

AUG 20 2009

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	AZ-09-1053-JuMkD
)		
7	GTI CAPITAL HOLDINGS, L.L.C.,	)	Bk. Nos.	03-07923
	dba ROCKLAND MATERIALS,	)		03-07924
8		)		(Jointly Administered)
)		
9	Debtor,	)	Adv. Nos.	08-00464
		)		08-00471
10	_____	)		(Consolidated)
)		
11	TRIAD COMMERCIAL CAPTIVE CO.;)		
	STIRLING BRIDGE, L.L.C.; NEW)		
12	YORK - NEWPORT ASSURANCE CO.;)		
	TERI and GRANT H. GOODMAN,)		
13)		
	Appellants,)		
14	v.	)	M E M O R A N D U M ¹	
)		
15	MICHAEL WARREN CARMEL;)		
	COMERICA BANK; BURCH AND)		
16	CRACCHIOLO, P.A.,)		
)		
17	Appellees.)		
	_____)		

Argued and Submitted on July 30, 2009
at San Francisco, California

Filed - August 20, 2009

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: JURY, MARKELL, and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 At the outset, we briefly clarify what is before us in this
2 appeal. The Notice of Appeal ("NOA") designated the orders
3 appealed from as Civil Contempt Orders entered on February 8,
4 2009. However, our review of the bankruptcy docket shows that
5 there were no orders entered on that date nor any Civil Contempt
6 Orders entered on any date.

7 The NOA attached the bankruptcy court's Order Denying Three
8 Motions to Alter/Amend Judgment, or Alternatively Motion to
9 Reconsider ("Order Denying Motions to Alter/Amend Judgment"),
10 which apparently is the order challenged in this appeal.² The
11 order appealed from relates to three separate underlying Motions
12 to Alter/Amend Judgment filed by Appellants on December 19, 22
13 and 23, 2008. Appellants filed the motions after the bankruptcy
14 court dismissed the consolidated adversary proceedings at issue
15 in this appeal due to Appellants' voluntary withdrawal of the
16 underlying complaints in the state court.

17 Appellants' December 19, 2008 motion related to the court's
18 November 19, 2008 order and published decision, Goodman v. Cal.
19 Portland Cement Co. (In re GTI Capital Holdings, L.L.C.), 399
20 B.R. 247 (Bankr. D. Ariz. 2008), in which the court found that
21 it had post-dismissal jurisdiction to consider the expense
22 requests of Michael W. Carmel, Ltd. ("Carmel"), Empire
23 Southwest, LLC ("Empire") and Comerica Bank ("Comerica") under

24
25 ² We take judicial notice of the Order Denying Motions to
26 Alter/Amend Judgment and other pleadings not included in the
27 record. Atwood v. Chase Manhattan Mortgage Co. (In re Atwood),
28 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). The NOA presented in
Appellants' Record on Appeal had no order attached. The NOA on
the BAP docket, however, did attach the referenced order.

1 Rule 37(a) (5) (B).³

2 Appellants' December 22, 2008 motion related to the court's
3 order dated December 19, 2008, awarding \$3,251.20 in attorneys'
4 fees and \$23.20 in costs under Rule 37 to Empire.

5 Finally, Appellants' December 23, 2008 motion related to
6 the court's minute order dated December 9, 2008 denying their
7 motion to disqualify the bankruptcy judge.

8 The bankruptcy court denied all three motions by order
9 entered on February 5, 2009, concluding that Appellants failed
10 to set forth a basis to grant them any type of affirmative
11 relief under Rules 59 or 60.

12 Based on our review and as explained below, we conclude
13 that this appeal involves the narrow issues of whether the court
14 had post-dismissal jurisdiction to consider Empire's Rule 37
15 expense request and, if so, whether it abused its discretion in
16 granting the request. We hold that as a matter of law, the
17 court had post-dismissal jurisdiction to consider collateral
18 matters such as the Rule 37 expense request. We also conclude
19 that the bankruptcy court did not abuse its discretion in making
20 the award. Accordingly, we AFFIRM.

21 **I. FACTS**

22 On May 8, 2003 GTI Capital Holdings, LLC dba Rockland
23 Materials and G.H. Goodman Investment Companies, LLC
24 (collectively, "Debtors") filed separate petitions under chapter
25

26 ³ Unless otherwise indicated all rule references are to
27 Federal Rules of Civil Procedure 26, 37, 59 and 60, incorporated
28 by, the Federal Rules of Bankruptcy Procedure 7026, 7037, 9023
and 9024, respectively.

