

**AUG 22 2006**

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

**NOT FOR PUBLICATION**

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

In re:	)	BAP Nos.	NV-05-1444-PKPa
	)		NV-05-1445-PKPa
FLAMINGO 55, INC.; VEGAS	)		NV-05-1446-PKPa
TOWNHOME PARTNERS, L.P.,	)		
	)	Case No.	03-19478
Debtors.	)		
<hr/>		Ref. Nos.	05-23
	)		05-24
JOHN SABA; GREGORY GRANTHAM,	)		05-25
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
	)		
EMERALD GATE CONSTRUCTION, INC.,	)		
	)		
Appellee.	)		
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Argued and Submitted on  
July 21, 2006 at Las Vegas, Nevada

Filed - August 22, 2006

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: PERRIS,<sup>2</sup> KLEIN and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Elizabeth L. Perris, Chief United States Bankruptcy Judge for the District of Oregon, sitting by designation.

1 John Saba and Gregory Grantham (appellants) appeal from an  
2 order of the bankruptcy court imposing various sanctions for the  
3 filing of certain pleadings and other conduct in this bankruptcy  
4 case. They raise a myriad of arguments why the order should be  
5 reversed. For the reasons explained below, we VACATE the order and  
6 REMAND.

#### 7 FACTS

8 The underlying facts of the bankruptcy case are not  
9 particularly relevant to this appeal. Creditor Emerald Gate  
10 Construction, Inc. (Emerald Gate), the appellee in this appeal,  
11 filed an involuntary chapter 7<sup>3</sup> bankruptcy petition against Flamingo  
12 55, Inc. in 2003. An order for relief was entered. A related  
13 entity, Vegas Townhome Partners, LP, filed a voluntary chapter 11  
14 petition. That bankruptcy case was converted to a chapter 7, and  
15 was substantively consolidated with the Flamingo 55 chapter 7 case.

16 Appellants are California attorneys who, throughout this  
17 bankruptcy case, have asserted various interests in or claims  
18 against debtors.<sup>4</sup> Currently, they assert that they own 100 percent  
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20 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
21 references are to the version of the Bankruptcy Code, 11 U.S.C.  
22 §§ 101-1330, in effect before the 2005 amendments, and to the  
Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

23 <sup>4</sup> It is clear from reading the record that this case has a  
24 long and contentious history, particularly where appellants are  
25 concerned. It is difficult to determine exactly the relationship  
26 between appellants and debtors. It appears, however, that  
appellants have been very active in this bankruptcy case, and that  
it is against this background of their changing positions with  
relation to debtors that the motions for sanctions and order to show  
cause were filed.

1 of the equity interest in both debtors, through their ownership of  
2 an entity called Acorn Development, Inc. Appellants objected to the  
3 proof of claim filed by Emerald Gate, and have apparently appeared  
4 at various proceedings in this case. They filed a \$5,000,000  
5 secured claim against the estate, which the court disallowed.

6 As relevant to this appeal, in December 2004, appellants filed  
7 amended Schedules D, F, and H, purportedly on behalf of Vegas  
8 Townhome. In early March 2005, appellants filed an amended Schedule  
9 A, again purportedly on behalf of Vegas Townhome, in which they  
10 asserted that debtor holds only bare legal title to the real  
11 property of Vegas Townhome and that appellants hold the entire  
12 equitable interest.

13 Emerald Gate filed a motion to strike the amended schedules.  
14 Before the hearing on that motion was held, on April 11, 2005,  
15 appellant Saba, purportedly acting on behalf of both debtors, filed  
16 an amendment to the bankruptcy petitions of both debtors, pursuant  
17 to Rule 1007(a)(3), amending the list of equity security holders to  
18 show Acorn Development, Inc. as the sole equity security holder of  
19 debtors.

20 On April 15, 2005, Saba, purportedly on behalf of both debtors,  
21 filed a motion to dismiss the consolidated case or convert it to  
22 chapter 11.

23 The court held a hearing on the motion to strike the amended  
24 schedules on April 27, 2005. On May 13, 2005, it entered an order  
25 striking the amended schedules, finding that the schedules  
26 "contravene the prior final orders of this Court, including the

1 denial of the claim of Gregory Grantham and John Saba," and that the  
2 amended schedules were filed in bad faith.

3 On May 17, 2005, the court held a hearing on Saba's motion to  
4 convert or dismiss, and denied the motion by order entered May 31,  
5 2005.

6 In the meantime, on May 3, 2005, Emerald Gate's counsel sent  
7 Saba a letter enclosing a draft motion for sanctions for filing the  
8 amendment to the bankruptcy petition (amended list of equity  
9 security holders).<sup>5</sup> On the same date, Emerald Gate's counsel sent  
10 Saba a second letter enclosing a draft motion for sanctions for  
11 filing the motion to dismiss or convert. Both letters cited Rule  
12 9011 and gave Saba 21 days to allow him to correct the action.

13 Saba did not withdraw either the amendment to the bankruptcy  
14 petitions (amended list of equity security holders) or the motion to  
15 dismiss or convert. Emerald Gate filed both motions for sanctions  
16 on June 7, 2005.

17 Saba filed oppositions to both motions for sanctions. Saba and  
18 Grantham appeared telephonically at the hearing on the motions for  
19 sanctions. During the course of the hearing, the court found  
20 Grantham in contempt and fined him \$100 for disrespect for the  
21 court. Transcript of July 27, 2005 hearing at 36. The court found  
22 that there were grounds for sanctions based on both of Emerald  
23 Gate's motions, and continued the hearing to consider what sanctions  
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25 <sup>5</sup> This motion did not relate to the filing of the amended  
26 schedules, which the court had ordered stricken (the hearing was  
held on April 27, 2005, and the order striking was entered on May  
13, 2005).

1 would be appropriate. The court also indicated that it would issue  
2 an order to show cause why Grantham and Saba should not be  
3 sanctioned for their conduct at the hearing. Id. at 49.

