

MAR 07 2014

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	NV-13-1205-KiTaJu
)		
WILLIAM WALTER PLISE,)	Bk. No.	2:12-bk-14724-LBR
)		
Debtor.)		
_____)		
MITCHELL D. STIPP,)		
)		
Appellant,)		
)		
v.)		
)		
CML-NV ONE, LLC; SHELLEY D.)		
KROHN, Chapter 7 Trustee,)		
)		
Appellees.)		
_____)		

O P I N I O N

Argued and Submitted on January 24, 2014,
at Las Vegas, Nevada

Filed - March 7, 2014

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

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: _____
Nathan Andrew Schultz, Esq. of Greenberg Traurig,
LLP argued for appellant, Mitchell D. Stipp;
Matthew Kneeland, Esq. of Sylvester & Polednak,
Ltd. argued for appellee, CML-NV One, LLC.

Before: KIRSCHER, TAYLOR and JURY, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

2

3 Appellant Mitchell D. Stipp ("Stipp") appeals an order
4 sanctioning him \$10,000 for his noncompliance with the subpoenas
5 of appellee CML-NV One, LLC ("CML"), a creditor of chapter 7¹
6 debtor William Walter Plise ("Debtor").² Because the bankruptcy
7 court applied an incorrect standard of law to a nonparty –
8 applying Civil Rule 37 when it should have applied Civil Rule 45 –
9 we REVERSE.

10 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

11 **A. Events leading to Stipp's motion for protective order and**
12 **CML's countermotion to compel**

13 Debtor owned and operated several commercial real estate
14 development companies in Nevada. He filed an individual chapter 7
15 bankruptcy case on April 23, 2012. CML is the successor-in-
16 interest to Silver State Bank.

17 Stipp served as Debtor's special litigation counsel and as
18 general counsel for Aquila Management, LLC, one of Debtor's
19 companies, which served as the manager of most (if not all) of the
20 entities previously owned by Debtor. Stipp also, either

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22

23 ¹ Unless specified otherwise, all chapter, code and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

25

26 ² The order on appeal actually did three things. It denied
27 Stipp's motion for protective order, granted CML's countermotion
to compel, and sanctioned Stipp \$10,000 for his noncompliance with
CML's subpoenas. Pursuant to an order entered on September 19,
28 2013, the only issue before this Panel is whether the bankruptcy
court abused its discretion in sanctioning Stipp for noncompliance
with the subpoenas.

1 individually or through MSJM Advisors, LLC ("MSJM"), a company in
2 which Stipp held an interest, provided services to and/or managed,
3 owned or controlled various entities also controlled by Debtor
4 and/or his affiliate entities. Stipp also is the former COO and
5 general counsel for other entities once owned and operated by
6 Debtor.

7 On September 12, 2012, CML moved for a Rule 2004 examination
8 of Stipp individually and as the person most knowledgeable of
9 MSJM. At that time, CML was represented by the law firm Lionel
10 Sawyer & Collins ("LS&C"). The Clerk issued orders granting both
11 motions.

12 Pursuant to Civil Rule 45,³ CML served Stipp and MSJM with
13 subpoenas to appear at Rule 2004 examinations and to produce
14 documents. Stipp retained Quarles & Brady LLP ("Quarles & Brady")
15 to represent him.

16 In compliance with Civil Rule 45(c)(2)(B), Quarles & Brady
17 prepared written objections to the subpoenas on behalf of Stipp
18 and MSJM ("Written Objections") and timely served them on LS&C on
19 October 5, 2012.

20 CML agreed to continue the Rule 2004 examinations
21 indefinitely to resolve Stipp's Written Objections. LS&C then
22 filed two notices continuing the Rule 2004 examinations to a date
23 and time to be subsequently noticed.

24 On November 19, 2012, LS&C informed Quarles & Brady that it
25 was withdrawing from representing CML due to a conflict. LS&C
26 told Quarles & Brady to "stand down" and wait for further

27
28 ³ All references to Civil Rule 45 are to the version prior to
the amendments in December 2013.

1 instruction from substitute counsel. At that time, the parties
2 had not yet engaged in any substantive discussions to resolve the
3 Written Objections. Thereafter, CML retained Snell & Wilmer as
4 substitute counsel. Snell & Wilmer never contacted Quarles &
5 Brady regarding the Stipp matter.