1 11. On June 15, 2003 the bankruptcy court issued an Order for
2 Joint Administration, transferred the cases to one judge and
3 directed use of a consolidated caption.

4 On April 30, 2007 Debtors' cases converted to chapter 7 and
5 David M. Reaves was appointed trustee. Thereafter the trustee
6 and Comerica settled various claims (the "Settlement") arising
7 out of two adversary proceedings previously filed by Debtors.
8 The Settlement contained broad, mutual releases of all claims
9 between the estates and Comerica and required Comerica to pay
10 \$950,000 to the estates. Grant Goodman, an attorney, and other
11 entities he represented objected to the Settlement on the
12 grounds that the trustee did not have standing and the releases
13 were contrary to Ninth Circuit law.

14 The bankruptcy court approved the Settlement on March 17,
15 2008 in a written decision and entered a separate order
16 referring to its written decision on the same date. This panel
17 affirmed the bankruptcy court's ruling on December 9, 2008 in
18 Triad Commercial Captive Co. v. Reaves (In re GTI Capital
19 Holdings, L.L.C.), BAP No. AZ-08-1079-MkEMO.⁴ Goodman, on
20 behalf of himself and the entities he represented, appealed this
21 decision to the Ninth Circuit on January 21, 2009.

22 **A. The State Court "Independent Actions", Removal to the**
23 **Bankruptcy Court and Subsequent Dismissals**

24 On June 20, 2008 Appellants filed two lawsuits in the
25 Maricopa County Superior Court which named, among others, the
26 _____

27 ⁴ The details relating to the underlying claims, which are
28 not relevant to the pending appeal, are set forth in that
decision and will not be restated here.

1 trustee, Carmel, Empire and Comerica as defendants (the
2 "Independent Actions"). The Independent Actions, which were
3 virtually identical, essentially sought to vacate state court
4 judgments obtained by Empire and others against Goodman and his
5 wife as guarantors for Debtors. The basis for the relief sought
6 by Appellants were the releases in the Settlement and fraud upon
7 the court by the lawyers who represented various named
8 defendants.

9 On July 10, 2008 the trustee filed a Notice of Removal of
10 the Independent Actions (Adv. Nos. 08-00464 and 08-00471) to the
11 bankruptcy court.⁵ The removal was based on Appellants' failure
12 to obtain leave in the bankruptcy court to sue the trustee in
13 state court.

14 Thereafter the trustee, Empire and other defendants filed
15 motions to dismiss the adversary proceedings.⁶

16 On July 17, 2008 the bankruptcy court issued an order
17 setting a status conference for August 27, 2008.

18 On July 21, 2008 Appellants filed a Motion to Remand. In
19 that motion, Appellants maintained that the removal of the
20 Independent Actions was "fatally flawed given the lack of
21 jurisdiction of this Article I Court to entertain non-core state
22 law proceedings"

23 On July 23, 2008 Appellants filed a Motion to Convert

24
25 ⁵ On August 27, 2008 the court granted a Motion to
26 Consolidate the two adversary proceedings under Adv. No.
08-00464.

27 ⁶ The court set a hearing on the trustee's motion to
28 dismiss for September 11, 2008; the remaining motions to dismiss
were set for hearing on September 17, 2008.

1 Status Hearing To Merits Hearing. In that motion, Appellants
2 requested emergency court approval to conduct jurisdictional
3 discovery and reiterated the court's lack of jurisdiction over
4 the Independent Actions. Appellants asserted in the motion that
5 they "requested lawyers (Reaves, Carmel, Novotny, Clemency,
6 Gardner, and Meyers)⁷ to make themselves available for six (6)
7 consecutive one hour depositions on the issue of 'jurisdiction',
8 the lawyers' public filings, and statements of record embedded
9 within their most recent collective barrage of filings."

10 On August 4, 2008 the court issued an Order Setting Hearing
11 and Briefing Schedule (the "Scheduling Order"). The court also
12 addressed Appellants' request to conduct discovery: "The Court
13 will allow, at this time, whatever discovery is appropriate and
14 consistent with the Federal Rules of Civil Procedure and the
15 Federal Rules of Bankruptcy Procedure." The court denied
16 Appellants' Motion to Convert Status Hearing to Merits Hearing
17 as moot.

