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ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|                                                  |   |                      |                  |
|--------------------------------------------------|---|----------------------|------------------|
| In re:                                           | ) | BAP No.              | CC-14-1342-KiBrD |
|                                                  | ) |                      |                  |
| TONY PHAM and LINDSIE KIM PHAM,                  | ) | Bk. No.              | SA 12-18847-CB   |
|                                                  | ) |                      |                  |
| Debtors.                                         | ) | Adv. No.             | SA 12-01619-CB   |
|                                                  | ) |                      |                  |
| _____                                            | ) |                      |                  |
|                                                  | ) |                      |                  |
| TONY PHAM; LINDSIE KIM PHAM; JONATHAN T. NGUYEN, | ) |                      |                  |
|                                                  | ) |                      |                  |
| Appellants,                                      | ) |                      |                  |
|                                                  | ) |                      |                  |
| v.                                               | ) | <b>O P I N I O N</b> |                  |
|                                                  | ) |                      |                  |
| JEFFREY I. GOLDEN, Chapter 7 Trustee,            | ) |                      |                  |
|                                                  | ) |                      |                  |
| Appellee.                                        | ) |                      |                  |
| _____                                            | ) |                      |                  |

Argued and Submitted on July 23, 2015,  
at Pasadena, California

Filed - September 2, 2015

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellants Tony Pham, Lindsie Kim Pham and Jonathan T. Nguyen did not appear at oral argument; Ashley McDow of Baker & Hostetler LLP argued for appellee Jeffrey I. Golden, Chapter 7 Trustee.

Before: KIRSCHER, BRANDT<sup>1</sup> and DUNN, Bankruptcy Judges.

<sup>1</sup> Hon. Philip H. Brandt, Bankruptcy Judge for the Western District of Washington, sitting by designation.

1 KIRSCHER, Bankruptcy Judge:

2

3 Tony and Lindsay Kim Pham ("Debtors") and their attorney,  
4 Jonathan T. Nguyen ("Nguyen") (collectively, "Appellants"), appeal  
5 an order compelling Debtors to appear for depositions and to  
6 produce certain documents and sanctioning Appellants for the  
7 chapter 7<sup>2</sup> trustee's expenses incurred in bringing the motion to  
8 compel under Local Bankruptcy Rules ("LBR") 1001-1(f), 7026-1(c)  
9 and 9011-3.<sup>3</sup>

10 Debtors have already produced the required documents and have  
11 been deposed. The \$17,515 sanction for attorney's fees has been  
12 paid. Appellants challenge only the sanctions award. Because the  
13 bankruptcy court could not rely on these local rules to sanction  
14 Appellants, we VACATE and REMAND.

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

16 Jeffrey I. Golden ("Trustee") was appointed chapter 7 trustee  
17 in Debtors' case. He scheduled and held at least 15 continued  
18 § 341(a) meetings of creditors to interview Debtors and to review  
19 documents.

20 The Trustee filed an adversary complaint against two

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23 <sup>2</sup> 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. All  
"Civil Rule" references are to Federal Rules of Civil Procedure.

25 <sup>3</sup> The local rules referenced are the Local Bankruptcy Rules  
26 for the U.S. Bankruptcy Court for the Central District of  
27 California. We note that the bankruptcy court amended its local  
28 rules effective January 5, 2015; however, in reviewing the public  
notice associated with the revisions, we conclude that the  
bankruptcy court did not amend the three local rules discussed  
herein.

1 individuals, Phat The Bui ("Bui") and Thuan Tran ("Tran").<sup>4</sup> The  
2 Trustee alleged that Mrs. Pham had fraudulently transferred four  
3 condominium units approximately sixteen months prior to the  
4 petition date – three units to Bui and one to Tran. Debtors  
5 disclosed the transfers to Bui in their statement of financial  
6 affairs; they did not disclose the transfer to Tran. The Trustee  
7 sought to avoid and recover the transferred property under the  
8 Code and California law. Nguyen, who has practiced law for  
9 twenty-one years, represented defendants Bui and Tran. Debtors  
10 were not named as defendants and have never been parties to that  
11 action.

12 **A. Events leading to the Trustee's motion to compel**

13 The Trustee issued subpoenas to Debtors pursuant to Civil  
14 Rule 45, commanding them to appear for depositions and to produce  
15 documents. Nguyen accepted service of the subpoenas on behalf of  
16 Debtors via email. Debtors did not object to the subpoenas.