6 On December 12, 2012, attorney Matthew Kneeland ("Kneeland")
7 of the law firm Sylvester & Polednak, Ltd. contacted Quarles &
8 Brady to inquire about the status of Stipp's document production
9 for CML. Specifically, Kneeland sought to obtain the documents he
10 understood Quarles & Brady had already prepared for production.

11 Quarles & Brady promptly responded that it was confused by
12 Kneeland's email because Snell & Wilmer had appeared as new
13 counsel for CML. In response, Kneeland filed a notice of
14 appearance on behalf of CML and expressed his concern to Quarles &
15 Brady that Stipp had not yet produced any documents, despite the
16 issuance of the subpoena duces tecum in September.

17 On December 14, 2012, Quarles & Brady informed Kneeland that
18 it was forced to withdraw as counsel for Stipp due to a conflict.

19 Immediately thereafter Stipp, now pro se, began corresponding
20 with Kneeland to discuss the document production matter. Stipp
21 noted his Written Objections to the subpoenas and explained that
22 no substantive discussions ever took place between Quarles & Brady
23 and LS&C to resolve them. Stipp also explained the complications
24 involved in complying with CML's document request due to his
25 former role as Debtor's attorney. Stipp's young son also had been
26 recently diagnosed with a significant medical condition, which was
27 consuming a great deal of his time. However, Stipp expressed to
28 Kneeland his intention of complying with the subpoenas and stated

1 that he was confident the parties could amicably resolve the
2 matter without resorting to costly litigation.

3 Ultimately, Stipp requested an extension until January 14,
4 2013, to retain new counsel for purposes of completing the
5 production process started by Quarles & Brady. Kneeland
6 eventually agreed to the January 14 extension for Stipp to hire
7 new counsel, but told Stipp that CML would file a motion to compel
8 and/or for a contempt order if he failed to produce all documents
9 responsive to the subpoenas by that date. In a January 7, 2013
10 email to Kneeland, Stipp asked that CML refrain from taking any
11 action on the subpoenas and suggested that the parties meet within
12 two weeks after January 14, 2013, assuming he had obtained new
13 counsel by then. Kneeland did not respond to Stipp's January 7
14 email.

15 As promised, Stipp hired new counsel and sent an email to
16 Kneeland on January 14, 2013, informing him that he was now
17 represented by Bogatz & Associates. Stipp again expressed his
18 desire to comply with the subpoenas in a timely manner. Later
19 that same day, attorney Scott Bogatz ("Bogatz") sent an email to
20 Kneeland requesting that all Stipp communications be directed to
21 his firm. Kneeland replied that no documents had been produced by
22 the January 14 deadline. He further contended that none of
23 Stipp's Written Objections would hold up in court. Kneeland
24 demanded production of all documents responsive to the subpoenas
25 as a "precondition" for CML not filing a motion to compel. Bogatz
26 responded, explaining that his firm was reviewing the history of
27 the discovery issues and noting that they appeared more complex
28 than Kneeland had implied. Counsel for the parties engaged in

1 several phone conferences in late January 2013.

2 On February 1, 2013, Kneeland's co-counsel, attorney Jeff
3 Sylvester ("Sylvester"), sent Bogatz an email stating that he
4 understood Stipp's intention, with some exceptions, to stand by
5 his Written Objections. The "exceptions" related to documents
6 that had been withheld under a claim of attorney-client privilege.
7 Sylvester asked that the privileged documents be identified so he
8 could obtain a waiver from the chapter 7 trustee to facilitate
9 their production. Sylvester also notified Bogatz that his firm
10 intended to file a motion to compel within the week.

11 On February 4, 2013, Bogatz replied to Sylvester's February 1
12 email, listing the documents responsive to the subpoena, that,
13 subject to a resolution of attorney-client privilege and
14 confidentiality issues, Stipp was willing to produce. Bogatz
15 further informed Sylvester that because the parties could not
16 reach an agreement on this process, Stipp was currently filing a
17 motion for protective order.

18 **B. The competing motions**

19 **1. Stipp's motion for protective order**

20 In response to CML's threatened motion to compel, Stipp filed
21 a motion for protective order ("MPO") on February 4, 2013, seeking
22 to limit CML's scope of discovery and otherwise protect what he
23 asserted was confidential and privileged information. Stipp
24 argued that the subpoenas requested information that was largely
25 unrelated to the administration of Debtor's bankruptcy case,
26 intruded into Stipp's personal and confidential affairs and
27 amounted to nothing more than an abuse of process designed to
28 burden, annoy and harass him. Stipp projected that complying with

1 the subpoenas to produce would take months and cost thousands, if
2 not hundreds of thousands, of additional dollars. Stipp claimed
3 that, to date, he already had incurred more than \$100,000 in
4 attorney's fees and costs regarding the subpoenas.