18 Appellants commenced discovery both prior, and subsequent,
19 to the issuance of the Scheduling Order. On August 10, 2008 (a
20 Sunday) Appellants served subpoenas electronically on various
21 lawyers. On August 11, 2008 Appellants filed a Pre-Trial Motion
22 to Compel Depositions; Motion to Compel Document Disclosure(s)
23 and Motion Requesting Emergency Hearing (the "Motion to
24 Compel"). On August 12, 2008 Appellants filed another motion
25 titled Pre-Trial Motion to Accelerate/Expedite Hearing on

26
27 ⁷ With the exception of Reaves and Carmel, the lawyers
28 apparently represented various defendants named in the
Independent Actions.

1 Discovery Depositions.

2 Comerica moved for a protective order on August 14, 2008
3 and requested an award of attorneys' fees and costs under Rule
4 37(a) (5) (B). Carmel joined Comerica's motion for a protective
5 order on August 20, 2008 and filed a separate motion for
6 attorneys' fees and costs on August 28, 2008. Empire also filed
7 a response to the Motion to Compel, requested that the court
8 deny the motion, issue a protective order prohibiting further
9 discovery by Appellants and award attorney fees' and costs under
10 Rule 37(a) (5) (B).⁸

11 At the August 27, 2008 hearing, the court denied
12 Appellants' Motion to Compel. The court agreed with the various
13 parties that the subpoenas did not make sense at that point in
14 time because of the number of dispositive motions pending before
15 the court. The court also noted that the subpoenas were not
16 properly served and concluded that expedited discovery would not
17 proceed. The court did not award attorneys' fees at that time
18 but gave the parties time to file their requests and set a
19 hearing for September 29, 2008.

20 After the August 27, 2008 hearing, but prior to September
21 29, 2008, Appellants withdrew their complaints that had been
22 filed in the state court⁹ and filed a Notice of Complaint
23 Withdrawal with the bankruptcy court. The bankruptcy court

24
25 ⁸ The trustee, California Portland Cement Co. and Bombardier
Capital, Inc. also responded to Appellants' Motion to Compel.

26
27 ⁹ Because the Independent Actions had been removed, any
further proceedings in the state court would be a nullity.
28 Appellants' actions in the state court were harmless however
since the bankruptcy court subsequently dismissed the Independent
Actions.

1 dismissed the Independent Actions without prejudice by order
2 entered on September 16, 2008.

3 **B. The Court's November 19, 2008 Decision On Its Jurisdiction**

4 In a published decision dated November 19, 2008, the court
5 held that it had subject matter jurisdiction over the removed
6 Independent Actions for essentially two reasons. First, the
7 court found Appellants improperly named the trustee as a
8 defendant in their state court complaints without seeking leave
9 of court. Second, the lawsuits involved the interpretation of
10 the Settlement which it had approved. In re GTI Capital
11 Holdings, L.L.C., 399 B.R. 247.

12 The court further ruled that despite the dismissal of the
13 Independent Actions, it retained jurisdiction to determine the
14 Rule 37 expense requests of Carmel, Empire and Comerica based on
15 the holding and reasoning set forth in Cooter & Gell v. Hartmarx
16 Corp., 496 U.S. 384 (1990).

17 Finally, the court sua sponte amended its order dismissing
18 the Independent Actions for the limited purpose of hearing and
19 resolving the Rule 37 expense requests. In re GTI Capital
20 Holdings, L.L.C., 399 B.R. at 257.

21 The court entered an order on November 19, 2008 which
22 incorporated its decision.

23 **C. The Expense Awards Under Rule 37(a)(5)(B); Motion To**
24 **Disqualify**

25 The court heard the Rule 37 expense requests on December 9,
26 2008 together with Appellants' Motion to Disqualify.¹⁰

27
28 ¹⁰ This motion was not properly noticed and served, as it
was filed on December 3, 2008, six days before the hearing.

1 Goodman appeared at the hearing, but presented no argument
2 - orally or in writing - as to why he was substantially
3 justified in bringing the Motion to Compel. Before the court
4 recited its rulings on the record regarding the Motion to
5 Disqualify or the Rule 37 expense requests, Goodman requested
6 permission to excuse himself and left the hearing.

7 On the Motion to Disqualify, the court considered the
8 standards for disqualification and concluded there was no basis
9 for disqualification and denied the motion.