4 Shortly thereafter, the court entered the Order to Show Cause  
5 (OSC) pursuant to Rule 9011(c)(1)(B), setting out three grounds for  
6 sanctions against Saba alone, two grounds for sanctions against  
7 Grantham alone, and one ground for sanctions against both Saba and  
8 Grantham.

9 The court held a joint hearing on the OSC and on what sanctions  
10 were appropriate on Emerald Gate's motions. The court concluded  
11 that Saba and Grantham had failed to show cause why they should not  
12 be sanctioned. Transcript of October 25, 2005 hearing beginning at  
13 19. The court then imposed various sanctions jointly and severally  
14 against both appellants. It barred them from appearing as attorneys  
15 in the Nevada bankruptcy court for one year, unless they first  
16 completed a continuing legal education course on basic civil  
17 procedure; if they completed the continuing legal education course,  
18 they could not associate with any local counsel that is affiliated  
19 with them in any business capacity; it indicated it would have the  
20 proceedings transcribed and submitted to the California State Bar;  
21 and it ordered payment of \$15,000 in sanctions, to be paid into the  
22 court's registry. Id. at 22-26. The court entered an order  
23 imposing those sanctions, and appellants timely appealed.

24 ISSUES

25 1. Whether the bankruptcy court abused its discretion in  
26 sanctioning Saba for filing the amendment to the bankruptcy

1 petitions (amended list of equity security holders).

2 2. Whether the bankruptcy court abused its discretion in  
3 sanctioning Saba for filing the motion to dismiss or convert.

4 3. Whether the bankruptcy court erred in sanctioning both Saba and  
5 Grantham for conduct outlined in the court's OSC.

6 STANDARD OF REVIEW

7 We review "all aspects of a decision to impose Rule 9011  
8 sanctions for abuse of discretion." In re Brooks-Hamilton, 329 B.R.  
9 270, 277 (9th Cir. BAP 2005). A court abuses its discretion "if it  
10 base[s] its ruling on an erroneous view of the law or on a clearly  
11 erroneous assessment of the evidence." Cooter & Gell v. Hartmarx  
12 Corp., 496 U.S. 384, 405 (1990).

13 DISCUSSION

14 The bankruptcy court imposed pursuant to Rule 9011. That rule  
15 provides, as relevant:

16 (b) **Representations to the Court.** By presenting to the court  
17 (whether by signing, filing, submitting, or later advocating) a  
18 petition, pleading, written motion, or other paper, an attorney  
19 or unrepresented party is certifying that to the best of the  
person's knowledge, information, and belief, formed after an  
inquiry reasonable under the circumstances,--

20 (1) it is not being presented for any improper purpose, such  
21 as to harass or to cause unnecessary delay or needless increase  
in the cost of litigation;

22 (2) the claims, defenses, and other legal contentions therein  
23 are warranted by existing law or by a nonfrivolous argument for  
the extension, modification, or reversal of existing law or the  
establishment of new law;

24 (3) the allegations and other factual contentions have  
25 evidentiary support or, if specifically so identified, are  
26 likely to have evidentiary support after a reasonable  
opportunity for further investigation or discovery; and

1 (4) the denials of factual contentions are warranted on the  
2 evidence or, if specifically so identified, are reasonably  
based on a lack of information or belief.

3 (c) **Sanctions.** If, after notice and a reasonable opportunity  
4 to respond, the court determines that subdivision (b) has been  
5 violated, the court may, subject to the conditions stated  
6 below, impose an appropriate sanction upon the attorneys, law  
7 firms, or parties that have violated subdivision (b) or are  
responsible for the violation.

8 (1) *How Initiated.*

9 (A) By Motion. A motion for sanctions under this rule  
10 shall be made separately from other motions or requests  
11 and shall describe the specific conduct alleged to violate  
12 subdivision (b). . . . The motion for sanctions may not be  
13 filed with or presented to the court unless, within 21  
14 days after service of the motion . . . , the challenged  
paper, claim, defense, contention, allegation, or denial  
is not withdrawn or appropriately corrected . . . .

15 (B) On Court's Initiative. On its own initiative, the  
16 court may enter an order describing the specific conduct  
17 that appears to violate subdivision (b) and directing an  
18 attorney, law firm, or party to show cause why it has not  
19 violated subdivision (b) with respect thereto.

20 Rule 9011. An attorney's conduct is measured "objectively against a  
21 reasonableness standard, which consists of a competent attorney  
22 admitted to practice before the involved court." Brooks-Hamilton,  
23 329 B.R. at 283 (quoting In re Grantham Bros., 922 F.2d 1438, 1441  
24 (9th Cir. 1991)). Rule 9011 is not, however, "intended to remedy  
25 all manner of attorney misconduct occurring before or during" the  
26 trial or hearing; the conduct must fit within the confines of Rule  
9011 to be sanctionable under that rule. Zaldivar v. City of Los  
Angeles, 780 F.2d 823, 829 (9th Cir. 1986), overruled on other  
grounds by Cooter & Gell v. Hartmarx Corp., 496 U.S. 384  
(1990)) (discussing Fed. R. Civ. P. 11).

1 Any sanction that the court imposes "shall be limited to what  
2 is sufficient to deter repetition of such conduct or comparable  
3 conduct by others similarly situated." Rule 9011(c)(2). Sanctions  
4 may include both monetary and nonmonetary components. Id.

5 1. Sanctions for filing the amendment to the bankruptcy petitions  
6 (amended list of equity security holders)

7 Saba filed an amended list of equity security holders as an  
8 amendment to the bankruptcy petitions, in which he indicated that  
9 Acorn Development, the corporation owned by him and Grantham, owned  
10 100 percent of the equity in both debtors. Emerald Gate sought  
11 sanctions against Saba for filing that document, arguing that Rule  
12 1007(a)(3), pursuant to which the list was filed, applies only in  
13 chapter 11 cases, not in chapter 7 cases such as this one. The  
14 motion for sanctions also asserted that the representations in the  
15 list of equity security holders were not true. The motion asserted  
16 that Saba and Grantham had previously filed amended schedules in the  
17 case in bad faith, and that the list of equity security holders was  
18 filed for the improper purpose of establishing prima facie evidence  
19 of Acorn Development's interest in debtors.