17 Just prior to this, the Trustee's counsel Michael Delaney  
18 ("Delaney") emailed Nguyen regarding dates for Debtors to be  
19 deposed. Ultimately, Delaney scheduled Mrs. and Mr. Pham's  
20 depositions for March 17 and March 19, 2014, respectively. On  
21 March 17, Nguyen and Mrs. Pham arrived at Delaney's office prior  
22 to the scheduled 10:00 a.m. start time. The attorney intending to  
23 conduct Mrs. Pham's deposition, Ashley McDow ("McDow"), was not  
24 there and neither were the court reporter or the Vietnamese  
25 interpreter. McDow arrived at 10:45 a.m. and asked Nguyen and  
26 Mrs. Pham to wait for the interpreter, who was running late. The

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27  
28 <sup>4</sup> Golden, Trustee, v. Bui, Case No. SA 12:bk-18847-CB, Adv.  
Pro. No. SA 12-ap-01619-CB (Bankr. C.D. Cal.).

1 court reporter arrived at 11:45 a.m. Around noon, when the  
2 interpreter had still not arrived, McDow offered to take Mrs.  
3 Pham's deposition on March 19 at 1:00 p.m. at Nguyen's office and  
4 credit her the two hours she and Nguyen were left waiting.

5 McDow took Mrs. Pham's deposition as planned on March 19  
6 between 1:13 p.m. and 6:00 p.m. McDow and Delaney arrived around  
7 1:00 p.m. without enough copies of certain documents, so Nguyen  
8 offered to let Delaney use his office's copier, at no charge, to  
9 make the necessary copies, approximately 180 pages. Nguyen said  
10 that at 4:00 p.m. Delaney and McDow unilaterally took a 20-25  
11 minute lunch break while he, Mrs. Pham, the court reporter and the  
12 interpreter waited. At this point, the stories diverge. Nguyen  
13 claims he told McDow during normal breaks and again at 5:30 p.m.  
14 that he had to leave promptly at 6:00 p.m. McDow contends that at  
15 6:00 p.m. Nguyen prematurely terminated Mrs. Pham's deposition  
16 without ever advising her of his intent to do so. McDow believed  
17 she had 55 minutes remaining of her allowed time to depose Mrs.  
18 Pham, after deducting time for breaks.

19 According to the deposition transcript, at 5:54 p.m. Nguyen  
20 stated for the record that he had told McDow during the last  
21 recess he had to leave at 6:00 p.m. to pick up his son from soccer  
22 practice. McDow stated that Nguyen had just told her for the  
23 first time five minutes before of his need to leave by 6:00 p.m.  
24 Nguyen then indicated that he would speak to McDow later about  
25 when she could complete her last hour of deposition with Mrs.  
26 Pham. McDow proceeded for the next six minutes with questions to  
27 Mrs. Pham. At 6:00 p.m., Nguyen announced he was leaving. While  
28 McDow tried to ask Nguyen about scheduling the last hour, he

1 walked off.

2 As for Mr. Pham, Nguyen contended that he told McDow on March  
3 17 that Mr. Pham would not be appearing for his deposition or  
4 producing documents on March 19, because he had recently suffered  
5 a stroke. He also gave McDow a copy of a doctor's note. McDow  
6 contended that she did not learn of Mr. Pham's nonappearance until  
7 Nguyen handed her the doctor's note, which was illegible except  
8 for Mr. Pham's name and the word "stroke."

9 A series of emails between counsel ensued. On March 21,  
10 Delaney emailed Nguyen inquiring about when Mrs. Pham's deposition  
11 could be completed. Delaney warned that if he heard nothing from  
12 Nguyen by 2:00 p.m. March 25, he would file a motion to compel.  
13 Not hearing from Nguyen, Delaney sent a second email on March 25  
14 at 5:27 p.m., stating his intention to prepare a motion to compel  
15 Debtors' depositions, as the doctor's note failed to provide any  
16 justification for denying the Trustee's right to depose Mr. Pham.  
17 Delaney requested that counsel meet and confer by April 1 to  
18 resolve any discovery disputes, citing LBR 7026-1(c)(2).

19 Nguyen responded to Delaney's email on March 26, indicating  
20 that he was not presenting Mrs. Pham for further deposition based  
21 on the March 17 incident and the events that occurred on March 19.

22 On April 15, another attorney for the Trustee, Yulia Fradkin  
23 ("Fradkin"), emailed Nguyen reminding him that he had failed to  
24 meet and confer with the Trustee's counsel by April 1 to discuss  
25 Mrs. Pham's last hour of deposition pursuant to LBR 7026-1(c)(2).  
26 Fradkin warned that if Nguyen did not provide a date and time to  
27 meet and confer within the next two days, they would proceed with  
28 preparing a joint stipulation of any remaining discovery disputes.

