

OCT 29 2015

SUSAN M. SPRAUL, 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NOT FOR PUBLICATION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 No. CC-14-1193-DTaKu
ALTERNATIVE GRAPHICS, INC.,)	Bk. No. 9:12-bk-11378
Debtor.)	
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HEWLETT-PACKARD FINANCIAL SERVICES COMPANY,)	
Appellant,)	
v.)	MEMORANDUM¹
ALTERNATIVE GRAPHICS, INC.,)	
Appellee.)	

Argued and Submitted on September 24, 2015
at Malibu, California

Filed - October 29, 2015

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

Honorable Robin L. Riblet,² Bankruptcy Judge, Presiding

Appearances: Amanda Nichole Ferns of Ferns, Adams & Associates
argued for Appellant; William Charles Beall of
Beall & Burkhardt argued for Appellee.

Before: DUNN, TAYLOR AND KURTZ, Bankruptcy Judges.

¹This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

²On May 9, 2014, the bankruptcy case was reassigned to the
Honorable Peter Carroll.

1 Creditor Hewlett-Packard Financial Services Company
2 ("HP Financial") appeals from the bankruptcy court's order
3 confirming the Debtor's chapter 11 plan of reorganization.³
4 Specifically, HP Financial takes issue with the following: 1) the
5 confirmed plan's characterization of HP Financial's claim; 2) the
6 amount to be paid to HP Financial under the confirmed plan; and
7 3) the court's denial of HP Financial's motions to alter or amend
8 previous orders awarding sanctions to the Debtor. We DISMISS AS
9 EQUITABLY MOOT the aspects of the appeal concerning plan
10 confirmation generally and the characterization of HP Financial's
11 agreement with the Debtor. Otherwise, we AFFIRM.

12 I. FACTUAL BACKGROUND

13 This appeal arises from a dispute involving a creditor who,
14 in the words of the bankruptcy court, "has been fighting tooth
15 and nail every inch to try and prevent the Debtor from getting
16 documents" requested in discovery.

17 The discovery dispute arose out of a disagreement between
18 the Debtor and creditor HP Financial as to the nature of a
19 transaction between the parties in 2007. The Debtor acquired a
20 piece of printing equipment from HP Financial. HP Financial
21 maintains that it leased the equipment to the Debtor, whereas the
22 Debtor contends (and the bankruptcy court found) that the
23

24 ³Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
26 All "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure. All "Civil Rule" references are to the Federal Rules
28 of Civil Procedure. The Local Bankruptcy Rules of the United
States Bankruptcy Court for the Central District of California
are referred to as "Local Bankruptcy Rule" or "LBR."

1 transaction was documented as a lease but was actually intended
2 as a security arrangement for a sale.

3 As explained below, this disagreement was the only issue in
4 need of resolution before the Debtor's chapter 11 plan could be
5 confirmed. Unfortunately, that resolution was delayed six months
6 while the parties waged a heated battle over the Debtor's
7 discovery requests and HP Financial's responses.

8 The Indigo 5500

9 The Debtor, Alternative Graphics, Inc., is a corporation
10 operating a commercial printing business in Goleta, California.
11 In December 2007, the Debtor acquired an HP Indigo 5500 digital
12 printing press (the "Indigo 5500") from HP Financial, a
13 subsidiary of Hewlett-Packard, Inc. ("HP Inc."). HP Financial,
14 in turn, had acquired the Indigo 5500 from Indigo America, Inc.
15 ("Indigo America"), also a subsidiary of HP Inc., for
16 \$350,000.00. The transaction was governed by a so-called Master
17 Lease and Financing Agreement ("Master Agreement").

18 The Master Agreement, together with its attached schedule,
19 provided that the value of the Indigo 5500 was \$337,002.00. The
20 Debtor was to pay HP Financial \$6,517.00 monthly for 60 months,
21 for a total of \$391,020.00. At the end of the 60-month term, the
22 Debtor could purchase the Indigo 5500 for an amount equal to its
23 fair market value at that time.

24 The Chapter 11 Case

25 On April 2, 2012, the Debtor filed a petition for
26 reorganization under chapter 11. The Debtor's amended plan of
27 reorganization ("Plan") listed the claim of HP Financial as a
28

1 secured claim, with the collateral being the Indigo 5500.⁴ The
2 Plan proposed to pay HP Financial a total of \$90,000.00, plus
3 interest, which the Debtor asserted was the value of the
4 Indigo 5500 as of the filing date. HP Financial objected to the
5 plan, arguing that the Debtor had mischaracterized its claim.
6 More specifically, HP Financial objected to its treatment as a
7 secured creditor, arguing that its status under the Master
8 Agreement was that of a lessor. HP Financial asserted that it
9 held an unsecured claim in the amount of \$272,219.33 and that the
10 correct value of the Indigo 5500 was \$250,000.00.⁵ A hearing on
11 confirmation of the Plan was set for November 14, 2013.
12
13

14 ⁴HP Financial did not include the Plan in its appendix or
15 excerpts of record. In fact, this is only one of the significant
16 omissions in the appendix and excerpts filed by HP Financial.
17 For example, the excerpts of record include only portions of the
18 transcript of the hearing on Plan confirmation. We have
19 exercised our discretion to take judicial notice of documents
20 filed in the Debtor's main bankruptcy case, including the Plan
21 and the full transcript of the confirmation hearing. See
22 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
23 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co.
24 (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

25 The Debtor filed supplemental excerpts of record but
26 declined to file the missing portions of the confirmation hearing
27 transcript, not wishing to waive its request for summary
28 affirmance on the basis of an inadequate record. We decline the
request.