20 Saba argued in opposition that the motion failed to comply with  
21 the local rule requiring every motion to contain a statement of  
22 relief sought and a legal memorandum. He further argued that the  
23 motion lacked any evidentiary support, and that the amended list of  
24 equity security holders was filed in good faith, because Acorn  
25 Development in fact held the equity in debtors.

26



1 The court granted the motion for sanctions. It concluded that  
2 Emerald Gate's motion was procedurally adequate. Because there is a  
3 question about the basis of the court's ruling, we set it out below  
4 in some detail. The court said:

5 Now, with respect to the actual motions itself [sic], let  
6 me first take the motion for the violation by Mr. Saba for  
7 signing the motion seeking to add the additional schedules.

8 Despite the protestations which I cannot understand of Mr.  
9 Grantham and Mr. Saba, there very clearly is an order entered  
10 on the docket of this court that the filing of those schedules  
11 were, one -- and I am reading from line 26, the order entered  
12 on May 13th -- that, quote, "The amended schedules contravene  
13 the prior final orders of this Court including denial of the  
14 claim of Gregory Grantham (sic) excuse me -- Gregory Grantham  
15 and John Saba which constitute res judicata against the parties  
16 thereto. Two, the amended schedules were filed in bad faith."

17 That is as Mr. Saba has admitted an unappealed final order  
18 of this Court and establishes that, in fact, the documents that  
19 were filed that relate to the motion for the schedules violate  
20 the various provisions of Rule 9011.

21 . . . .

22 For those, I am paraphrasing 9011(b), but I believe that  
23 the findings entered on May 13th establish that that motion was  
24 filed in contravention of that.

25 . . . .

26 Thus, I believe that there is a violation of Rule 9011(b) at  
least with respect to the filing of the papers related to the  
amended petition.

Transcript of July 27, 2005 hearing at 39:19 - 41:8 (emphasis  
supplied).

Appellants argue that the court erred, because the information  
contained in the amended list of equity security holders was  
correct, and that the court erroneously sanctioned them for filing  
the amended schedules, which had been stricken, and not for filing

1 the amended list of equity security holders, which was the subject  
2 of the motion for sanctions.

3 We need not decide whether the information contained in the  
4 amended list of equity security holders was correct, because  
5 appellants are correct that the court focused on the wrong documents  
6 in granting the motion for sanctions. The motion related  
7 specifically to the filing of the amendment to the bankruptcy  
8 petitions, which amended the list of equity security holders.<sup>6</sup> And  
9 yet, the court focused on the finding of bad faith that it had made  
10 in connection with its decision to strike the amended schedules.  
11 The amended list of equity security holders on which the motion for  
12 sanctions was based had never been stricken, and there had never  
13 been a finding of bad faith made with regard to that amended list.

14 Emerald Gate argues that the court was not mistaken about which  
15 documents were the subject of the sanction motion, asserting that  
16 the court was simply considering appellants' recent conduct in  
17 considering what the appropriate sanction would be. That argument  
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19 <sup>6</sup> As appellants point out, the motion could not have related  
20 to the filing of the amended schedules, because the court had  
21 ordered those schedules stricken before the 21-day safe harbor  
22 period required by Rule 9011 had expired. The motion for sanctions  
23 was served on May 3, 2005, and the amended schedules were stricken  
24 on May 13, less than 21 days later. Therefore, appellants would not  
25 have had the required 21 days allowed to withdraw those schedules  
26 and avoid sanctions. See Barber v. Miller, 146 F.3d 707, 710 (9th  
Cir. 1998) (purpose of safe harbor is to give offending party  
opportunity to withdraw pleading and so avoid sanctions); Advisory  
Committee Notes to 1993 amendment to Rule 11 (noting that safe  
harbor provision allows party presenting paper to court to withdraw  
it and avoid sanction); 5A Charles Alan Wright & Arthur R. Miller,  
Federal Practice and Procedure § 1337.2 at 722 (2004) (same).

1 disregards the court's explicit findings that it was granting the  
2 motion for sanctions because of the finding in the earlier order  
3 striking the amended schedules that those schedules had been filed  
4 in bad faith.

5       It is apparent from the transcript that the court considered  
6 Saba's bad faith in filing the amended schedules as the basis for  
7 awarding sanctions on this motion. Although the evidence may have  
8 supported a finding of bad faith in filing the amended list of  
9 equity security holders (because amended Schedule A and the amended  
10 list of equity security holders contained similar information),<sup>7</sup> the  
11 court did not articulate any connection, and we cannot imply a  
12 finding of bad faith in filing an amended list of equity security  
13 holders from a finding of bad faith in filing amended schedules.

14       There were other bases alleged for the sanctions motion, such  
15 as that the amended list of equity security holders was not to be  
16 filed in a chapter 7 case, and that appellants had no standing to  
17 act on behalf of debtors in filing the amended list. However, the  
18 court did not make either of those findings. Instead, the court  
19 relied exclusively on the bad faith determination from the earlier  
20 order striking the amended schedules.

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21  
22  
23       <sup>7</sup> The amended Schedule A, filed on March 4, 2005, and  
24 stricken on May 13, 2005, indicated that debtor held only naked  
25 legal title to the real estate, and that Grantham and Saba owned all  
26 equitable interest. The amended list of equity security holders,  
filed on April 11, 2005, indicates that Acorn Development is the 100  
percent owner of all equity interest in debtors pursuant to a 2004  
judgment.