1 If their issues could not be resolved, Fradkin warned they would  
2 file a motion to compel the remainder of Mrs. Pham's deposition.  
3 Fradkin requested further information about Mr. Pham's medical  
4 condition and inquired whether or not he would be appearing for  
5 deposition.

6 On April 18, Fradkin sent Nguyen another email regarding his  
7 apparent refusal to meet and confer about Debtors' depositions.  
8 Fradkin warned that if Nguyen did not provide information for the  
9 joint stipulation of remaining discovery disputes by April 21, the  
10 Trustee's counsel would file a motion to compel Debtors'  
11 depositions. Fradkin advised Nguyen they would seek sanctions  
12 under LBR 1001-1(f), 7026-1(c)(4), 9011-3 and 9020-1.

13 Nguyen responded to Fradkin's April 18 email, stating that he  
14 had already met and conferred with McDow and then again with  
15 Delaney.

16 **B. The motion to compel**

17 **1. The Trustee's motion**

18 Shortly thereafter, the Trustee moved for an order: (1)  
19 compelling Debtors to attend depositions and to produce documents;  
20 and (2) awarding attorney's fees and costs jointly and severally  
21 against Appellants ("Motion to Compel").<sup>5</sup> Overall, the Trustee  
22 blamed Nguyen for the "intentional and purposeful interference in  
23 discovery," which the Trustee alleged severely disadvantaged his  
24

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25 <sup>5</sup> The Trustee reiterated some discovery issues he had  
26 recently with Nguyen and defendants Bui and Tran. In that case,  
27 the Trustee prevailed on a motion to compel Bui and Tran to  
28 produce documents. The Trustee stated that he was now moving for  
attorney's fees and costs resulting from Bui's, Tran's and  
Nguyen's "obtrusive behavior leading to the prior motion to  
compel."

1 efforts to void the fraudulent transfers. He questioned Mrs.  
2 Pham's need for an interpreter, considering that she had lived in  
3 the U.S. for 30 years, attended high school and college here, and  
4 had never requested an interpreter at any of the § 341(a)  
5 meetings. The Trustee contended that Nguyen, as part of a delay  
6 tactic, had repeatedly interfered in Mrs. Pham's deposition,  
7 contradicting the interpreter and "correcting" his interpretation  
8 of certain questions and answers. Besides the remaining 55  
9 minutes, the Trustee argued he was entitled to an additional two  
10 hours of deposition time with Mrs. Pham due to Nguyen's  
11 interference.<sup>6</sup>

12 As for Mr. Pham, the Trustee contended that other than the  
13 doctor's note, which he argued was insufficient to excuse Mr.  
14 Pham's nonappearance, Nguyen provided no reason why Mr. Pham could  
15 not appear for deposition or produce the subpoenaed documents.  
16 The Trustee argued that if Mr. Pham wanted relief from the  
17 subpoena, he had to move to quash it. Absent such relief, argued  
18 the Trustee, he was entitled to depose Mr. Pham for seven hours  
19 per Civil Rule 30.<sup>7</sup>

20 In his request for sanctions, the Trustee contended  
21

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22 <sup>6</sup> In reviewing the deposition transcript, which the Trustee  
23 failed to produce until his reply, we counted an insignificant  
24 number of times where Nguyen tried to clarify or correct a  
25 question/answer, mainly because no equivalent word existed in  
26 Vietnamese for the English word McDow was using or the interpreter  
had used terminology different from McDow's. Nguyen's alleged  
"interference" does not appear to have consisted of more than a  
few minutes total.

27 <sup>7</sup> The Trustee contended that Debtors had also refused to  
28 produce documents pursuant to the subpoena duces tecum, including  
readily-available bank statements and tax returns. Appellants  
contended that Mrs. Pham had nothing left in her custody and  
possession that she had not already produced at § 341(a) meetings  
and/or at her deposition.

1 Appellants' bad faith conduct had cost the estate approximately  
2 \$12,000. In particular, the Trustee contended that Nguyen had  
3 refused to meet and confer and to provide information for the  
4 joint discovery stipulation as required by LBR 7026-1(c)(3). The  
5 Trustee argued that LBR 1001-1(f), 7026-1(c)(4) and 9011-3 all  
6 provided for imposing sanctions on "counsel or a party" for  
7 failing to comply with the local rules, to cooperate in discovery  
8 procedures or to provide information necessary to prepare the  
9 joint discovery stipulation.