⁵According to HP Financial's amended proof of claim,
\$99,801.89 of its claim was attributable to "Costs (attorney's
fees, late charges, other costs)." Counsel for HP Financial
later conceded that this number was a "typo," and that the
correct figure was \$9,981.89, approximately a tenth of the
originally stated amount. No further amendment to the proof of
claim was made.

1 The Discovery Dispute

2 On August 14, 2013, the Debtor served HP Financial with a
3 request for production of documents and a set of
4 interrogatories.⁶ These discovery requests were aimed at
5 establishing the true nature of the Master Agreement. The Debtor
6 requested documents and information concerning any leases
7 HP Financial had executed with other customers involving
8 equipment similar or identical to the Indigo 5500. Specifically,
9 the Debtor wanted to know: the prices paid by any customers to
10 acquire their presses at the end of their lease terms; the prices
11 for which such used presses had been sold to third parties; the
12 amount HP Financial had charged its customers to remove presses
13 if the customer did not wish to purchase at the end of the lease
14 term; HP Financial's expectations at the outset of its agreements
15 as to the equipment's value at the end of the lease term; and
16 other related matters.

17 On September 23, 2013, after requesting and receiving an
18 extension of time to respond to the first set of discovery
19 requests, counsel for HP Financial submitted responses.
20 HP Financial objected that the requests were ambiguous, overly
21 broad, burdensome and oppressive, and that the requests assumed
22 facts not in evidence and were not calculated to lead to the
23 production of admissible evidence. Aside from those very general
24 objections, HP Financial's responses were perfunctory. It
25

26 ⁶These discovery requests were made in the context both of
27 confirmation proceedings with respect to the debtor's initial
28 plan of reorganization and a relief from stay motion filed by
HP Financial.

1 produced only one document, a copy of the Master Agreement, which
2 the Debtor already possessed.

3 In addition to its general objections, HP Financial also
4 refused to provide any documents in the possession of HP Inc. or
5 Indigo America.

6 The First Motion to Compel

7 On Tuesday, September 24, 2013, The Debtor's attorney,
8 William Beall, e-mailed HP Financial's attorney, Amanda Ferns.
9 Mr. Beall complained that HP Financial's responses were
10 insufficient and threatened to file a motion to compel discovery
11 unless Ms. Ferns called him within one day to discuss the
12 situation. Ms. Ferns responded by e-mail on Wednesday evening,
13 September 25, 2013, stating her willingness to meet and confer
14 with Mr. Beall by telephone, but asking for more specific
15 information regarding the Debtor's grievances. The following
16 morning, Mr. Beall replied by e-mail, providing further details
17 and stating that he planned to telephone Ms. Ferns the next day,
18 Friday, September 27, 2013.

19 What happened next is a matter of some dispute. Mr. Beall
20 declared that he called Ms. Ferns' office "within normal business
21 hours" on Friday, September 27th, and left a voice mail.
22 Ms. Ferns stated in her declaration that she did not receive
23 Mr. Beall's voice mail until Monday, September 30th. What is
24 undisputed is that at 3:26 p.m. on September 30, 2013, the Debtor
25 filed a motion to compel discovery and for sanctions ("First
26 Motion to Compel"). Ms. Ferns stated that the First Motion to
27 Compel was filed "before [she] was able to return Mr. Beall's
28 telephone call[.]" Mr. Beall retorted that he did not begin

1 working on the First Motion to Compel until Monday morning,
2 September 30th, and that Ms. Ferns could have called him at any
3 time before 3:26 p.m.

4 In the First Motion to Compel, the Debtor argued that the
5 First Discovery Responses were so inadequate that the bankruptcy
6 court should treat HP Financial as if it had not responded at
7 all. The Debtor requested sanctions, in the form of either
8 attorney fees or terminating sanctions, i.e., prohibiting
9 HP Financial from voting against or objecting to the Plan. In
10 response, HP Financial argued that the First Motion to Compel was
11 procedurally defective, citing Local Bankruptcy Rule
12 ("LBR") 7026-1. Under LBR 7026-1, HP Financial argued, Mr. Beall
13 was required to send Ms. Ferns a letter requesting a meeting to
14 resolve the discovery dispute and detailing the discovery order
15 to be sought. If Ms. Ferns failed to respond within seven days,
16 only then could the Debtor file a motion to compel. HP Financial
17 also argued that its discovery responses had been sufficient in
18 any event.

19 The bankruptcy court held a hearing on the First Motion to
20 Compel on October 11, 2013. At the outset of the hearing, the
21 bankruptcy court agreed with HP Financial that the First Motion
22 to Compel was procedurally improper. Nevertheless, the court
23 proceeded with the hearing in the hope of avoiding delay of the
24 November 14 Plan confirmation hearing. The bankruptcy court
25 rejected the argument that HP Financial could not obtain records
26 from HP Inc. or Indigo America, because, as counsel for
27 HP Financial conceded, HP Financial and Indigo America are
28 subsidiaries and affiliates of HP Inc. The bankruptcy court gave

1 HP Financial until November 1, 2013 to supplement its discovery
2 responses.

3 After announcing its rulings on the record at the
4 October 11, 2013 hearing, the bankruptcy court entered an order
5 on October 31, 2013 ("First Discovery Order"). In the First
6 Discovery Order, the bankruptcy court denied the Debtor's request
7 for sanctions without prejudice due to the failure to comply with
8 LBR 7026-1. Consistent with the bankruptcy court's oral rulings,
9 the First Discovery Order stated that HP Financial's objections
10 were overruled and that HP Financial was required to respond to
11 discovery requests to which it had not already responded
12 satisfactorily.