1           Because the bankruptcy court's explanation does not support the  
2 award of sanctions for filing the amendment to the bankruptcy  
3 petitions (amended list of equity security holders), we conclude  
4 that the award of sanctions for filing the amended list of equity  
5 security holders cannot stand. However, because there may be other  
6 bases on which the bankruptcy court could award sanctions on this  
7 motion, on remand the bankruptcy court may, if it deems it  
8 appropriate, grant the motion on a different basis.

9   2.   Motion for sanctions for filing motion to dismiss or convert

10           The court also awarded sanctions for Saba's filing of a motion  
11 to dismiss the case or, in the alternative, to convert the case to  
12 chapter 11. Appellants argue that the court abused its discretion  
13 in awarding sanctions for filing that motion, because (1) it failed  
14 to comply with the safe harbor provisions of Rule 9011; (2) changed  
15 circumstances existed to provide a real prospect for reorganization;  
16 and (3) the motion was not filed for an improper purpose.

17           As with the sanctions for filing the amended list of equity  
18 security holders, the court's ruling is critical. In addressing  
19 this motion, the court said:

20           With respect to the motion to dismiss, again, as stated in  
21 Mr. Stern's argument, the motion to dismiss was in some  
22 respects more egregious than the attempt to amend the schedules  
23 in the sense that it was fairly nothing less than a transparent  
24 attempt to derail the estate's legitimate efforts to sell the  
25 property.

26           With respect to those sales, too, (indiscernible) have  
27 really -- and, again, I will incorporate my findings with  
respect to the motion to dismiss.

          There was no legitimate basis for rebringing that motion  
which had been brought as Mr. Stern indicates twice before or

1 at least directly once before this Court.

2 And, indeed, as at the time and as now, it was a  
3 relatively-transparent attempt to take the property back from  
the estate.

4 That is not to say that there are not legitimate  
5 disagreements between Grantham and Saba and their related  
6 entities on the one hand and the trustee and the estate on the  
other. There are.

7 There are appeals which will ultimately resolve that, but  
8 simply to say that there is a legitimate dispute between the  
parties does not validate or legitimate illegitimate attempts  
to attempt to win that dispute.

9 And as found in my prior orders with respect to striking  
10 the amended schedules and with respect to denying the motion to  
11 dismiss, I found Mr. Saba and Mr. Grantham had crossed the line  
with respect to the legitimacy of their actions. Those were  
again unappealed orders, prior orders, of this Court.

12 Transcript of July 27, 2005 hearing at 41:9 - 42:12 (emphasis  
13 supplied).

14 This ruling indicates that the court relied on the earlier  
15 findings it had made in denying the motion to dismiss or convert to  
16 support the award of sanctions for filing that motion. The motion  
17 to dismiss was denied by order dated May 31, 2005 after a hearing  
18 held on May 17, 2005. The May 31 order did not set out the court's  
19 findings and conclusions, but instead indicated that the court had  
20 "rendered its findings of fact and conclusions of law on the  
21 record." Order Denying Motion to Dismiss Chapter 7 Case at 2.

22 Appellants have not provided us with a transcript of the  
23 hearing on the motion to dismiss or convert, in which the court  
24 explained its reasons for denying that motion. Therefore, there is  
25 no way for this panel to know why the court denied the motion to  
26

1 dismiss, which reasons then form the basis for granting the motion  
2 for sanctions.

3 The appellant has the burden of providing a sufficient record  
4 on appeal pursuant to Rule 8009(b)(9); failure to provide an  
5 adequate record may be grounds for affirming the bankruptcy court's  
6 decision. In re Massoud, 248 B.R. 160, 163 (9th Cir. BAP 2000); In  
7 re Burkhardt, 84 B.R. 658, 660 (9th Cir. BAP 1988). Because the  
8 appellant has the burden to demonstrate the merits of its appeal,  
9 the appellant bears the burden of a deficient record. In re Webb,  
10 212 B.R. 320 (8th Cir. BAP 1997). When the appellant fails to  
11 provide a complete record, we are entitled to presume that the  
12 appellant does not regard the missing portions as helpful to the  
13 appellant's appeal. In re McCarthy, 230 B.R. 414, 417 (9th Cir. BAP  
14 1999).

15 Here, appellants have not provided a copy of the transcript of  
16 the May 17 hearing, at which the court set out its findings and  
17 conclusions in denying the motion to dismiss or convert. The court  
18 expressly relied on those findings and conclusions in sanctioning  
19 appellants for filing the motion to dismiss or convert. Because  
20 those findings and conclusions could support the award of sanctions,  
21 we cannot say that the bankruptcy court abused its discretion in  
22 awarding sanctions for the filing of the motion to dismiss or  
23 convert.

24 3. Sanctions awarded on order to show cause

25 The court also awarded sanctions against both appellants based  
26 on its order to show cause. That order followed on the heels of the

1 July 27, 2005, hearing, and addressed what the court considered to  
2 be sanctionable conduct that occurred at that hearing. The order to  
3 show cause required appellants to show cause why they should not be  
4 sanctioned for the following reasons:

5 [(A)] As to Mr. Saba, being unprepared in that he did not  
6 have, and could not locate, a copy of the motion being argued;

7 [(B)] As to Mr. Saba, that he continued to argue the good  
8 faith of his prior actions in the face of an unappealed court  
9 order to the contrary, and his interposition of an "exhaustion"  
10 defense;

11 [(C)] As to Mr. Saba, his request to file paper pleading in  
12 light of the court's prior order specifically barring him (and  
13 Mr. Grantham) from such paper filings, and his omission, from  
14 that paper filing, of any reference to the court's prior order;

15 [(D)] As to Mr. Grantham, his failure to adhere to the  
16 court's admonition to confine his remarks to the effect of the  
17 motion on his personal interests, and his making of  
18 inflammatory statements, including, without limitation, his  
19 references to the court's imposition of slavery and the 13th  
20 Amendment;

21 [(E)] As to Mr. Grantham, his "later advocating" (as that  
22 term is used in Rule 9011(b)) of each of Mr. Saba's positions  
23 above;

24 [(F)] As to Mr. Saba and Mr. Grantham, their non-compliance  
25 with this court's rules regarding *pro hac vice* practice, and  
26 the attempt to have Mr. Grantham speak for Mr. Saba during the  
hearing.