10 **2. Appellants' opposition**

11 Appellants opposed the Motion to Compel, countering that it  
12 was the Trustee's counsel who failed to show good faith efforts to  
13 resolve any discovery disputes. Nguyen contended that on March 19  
14 he believed the Trustee's counsel was no longer interested in  
15 taking Mr. Pham's deposition because: (1) he had explained to  
16 counsel that Mr. Pham was bed-ridden due to a recent stroke and  
17 gave McDow a copy of the doctor's note; (2) during the multiple  
18 § 341(a) meetings Mr. Pham recalled little or had no knowledge of  
19 the facts at issue in the fraudulent transfer proceeding; and (3)  
20 McDow failed to say anything on March 17 about rescheduling Mr.  
21 Pham's deposition to March 19 when she knowingly scheduled Mrs.  
22 Pham for the same date. Further, counsel had not contacted Nguyen  
23 about Mr. Pham's deposition until March 25, after the discovery  
24 deadline; the deposition was never re-noticed.

25 Appellants noted that the Trustee's moving papers failed to  
26 provide any evidence showing Nguyen's alleged "interference" with  
27 Mrs. Pham's deposition, namely, any excerpts of the transcript or  
28 any statements in counsels' declarations. Appellants refuted the



1 Trustee's accusation that Mrs. Pham was "faking" her need for an  
2 interpreter.

3 Appellants argued that sanctions were not appropriate because  
4 a series of mistakes were made by the Trustee's counsel; the March  
5 17 and 19 depositions were carelessly managed and counsel appeared  
6 to be either disorganized and reckless or engaging in  
7 gamesmanship. Appellants argued that Debtors were the ones  
8 entitled to sanctions against the Trustee and his counsel and  
9 requested \$8,450 for expenses incurred to oppose the Motion to  
10 Compel.

11 **3. The Trustee's reply**

12 In reply, the Trustee argued that Nguyen had not complied  
13 with LBR 7026-1 as contended; he had not met and conferred with  
14 counsel to resolve any discovery disputes. The Trustee disputed  
15 any contention that Mr. Pham's deposition was taken off calendar  
16 based on the doctor's note, which the Trustee maintained provided  
17 no excuse for his nonattendance. The Trustee further argued that  
18 Debtors had not complied with the subpoena duces tecum as they  
19 contended; they had never provided the requested bank statements  
20 and tax returns, which may or may not have been in their custody  
21 or possession but certainly were under their control.

22 In conclusion, the Trustee argued he was entitled to  
23 reasonable expenses incurred in bringing the Motion to Compel  
24 under Civil Rule 37(a)(5)(A). The Trustee stated that he would  
25 file a declaration contemporaneously with the lodging of the  
26 proposed order showing his expenses to ensure that all were  
27 included.

28

1 **C. The bankruptcy court's ruling on the Motion to Compel**

2 At the hearing on the Motion to Compel, the bankruptcy court  
3 stated several times that: Debtors were the parties "being  
4 sued[;]" they had an obligation to disclose everything to the  
5 Trustee and were required to answer the Trustee's questions no  
6 matter how long it took; and they risked having a judgment entered  
7 against them if they did not cooperate and give the Trustee what  
8 he needed. See Hr'g Tr. (June 3, 2014) at 8:8-10; 8:14-15; 11:13-  
9 15; 25:13-16; 28:15-19; 38:15-20; 39:9-13. After ordering Debtors  
10 to appear for depositions and to produce the requested documents,  
11 the bankruptcy court ruled on the sanctions request. The  
12 following is the extent of its oral ruling:

13 THE COURT: I'm awarding attorney's fees because we  
14 shouldn't be here. . . . You needed to do what the rule  
said you had to do before we had to come here to court.

15 . . . .

16 THE COURT: You didn't do what you were supposed to do and  
17 that as a lawyer is not forgivable at this point. You  
18 should know better. You are - have a state Bar card. You  
19 are supposed to do what you're supposed to do as a lawyer  
and you were supposed to do many things that you didn't do  
before coming here today.

20 So I'm going to go ahead and grant on #14.00 [the Motion  
21 to Compel] [] attendance, the production of documents and  
the awarding of attorney's fees.

22 Id. at 42:16-17; 43:3-5; 43:11-19.

23 The Trustee submitted a proposed order for the Motion to  
24 Compel, which stated that Appellants were ordered to pay the  
25 Trustee "the sum of \$\_\_ . . . as a sanction for abusive conduct in  
26 the course of discovery pursuant to Local Bankruptcy Rules 1001-  
27 1(f), 7026-1(c), and 9011-3[.]" In support, Delaney submitted a  
28 declaration setting forth the total amount of the Trustee's fees

1 associated with preparing and prosecuting the Motion to Compel –  
2 \$17,515. Delaney expressly waived any right to costs.