10 The court then ruled on the Rule 37 expense requests. Rule
11 37(a) (5) (B) provides that if a motion to compel is denied,

12 [T]he court . . . must, after giving an opportunity to
13 be heard, require the movant, the attorney filing the
14 motion, or both to pay the party or deponent who
15 opposed the motion its reasonable expenses incurred in
16 opposing the motion, including attorney's fees. But
17 the court must not order this payment if the motion
18 was substantially justified or other circumstances
19 make an award of expenses unjust.

20 The court found that Appellants' Motion to Compel was
21 neither substantially justified nor did other circumstances make
22 an award of expenses unjust. The court explained that Goodman
23 failed to meet and confer under Rule 26(f) regarding the
24 discovery. Next, after improperly serving the subpoenas by
25 email, Goodman did not allow the parties time to respond but
26 instead immediately filed his Motion to Compel. Lastly, the
27 court could not discern what information the lawyers could
28 possibly provide through discovery to aid Goodman on the issue
of the court's subject matter jurisdiction.

Accordingly, the court awarded \$2,655 in attorneys' fees to
Carmel, \$3,251.20 in attorneys' fees and \$23.20 in costs to

1 Empire, and \$5,526.50 in attorneys' fees and \$230.40 in costs to
2 Comerica by orders entered on December 11, 2008, December 19,
3 2008 and January 7, 2009, respectively.

4 **D. Appellants' Motions To Alter/Amend Judgment**

5 Appellants filed a Motion to Alter/Amend Judgment on
6 December 19, 2008. They filed a second Omnibus Motion to
7 Alter/Amend Judgment on December 22, 2008 and a third Motion to
8 Alter/Amend Judgment on December 23, 2008. None of the motions
9 explicitly or implicitly requested any affirmative relief from
10 the court.

11 With respect to the December 19, 2008 motion, the
12 bankruptcy court found that it

13 purports to request that the Court alter, modify, or
14 reconsider its November 19, 2008 Memorandum Decision,
15 Goodman v. Cal. Portland Cement Co. (In re GTI Capital
16 Holdings, L.L.C.), 399 B.R. 247 (Bankr. D. Ariz.
17 2008). However, the Motion simply attaches unrelated
18 pleadings and presents no basis, in fact or law, for
19 the Court to act. In essence, the Plaintiffs have
20 presented no request for relief. The Defendants also
21 point out that to the extent the Motion is a motion
22 for reconsideration, it was untimely filed.

23 With respect to the December 22, 2008 motion, the
24 bankruptcy court found that it

25 appears to relate to an order granting an award of
26 attorneys' fees to Empire Southwest LLC, dated
27 December 19, 2008. Once again the documents attached
28 to the Motion seem to have no relation to the award of
attorneys' fees. To the extent that the Plaintiffs are
questioning this Court's November 19, 2008 Memorandum
Decision, the Plaintiffs have set forth no basis for
this Court to alter, amend, or reconsider that
Decision. The Plaintiffs have requested no
affirmative relief from the Court that may be
discerned. The Court agrees with the Defendants'
position that this Motion should be denied.

With respect to the December 23, 2008 motion, the court

1 found:

2 The Plaintiffs appear to question the Court's denial
3 of the Plaintiffs' motion to disqualify, by minute
4 entry order, but have set forth no basis as to why
5 their motion should be granted other than they do not
6 like the Court's decisions. However, as noted in the
7 Court's decision and minute entry order denying the
8 motion to disqualify, a party's displeasure with a
9 court's decision is not a basis to disqualify the
10 judge presiding over the matter. The Plaintiffs also
11 attach the complaints filed in the Arizona state
12 court, but there is no analysis as to how those
13 complaints relate to the issues that the Court was
14 hearing on December 9, 2008. The Plaintiffs
15 have set forth no basis to grant them any type of
16 affirmative relief. The Court agrees with the
17 Defendants' position that this Motion should be
18 denied.

19 The court denied all three motions in its Order Denying
20 Motions to Alter/Amend Judgment entered on February 5, 2009.
21 Appellants timely appealed that order.

22 **II. JURISDICTION**

23 At the time the bankruptcy court granted the expense
24 requests of Carmel, Empire and Comerica under Rule 37(a)(5)(B),
25 Appellants had voluntarily withdrawn the Independent Actions in
26 the state court and the bankruptcy court had dismissed the
27 consolidated adversary proceedings at issue in this appeal. The
28 dismissal, however, did not deprive the court of jurisdiction to
consider the parties' Rule 37 expense requests. Willy v.
Coastal Corp., 503 U.S. 131, 135-39 (1992); Cooter & Gell, 496
U.S. 384 (1990).