Order to Show Cause at 1-2.

A. Saba's lack of preparation for the hearing on the motion  
for sanctions

At the July 27 hearing on the motion for sanctions, at which  
appellants appeared telephonically, the bankruptcy court directed  
Saba to look at the May 3 letter threatening sanctions. Saba  
apparently did not have access to a copy of the motion for

1 sanctions. The following colloquy occurred:

2 THE COURT: Do you have a copy of motion for sanctions  
in front of you, sir?

3 MR. SABA: No, sir. I don't have it here.

4 THE COURT: Why do you not have it in front of you?  
5 Did you not request to appear telephonically today?

6 MR. SABA: I did request to appear telephonically.

7 THE COURT: And you don't have the documents necessary  
8 for you to make any arguments or answer any of the questions of  
the Court before you?

9 MR. SABA: Well, frankly, your Honor, we thought it  
10 was tomorrow for some reason. We thought it was the hearing  
was going to be tomorrow.

11 THE COURT: Well, your letter did request something for  
12 Thursday the 27th, so you were --

13 MR. SABA: I --

14 THE COURT: -- ambiguous.

15 MR. SABA: I know, your Honor. Again, we're very  
16 busy, and I was out of the office this morning. I came in, and  
Greg was alone in the office, and he --

17 THE COURT: Is --

18 MR. SABA: -- thought --

19 THE COURT: Is --

20 MR. SABA: -- it was going --

21 THE COURT: Is --

22 MR. SABA: -- to be tomorrow.

23 THE COURT: Is anyone --

24 MR. SABA: And I thought it was for --

25 THE COURT: Is anyone able to get the motion and bring  
it to you right now within the next minute or so?

26 MR. SABA: Greg is looking for it, your Honor.



1 THE COURT: Please keep looking.  
2 Transcript of July 27, 2005 hearing at 25:20 - 26:25. Counsel then  
3 said he was trying to access PACER, because he could not find the  
4 motion. The hearing continued with a discussion of the authority  
5 set out in the letter threatening sanctions.

6 In response to the order to show cause, Saba reiterated that he  
7 had been out of the office until shortly before the hearing was to  
8 begin, and mistakenly thought the hearing was the next day. He said  
9 that the file in the case "consists of approximately eight banker's  
10 boxes and it was difficult for Mr. Saba to conduct a proper search  
11 and at the same time make his appearance before this court."  
12 Response to OSC Re Sanctions at 2.

13 The court found that response insufficient, and chastised Saba  
14 for not informing the court that he was unprepared until the court  
15 asked about it. Transcript of October 25, 2005 hearing at 19:18 -  
16 20:3.

17 On appeal, appellants now argue that Saba's lack of preparation  
18 is not sanctionable conduct under Rule 9011, because "Rule 9011(b)  
19 relates to the legal and factual support for pleadings and papers  
20 signed by an attorney or unrepresented party." Appellants' Brief at  
21 27. Emerald Gate attempts to fit Saba's lack of preparation into  
22 Rule 9011 by arguing that Saba requested in writing to appear at the  
23 hearing by telephone when he never intended to personally  
24 participate in the hearing.

25 We agree with appellants that lack of preparation is not a  
26 violation of Rule 9011(b). That rule relates to the presentation of

1 pleadings, motions, or other papers to the court, which presentation  
2 constitutes a certification that, to the best of the person's  
3 knowledge, the factual and legal assertions have support and the  
4 document is not being presented for an improper purpose. There is  
5 no evidence (nor was there any argument to the bankruptcy court)  
6 that Saba's request to appear telephonically was unsupported by  
7 facts or presented for an improper purpose. His lack of preparation  
8 was not an argument related to any paper he had filed. It may have  
9 been sanctionable under some theory other than Rule 9011,<sup>8</sup> but it  
10 did not violate Rule 9011, which prohibits presenting papers or  
11 documents to the court that lack evidentiary or legal support or are  
12 for an improper purpose. Thus, we conclude that the bankruptcy  
13 court abused its discretion in sanctioning Saba under Rule 9011 for  
14 lack of preparation.

15 B. Saba's continued argument that the amendment to bankruptcy  
16 schedules had been filed in good faith, in light of the unappealed  
17 court order to the contrary, and his interposition of an  
18 "exhaustion" defense for failure to appeal the bad faith order

19 At the July 27 hearing on Emerald Gate's motions for sanctions,  
20 Saba argued that the amended schedules, which had been stricken, had  
21 been filed in good faith, and that he had failed to appeal the order  
22 finding bad faith in the filing of the amended schedules because he

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23  
24 <sup>8</sup> The sanction cannot be affirmed as an award pursuant to  
25 the court's inherent authority, because such a sanction requires a  
26 finding of bad faith, which the court did not make here. See In re  
Fjeldsted, 293 B.R. 12, 26 (9th Cir. BAP 2003) (court has inherent  
authority to sanction bad faith, but must make explicit finding of  
bad faith).

1 was exhausted. Transcript of July 27, 2005 hearing at 22:7 - 24:5.

2 Saba's response to the OSC argued that an order striking an  
3 amended schedule is not a final, appealable order, so appellants had  
4 until the end of the bankruptcy case to appeal it. Thus, he argued,  
5 he was free to continue to argue that the amended schedules had been  
6 filed in good faith, despite the court's ruling to the contrary.  
7 Saba further reargued the bad faith determination, asserting that  
8 the amendment to the schedules was correct because the schedules  
9 should reflect the debtor's assets and liabilities as of the date of  
10 the petition. Response to OSC Re Sanctions at 2-4.