3 Appellants objected to the proposed order, arguing that the  
4 Trustee's increased attorney's fee request of \$17,515 was not  
5 presented until **after** the hearing, which denied their due process  
6 rights. Appellants further contended that awarding the sanction  
7 of attorney's fees was contrary to the Panel's recent decision in  
8 Stipp v. CML-NV One, LLC (In re Plise), 506 B.R. 870 (9th Cir. BAP  
9 2014), which Appellants contended held that a court may not order  
10 a nonparty to pay sanctions for discovery violations under Civil  
11 Rule 37.

12 In reply, the Trustee disputed any violation of Appellants  
13 due process rights; he had stated in the Motion to Compel that he  
14 would seek payment of all fees and costs relating to preparing and  
15 prosecuting the Motion to Compel, including any future fees and  
16 expenses. Further, argued the Trustee, Appellants were given  
17 ample opportunity at the hearing to present their arguments on the  
18 matter. The Trustee also disputed the applicability of Plise,  
19 noting that the bankruptcy court awarded sanctions under LBR 1001-  
20 1(f), 7026-1(c)(4) and 9011-3, not Civil Rule 37.

21 Making minor changes to the proposed order, the bankruptcy  
22 court entered its order granting the Motion to Compel ("Compel  
23 Order"). Appellants were ordered to pay the Trustee \$17,515 "as a  
24 sanction for abusive conduct in the course of discovery pursuant  
25 to Local Bankruptcy Rules 1001-1(f), 7026-1(c), and 9011-3[.]"

## 26 **II. JURISDICTION**

27 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
28 and 157(b)(2)(A). As to the portion of the Compel Order awarding

1 sanctions, the order is sufficiently final for immediate appeal.  
2 In re Plise, 506 B.R. at 876 (citing Pennwalt Corp. v. Durand-  
3 Wayland, Inc., 708 F.2d 492, 494 n.3 (9th Cir. 1983)(orders  
4 imposing sanctions on nonparties for failure to comply with  
5 discovery are considered final for purposes of appeal)). Out of  
6 an abundance of caution, however, we granted Appellants leave to  
7 appeal the Compel Order. Therefore, we have jurisdiction under 28  
8 U.S.C. § 158.

### 9 III. ISSUE

10 Did the bankruptcy court abuse its discretion when it imposed  
11 the sanction of attorney's fees against Appellants for discovery  
12 abuse under LBR 1001-1(f), 7026-1(c) and 9011-3?

### 13 IV. STANDARDS OF REVIEW

14 The imposition of discovery sanctions is reviewed for abuse  
15 of discretion. In re Plise, 506 B.R. at 876 (citing Freeman v.  
16 San Diego Ass'n of Realtors, 322 F.3d 1133, 1156 (9th Cir. 2003)).  
17 A bankruptcy court abuses its discretion if it applies the wrong  
18 legal standard, misapplies the correct legal standard, or if its  
19 factual findings are clearly erroneous. TrafficSchool.com, Inc.  
20 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

21 The validity of a local court rule is a question of law  
22 reviewed de novo. Steinacher v. Rojas (In re Steinacher), 283  
23 B.R. 768, 771-72 (9th Cir. BAP 2002)(citing Jones v. Hill (In re  
24 Hill), 811 F.2d 484, 485-86 (9th Cir. 1987)).

### 25 V. DISCUSSION

26 **The bankruptcy court abused its discretion in sanctioning**  
27 **Appellants under LBR 1001-1(f), 7026-1(c) and 9011-3.**

28 During the hearing on the Motion to Compel, the bankruptcy

1 court stated repeatedly that Debtors are debtors in bankruptcy and  
2 subject to duties to disclose certain information to their  
3 appointed trustee. See § 521. We do not question this important  
4 statutory obligation imposed on debtors. However, the court also  
5 stated repeatedly that Debtors were "being sued." In this  
6 adversary proceeding, the Trustee did **not** sue the Debtors; they  
7 were nonparty witnesses. Also, the Trustee was not operating  
8 under Rule 2004 to obtain their examination or the production of  
9 documents. In these circumstances, Debtors were entitled to the  
10 protections provided them as nonparty witnesses under the Federal  
11 Rules of Civil Procedure and the Bankruptcy Rules, particularly  
12 Civil Rule 45 and Rule 9016 (incorporating Civil Rule 45), which  
13 were cited in the issued subpoenas.

14 Further, we fail to see how Nguyen, an attorney for a  
15 nonparty, would be subject to complying with a "meeting of  
16 counsel," a "joint discovery stipulation" or any other aspect of  
17 discovery by the Trustee under Civil Rule 26 or LBR 7026-1(c).