We have jurisdiction under 28 U.S.C. § 158.

29 **III. ISSUES**

30 A. Whether the bankruptcy court abused its discretion in
31 denying Appellants' Motions to Alter/Amend Judgment filed on
32 December 19, 22 and 23, 2008.

1 B. Whether the bankruptcy court erred as a matter of law
2 in concluding that it had jurisdiction after dismissal of the
3 Independent Actions to award expenses under Rule 37(a)(5)(B).

4 C. Whether the bankruptcy court abused its discretion in
5 awarding Empire its expenses under Rule 37(a)(5)(B).

6 D. Whether the bankruptcy court abused its discretion in
7 denying Appellants' Motion to Disqualify.

8 IV. STANDARD OF REVIEW

9 We review the bankruptcy court's decision to deny a motion
10 to alter or amend a judgment or for reconsideration under the
11 abuse of discretion standard. Arrow Elecs., Inc. v. Justus (In
12 re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000).

13 The existence of the bankruptcy court's jurisdiction is a
14 question of law subject to de novo review. Reebok Int'l, Ltd. v.
15 Marnatech Enters., 970 F.2d 552, 554 (9th Cir. 1992).

16 A trial judge's decision, which declines a recusal request,
17 is reviewed for an abuse of discretion. Am. Express Travel
18 Related Servs. Co. v. Fraschilla (In re Fraschilla), 235 B.R.
19 449, 453 (9th Cir. BAP 1999).

20 An award for fees and costs pursuant to Rule 37 is also
21 reviewed for an abuse of discretion. Marchand v. Mercy Med.
22 Ctr., 22 F.3d 933, 936 (9th Cir. 1994). "A court abuses its
23 discretion when it bases its decision on an erroneous conclusion
24 of law or when the record contains no evidence on which it could
25 rationally base its decision." United States v. Prairie
26 Pharmacy, Inc., 921 F.2d 211, 212 (9th Cir. 1990).

1
2 **V. DISCUSSION**

3 **A. Jurisdiction and Scope of Appeal**

4 We address first the scope of our jurisdiction in this
5 appeal.¹¹ The order attached to the NOA was the bankruptcy court's
6 Order Denying Motions to Alter/Amend Judgment, but the NOA
7 designates the orders appealed from as Civil Contempt Orders.
8 Even if we were to treat the three orders awarding fees and costs
9 to Carmel, Empire and Comerica under Rule 37 as civil contempt
10 orders, we conclude that the scope of our review in this appeal
11 concerns only Empire's order.

12 Appellants and Carmel settled the expense award and other
13 claims by agreement dated February 18, 2009.

14 Comerica's expense award order is not before us because none
15 of Appellants' Motions to Alter/Amend Judgment filed on December
16 19, 22 and 23, 2008 related to Comerica's order. Nor could they,
17 because Appellants filed their three Motions to Alter/Amend
18 Judgment prior to the entry of Comerica's order on January 7,

19 ¹¹ The caption used in the NOA is different from the
20 caption in the Order Denying Motions to Alter/Amend Judgment.
21 The NOA shows Triad Commercial Captive Co., Stirling Bridge, LLC,
22 and New York-Newport Assurance Co. as appellants. These entities
23 lack standing under the "person aggrieved" test for appellate
24 standing set forth in Fondiller v. Robertson (In re Fondiller),
25 707 F.2d 441, 443 (9th Cir. 1983) (appellate standing requires
26 that a party must demonstrate that it is directly and adversely
27 pecuniarily affected by the order at issue). None of these
28 entities was liable for attorneys' fees and costs to Empire. The
proper party Appellants are named in the caption in the Order
Denying Motions to Alter/Amend Judgment. See Lenders Prot. Group
v. USA Commercial Mortgage Co. (In re USA Commercial Mortgage
Co.), 369 B.R. 587, 595 (D. Nev. 2007) (naming parties in a
document that is "functionally equivalent" to the NOA meets the
Rule 8001(a) requirement that the NOA contain the names of all
parties to the judgment, order, or decree appealed from).