11 The court rejected this explanation, noting that an order is  
12 binding until it is changed or reversed. Transcript of October 25,  
13 2005 hearing at 20:4-13.

14 Now, on appeal, Saba contends that the argument that the  
15 amended schedules were filed in good faith, despite the court's  
16 order to the contrary, was justified, because the bankruptcy court  
17 was mistakenly focused on the filing of the amended schedules rather  
18 than the amended list of equity security holders. Although Saba is  
19 correct that he could argue that the amended list of equity security  
20 holders was filed in good faith, the conduct for which he was  
21 sanctioned under the order to show cause was arguing that the  
22 amended schedules were filed in good faith. The court's mistaken  
23 belief that the underlying motion for sanctions related to the  
24 filing of the amended schedules does not justify Saba's argument of  
25 good faith in the filing of the amended schedules in the face of a  
26 court finding to the contrary. The court did not abuse its

1 discretion in ordering sanctions for Saba's continued advocacy of  
2 good faith in filing the amended schedules.<sup>9</sup>

3 C. Saba's request to file a paper pleading and failure to  
4 disclose in that request the court order barring him from paper  
5 filings

6 On May 6, 2005, the court entered an Order Denying Application  
7 for Order Shortening Time, in which the court said:

8 The court permitted [documents related to a motion] to be filed  
9 in paper format, but hereby warns Mr. Grantham and Mr. Saba  
10 that the court will no longer sign orders permitting them to  
11 file their documents in paper form. They state that they took  
12 the necessary training in February, and three months is  
13 sufficient time to do the necessary follow-up work.  
14 Alternatively, since Acorn Development, Inc. has local counsel,  
15 that local counsel may be used to electronically file  
16 documents. In any event, the papers filed on May 5, 2005 will  
17 be the last paper filings permitted to Mr. Saba and Mr.  
18 Grantham.

19 Order Denying Application for Order Shortening Time at 1 n.1.

20 Despite that order, on June 30, 2005, Saba filed a Motion for  
21 Permission to File in Paper Format, requesting that he be able to  
22 file the oppositions to the two motions for sanctions in paper form.  
23 The motion indicated that there had been approximately eight prior  
24 requests for paper filing, all of which had been granted. It was  
25 silent with regard to the court's admonition that it would no longer  
26 allow paper filings.

27 Saba's response to the order to show cause was simply that the  
28 court was well aware of its prior order requiring him to file

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29 <sup>9</sup> Appellants do not argue that Rule 9011 does not authorize  
30 an award of sanctions for oral advocacy. Nor do they make any  
31 argument about the "exhaustion defense."

1 electronically only, that the request to file paper pleadings was  
2 not done to mislead or deceive, and that the motion adequately  
3 explained that this would likely be the last time he would be filing  
4 any pleadings with the court, so he should not have to go through  
5 the effort of obtaining an ID and password for the electronic filing  
6 system. Response to OSC Re Sanctions at 4-5.

7 The court found that response to be "insufficient and  
8 unconvincing." Transcript of October 25, 2005 hearing at 21:19-20.

9 On appeal, Saba argues for the first time that filing a  
10 document in paper form rather than electronically does not violate  
11 Rule 9011. That argument does not show that the court erred in  
12 sanctioning him. Saba was not sanctioned for filing documents in a  
13 paper format; he was sanctioned for making a written request to file  
14 in a paper format, without disclosing that he had previously been  
15 barred from doing so. Rule 9011 provides that the presentation to  
16 the court of a written motion constitutes a certification that the  
17 information contained in the motion has evidentiary support. Rule  
18 9011(b). Saba's motion for permission to file in a paper format was  
19 misleading in that it failed to inform the court that he had been  
20 barred from making just such a request. The court did not abuse its  
21 discretion in sanctioning Saba for filing the motion, which lacked  
22 factual support.

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1           D. and F. (1) Grantham's failure to limit his argument to  
2 matters affecting his personal interests, in light of the fact that  
3 he was not admitted to practice in the bankruptcy court, and both  
4 Saba and Grantham's failure to comply with court's pro hac vice  
5 rules; (2) Grantham's making of certain inflammatory statements

6           (1) The conduct set out in the fourth and sixth bullet points  
7 of the order to show cause largely address the same issue -  
8 Grantham's attempt to argue on behalf of Saba despite not being  
9 admitted to practice before the Nevada bankruptcy court, and Saba's  
10 acquiescence in having Grantham argue on his behalf.

11           At the outset of the July 27 hearing on the motions for  
12 sanctions, Grantham stated that he was appearing on behalf of the  
13 Law Office of John Saba. Transcript of July 27, 2005 hearing at  
14 4:20-24. After some preliminary matters, the court questioned  
15 whether Grantham should be speaking on behalf of Saba, against whom  
16 the motions for sanctions had been filed, because Grantham was not  
17 admitted to practice before the Nevada court. This colloquy  
18 followed:

19           MR. GRANTHAM: Well, I'm associated in with the Law Office  
20 of John Saba. We're both attorneys. We're partners.  
21 Basically, on the bankruptcy side of it, Mr. Saba has more  
experience in that field.

22           And, generally, when we practice, we do it under his name  
23 in the bankruptcy. And in state courts where I have more  
experience, it generally goes under my name.

24           THE COURT: I understand that. But while I would let  
25 Mr. Saba speak in his own defense because I always let people  
26 who are representing themselves appear in their own, I do not  
believe that you have been admitted to the bar of this court,  
have you?

1 MR. GRANTHAM: No. I don't think that I have filed an  
2 application. I may do so soon, though.

3 THE COURT: But you haven't done it, yet, correct?

4 MR. GRANTHAM: That's correct.

5 THE COURT: So, I mean, it is not like you are a  
6 stranger to this courtroom nor is this case a stranger to  
7 people being admitted pro hac vice; thus, I will not let you  
8 speak for Mr. Saba today.