18 Appellants argue that the bankruptcy court erred by failing  
19 to apply the proper procedure afforded nonparties when imposing  
20 sanctions for noncompliance with a subpoena under Civil Rule 45.  
21 Specifically, Appellants argue that the procedure followed here  
22 conflicts with our holding in Plise. There, a creditor of the  
23 debtor served a nonparty witness with a subpoena compelling him to  
24 appear for a Rule 2004 examination and to produce documents. In  
25 re Plise, 506 B.R. at 872-73. The nonparty witness timely served  
26 his written objections to the subpoena duces tecum on the creditor  
27 and later moved for a protective order. Id. at 873-74. In  
28 response, the creditor filed a counter-motion to compel and

1 requested attorney's fees. Id. at 874-75. The bankruptcy court  
2 denied the nonparty's motion for protective order, granted the  
3 creditor's countermotion to compel and awarded the creditor  
4 \$10,000 for its attorney's fees incurred in bringing the  
5 countermotion to compel pursuant to Civil Rule 37(a)(5). Id. at  
6 876.

7 We reversed, holding that the sanction of attorney's fees  
8 could not be imposed on a nonparty witness for noncompliance with  
9 a subpoena duces tecum under Civil Rule 37 (incorporated by Rule  
10 7037); rather, Civil Rule 45 is the sole basis for enforcing a  
11 nonparty's noncompliance with a subpoena duces tecum. Id. at 877-  
12 79. See also Civil Rule 34(c), incorporated by Rule 7034, which  
13 provides that motions to compel a nonparty to produce documents  
14 are governed by Civil Rule 45. Under Civil Rule 45, the nonparty  
15 must first be subject to an order compelling discovery and then  
16 fail to comply with that order before the court can invoke its  
17 contempt powers and impose a sanction of attorney's fees. Id.  
18 See also Pennwalt Corp., 708 F.2d at 494.

19 Our holding in Plise is narrower than Appellants contend.  
20 First, to receive the procedural protections of Civil Rule 45, the  
21 nonparty witness must timely object to a subpoena duces tecum,  
22 either by serving written objections to the requesting party or by  
23 a motion to quash. In re Plise, 506 B.R. at 879. See also  
24 Pennwalt Corp., 708 F.2d at 494 n.5 (once the subpoenaed party  
25 objects, the protections of Civil Rule 45(d) come into play and  
26 the party seeking discovery must obtain a court order directing  
27 compliance). Debtors did not serve any written objections on the  
28 Trustee regarding production of the requested documents or file a

1 motion to quash.

2       Next, for a subpoenaed nonparty's failure to attend a  
3 deposition, Civil Rule 37(a)(5) authorizes an award of expenses,  
4 including attorney's fees, incurred for a motion to compel the  
5 nonparty's attendance. Pennwalt Corp., 708 F.2d at 494 n.4 (Civil  
6 Rule 37 sanctions apply to motions to compel nonparties to attend  
7 depositions); Civil Rule 37(a)(5)(A) (expressly referencing a  
8 "party or deponent" and stating that the sanction of attorney's  
9 fees may be imposed on the party, the deponent, the attorney  
10 advising the party or deponent whose conduct necessitated the  
11 motion to compel, or both). See also Civil Rule 30(d)(2),  
12 incorporated by Rule 7030, which provides that the court may  
13 impose a sanction of reasonable attorney's fees incurred by any  
14 party on a "person" who impedes, delays or frustrates the fair  
15 examination of a deponent; and Civil Rule 30(d)(3)(C), which  
16 provides that any such sanction is governed by Civil Rule  
17 37(a)(5). In this case, much of the conflict stemmed from  
18 securing Debtors' appearance for depositions and Nguyen's alleged  
19 interference with Mrs. Pham's deposition.

20       Debtors and Nguyen could have been sanctioned for attorney's  
21 fees under Civil Rule 37(a)(5) for any failure to comply with the  
22 subpoenas. The bankruptcy court, however, did not impose  
23 sanctions under Civil Rule 37(a)(5), but rather relied on three  
24 local rules to impose them. We conclude that none of these local  
25 rules support the sanction of attorney's fees in this context. We  
26 review them in reverse order.

27

28

1 **A. The bankruptcy court could not rely on LBR 9011-3.**

2 LBR 9011-3(a) – Violation of Rules<sup>8</sup> – provides that violation  
3 of the Rules or the LBR may subject the offending party or counsel  
4 to penalties, including the monetary sanction of attorney’s fees  
5 and costs payable to opposing counsel. In other words, this rule  
6 allows the bankruptcy court to impose sanctions for **any** infraction  
7 of a local or federal bankruptcy rule. However, Rule 9011  
8 (incorporating Civil Rule 11), expressly prohibits the use of this  
9 rule to sanction violations respecting “disclosure and discovery  
10 requests, responses, objections, and motions that are subject to  
11 the provisions of Rules 7026 through 7037.” See Rule 9011(d).