1 2009. Rules 59 and 60 both require a motion "after entry of
2 judgment". Our review of the docket shows that Appellants did not
3 present a written motion to the court under either rule after
4 entry of Comerica's order on January 7, 2009. Comerica's order
5 thus became a final, non-appealable order, and we do not have
6 jurisdiction to review it. Wiersma v. Bank of the West (In re
7 Wiersma), 483 F.3d 933, 937 (9th Cir. 2007) ("[T]he failure to
8 timely file a notice of appeal is a jurisdictional defect barring
9 appellate review.").¹²

10 We also do not consider the court's denial of Appellants'
11 Motion to Disqualify or their related Motion to Alter/Amend
12 Judgment. In the section entitled "Issues Presented" of
13 Appellants' opening brief, Appellants do not mention this order.
14 Nor do Appellants assign error or make any arguments with respect
15 to the court's ruling on the Motion to Disqualify or its denial of
16 their Motion to Alter/Amend that order. Accordingly, we consider
17 this ground for appeal waived. See Kim v. Kang, 154 F.3d 996,
18 1000 (9th Cir. 1998).¹³

21 ¹² The only substantive appellee brief we received was
22 filed by Comerica, later joined by Empire. This issue was not
23 raised by Comerica. Although Comerica's order is not before us,
24 we conclude that Comerica had standing to file its brief and
25 appear because Appellants raised the issue of the court's post-
26 dismissal jurisdiction to make the awards to Carmel, Empire and
27 Comerica. It was this jurisdiction which allowed the court to
28 award Comerica Rule 37 expenses. Hence, reversal on this issue
could void the Comerica award and Comerica is accordingly a party
aggrieved.

¹³ Appellants raised several additional issues in their
Statement of Issues on Appeal which were not addressed in their
opening brief. These issues we also do not consider. See Kim,
154 F.3d at 1000.

1 **B. The Bankruptcy Court Did Not Abuse Its Discretion In**
2 **Granting Empire's Rule 37 Expense Request**

3 Having explained in detail what this appeal does not involve,
4 we now proceed to the narrow issues presented – whether the court
5 had post-dismissal jurisdiction over Empire's Rule 37 expense
6 request and, if so, whether the court abused its discretion in
7 granting the request.

8 At the outset, we observe that Appellants offered no
9 arguments in their opening brief as to why the bankruptcy court
10 abused its discretion in denying their Motion to Alter/Amend
11 Judgment which related to the December 19, 2008 order awarding
12 Rule 37 expenses to Empire. Nor does our review of the record
13 show that Appellants presented any coherent theory to the
14 bankruptcy court which explained why they were substantially
15 justified in bringing their Motion to Compel. Appellants did not
16 address the standards under Rule 37 in the bankruptcy court either
17 in their pleadings or orally since Goodman left the hearing prior
18 to the court's ruling.

19 Instead, Appellants advanced vague and rambling arguments
20 addressing standards under contempt which they raise again in
21 their opening brief. They complain that the bankruptcy court
22 never identified or made findings that Goodman intentionally, or
23 even negligently, breached a court order. However, as the
24 bankruptcy court explained, the Rule 37 expense awards were not
25 based on contempt, making the standards for contempt inapplicable.
26 See Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994) (a
27 finding of bad faith is not required for sanctions under Rule 37).

28 Appellants also challenge the court's removal (or subject

1 matter) jurisdiction over the Independent Actions by delving into
2 how the Settlement between the trustee and Comerica should be
3 interpreted. But issues relating to the Settlement are not before
4 us in this appeal, and the Independent Actions have been
5 dismissed. Therefore, any question regarding the court's subject
6 matter jurisdiction over the merits of the Independent Actions has
7 been rendered moot by Appellants' voluntary withdrawal of the
8 complaints because there is no longer any case or controversy
9 before the court.¹⁴

10 Appellants have contested the bankruptcy court's subject
11 matter jurisdiction over the Independent Actions throughout these
12 proceedings. However, well-developed case law makes clear that a
13 court's authority to award sanctions is not dependent on the
14 court's subject matter jurisdiction. Willy, 503 U.S. at 135-39
15 (award of sanctions is collateral to underlying merits); Orange
16 Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797, 801
17 (9th Cir. 1986) ("[T]he fact the district court lacked
18 jurisdiction to consider the merits of the case [does] not
19 preclude it from imposing sanctions."). Nor does Appellants'
20 voluntary withdrawal of the Independent Actions mean the court
21 lost its power to proceed. Rather, whether the court should
22 impose sanctions for abuse of the judicial process is a collateral

23
24 ¹⁴ Because this appeal deals only with the Rule 37 expense
25 awards, which the court made after Appellants' voluntary
26 dismissal of the Independent Actions, we need not reach the
27 broader question whether the bankruptcy court had subject matter
28 jurisdiction to hear the merits of the adversary proceedings.
The court's ruling regarding its post-dismissal jurisdiction was
also not a final order, but a preliminary ruling that was
necessary before the court made its decision to award expenses
under Rule 37.