13 On November 14, 2013, HP Financial filed a motion to alter
14 or amend the First Discovery Order ("First Motion to Alter").
15 HP Financial requested alteration of the First Discovery Order
16 based on purportedly new evidence on two points:

17 (1) HP Financial could not search its files by asset,
18 making it impossible to find previous leases of equipment similar
19 or identical to the Indigo 5500. In an attached declaration,
20 HP Financial's representative Cindy Roebuck asserted that
21 HP Financial had entered into some 62,000 lease agreements in
22 North America since July 2013. Ms. Roebuck stated that it would
23 take "thousands of hours" for HP Financial to find the requested
24 documents.

25 (2) HP Financial did not have custody or control over
26 documents belonging to HP Inc. or Indigo America. Ms. Roebuck
27 declared that HP Financial was a subsidiary of HP Inc., but
28 nevertheless Ms. Roebuck had received no response to her efforts

1 at communication with HP Inc.

2 Due to HP Financial's failure to comply with the bankruptcy
3 court's calendaring procedures, the First Motion to Alter was not
4 set for hearing.

5 The Second Motion to Compel

6 Three days after the hearing on the First Motion to Compel,
7 the Debtor served HP Financial with a second set of
8 interrogatories and requests for production of documents. The
9 Debtor requested all invoices and other communications between
10 and among HP Financial, HP Inc. and Indigo America regarding
11 HP Financial's acquisition of the Indigo 5500, as well as all
12 accounting documents regarding the Debtor's account.

13 The November 1 deadline came and went without any additional
14 responses by HP Financial. On November 12, 2013, HP Financial
15 submitted supplemental responses to the first round of discovery.
16 The supplemental responses contained some new information, but
17 HP Financial repeated its overruled objections regarding burden,
18 relevance and lack of custody or control of documents and refused
19 to provide substantive responses to most of the requests. One
20 significant addition was an appraisal of the Indigo 5500
21 performed at HP Financial's request by an appraiser named Steven
22 Hjelmstrom. Mr. Hjelmstrom valued the Indigo 5500 at
23 \$173,100.00. On November 15, 2013, HP Financial submitted its
24 responses to the second set of discovery requests.

25 Throughout November, Mr. Beall and Ms. Ferns met and
26 conferred regarding the Debtor's continuing dissatisfaction with
27 HP Financial's various discovery responses. On December 4, 2013,
28 the Debtor filed a second motion to compel discovery and for

1 sanctions ("Second Motion to Compel"). The Debtor again
2 requested monetary sanctions and terminating sanctions in the
3 form of an order deeming HP Financial to have consented to
4 confirmation of the Plan.

5 The bankruptcy court held a hearing on the Second Motion to
6 Compel on January 29, 2014. After the bankruptcy court overruled
7 HP Financial's objections based on burdensomeness and relevance,
8 counsel for HP Financial explained that, after "months" of
9 effort, HP Financial had obtained a number of the requested lease
10 agreements with other customers. After prolonged colloquy, the
11 bankruptcy court ordered HP Financial to comply with "each and
12 every" discovery request, to the extent it had not done so
13 previously.

14 The court entered an order ("Second Discovery Order")
15 granting the Second Motion to Compel, overruling HP Financial's
16 objections and requiring HP Financial to respond to all discovery
17 requests. The Second Discovery Order also required HP Financial
18 to pay the Debtor's reasonable attorney fees incurred in the
19 filing and prosecution of the First and Second Motions to Compel.
20 The Debtor was to file a declaration setting forth such fees,
21 after which HP Financial would have "two calendar weeks" in which
22 to object. On February 4, 2014, the Debtor filed a declaration
23 of Mr. Beall ("Fee Declaration"), with an attached itemization of
24 his fees in the amount of \$16,965.00. The court entered an order
25 ("Fee Order") on February 18, 2014, requiring HP Financial to pay
26 the amount set forth in the declaration.

27 That evening, after the Fee Order had been entered,
28 HP Financial filed an objection to the Fee Declaration.

1 Specifically, HP Financial objected to the inclusion in the Fee
2 Order of fees incurred in connection with the First Motion to
3 Compel, the Motion to Alter, the Debtor's review of discovery
4 responses, and the Debtor's motion to continue the confirmation
5 hearing.

6 Shortly before midnight the same night, HP Financial filed a
7 motion to alter or amend the Second Discovery Order ("Second
8 Motion to Alter"). HP Financial argued that it was inappropriate
9 for the Second Discovery Order to impose sanctions that had been
10 requested in the First Motion to Compel but denied in the First
11 Discovery Order. Under this argument, the bankruptcy court
12 should have awarded sanctions, if at all, only in connection with
13 the Second Motion to Compel.