12 In adopting the Code, Congress delegated to the Supreme Court  
13 the power to make and enforce general bankruptcy rules. 28 U.S.C.  
14 § 2071. Pursuant to this authority, the Supreme Court promulgated  
15 Rule 9029,<sup>9</sup> which authorizes district courts, or bankruptcy courts  
16

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17 <sup>8</sup> **Violation of Rules.** The violation of, or failure to  
18 conform to, the [Fed. R. Bankr. P] or these rules may subject the  
19 offending party or counsel to penalties, including monetary  
20 sanctions, the imposition of costs and attorneys’ fees payable to  
21 opposing counsel, and/or dismissal of the case or proceeding.

22 <sup>9</sup> Rule 9029(a) provides, in relevant part:

23 (1) Each district court acting by a majority of its district  
24 judges may make and amend rules governing practice and  
25 procedure in all cases and proceedings within the district  
26 court’s bankruptcy jurisdiction which are consistent with –  
27 but not duplicative of – Acts of Congress and these rules and  
28 which do not prohibit or limit the use of the Official Forms.  
Rule 83 F.R.Civ.P. governs the procedure for making local  
rules. A district court may authorize the bankruptcy judges  
of the district, subject to any limitation or condition it  
may prescribe and the requirements of [Rule] 83 F.R.Civ.P.,  
to make and amend rules of practice and procedure which are  
consistent with – but not duplicative of – Acts of Congress  
and these rules and which do not prohibit or limit the use of  
the Official Forms. Local rules shall conform to any uniform  
numbering system prescribed by the Judicial Conference of the  
United States.



1 with authority from the district courts, to adopt their own local  
2 bankruptcy rules. In re Steinacher, 283 B.R. at 772. Under Rule  
3 9029, however, this power is strictly limited. Sigma Micro Corp.  
4 v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 784  
5 (9th Cir. 2007)(citing 10 COLLIER ON BANKRUPTCY ¶ 9029.01[1](Alan N.  
6 Resnick & Henry J. Sommer, eds., 15th ed. rev. 2006)). A local  
7 rule of bankruptcy procedure cannot be applied in a manner that  
8 conflicts with the federal rules; it must be consistent with the  
9 Code, the Rules and the Civil Rules. Anwar v. Johnson, 720 F.3d  
10 1183, 1189 (9th Cir. 2013); In re Steinacher, 283 B.R. at 772.  
11 Local bankruptcy rules may not “enlarge, abridge, or modify any  
12 substantive right.” Anwar, 720 F.3d at 1189 (citing Sunahara v.  
13 Burchard (In re Sunahara), 326 B.R. 768, 782 (9th Cir. BAP 2005)).  
14 Any local rule that is inconsistent with the Acts of Congress and  
15 the Rules must be held invalid. In re Healthcentral.com, 504 F.3d  
16 at 784; In re Sunahara, 326 B.R. at 783.

17 To the extent LBR 9011-3 conflicts with Rule 9011 in  
18 authorizing sanctions for discovery violations, it is invalid. If  
19 LBR 9011-3 is not intended to be used to support a sanction for  
20 attorney’s fees respecting discovery abuse, clearly the bankruptcy  
21 court abused its discretion in applying it in this context to  
22 Appellants. Either way, LBR 9011-3 cannot support the sanction.

23 **B. The bankruptcy court could not rely on LBR 7026-1(c).**

24 LBR 7026-1(c), specifically (c)(4)<sup>10</sup> – Cooperation of Counsel;  
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26 <sup>10</sup> Cooperation of Counsel; Sanctions. The failure of any  
27 counsel either to cooperate in this procedure, to attend the  
28 meeting of counsel, or to provide the moving party the information  
necessary to prepare the stipulation required by this rule within  
7 days of the meeting of counsel will result in the imposition of  
sanctions, including the sanctions authorized by [Rule] 7037 and  
LBR 9011-3.

1 Sanctions – allows the bankruptcy court to impose sanctions on  
2 counsel who fail to cooperate in disclosure or discovery, to  
3 attend the meeting of counsel or to provide the moving party the  
4 information necessary to prepare the stipulation required by LBR  
5 7026-1. For awarding the sanction of attorney’s fees, LBR 7026-  
6 1(c)(4) relies, in part, on the sanction authority authorized by  
7 LBR 9011-3, which we have determined conflicts with Rule 9001's  
8 express prohibition of sanctions relating to discovery abuse.