1 matter that may be determined after the suit has terminated.

2 Cooter & Gell, 496 U.S. at 395-96.

3 One court explained that "'[j]urisdiction' is an all-purpose
4 word denoting adjudicatory power. A court may have power to do
5 some things but not others, and the use of 'lack of jurisdiction'
6 to describe the things it may not do does not mean that the court
7 is out of business." Szabo Food Serv., Inc. v. Canteen Corp., 823
8 F.2d 1073, 1077 (7th Cir. 1987).

9 Here, Appellants put the court's subject matter jurisdiction
10 at issue in their Motion to Remand. It is well-settled that a
11 trial court has jurisdiction to determine its jurisdiction.
12 United States v. United Mine Workers, 330 U.S. 258, 292 n.57
13 (1947). Further, the court may allow discovery to aid in
14 determining whether it has subject matter jurisdiction. Wells
15 Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24
16 (9th Cir. 1977). It follows then that a court has the power to
17 supervise that discovery and award expenses authorized under
18 Rule 37 for any discovery abuse that occurs.

19 Although Willy, Cooter and Orange arose in the Rule 11
20 context, we conclude their jurisdictional holdings and reasoning
21 extend to the Rule 37 expense awards because the awards were
22 collateral matters which did not involve an adjudication of the
23 underlying merits. Therefore, regardless of whether the court had
24 subject matter jurisdiction over the merits, we hold that the
25 bankruptcy court had jurisdiction to remedy Appellants' violation
26 of the discovery rules after their voluntary withdrawal of the
27 Independent Actions. Thus the court did not abuse its discretion
28 when it amended the dismissal order to retain jurisdiction for the

1 limited purpose of deciding the Rule 37 expense requests.

2 Having established that the bankruptcy court had post-
3 dismissal jurisdiction, we next review under the abuse of
4 discretion standard the merits of the court's award to Empire.
5 Since the court denied Appellants' Motion to Compel, Rule
6 37(a)(5)(B) requires that Appellants pay Empire's expenses
7 incurred in opposing the motion unless the court finds that the
8 motion was substantially justified or other circumstances would
9 make an award of expenses unjust. Appellants had the burden of
10 establishing substantial justification and special circumstances.
11 Hyde & Drath, 24 F.3d at 1171. They failed to meet that burden.

12 Appellants argue that they properly sought to conduct
13 jurisdictional discovery by motion and that the court granted
14 their request in the Scheduling Order which stated:

15 The Court has also considered the request by the Goodman
16 parties to conduct discovery. The Court will allow, at
17 this time, whatever discovery is appropriate and
consistent with the Federal Rules of Civil Procedure and
the Federal Rules of Bankruptcy Procedure.

18 Appellants infer that the court abused its discretion by awarding
19 expenses because they were simply complying with the court's
20 order. However, even if we accept Appellants' belief that
21 jurisdictional discovery was authorized by the Scheduling Order,
22 the manner in which they conducted the discovery was clearly not
23 contemplated by the court's order, nor was their failure to follow
24 the discovery rules excused.

25 The court's authorization for discovery did not bless the
26 requested discovery on the attorneys, and there is nothing in the
27 order that authorized discovery on an expedited basis.

28 Nevertheless, Appellants proceeded on an expedited schedule and

1 did not follow the rules.

2 Appellants never met and conferred with the various parties
3 as required under Rule 26(f) to determine how best to proceed with
4 the discovery on jurisdiction.¹⁵ The record supports the court's
5 findings that Appellants by passed the meet and confer requirement
6 and immediately proceeded to schedule numerous depositions and
7 require the turnover of documents on an expedited schedule. They
8 served subpoenas electronically on the night of August 10, 2008
9 requesting several parties to appear for depositions and bring
10 documents for their review.

11 Before the parties had an opportunity to respond, Appellants
12 filed their Motion to Compel without complying with Bankruptcy
13 Local Rule 9013-1(e)¹⁶ which requires certification that the
14 attorney made sincere efforts to resolve the dispute. In
15 construing a similar local rule, one court emphasized "[t]he
16 purpose of this rule is simple: to lessen the burden on the court
17 and reduce the unnecessary expenditure of resources by litigants,
18 through promotion of informal, extrajudicial resolution of
19 discovery disputes." Nev. Power Co. v. Monsanto Co., 151 F.R.D.