9 If he is there, he may speak for himself, but you are not  
10 authorized or admitted to this court to represent clients, and  
11 so I will not allow you to appear on behalf of Mr. Saba at this  
12 point. If he is there, he may talk.

13 Id. at 6:20 - 7:18. Saba then spoke for himself.

14 Grantham later asked if he could speak "just as a party in the  
15 case." Id. at 8:12-13. The court responded that, if Grantham  
16 wanted to add something after Saba had argued the motion, the court  
17 would allow Grantham to speak with regard to his individual  
18 interest. Id. at 9:4-8.

19 Later in the hearing, the court allowed Grantham to address the  
20 court. His argument addressed the merits of the sanctions motions.  
21 Id. at 29:21 et seq.

22 After a lengthy argument, the court fined Grantham \$100 for  
23 contempt of court for acting in a disrespectful manner to the court.  
24 Id. at 36:6-12. The court again asked how the arguments Grantham  
25 had made affected Grantham personally. Grantham responded that Saba  
26 was his partner, so anything Saba pays, Grantham pays. Id. at  
36:20-21. The court responded:

Fair enough. Although it's unclear to me exactly how that  
affects your interest as a creditor in this particular case, I  
understand how that may affect your interest with respect to

1           your ongoing relations with Mr. Saba.

2 Id. at 37:8-12.

3           The court's show cause order listed as bases for sanctions  
4 Grantham's continued attempt to represent Saba when Grantham was not  
5 admitted to practice before the court, and both Saba and Grantham's  
6 failure to comply with the court's pro hac vice rules.

7           In response to the OSC, Grantham indicated that he had believed  
8 that, by stating his personal pecuniary interest in the sanctions  
9 award, he was allowed to speak to the merits of the sanctions  
10 motions. Response to OSC Re Sanctions at 5. Both Saba and Grantham  
11 also argued that they were not aware of any pro hac vice violations,  
12 and that Grantham had only wanted to address the court because the  
13 sanctions motions affected his own pecuniary interest. Id. at 7.

14           The parties do not cite in their briefs any local rule  
15 regarding pro hac vice admission. Nor did the court cite to any  
16 such rule in its OSC. It appears that a local district court rule,  
17 L.R. IA 10-2, applies to bankruptcy cases.

18           Rule IA 10-2(a) provides:

19           An attorney who is not a member of the bar of this court, who  
20 has been retained or appointed to appear in a particular case  
21 may do so only with permission of the court. Application for  
22 such permission shall be by verified petition on the form  
furnished by the clerk. The attorney may submit the verified  
petition if the following conditions are met:

23 The rule then sets out a number of conditions, which are not  
24 relevant here. This rule appears to apply in bankruptcy cases, as  
25 it addresses the time for performing any act under the Rules of  
26 Bankruptcy Procedure, L.R. IA 10-2(d), and provides that, "[i]n



1 bankruptcy cases, attorneys shall have ten (10) days after their  
2 first appearance to comply with all of the provisions of this rule.”

3 L.R. IA 10-2(g).

4       There can be little doubt that Grantham sought to represent  
5 Saba at the hearing on the sanctions motion; he stated at the outset  
6 of the hearing that he was representing the Law Office of John Saba.  
7 Transcript of July 27, 2005 hearing at 4:22-23. He also admitted to  
8 the court that he had never sought to be admitted pro hac vice to  
9 appear in Nevada bankruptcy court. Id. at 27:5-10. Thus, it is  
10 clear that Grantham violated the attorney admission rules of the  
11 bankruptcy court.

12       It is not clear, however, how a violation of the local pro hac  
13 vice rule translates into a violation of Rule 9011(b), which governs  
14 the presentation of papers to the court (by filing, submitting, or  
15 later advocating) as a certification that they are not frivolous and  
16 are not presented for an improper purpose. Although we agree with  
17 the bankruptcy court that appellants' explanation provided in the  
18 response to the order to show cause did not adequately explain the  
19 attempt to appear as counsel without being admitted to practice  
20 before the court, that does not explain how doing so constitutes a  
21 violation of Rule 9011.

22       It also is not clear, and we do not see, how Saba violated the  
23 pro hac vice rule. He apparently was admitted to practice pro hac  
24 vice for this bankruptcy case. If the violation was his willingness  
25 to allow Grantham to speak for him, we again do not see how that  
26

1 relates to any written document presented to the court that could  
2 form the basis for a sanction under Rule 9011.

3 Therefore, the bankruptcy court abused its discretion in  
4 awarding sanctions under Rule 9011 for Saba and Grantham's  
5 violations of pro hac vice requirements, if any.

6 (2) At the July 27 hearing, after explaining the court's  
7 ruling on the motions for sanctions against Saba, the court began  
8 considering possible sanctions. Because appellants had not been  
9 given a list of possible sanctions to which they could respond  
10 before the hearing, the court decided to continue the hearing for  
11 the purpose of determining appropriate sanctions. It set a briefing  
12 schedule for Emerald Gate to file evidence about what the  
13 appropriate sanction would be, and gave Saba time to respond. The  
14 court then set out a number of types of sanctions it would consider,  
15 including barring Saba from appearing in that court, sending a  
16 transcript of the hearing to the California State Bar, or any other  
17 type of nonmonetary sanctions that Emerald Gate might request, along  
18 with monetary sanctions. In response to the litany of possible  
19 sanctions, Grantham said, "Perhaps, servitude, too, slavery, maybe  
20 taking away children, homes. Who knows where it ends, huh?"  
21 Transcript of July 27, 2005 hearing at 48:7-9.

22 The court listed these "inflammatory statements" as one of the  
23 bases for the order to show cause.

24 In responding to the order to show cause, Grantham first argued  
25 that he had already been sanctioned for his comments and had paid  
26 the \$100 fine the court had ordered. He further described his

1 comments about possible sanctions as "hyperbole, intentionally  
2 exaggerated and designed to make a substantive point, to wit: that  
3 the list of potential sanctions . . . appeared extreme in relation  
4 to the conduct involved[.]" Response to OSC Re Sanctions at 5-6.