14 On March 4, 2012, HP Financial filed yet another motion to
15 alter or amend ("Third Motion to Alter"), this time seeking
16 reconsideration of the Fee Order. For the most part, the Third
17 Motion to Alter raised the same arguments as the Second Motion to
18 Alter regarding the impropriety of the fees requested. Apart
19 from those matters, however, HP Financial now argued that the Fee
20 Order should be altered because it was entered one day too early.
21 The Beall Declaration was filed on February 4, and the Second
22 Discovery Order provided that HP Financial would have "two
23 calendar weeks" in which to respond; therefore, HP Financial
24 argued, the Fee Order should not have been entered before
25 February 19. HP Financial asked the bankruptcy court to alter or
26 amend the Fee Order to take into account HP Financial's
27 objection, which was filed within the allowed two-week period.
28 As with the two previous motions to alter or amend, the Third

1 Motion to Alter was not set for hearing.

2 The Confirmation Hearing

3 The bankruptcy court held an evidentiary hearing regarding
4 confirmation of the Plan ("Confirmation Hearing"). The
5 bankruptcy court heard testimony from Mr. Hjelmstrom, the
6 appraiser who had performed an appraisal of the Indigo 5500 at
7 HP Financial's request. Mr. Hjelmstrom testified consistent with
8 his report that the value of the Indigo 5500 was \$173,100.00.
9 This was based on a "desktop appraisal," which means an appraisal
10 based on photographs and interviews rather than physical
11 inspection. Mr. Hjelmstrom said the valuation he performed was
12 "fair market value in place," which is higher than other
13 valuations because it takes into account the fact that the
14 equipment is already installed and in use. Mr. Hjelmstrom
15 explained his process for arriving at a valuation:

16 (1) He began with the selling price of a refurbished unit
17 equivalent to the Indigo 5500.

18 (2) He then reduced that figure to reflect that the Indigo
19 5500 had not been refurbished.

20 (3) He added "in-place costs;" that is, he increased his
21 valuation to account for the fact that the Indigo 5500 was
22 already in place and therefore more valuable than a unit that
23 would require transportation and installation.

24 (4) He considered two forms of obsolescence: functional and
25 economic. Functional obsolescence is a matter of whether the
26 equipment was functionally out of date. Economic obsolescence
27 applies when a piece of equipment is non-compliant with
28 applicable regulations and is thus no longer usable.

1 Mr. Hjelmstrom determined that neither of these applied to the
2 Indigo 5500.

3 On cross-examination, Mr. Hjelmstrom admitted that he had
4 not examined the Indigo 5500 or any other presses of that model.
5 Mr. Hjelmstrom also testified that he had not considered
6 comparable sales in general or sales by HP Inc. of previously
7 leased machines in particular; he had investigated only the
8 **asking prices** on equipment offered for sale by various sellers.
9 With regard to the sales by HP Inc., Mr. Hjelmstrom explained
10 that such sales are relevant to "orderly liquidation value," but
11 irrelevant to determining fair market value in place.

12 Mr. Hjelmstrom further acknowledged that, although the
13 Indigo 5500 was not yet functionally obsolete, the model was no
14 longer in production and would "soon" be a "white elephant."

15 The bankruptcy court also admitted into evidence a number of
16 exhibits, including a document produced by HP Financial showing a
17 history of sales of Indigo 5500 printers to customers at the end
18 of their lease terms. For each transaction, this document showed
19 the date on which the lease term had begun, a date labeled "BO,"
20 which all parties agreed stood for "buyout," and a price also
21 designated "BO."

22 After argument and colloquy, the bankruptcy court announced
23 its findings of fact and conclusions of law. The court found
24 that Mr. Hjelmstrom's appraisal value was too high, and that the
25 better method to determine the value of the Indigo 5500 was to
26 consider the previous lease buyouts. Considering only the lease
27 buyouts of five-year-old Indigo 5500 presses, the court
28 calculated that the average price was approximately \$45,000. The

1 court then found, based on Mr. Hjelmstrom's testimony regarding
2 in-place costs, that the cost to return the equipment under the
3 Master Agreement would have been \$25,000. In light of these
4 calculations, the court found that HP Financial could not
5 reasonably have expected to receive anything more than minimal
6 value at the end of the term of the Master Agreement. The court
7 further found that "it would not make any sense under the
8 circumstances of this case for the Debtor to pay \$25,000 to send
9 the [Indigo 5500] back rather than \$45,000 to keep it." On that
10 basis, the court concluded that the Master Agreement was a
11 security agreement under applicable law. Even though the value
12 of the Indigo 5500 was determined to be \$45,000, the bankruptcy
13 court concluded that the Debtor was "stuck with" the \$90,000
14 value stated in the Plan.

15 On April 15, 2014, the bankruptcy court entered an order
16 consistent with its rulings at the Confirmation Hearing
17 ("Confirmation Order"). In addition to confirming the Plan, the
18 Confirmation Order contained language denying HP Financial's
19 relief from stay motion and the Second and Third Motions to
20 Alter. HP Financial filed a timely notice of appeal but did not
21 seek a stay of the Confirmation Order pending appeal. Since the
22 Confirmation Order was entered, the Debtor has proceeded to make
23 payments as required under the Plan. Among the priority
24 unsecured creditors, some are employees owed vacation time, some
25 of whom elected to take the vacation time in lieu of payment.
26 Other unsecured creditors are customers of the Debtor, some of
27 whom elected to accept payment in kind, in the form of free
28 printing services, instead of cash distributions.

1 II. JURISDICTION

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 1334 and 157(b) (2) (A). Except as otherwise stated below, we
4 have jurisdiction under 28 U.S.C. § 158.

5 III. ISSUES

6 1. Whether this appeal is moot insofar as HP Financial
7 seeks reversal of confirmation of the Plan.

8 2. Whether the bankruptcy court erred in finding that the
9 Master Agreement was in the nature of a security agreement rather
10 than a true lease.

11 3. Whether the bankruptcy court clearly erred in its
12 valuation of the Indigo 5500.

13 4. Whether the bankruptcy court abused its discretion in
14 awarding monetary sanctions to the Debtor.