21 ¹⁵ Rule 26(f) requires the parties to confer "as soon as
22 practicable" and consider the "nature and basis of their claims
23 and defenses and the possibilities for promptly settling or
24 resolving the case; . . . ; discuss any issues about discoverable
25 information; and develop a proposed discovery plan." Rule
26 26(f)(1) and (2). Appellants did not fulfill any of these
27 requirements.

26 ¹⁶ District of Arizona Bankr. L. Rule 9013-1(e) states: "No
27 motion concerning discovery disputes will be considered unless a
28 statement of the moving party or its counsel, if represented, is
attached certifying that after personal consultation and sincere
efforts to do so, the parties have been unable to resolve the
matter."

1 118, 120 (D. Nev. 1993).

2 Rule 37(a)(1) also requires that the motion "include a
3 certification that the movant has in good faith conferred or
4 attempted to confer with the person or party failing to make
5 disclosure or discovery in an effort to obtain it without court
6 action." Goodman states in his Motion to Compel that the
7 "plaintiffs endeavored to set consensual depositions on numerous
8 occasions." However, this single statement does not come close to
9 meeting the standards for certification under Rule 37(a)(1).

10 [T]wo components are necessary to constitute a facially
11 valid motion to compel. First is the actual
12 certification document. The certification must
13 accurately and specifically convey to the court who,
14 where, how, and when the respective parties attempted to
15 personally resolve the discovery dispute. Second is the
16 performance, which also has two elements. The moving
party performs, according to the federal rule, by
certifying that he or she has (1) in good faith (2)
conferred or attempted to confer. Each of these two
subcomponents must be manifested by the facts of a
particular case in order for a certification to have
efficacy and for the discovery motion to be considered.

17 Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166,
18 170 (D. Nev. 1996). The Shuffle Master court further explained
19 that, "[A] moving party must include more than a cursory
20 recitation that counsel have been 'unable to resolve the matter.'"
21 Id. at 171. In short, Appellants' Motion to Compel lacked the
22 necessary Rule 37(a)(1) certification under these standards.

23 Finally, we cannot discern from this record how any inquiry
24 of the various lawyers would have resolved the subject matter
25 jurisdictional issue. Discovery of an issue relating to subject
26 matter jurisdiction is appropriate only when additional facts are
27 required to determine whether jurisdiction exists. Oppenheimer
28 Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978). However,

1 discovery is not necessary or appropriate when it is clear that
2 discovery would not uncover facts providing a basis – or lack
3 thereof – for jurisdiction. Wells Fargo & Co., 556 F.2d at 430
4 n.24.

5 Our review of the record did not uncover any argument or
6 evidence that explained what information the lawyers had which was
7 relevant to the issue of subject matter jurisdiction. It is
8 neither our duty to guess at what those arguments may entail nor
9 develop them to justify Appellants' Motion to Compel.

10 In sum, Appellants' pleadings in the bankruptcy court did not
11 even address Rule 37(a) (5) (B)'s substantial justification
12 requirement nor did Goodman address it at the hearing. The record
13 is bereft of any intelligible argument as to why the court ruled
14 incorrectly. Appellants were entitled to contest the court's
15 subject matter jurisdiction after removal, but that right did not
16 include ignoring the discovery rules and proceeding on an
17 expedited schedule that was not approved by the bankruptcy court.
18 Once the court denied their Motion to Compel, Appellants' tactical
19 move of dismissing the Independent Actions did not serve to
20 obviate the consequences of their failures to follow the rules.

21 Accordingly, we hold that based on the record before us, the
22 bankruptcy court's award of fees and costs to Empire under
23 Rule 37(a) (5) (B) was not an abuse of discretion. We also hold
24 that the bankruptcy court did not abuse its discretion by denying
25 Appellants' Motion to Alter/Amend Judgment dated December 22, 2008
26 because the motion failed to show that the court clearly erred in
27 rendering the underlying decision. See First Ave. West Bldg.,
28 L.L.C. v. James (In re Onecast Media, Inc.), 439 F.3d 558, 561

1 (9th Cir. 2006) (stating that a court abuses its discretion by
2 denying a motion for reconsideration if its decision involved
3 clear error).

4 **VI. CONCLUSION**

5 For the reasons stated above, we AFFIRM.
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