5 **2. CML's countermotion to compel**

6 On February 25, 2013, three weeks after Stipp filed his MPO
7 and about two weeks before the motion's scheduled hearing, CML
8 filed its opposition and countermotion to compel, also to be heard
9 on March 13, 2013 ("Countermotion to Compel"). CML's opposition
10 and separately-filed Countermotion to Compel were identical and
11 requested the same relief.

12 CML contended that Stipp's MPO failed either to account for
13 his failure of producing a single document over the last five
14 months or to explain his failure of producing the privilege log
15 required by Civil Rules 45(d)(2) or 26(b)(5). CML contended that
16 Stipp's Written Objections were meritless and improper and that
17 the subpoenas did not exceed the broad scope allowed by Rule 2004.
18 Accordingly, CML argued that Stipp's MPO had to be denied and that
19 he must be compelled to produce documents and submit to the Rule
20 2004 examinations. In conclusion, CML requested attorney's fees
21 incurred in bringing its Countermotion to Compel pursuant to Civil
22 Rule 37(a)(5).

23 In his reply, Stipp argued that the information requested by
24 CML went beyond the admittedly broad scope of Rule 2004, was
25 protected by the attorney-client privilege and/or work product
26 doctrine or was subject to Stipp's other constitutional rights and
27 privileges. Stipp merely sought to "place reasonable parameters
28 on the breadth of discovery being requested by a creditor upon a

1 non-debtor." Stipp also argued that he was not evading discovery;
2 he had complied with Civil Rule 45 by timely serving his Written
3 Objections. Any delays in production, argued Stipp, had been
4 caused by CML's multiple substitutions of counsel, by its
5 unreasonable requests, by its inflexible demands and by its
6 unnecessary criticism of Stipp's compliance.

7 **3. The parties' attempts to resolve the production dispute**

8 The hearing on the MPO and Countermotion to Compel was
9 continued to March 28, 2013, in hopes that the parties could
10 resolve the matter without court intervention. After three
11 meetings between counsel for CML, Stipp's criminal defense
12 attorney Jeffrey Setness ("Setness"), Bogatz, and counsel for the
13 chapter 7 trustee, Setness agreed, subject to Stipp's final
14 approval, that Stipp and MSJM would withdraw nearly all of their
15 prior objections and produce responsive documents in a timely
16 manner. On March 19, 2013, Sylvester drafted two letters to
17 Bogatz and Setness memorializing the parties' agreement to
18 produce.

19 On March 20, 2013, Stipp sent a letter to counsel for CML
20 stating that neither of his counsel represented MSJM and that he
21 did not agree to the settlement terms. As a result, asserted
22 Stipp, no agreement had been reached between him and CML regarding
23 production of any documents. Nonetheless, Stipp agreed to produce
24 by March 22, 2013, copies of nonprivileged documents he believed
25 were responsive to the subpoenas. However, he still reserved all
26 prior objections. As for the privileged documents, Stipp would
27 deliver them to the parties he believed held the privilege so they
28 could waive or assert their privileges and/or prepare a privilege

1 log.

2 Stipp did as promised. Counsel for CML timely received a CD
3 containing 1,058 documents. Stipp also sent counsel for Debtor
4 over 1,500 pages of documents that he believed might be privileged
5 and requested that Debtor either prepare a privilege log, assert
6 the privileges or waive them.

7 **4. CML's reply supporting its Countermotion to Compel**

8 CML complained that Stipp's "document dump" was in violation
9 of Civil Rule 45, contending that the documents in his CD were in
10 no particular order, making it impossible for CML to distinguish
11 which documents were responsive to the requests, if any. CML
12 further contended that Stipp had waived any asserted attorney-
13 client or work product privilege due to his "blanket" privilege
14 assertions and his failure to produce a log or any specific
15 information to evaluate his objections. Lastly, CML argued that
16 it was entitled to reasonable expenses incurred in bringing the
17 Countermotion to Compel under Civil Rule 37(a)(5), because Stipp
18 did not comply with the subpoenas until after CML's motion had
19 been filed. CML requested \$11,809 in attorney's fees it incurred
20 due to Stipp's alleged unjustifiable failure to comply with the
21 subpoenas.