15 IV. STANDARDS OF REVIEW

16 We review our own jurisdiction, including questions of
17 mootness, de novo. Ellis v. Yu (In re Ellis), 523 B.R. 673, 677
18 (9th Cir. BAP 2014). We review the bankruptcy court's findings
19 of fact for clear error and its conclusions of law de novo.
20 Bronitsky v. Bea (In re Bea), 533 B.R. 283, 285 (9th Cir. BAP
21 2015). The bankruptcy court's imposition of sanctions for
22 discovery abuse is reviewed for abuse of discretion. Pham v.
23 Golden (In re Pham), 536 B.R. 424, 430 (9th Cir. BAP 2015);
24 Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1156 (9th
25 Cir. 2003). We review the bankruptcy court's decision to confirm
26 a chapter 11 plan for an abuse of discretion. Marshall v.
27 Marshall (In re Marshall), 721 F.3d 1032, 1045 (9th Cir. 2013).

28 A bankruptcy court abuses its discretion if it applies an

1 incorrect legal standard or misapplies the correct legal
2 standard, or if its factual findings are illogical, implausible
3 or unsupported by evidence in the record. TrafficSchool.com,
4 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011). Only if
5 the bankruptcy court did not apply the correct legal standard or
6 improperly applied it, or if its fact findings were illogical,
7 implausible, or without support in inferences that can be drawn
8 from facts in the record, is it proper to conclude that the
9 bankruptcy court abused its discretion. United States v.
10 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

11 We may affirm the decision of the bankruptcy court on any
12 basis supported by the record. See ASARCO, LLC v. Union Pac. R.
13 Co., 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel,
14 540 F.3d 1082, 1086 (9th Cir. 2008).

15 V. DISCUSSION

16 A. Mootness

17 The doctrine of equitable mootness counsels that an
18 appellate body should dismiss an appeal where “a ‘comprehensive
19 change of circumstances’ has occurred so ‘as to render it
20 inequitable for this court to consider the merits of the
21 appeal.’” Motor Vehicle Cas. Co. v. Thorpe Insulation Co.
22 (In re Thorpe Insulation Co.), 677 F.3d 869, 880 (9th Cir. 2014)
23 (quoting Trone v. Roberts Farms, Inc. (In re Roberts Farms,
24 Inc.), 652 F.2d 793, 798 (9th Cir. 1981)). This doctrine exists
25 to protect the finality of bankruptcy decisions, particularly
26 where the rights of third parties are implicated. Id. The Ninth
27 Circuit follows a four-step process to determine whether an
28 appeal from an order confirming a chapter 11 plan is equitably

1 moot:

2 [1] We will look first at whether a stay was
3 sought, for absent that a party has not fully
4 pursued its rights. [2] If a stay was sought
5 and not gained, we then will look to whether
6 substantial consummation of the plan has
7 occurred. [3] Next, we will look to the
8 effect a remedy may have on third parties not
before the court. [4] Finally, we will look
at whether the bankruptcy court can fashion
effective relief without completely knocking
the props out from under the plan and thereby
creating an uncontrollable situation for the
bankruptcy court.

9 Id. at 881; JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest
10 Resort Props., Inc. (In re Transwest Resort Props., Inc.),
11 801 F.3d 1161(9th Cir. 2015).

12 1. HP Financial's failure to seek a stay

13 Here, HP Financial did not seek a stay pending appeal and
14 has thus "flunked the first step." In re Roberts Farms, Inc.,
15 652 F.2d at 798. Granted, the Ninth Circuit has not held that an
16 appeal of this sort is **always** moot if the appellant fails to seek
17 a stay. See Rev Op Grp. v. ML Manager LLC (In re Mortgs. Ltd.)
18 ("Mortgages I"), 771 F.3d 1211, 1216 (9th Cir. 2014) (noting
19 "tension" in Ninth Circuit authorities concerning this issue).
20 Therefore, consideration of the remaining steps is appropriate.

21 2. Substantial consummation of the Plan

22 The Code defines substantial consummation as:

- 23 (A) transfer of all or substantially all of
24 the property proposed by the plan to be
transferred;
25 (B) assumption by the debtor or by the
26 successor to the debtor under the plan of the
27 business or of the management of all or
substantially all of the property to be dealt
with by the plan; and
28 (C) commencement of distribution under the
plan.

1 11 U.S.C. § 1101(2). The transfers of property referred to in
2 subsection A do not include "payments to creditors in
3 satisfaction of the debtor's debts." Rev Op Grp. v. ML Manager
4 LLC (In re Mortgs. Ltd.) ("Mortgages II"), 771 F.3d 623, 628 (9th
5 Cir. 2014). Rather, such payments are "distributions" under
6 subsection C. Id. The significance of this distinction is that
7 payments to creditors must merely have "commenced" for a
8 reorganization plan to be substantially consummated.

9 Here, the reorganized Debtor has assumed the business of
10 Alternative Graphics, Inc. No other transfers of property were
11 proposed by the Plan. The Debtor has paid all tax claims and one
12 of two administrative claims in full, while its other
13 administrative claim continues to be paid. The Debtor also has
14 made ongoing monthly payments to its only secured creditor,
15 HP Financial. Holders of priority claims, all of whom are the
16 Debtor's employees, have been paid either in full or in kind.
17 General unsecured creditors who elected to receive printing
18 services rather than cash distributions have received those
19 services. Finally, the first and second semiannual distributions
20 to general unsecured creditors who elected not to receive
21 services in kind have been made. In short, distributions have
22 commenced, and the plan has been substantially consummated.

