and adjust its  
5 calendar to accommodate for them. They are also prejudicial to  
6 the defendant who is accused of fraud and is faced with  
7 substantial non-dischargeable debt. The absence of timely  
8 alternate direct testimony declarations and marked exhibits  
9 interferes with the defendant's ability to develop a meaningful  
10 defense and prepare effective cross-examination. An awareness of  
11 what the evidence might be based on the parties' prior  
12 arbitration proceeding does not alleviate that prejudice. In  
13 other words, ignoring for the moment that the arbitration  
14 concluded nearly five years ago and memories fade, there is a  
15 substantial difference between knowing what a witness *may* say and  
16 the exhibits that a party *may* offer and knowing what a witness  
17 *will* say and the exhibits that a party *will* offer. Alternate  
18 direct testimony declarations and timely marked exhibits  
19 facilitate the latter for the court and the defendant and that is  
20 why they are ordered for trial.

21  
22 The determination that plaintiff's court order and local  
23 rule violations are not substantially justified-and that they are  
24 prejudicial and therefore not harmless-would typically result in  
25 exclusion under Civil Rule 37(c)(1) and thence Local Bankruptcy  
26 Rule 9017-1. But here exclusion would be case terminating  
27 because it would prevent the plaintiff from proving any element  
28 of the § 523(a)(2)(A) claim. And although plaintiff's court  
order and local rule violations are willful because they are not

1 substantially justified, see Fjelstad, 762 F.2d at 1341, and at  
2 least three factors weigh in favor of a terminating sanction,<sup>5</sup>  
3 several other factors and several sub-factors compel the court,  
4 reluctantly, to order a lesser sanction.<sup>6</sup> Therefore, for all the  
5 foregoing reasons:

6 IT IS ORDERED that defendant's motion in limine is GRANTED  
7 IN PART AND DENIED IN PART: GRANTED as to the imposition of a  
8 lesser sanction and DENIED as to an exclusionary sanction.

9 IT IS FURTHER ORDERED that the April 23, 2018, trial is  
10 VACATED and trial is continued to June 4, 2018, at 9:30 a.m.

11 IT IS FURTHER ORDERED that by April 30, 2018, plaintiff  
12 shall serve defendant with alternate direct testimony  
13 declaration(s) of any individual who will or may testify in  
14 plaintiff's case-in-chief and all properly marked exhibits  
15 plaintiff will or may offer at trial (in a three-hole punched  
16 binder). Defendant may file and serve an amended alternate  
17

18  
19 <sup>5</sup>There is a strong public interest in expeditiously  
20 resolving this adversary proceeding which has been pending for  
21 nearly two years. The expeditious resolution of this adversary  
22 proceeding would facilitate the court's management of its docket  
23 insofar as it would eliminate the need for the court to again  
24 reset trial and conduct other proceedings related to this  
adversary proceeding. And as noted above, plaintiff's court  
order and local rule violations are prejudicial to the defendant  
and the court.

25 <sup>6</sup>There is a strong public policy that favors resolving cases  
26 on their merits. The court has not previously imposed a lesser  
27 sanction for the plaintiff's conduct addressed hereinabove which  
28 means the court is unable to ascertain the effectiveness of any  
lesser sanction. And plaintiff was not warned that a failure to  
comply with the court's January 18, 2018, order and Local  
Bankruptcy Rule 9017-1 would result in an exclusion of all of  
plaintiff's evidence resulting in an inability to prove the §  
523(a)(2)(A) claim.

1 direct testimony declaration by May 7, 2018.

2 IT IS FURTHER ORDERED that by 5:00 p.m. on April 30, 2018,  
3 plaintiff shall pay defendant \$5,250.00 in attorney's fees (15  
4 hours at \$350.00 per hour) for defendant's appearance on April  
5 23, 2018, trial preparation, and preparation of the motion in  
6 liminie, trial brief, and other related documents filed in  
7 preparation of trial. Plaintiff shall also file certification of  
8 payment with the court.

9 IT IS FURTHER ORDERED that-in addition to the \$5,250.00  
10 ordered hereinabove-plaintiff shall pay the attorney's fees that  
11 defendant incurs in this matter from April 24, 2018, to and  
12 including 9:30 a.m. on June 4, 2018. These attorney's fees shall  
13 be paid prior to the commencement of trial on June 4, 2018. To  
14 facilitate the payment of these attorney's fees, on May 31, 2018,  
15 defendant shall file and serve (by facsimile and email) a  
16 declaration of all attorney's fees incurred during the referenced  
17 period with an estimate of the attorney's fees for the period  
18 from June 1, 2018, through and including 9:30 a.m. on June 4,  
19 2018.

20  
21 IT IS FURTHER ORDERED that if the plaintiff fails to pay any  
22 of the attorney's fees ordered hereinabove the court will  
23 consider dismissal of this adversary proceeding, the exclusion of  
24 evidence, and any additional sanction determined to be  
25 appropriate under the circumstances.

26 IT IS FURTHER ORDERED that trial in this matter is limited  
27 to the issues framed by the pleadings.  
28

1 IT IS FURTHER ORDERED that objections to alternate direct  
2 testimony declaration(s) and exhibit(s) shall be served on  
3 opposing counsel and lodged with the court by May 31, 2018.

4 Dated: April 23, 2018.

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7 UNITED STATES BANKRUPTCY JUDGE

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INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Joseph M. ElGuindy  
2990 Lava Ridge Court, Suite 205  
Roseville CA 95661

Karen Pine  
PO Box 4155  
El Dorado Hills CA 95762

Timothy L. Hamilton  
3161 Cameron Park Dr #205  
Cameron Park CA 95682