22 **5. Ruling on the competing motions**

23 At the hearing on the MPO and Countermotion to Compel, the
24 bankruptcy court did not expressly deny or grant either motion,
25 but ordered the following: (1) MSJM had to produce all documents
26 and Stipp had to identify those already produced; (2) rather than
27 requiring Stipp to resubmit his documents by category, CML would
28 ask Stipp to identify the documents at his ordered Rule 2004

1 examination; (3) if Stipp wanted to assert any attorney-client
2 privilege, he needed to provide a privilege log by April 10, 2013;
3 and (4) if there were any objections to the expected privilege
4 log, another hearing would be held. The bankruptcy court also
5 awarded attorney's fees of \$10,000 for CML's efforts in bringing
6 the Countermotion to Compel, reducing it from the \$11,809
7 requested because Stipp had produced some documents.

8 The parties disapproved of each other's proposed orders on
9 the competing motions and were ordered to file additional
10 briefing. Not surprisingly, the parties disagreed about what was
11 granted or denied at the hearing and/or to what extent. After
12 reviewing the parties' responses, the bankruptcy court entered an
13 order denying Stipp's MPO and granting CML's Countermotion to
14 Compel ("Order"). Stipp paid the \$10,000 sanction as ordered and
15 timely appealed.

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
18 and 157(b)(2)(A). As to the portion of the Order awarding
19 sanctions, the Order is sufficiently final for immediate appeal.
20 Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 n.3 (9th
21 Cir. 1983) (orders imposing sanctions on nonparties for failure to
22 comply with discovery are considered final for purposes of
23 appeal). Therefore, we have jurisdiction under 28 U.S.C. § 158.

24 **III. ISSUE**

25 Did the bankruptcy court abuse its discretion when it awarded
26 CML its attorney's fees for Stipp's noncompliance with the
27 subpoenas?

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1 **IV. STANDARD OF REVIEW**

2 The imposition of discovery sanctions is reviewed for abuse
3 of discretion. Freeman v. San Diego Ass'n of Realtors, 322 F.3d
4 1133, 1156 (9th Cir. 2003). We apply a two-part test to determine
5 objectively whether the bankruptcy court abused its discretion,
6 first determining de novo whether the court identified the correct
7 legal rule, and second examining the court's factual findings
8 under the clearly erroneous standard. Beal Bank USA v. Windmill
9 Durango Office, LLC (In re Windmill Durango Office, LLC), 481 B.R.
10 51, 64 (9th Cir. BAP 2012) (citing United States v. Hinkson, 585
11 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc)).

12 **V. DISCUSSION**

13 **The bankruptcy court abused its discretion by applying an**
14 **incorrect legal rule in awarding sanctions.**

15 In its Countermotion to Compel and reply, CML requested
16 sanctions for its attorney's fees under Civil Rule 37(a)(5),⁴
17 incorporated by Rule 7037. The bankruptcy court did not specify
18 either in the Order or in its oral ruling which authority it

19
20 ⁴ Civil Rule 37(a)(5) provides:

21 If the motion is granted – or if the disclosure or requested
22 discovery is provided after the motion was filed – the court
23 must, after giving an opportunity to be heard, require the
24 party or deponent whose conduct necessitated the motion, the
25 party or attorney advising that conduct, or both to pay the
26 movant's reasonable expenses incurred in making the motion,
27 including attorney's fees. But the court must not order this
28 payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

1 applied for imposing sanctions. However, in reviewing the record,
2 it appears to have applied Civil Rule 37. Moreover, the parties
3 have argued exclusively about how the bankruptcy court properly or
4 improperly applied Civil Rule 37 in this case.