23 3. The third and fourth steps

24 The third and fourth steps of the Thorpe Insulation analysis
25 require us to consider what relief can be accorded if we consider
26 the merits of this appeal. Step three involves a consideration
27 of the effects on third parties of any available remedy, and step
28 four involves the related question of whether such remedy would

1 create a difficult and essentially unmanageable situation at the
2 bankruptcy court. Both of these questions in turn depend on the
3 nature of the relief that would be available.

4 To the extent HP Financial takes issue with Plan
5 confirmation itself, any effective relief that might be granted
6 would inequitably harm the interests of third parties and would
7 "knock the props out from under the [P]lan." If we reverse
8 confirmation, there will be no viable way to claw back
9 distributions that already have been made under the Plan,
10 particularly where employees elected to take vacation time in
11 lieu of payment and where other creditors received payment in
12 kind in the form of free printing services. Reversal would be
13 both prejudicial to these third parties and unmanageable in the
14 bankruptcy court on remand. Furthermore, since HP Financial
15 ultimately seeks return of the Indigo 5500, the prospect of any
16 future confirmable plan might be in jeopardy, which would make
17 the situation still more unmanageable for the court and third
18 parties. For these reasons, we decline to consider setting aside
19 Plan confirmation as equitably moot.⁷

20
21 _____
22 ⁷We note also the following ambiguous exchange between
23 counsel for HP Financial and the court that took place near the
24 end of the Confirmation Hearing, after the court had announced
25 its decision:

26 MS. FERNS: As it stands, we do not object to
27 the plan. We withdraw our objection.

28 THE COURT: You withdraw your objection to
the plan?

(continued...)

1 The same rationale applies to the bankruptcy court's
2 determination that the Master Agreement created a security
3 interest rather than a lease. If this decision were reversed, it
4 would not only knock the props out from under the plan by casting
5 doubt on the Debtor's right to retain the Indigo 5500, but it
6 would also upset the plan's treatment of unsecured creditors by
7 adding HP Financial's very large claim for lease payments as an
8 unsecured claim. Again, we decline to consider the merits of
9 this issue as equitably moot.

10 The issue of the valuation of the Indigo 5500, on the other
11 hand, presents a less clear case for mootness. Were we to remand
12 to the bankruptcy court on this issue, it might be possible to
13 craft relief in the form of modification of the Plan. The
14 bankruptcy court could simply augment the amount to be paid to
15 HP Financial under the Plan, which would result in a longer

17 ⁷(...continued)

18 MS. FERNS: Well, the objection has been --

19 THE COURT: Okay.

20 MS. FERNS: -- I -- you know, I mean, I --
21 the Court has determined that it's not a
22 lease, we're sticking with the 90,000 --

23 THE COURT: Okay.

24 MS. FERNS: -- we agree with the plan. . . .

25 Hr'g Tr. (Apr. 11, 2014) at 157:17-158:1.

26 At oral argument, Debtor's counsel argued that this colloquy
27 provides an additional ground for affirmance. Because we do not
28 consider setting aside confirmation of the Plan, we do not
otherwise address this argument.

1 duration before the claim is paid off but would have no impact on
2 distributions to third parties. Thus, in spite of HP Financial's
3 failure to pursue its rights by seeking a stay, we elect to
4 consider the merits of the valuation issue.

5 As to the issue of sanctions, no third-party rights are
6 implicated. We therefore consider the merits of that issue
7 below.

8 B. Valuation of the Indigo 5500

9 The proper standard for valuation in this context is
10 replacement value. Associates Commercial Corp. v. Rash, 520 U.S.
11 953, 956 (1997). Replacement value is defined as "the cost the
12 debtor would incur to obtain a like asset" for the same use. Id.

13 The bankruptcy court had before it two kinds of evidence
14 bearing on this question. The Debtor presented evidence of the
15 prices paid by other customers of HP Financial who had elected to
16 purchase equivalent equipment at the end of their "lease" terms.
17 HP Financial presented evidence of value in the form of expert
18 appraisal testimony by Mr. Hjelmstrom. The bankruptcy court as
19 trier of fact concluded that the prior lease buyouts provided
20 better evidence of value than the appraisal. Based on the
21 evidence of the most recent lease buyouts provided, the
22 bankruptcy court determined the value of the Indigo 5500 to be
23 approximately \$45,000. But because the Debtor had already
24 proposed to pay HP Financial \$90,000 in the Plan, the bankruptcy
25 court concluded that the Debtor was "stuck with" that amount.

26 An examination of the entire record before the bankruptcy
27 court, including portions of the Confirmation Hearing transcript
28 omitted from HP Financial's record on appeal, provided evidence

1 to support the bankruptcy court's value determination. On cross-
2 examination, Mr. Hjelmstrom admitted that he had neither
3 inspected the Indigo 5500 nor considered any of the lease buyouts
4 presented by the Debtor. Indeed, Mr. Hjelmstrom stated that he
5 had not considered any actual sales of equipment similar to the
6 Indigo 5500 in making his appraisal. The bankruptcy court
7 further took issue with Mr. Hjelmstrom's use of a refurbished
8 value as the baseline from which he began his analysis. Although
9 Mr. Hjelmstrom testified that he reduced the refurbished value by
10 twenty percent to account for the fact that the Indigo 5500 was
11 not refurbished, the bankruptcy court did not clearly err in
12 finding that the value given was still too high, particularly in
13 light of the evidence showing much lower prices obtained from
14 actual sales. Additionally, Mr. Hjelmstrom acknowledged on
15 cross-examination that the Indigo 5500 was no longer in
16 production, but he made no adjustment to account for the prospect
17 of obsolescence in the future.