5 At the show cause hearing, the court correctly pointed out  
6 that, in fact, Grantham had not previously been fined for his  
7 intemperate comments about slavery, but in fact had been fined  
8 earlier in the hearing for different conduct. Transcript of October  
9 25, 2005 hearing at 21:1-8.

10 On appeal, Grantham argues that these sarcastic remarks do not  
11 violate Rule 9011. We agree. Grantham's comment was disrespectful  
12 and may have constituted contempt of court. However, Rule 9011 is  
13 designed to address the adequacy of and purpose for filing documents  
14 with the court. It is not designed to address every instance of  
15 attorney misconduct. Trulis v. Barton, 107 F.3d 685, 695 (9th Cir.  
16 1995). When Grantham made the impertinent statement, he was not  
17 advocating a position he had taken in earlier papers filed with the  
18 court; he was responding to the court's list of possible sanctions  
19 it would consider. Impertinent statements, by themselves, do not  
20 violate the certification of Rule 9011(b) that a paper presented to  
21 the court will have legal and factual support and will not be  
22 presented for an improper purpose. Therefore, the bankruptcy court  
23 abused its discretion in imposing a sanction under Rule 9011 on  
24 Grantham for his impertinent comment.

1 E. Grantham's "later advocating" each of the positions set  
2 out by Saba in his written pleadings

3 Finally, the court imposed sanctions on Grantham for orally  
4 advocating the positions Saba had set out in his written pleadings.  
5 Because we have concluded that the court abused its discretion in  
6 sanctioning Saba for filing the amended list of equity security  
7 holders (because it based the sanction on the filing of a different  
8 pleading), the court should not have sanctioned Grantham for  
9 advocating the same position. Therefore, the court erred in  
10 imposing a sanction pursuant to Rule 9011 for advocating the good  
11 faith of the amended list of equity security holders.

12 We have also concluded that the court did not abuse its  
13 discretion in sanctioning Saba for filing the motion to dismiss.  
14 Therefore, Grantham's advocacy of that motion could similarly  
15 violate the certification provision of Rule 9011(b), which applies  
16 to the presentation to the court of a pleading, written motion, or  
17 other paper, "whether by signing, filing, submitting, or later  
18 advocating" the document. Rule 9011(b).<sup>10</sup>

19 Nonetheless, we conclude that the court abused its discretion  
20 in sanctioning Grantham for his advocacy of the motion for sanctions  
21 on the motion to dismiss or convert, which was filed by Saba. Most  
22 of Grantham's argument at the hearing on the motions for sanctions  
23 related to the good faith of the filing of the amended list of  
24 equity security holders. The only argument made by Grantham that

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26 <sup>10</sup> As we said above, appellants have not challenged whether orally advocating a position can be sanctionable under Rule 9011.

1 arguably related to the motion to dismiss or convert was a general  
2 argument, which had been raised in Saba's responses to the motion  
3 for sanctions, that Emerald Gate had failed to request any  
4 particular sanction in its motion. Transcript of July 27, 2005  
5 hearing at 30:4 - 31:2; 48:12 - 49:3. But the court agreed with  
6 that argument, and continued the hearing until a later date so that  
7 Emerald Gate could file a request for particular sanctions and Saba  
8 and Grantham could respond. Thus, advocating that position was not  
9 advocating a position that was frivolous or asserted for an improper  
10 purpose, and did not violate Rule 9011(b).

11 4. Sanctions

12 Appellants argue that, if we conclude that the court erred in  
13 imposing sanctions for some of the conduct set out in the motions  
14 for sanctions and the OSC, we must reverse the entire sanctions  
15 order, because the court did not tailor the sanctions to each  
16 particular violation.

17 The bankruptcy court did not award sanctions separately for the  
18 two motions to dismiss and the OSC, let alone for the particular  
19 instances of conduct that it had listed in the OSC. We have  
20 concluded that the court's reasons for imposing sanctions on the  
21 motion relating to the filing of the amended list of equity security  
22 holders does not support the award, and that some of the sanctioned  
23 conduct set out in the OSC is not sanctionable under Rule 9011.  
24 Although there is no requirement that the court separately impose  
25 sanctions for each violation, the combined award precludes us from  
26 knowing what sanctions the bankruptcy court would have imposed based

1 on the conduct that is sanctionable. Therefore, we will vacate the  
2 sanctions order and remand for the court to consider whether there  
3 is a different reason that supports an award of sanctions on the  
4 motion for sanctions for filing the amended list of equity security  
5 holders, and to award sanctions for the violations of Rule 9011(b)  
6 that we have upheld.

7 CONCLUSION

8 The bankruptcy court's reasoning does not support its sanction  
9 against Saba for filing the amendment to bankruptcy petitions  
10 (amended list of equity security holders). Rule 9011 does not  
11 authorize sanctioning appellants for being unprepared for the  
12 hearing, for violations of the court's pro hac vice rules, and for  
13 Grantham's arguments relating to the motion to dismiss or convert.  
14 We VACATE the sanctions order and REMAND for the bankruptcy court to  
15 consider whether the motion for sanctions for filing the amendment  
16 to bankruptcy petitions (amended list of equity security holders)  
17 should be granted for different reasons, and to reconsider what, if  
18 any, sanctions are appropriate for that violation (if the court  
19 grants the motion) and for those violations of Rule 9011 that we  
20 have upheld.

21  
22  
23 KLEIN, Bankruptcy Judge, CONCURRING:

24  
25 I join the memorandum decision and write separately to note my  
26 understanding that, on remand, the bankruptcy court will be free to

1 conduct further proceedings and to award sanctions on any  
2 appropriate theory and by any appropriate measure, which may be  
3 higher or lower in amount than, or different in nature from, what it  
4 earlier awarded.

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