5 Civil Rule 37 applies only to a party (or a deponent) in a
6 contested matter or adversary proceeding. See Rule 9014 (Rule
7 7037 applies in contested matters); Rule 7037 (incorporating Civil
8 Rule 37 into adversary proceedings); Nicole Energy Mktg., Inc. v.
9 McClatchey (In re Nicole Energy Servs., Inc.), 356 B.R. 786 (6th
10 Cir. BAP 2007) (unpublished table case); Pereira v. Felzenberg,
11 1997 WL 698186, at *5 (S.D.N.Y. Nov. 7, 1997); In re Consol.
12 Meridian Funds, 2013 WL 1501636, at *10 n.14 (Bankr. W.D. Wash.
13 Apr. 5, 2013) (Civil Rule 37 applies only in a contested matter or
14 adversary proceeding, citing Rules 9014 and 7037); Riley v. Sciaba
15 (In re Sciaba), 334 B.R. 524, 526 (Bankr. D. Mass. 2005); In re
16 Sutera, 141 B.R. 539, 541 (Bankr. D. Conn. 1992) (Civil Rules
17 26-37, incorporated by Rules 7026-7037, apply only when contested
18 matters or adversary proceedings have been commenced). Civil
19 Rule 37 applies to motions to compel production only from a
20 "party" under Civil Rule 34, incorporated by Rule 7034, which in
21 turn provides that motions to compel production from nonparties
22 are governed by Civil Rule 45. See Civil Rule 34(c).

23 Because Stipp⁵ is a nonparty, the bankruptcy court could not
24 resort to the enforcement remedies under Civil Rule 37 for
25 noncompliance with a subpoena. Pennwalt, 708 F.2d at 494 n.4
26 (sanctions under Civil Rule 37 do not apply to nonparty's failure
27

28 ⁵ References to Stipp include both Stipp and MSJM.

1 to produce documents); Scruggs v. Vance, 2012 WL 423486, at *1
2 (E.D. Cal. Feb. 8, 2012); In re Nicole Energy Servs., Inc., 356
3 B.R. 786; Pereira, 1997 WL 698186, at *5 (nonparty's failure to
4 obey a court order directing their attendance at a Rule 2004
5 examination cannot subject them to Civil Rule 37 sanctions); In re
6 Consol. Meridian Funds, 2013 WL 1501636, at *10 n.14; In re
7 Sciaba, 334 B.R. at 526. The only authority in the Federal Rules
8 of Civil Procedure for the imposition of sanctions against a
9 nonparty for failure to comply with a subpoena duces tecum is
10 Civil Rule 45(e), applicable here through Rule 9016. Pennwalt,
11 708 F.2d at 494 (applying former Civil Rule 45(f) and citing
12 Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1341 (8th Cir.
13 1975)); In re Exxon Valdez, 142 F.R.D. 380, 385 (D.D.C. 1992)
14 (denying petitioner's request for attorney's fees under Civil
15 Rule 37 for respondent's alleged bad faith in not complying with
16 subpoena and holding that the only sanction available is one for
17 contempt under Civil Rule 45, which did not apply because nonparty
18 timely objected to the subpoena); In re Scruggs, 2012 WL 423486,
19 at *1; In re Nicole Energy Servs., Inc., 356 B.R. 786; In re
20 Sciaba, 334 B.R. at 526. Hence, the only way CML could seek
21 sanctions against Stipp for noncompliance with the subpoenas was
22 to seek to hold him in contempt of court.⁶ However, even this has

24 ⁶ Arguably, the remedy of attorney's fees under Civil Rule
25 37(a)(5) may apply to a nonparty's failure to attend a deposition
26 that requires the filing of a motion to compel. However, we
27 disagree that such remedy could apply here. CML's real focus was
28 on obtaining documents from Stipp, and the vast majority of its
time was spent engaging in that activity. Further, the Rule 2004
examinations had been continued indefinitely, as no further
notices were filed after October 11, 2012. Thus, because Stipp
(continued...)

1 its limitations.

2 Under Civil Rule 45(e), a court may hold in contempt a person
3 who fails "without adequate excuse" to obey a subpoena. A
4 nonparty served with a subpoena has three options: it may
5 (1) comply with the subpoena, (2) serve an objection on the
6 requesting party in accordance with Civil Rule 45(c)(2)(B), or
7 (3) move to quash or modify the subpoena in accordance with Civil
8 Rule 45(c)(3). See In re Consol. Meridian Funds, 2013 WL 1501636,
9 at *10. Here, Stipp timely served Written Objections to the
10 subpoenas in accordance with Civil Rule 45(c)(2)(B).⁷ This
11 qualifies as an "adequate excuse." DeGeer v. Gillis, 755 F. Supp.
12 2d 909, 930 (N.D. Ill. 2010). See also In re Exxon Valdez, 142
13 F.R.D. at 385. Having raised timely objections to the subpoenas,
14

15 ⁶(...continued)
16 was not directed to attend a deposition, he could not have failed
17 to attend one. Finally, as noted above, Rule 7037 applies only in
18 cases of adversary proceedings or contested matters (via Rule
19 9014), neither of which we have here.