18 On this record, we can neither conclude that the bankruptcy
19 court clearly erred in its valuation, nor that the court abused
20 its discretion in confirming the Plan with its provision to pay
21 HP Financial \$90,000, plus interest at six percent per annum, for
22 the Indigo 5500.

23 C. Sanctions

24 The Debtor requested sanctions in both Motions to Compel,
25 and the bankruptcy court awarded sanctions in the form of
26 attorney fees in its Second Discovery Order. The amount of those
27 sanctions was determined in a separate Fee Order. HP Financial
28 takes issue both with the imposition of sanctions and with the

1 amount awarded.

2 1. Imposition of sanctions was not an abuse of discretion

3 Civil Rule 37(a)(5), made applicable by Rule 7037, requires
4 the court to award attorney fees to a movant where a party's
5 failure to respond to discovery necessitated a motion to compel.
6 Such sanctions are not awarded if the moving party resorted to a
7 motion to compel without first making a good-faith effort to
8 obtain discovery through ordinary means; if the opposing party's
9 nonresponse was substantially justified; or if circumstances
10 otherwise make an award of sanctions unjust. Civil
11 Rule 37(a)(5)(A). An evasive or incomplete response to discovery
12 requests is equivalent to a failure to respond. Civil
13 Rule 37(a)(4). Absent a motion for a protective order, the fact
14 that a discovery request is objectionable is no excuse for a lack
15 of response. Civil Rule 37(d)(2).

16 In response to the first round of document requests,
17 HP Financial produced a single document, the Master Agreement
18 itself, which was already in the Debtor's possession. Similarly,
19 HP Financial's responses to Debtor's first set of interrogatories
20 were largely evasive and incomplete. In some cases HP Financial
21 simply did not respond, other than to make a boilerplate
22 objection. After the hearing on the First Motion to Compel, at
23 which the bankruptcy court required additional responses,
24 HP Financial provided no further responses whatsoever by the
25 deadline stated on the record at the hearing and later
26 incorporated into the First Discovery Order. HP Financial
27 eventually provided supplemental responses, but other information
28 was furnished only after the Second Motion to Compel was filed

1 and the Second Discovery Order was entered. Still other
2 information was never provided at all.

3 a. The court did not commit reversible error in
4 requiring HP Financial to provide documents in the
5 custody of HP Inc. and Indigo America

6 With respect to some of the requested documents and
7 information, HP Financial has maintained both in the bankruptcy
8 court and now on appeal that the information, which was held
9 either by HP Inc. or by Indigo America, was not in the
10 possession, custody or control of HP Financial.

11 In the related context of Civil Rule 45, the Ninth Circuit
12 has held that a party has "control" over documents that it has a
13 legal right to obtain on demand. In re Citric Acid Litigation,
14 191 F.3d 1090, 1107 (9th Cir. 1999). The Ninth Circuit stated
15 that its Citric Acid decision was consistent with the decisions
16 of other circuits on this question, including the Third Circuit's
17 decision in Gerling Int'l Ins. Co. v. Comm'r, 839 F.2d 131 (3d
18 Cir. 1988). The Third Circuit in Gerling explained that, where a
19 litigating subsidiary acting as the agent of its parent company
20 has access to the parent company's documents for its own business
21 purposes, the subsidiary cannot deny control for purposes of
22 litigation. Gerling Int'l Ins. Co., 839 F.2d at 141. See also
23 Cooper Industries v. British Aerospace Corp., 102 F.R.D. 918, 919
24 (S.D.N.Y. 1984) ("inconceivable" that subsidiary lacked control
25 over parent's materials relevant to its business of marketing and
26 servicing parent's aircraft).

27 There is no dispute that both HP Financial and Indigo
28 America are subsidiaries of HP Inc. The record amply supports

1 the conclusion that HP Financial, as the in-house financing unit
2 of HP Inc., had access to documents possessed by HP Inc. relating
3 to the very equipment that HP Financial finances on a daily
4 basis. We perceive no error in the bankruptcy court's decision
5 to require production by HP Financial of relevant documents in
6 its affiliates' possession.

7 HP Financial does not argue that it suffered any prejudice
8 or harm as a result of the bankruptcy court's requirement that
9 these documents be produced. Even if we were to hold that this
10 determination by the bankruptcy court was erroneous, the error
11 would be harmless and therefore not reversible. Van Zandt v.
12 Mbunda (In re Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012),
13 aff'd, 2015 WL 1619469 (9th Cir. Apr. 13, 2015) (no reversal for
14 harmless error).

15 b. The court did not abuse its discretion overruling
16 HP Financial's other objections

17 HP Financial also objected to various discovery requests on
18 the grounds that the requested information was not relevant and
19 that the requests were unduly burdensome. None of these
20 objections was meritorious, and the bankruptcy court did not
21 abuse its discretion in imposing sanctions over HP Financial's
22 objections.

23 The requested materials were highly relevant to the
24 underlying dispute regarding the nature of the Master Agreement
25 and the value of the Indigo 5500. The discovery requests at
26 issue sought information regarding similar equipment and similar
27 transactions with other putative lessees. As noted above, the
28 bankruptcy court properly relied on admitted evidence of this

1 type in making its factual findings. We perceive no abuse of
2 discretion in requiring production of this relevant information.