9 As noted above, we fail to see how the requirements of LBR  
10 7026-1 apply to counsel for a nonparty. However, even if they do,  
11 two problems exist. First, the attorney’s fees were imposed  
12 jointly and severally on Nguyen and Debtors; LBR 7026-1(c)(4)  
13 expressly applies only to counsel. Second, and more importantly,  
14 no such sanction is authorized by Rule 7026 (incorporating Civil  
15 Rule 26). Civil Rule 26 – the rule governing discovery generally  
16 – expressly provides that Civil Rule 37(a)(5) governs the award of  
17 expenses in connection with requests for protective orders and/or  
18 successful oppositions thereto. See Civil Rule 26(c)(3).

19 Civil Rule 26 does not provide for the imposition of  
20 sanctions except in one circumstance – improper certification in  
21 signing disclosure and discovery requests, responses and  
22 objections. See Civil Rule 26(g)(3). Improper certification was  
23 not an issue here. Thus, because Rule 7026 does not expressly  
24 provide for sanctions for discovery abuse, in particular  
25 attorney’s fees with respect to a motion for a protective order,  
26 opposition thereto, or a motion to compel, neither can LBR 7026-1.  
27 To the extent LBR 7026-1(c)(4) is inconsistent with Rule 7026, it  
28 is invalid and cannot support the sanction of attorney’s fees.

1 **C. The bankruptcy court could not rely on LBR 1001-1(f).**

2 LBR 1001-1(f)<sup>11</sup> is a "catch all" rule providing for the  
3 sanction of attorney's fees for the failure of "counsel or of a  
4 party" to comply with the LBRs, the Civil Rules or the Rules, or  
5 with any order of the bankruptcy court. Rule 1001, the rule from  
6 which LBR 1001-1(f) is derived, provides for the scope of the  
7 Rules and Bankruptcy Forms and states that the Rules and Forms  
8 govern procedure in bankruptcy cases. Rule 1001 does not  
9 expressly authorize sanctions for violating other federal rules.  
10 Therefore, LBR 1001-1(f) is inconsistent with Rule 1001 in that it  
11 grants the court sanction authority not provided for in Rule 1001.  
12 Thus, it is invalid, and the bankruptcy court could not rely on  
13 this local rule to sanction Appellants.

14 In summary, the bankruptcy court abused its discretion when  
15 it imposed the sanction of attorney's fees against Appellants for  
16 alleged discovery abuse under LBR 1001-1(f), 7026-1(c) and 9011-3.  
17 Although the court could have sanctioned Appellants under Rule  
18 7037, and we can affirm on any basis supported by the record, the  
19 insufficient findings made by the bankruptcy court prevent us from  
20 doing so. We are particularly concerned about the court's  
21 erroneous assumptions that may have caused it to err in awarding  
22 sanctions in the first place: that Debtors were parties to the  
23 adversary proceeding; and that because they are debtors they are  
24 not entitled to the protections afforded nonparties in discovery  
25 under the Rules.

26 The Motion to Compel was a contested motion under Rule 9014

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28 <sup>11</sup> **Sanctions for Noncompliance with Rules.** The failure of  
counsel or of a party to comply with these Local Bankruptcy Rules,  
with the F.R.Civ.P. or the [Fed. R. Bankr. P.], or with any order  
of the court may be grounds for the imposition of sanctions.

1 and subject to Civil Rule 52(a) (incorporated by Rule 7052), which  
2 requires the bankruptcy court to find facts specifically and state  
3 its conclusions of law separately. First Yorkshire Holdings, Inc.  
4 v. Pacifica L 22 (In re First Yorkshire Holdings, Inc.), 470 B.R.  
5 864, 870 (9th Cir. BAP 2012). The bankruptcy court's findings,  
6 made at the hearing, merely state that Nguyen (not Debtors) failed  
7 to comply with discovery, namely, LBR 7026-1. We conclude that  
8 LBR 7026-1, as promulgated, imposes obligations, such as "meet and  
9 confer" and "joint discovery stipulation" on parties but not on  
10 nonparties. Further, the Compel Order provides no findings of  
11 fact to support the court's decision to sanction Appellants for  
12 "abusive conduct in the course of discovery."

#### 13 VI. CONCLUSION

14 Accordingly, because the bankruptcy court applied incorrect  
15 standards of law and failed to make the necessary findings  
16 required under Rule 7052 for us to affirm under Rule 37, we VACATE  
17 and REMAND the Compel Order for further proceedings consistent  
18 with this opinion.<sup>12</sup>

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28 <sup>12</sup> Because we are vacating and remanding the Compel Order, we  
need not address Appellants' argument that they were denied due  
process because the Trustee failed to present his fees evidence  
until after the bankruptcy court had already awarded them.