19 ⁷ Prior to the amendments in December 2013, Civil Rule
20 45(c)(2)(B) read as follows:

21 A person commanded to produce designated materials or to
22 permit inspection may serve on the party or attorney
23 designated in the subpoena a written objection to inspecting,
24 copying, testing or sampling any or all of the designated
25 materials or to inspecting the premises—or to producing
26 electronically stored information in the form or forms
27 requested. The objection must be served before the earlier
28 of the time specified for compliance or 14 days after the
subpoena is served. If an objection is made, the following
rules apply:

- 25 (i) At any time, on notice to the commanded person, the
26 serving party may move the issuing court for an order
27 compelling production or inspection.
- 27 (ii) These acts may be required only as directed in the
28 order, and the order must protect a person who is
neither a party nor a party's officer from significant
expense resulting from compliance.

1 Stipp was not required to produce documents, or even search for
2 them, until CML obtained an order directing compliance. Pennwalt,
3 708 F.2d at 494 & n.5 (although a subpoena itself is a court order
4 and noncompliance may warrant contempt sanctions, once a nonparty
5 objects, the provisions of Civil Rule 45(c) come into play, and
6 the party seeking discovery must obtain a court order directing
7 compliance); DeGeer, 755 F. Supp. 2d at 930 (same).⁸

8 CML did as Civil Rule 45(c) requires and moved to compel
9 Stipp to produce the documents once he properly objected to the
10 subpoenas. See Civil Rule 45(c)(2)(B)(i). CML also requested
11 sanctions for Stipp's noncompliance. In the Order, the bankruptcy
12 court ordered Stipp to comply with the subpoenas and awarded CML
13 its attorney's fees incurred due to his noncompliance. The
14 awarding of sanctions in this case was erroneous. When a nonparty
15 has objected to a subpoena under Civil Rule 45(c)(2)(B) or even
16 when its objection has been first raised in a motion to quash, a
17 court may not invoke its contempt powers for failure to comply
18 without first issuing an order compelling that compliance.
19 Pennwalt, 708 F.2d at 494; DeGeer, 755 F. Supp. 2d. at 930.
20 Therefore, Stipp's excused noncompliance with the subpoenas could
21 not be deemed a "contempt" under Civil Rule 45(e), and sanctions

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23 ⁸ Authority exists, however, providing that even though Stipp
24 timely served his Written Objections on CML, because some of his
25 objections were based on attorney-client privilege, that he was to
26 also serve a privilege log "within a reasonable time." DG
27 Creditor Corp. v. Dabah (In re DG Acquisition Corp.), 151 F.3d 75,
28 81 (2d Cir. 1998); Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir.
1996) (holding that to raise a privilege objection to a subpoena
requiring production of documents, a written objection stating the
claim of privilege must be made within 14 days after the subpoena
is served, but that a privilege log can be served within a
reasonable time); Minn. Sch. Bds. Ass'n Ins. Trust v. Emp'rs Ins.
Co. of Wausau, 183 F.R.D. 627, 630 (N.D. Ill. 1999).

1 were not warranted. The bankruptcy court also could not impose
2 sanctions under its "inherent authority" for abuse of the judicial
3 process, absent a showing and finding of bad faith. Pennwalt, 708
4 F.2d at 494; In re Exxon Valdez, 142 F.R.D. at 385 (citing
5 Pennwalt). No such showing or finding was made here.

6 Accordingly, in cases of nonparty subpoenas under Civil Rule
7 45, the court must first issue an order compelling the nonparty's
8 compliance with the subpoena, and the nonparty must fail to comply
9 with the order before any contempt sanctions can be awarded. Of
10 course, before such sanctions can be awarded, the requesting party
11 must first file a motion for contempt, and the subpoenaed party
12 must be found to be in contempt, which did not occur here.

13 The remedy under Civil Rule 37(a)(5) of awarding a party its
14 reasonable expenses incurred in bringing a motion to compel before
15 a discovery order is entered was simply not available here; the
16 bankruptcy court abused its discretion when it imposed the
17 sanction against Stipp for CML's attorney's fees.

18 VI. CONCLUSION

19 For the foregoing reasons, we REVERSE the portion of the
20 Order awarding CML \$10,000 for its attorney's fees.

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