3 As to the objections regarding burdensomeness, even though
4 HP Financial never moved for a protective order, the court dealt
5 with the issue during the hearings on both Motions to Compel.
6 The bankruptcy court made it clear during colloquy that
7 HP Financial was not expected to dedicate "thousands of hours" to
8 locating the requested documents, and that a more modest volume
9 of production would be acceptable. HP Financial appears to
10 argue, on appeal as well as before the bankruptcy court, that it
11 should not have been required to produce **anything** in response to
12 these requests merely because it objected on the grounds of
13 burdensomeness.

14 Civil Rule 26(b)(2)(C), which provides that electronically
15 stored information need not be produced if the responding party
16 shows the information is not "reasonably accessible," does not
17 support HP Financial's argument. HP Financial asserted that the
18 information regarding prior leases was unavailable due to undue
19 burden or cost, but the bankruptcy court did not find this
20 assertion credible. In fact, at least some of this information
21 ultimately was produced and was presented as evidence at the
22 Confirmation Hearing. The bankruptcy court did not abuse its
23 discretion in requiring production of this relevant information.

24 2. The amount of sanctions was not reversible error

- 25 a. The bankruptcy court did not abuse its discretion
26 in awarding attorney fees for both Motions to
27 Compel

28 LBR 7026-1 requires a party seeking discovery to follow

1 certain procedures before filing a motion to compel.
2 Specifically, the moving party must first arrange a meeting of
3 counsel in a good faith effort to resolve any discovery dispute.
4 Seven days after requesting such a meeting, the moving party may
5 file and serve a stipulation by the parties explaining the
6 unresolvable discovery dispute or a declaration of non-
7 cooperation by the opposing party. Only then is a party to file
8 a motion to compel discovery. LBR 7026-1(c)(3). Failure of
9 counsel to cooperate in this procedure is grounds for imposition
10 of sanctions. LBR 7026-1(c)(4).

11 The Debtor filed the First Motion to Compel without waiting
12 the full seven days after requesting a meeting of counsel and
13 without filing the required stipulation. Debtor's counsel argued
14 at that time that his failure to follow the steps set out in
15 LBR 7026-1 was justified, as the Confirmation Hearing was fast
16 approaching and the discovery dispute was unlikely to be resolved
17 in time. The court, however, concluded that LBR 7026-1 did not
18 permit the imposition of sanctions absent strict compliance with
19 its local rule. Nevertheless, the denial of the sanctions
20 request was without prejudice.

21 The Second Motion to Compel was filed after meetings of
22 counsel had been arranged and concluded in an effort to resolve
23 the ongoing discovery disputes. Debtor's counsel also filed,
24 together with the Second Motion to Compel, a declaration
25 explaining that he had been unable to obtain the cooperation of
26 counsel for HP Financial in preparing the required stipulation.
27 In the Second Discovery Order, the court awarded attorney fees
28 incurred in prosecuting both Motions to Compel. The original

1 denial, without prejudice, of the sanctions request did not
2 foreclose this award. The record before the bankruptcy court was
3 sufficient to establish not only that HP Financial had failed to
4 comply with discovery, but also that counsel for HP Financial had
5 not cooperated reasonably with Debtor's counsel's attempts to
6 resolve the discovery dispute. The award of sanctions for both
7 motions did not constitute an abuse of discretion.

8 b. Entry of the Fee Order before HP Financial filed
9 its objection to the Fee Declaration was not
10 reversible error

11 Finally, HP Financial argues that the bankruptcy court
12 abused its discretion by entering the Fee Order before the
13 expiration of the objection period following the filing of the
14 Fee Declaration. According to the Second Discovery Order,
15 HP Financial was to have "two calendar weeks" in which to file
16 any objection to the Fee Declaration. In fact, the bankruptcy
17 court entered the Fee Order on the fourteenth day after the Fee
18 Declaration was filed. HP Financial filed an objection to the
19 Fee Declaration later the same day in the evening.

20 Although the Fee Order appears to have been entered
21 technically in violation of the Second Discovery Order, this
22 violation was remedied when the bankruptcy court considered and
23 denied the Second and Third Motions to Alter. Wade v. State Bar
24 of Arizona (In re Wade), 948 F.2d 1122, 1125 (9th Cir. 1991) (no
25 due process violation when order was entered before response
26 deadline if party had meaningful opportunity to respond in
27 reconsideration motion). In filing those motions, HP Financial
28 had a meaningful opportunity to raise its objections to the Fee

1 Declaration. The bankruptcy court considered and rejected these
2 objections. We perceive no abuse of discretion in this decision.
3 Moreover, HP Financial's arguments regarding the substance of the
4 Fee Order are so insubstantial as not to warrant further
5 proceedings before the bankruptcy court.⁸

6 VI. CONCLUSION

7 Based on the foregoing, because the bankruptcy court did not
8 clearly err in its valuation of the Indigo 5500, we conclude that
9 it did not abuse its discretion in approving the Plan provision
10 requiring the Debtor to pay HP Financial \$90,000 on its secured
11 claim. The bankruptcy court's award of sanctions also was not an
12 abuse of discretion. We DISMISS AS EQUITABLY MOOT the aspects of
13 the appeal concerning confirmation of the Plan generally and the
14 nature of the Master Agreement. On the issues of sanctions and
15 the valuation of the Indigo 5500, we AFFIRM.

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25 ⁸In fact, the Debtor argues, as an alternative basis for
26 affirmance, that the bankruptcy court should have imposed
27 terminating sanctions. As no cross-appeal was filed, this issue
28 is not properly before us, but we note that the sanctions
actually imposed were intermediate between the parties'
respective positions.