

JUN 05 2018

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

ORDERED PUBLISHED

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

In re:)	BAP No.	WW-17-1226-TaSKu
)		
MICHAEL R. MASTRO,)	Bk. No.	2:09-bk-16841-MLB
)		
Debtor.)		
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JAMES F. RIGBY, JR.,)		
Chapter 7 Trustee,)		
)		
Appellant,)		
)		
v.)	OPINION	
)		
MICHAEL R. MASTRO,)		
)		
Appellee.)		
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Argued and Submitted on March 22, 2018
at Pasadena, California

Filed - June 5, 2018

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Marc L. Barreca, Bankruptcy Judge, Presiding

Appearances: Rick Rein of Horwood Marcus & Berk Chartered
argued for appellant James F. Rigby, Jr.; C.
James Frush of Corr Cronin Michelson Baumgardner
Fogg & Moore argued for appellee Michael R.
Mastro.

Before: TAYLOR, SPRAKER, and KURTZ, Bankruptcy Judges.

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1 TAYLOR, Bankruptcy Judge:
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3 **INTRODUCTION**

4 Extraordinary cases may require unusual measures; and this
5 case certainly qualifies as extraordinary. Chief among the
6 atypical events is debtor Michael Mastro's flight from the
7 United States to avoid turning potentially significant assets
8 over to chapter 7¹ trustee James F. Rigby, Jr. Debtor and his
9 wife are now resident in France, and extradition efforts in a
10 related criminal proceeding have failed.

11 As a result of this extraordinary lack of cooperation, the
12 Trustee seeks unusual assistance in his attempt to identify and
13 collect assets of the estate: He requests an order compelling
14 Mastro to sign a consent directive, a rara avis in the
15 bankruptcy world. He intends to send the executed document to
16 international banks and financial entities in an attempt to
17 identify undisclosed Mastro accounts.

18 Mastro opposed issuance of the consent directive with
19 vehemence, and his opposition was successful. The bankruptcy
20 court, while sympathetic to the Trustee's dilemma, declined to
21 compel execution of the document because, it reasoned, it lacked
22 any authority to do so.

23 The Trustee appealed, and he now asks us to rule that a
24 bankruptcy court may issue a consent directive. As we agree
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 that the bankruptcy court had discretion to do so, we REVERSE
2 and REMAND.

3 **FACTS²**

4 The parties provide little background information about
5 this 2009 involuntary bankruptcy case. As already noted,
6 however, Mastro was not a cooperative involuntary debtor; he and
7 his wife fled to France with estate assets. Their legal
8 troubles include pending criminal charges. See generally Mastro
9 v. Rigby, 764 F.3d 1090, 1092 (9th Cir. 2014) (“[A] French Court
10 of Appeal has denied U.S. requests to extradite Linda and
11 Michael.”). The Trustee appears confident that estate assets
12 outside his control exist.

13 In May 2017 (and nearly 4,000 docket entries after case
14 initiation), the Trustee moved for an order under Rule 2004 and
15 § 521(a)(3) and (4) allowing the “issuance for execution by the
16 Debtor, Michael R. Mastro, of a Consent Directive.”³

17
18 ² We exercise our discretion to take judicial notice of
19 documents electronically filed in the underlying bankruptcy
20 case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

21 ³ The Trustee’s proposed consent directive reads in part:

22 I, Michael R. Mastro, a United States citizen, do
23 hereby direct any bank, trust company, financial
24 services company, brokerage entity, and other
25 financial institution or branch thereof, and its
26 officers, employees and agents (“Financial
27 Institution”), located outside the territorial United
28 States, at which I may have or may have had a bank or
brokerage account of any kind however described upon
which I am or was authorized to draw (“Accounts”), to
disclose all information and deliver copies of all

(continued...)

1 The bankruptcy court denied the request. It expressed
2 concern that the consent directive was a form of injunctive
3 relief and concluded: "I still have to follow the law. I only
4 have the authority, under Rule 2004, to do what Rule 2004
5 blesses. I don't see that it blesses consent directives, even
6 if it does bless, as it does, issuance of subpoenas under
7 [Civil] Rule 45."

8 The bankruptcy court entered a separate order denying the
9 motion. That same day, the Trustee moved for reconsideration;
10 treating it as a Rule 9023 motion, the bankruptcy court denied
11 the motion.

12 The Trustee timely appealed. Because a Rule 2004
13 examination decision may be interlocutory, we granted leave to
14 appeal under 28 U.S.C. § 158(a) (3).

15 **JURISDICTION**

16 The bankruptcy court had jurisdiction under 28 U.S.C.
17 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.
18 § 158.

19 **ISSUES**

20 Did the bankruptcy court abuse its discretion in denying
21 the Trustee's request for an order compelling a consent
22 directive and the Trustee's reconsideration motion?

23
24 ³(...continued)
25 documents of every interest in the Financial
26 Institution's possession or control which relate to
27 the Accounts, together with a certificate attesting to
28 the authenticity of any and all such documents, to any
agent or attorney of James F. Rigby, Jr., Trustee of
the bankruptcy estate of Michael R. Mastro, who
presents a copy of this Consent Directive.

1 **STANDARDS OF REVIEW**

2 We review the bankruptcy court's legal conclusions de novo.
3 Los Angeles Cnty. Treasurer & Tax Collector v. Mainline Equip.,
4 Inc. (In re Mainline Equip., Inc.), 539 B.R. 165, 167 (9th Cir.
5 BAP 2015). We otherwise review for an abuse of discretion a
6 bankruptcy court's: (1) Rule 2004 decision, In re Dinubilo, 177
7 B.R. 932, 939 (E.D. Cal. 1993); Motor Coach Indus., Inc. v.
8 Drewes (In re Rosenberg), 303 B.R. 172, 175 (8th Cir. BAP 2004);
9 and (2) denial of a motion for reconsideration, Weiner v. Perry,
10 Settles & Lawson, Inc. (In re Weiner), 161 F.3d 1216, 1217 (9th
11 Cir. 1998).

12 A bankruptcy court abuses its discretion if it applies the
13 wrong legal standard, misapplies the correct legal standard, or
14 makes factual findings that are illogical, implausible, or
15 without support in inferences that may be drawn from the facts
16 in the record. See TrafficSchool.com, Inc. v. Edriver Inc.,
17 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v.
18 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

19 In considering whether the bankruptcy court applied or
20 rested its conclusion on an erroneous legal standard, we review
21 legal conclusions de novo. See Pom Wonderful LLC v. Hubbard,
22 775 F.3d 1118, 1123 (9th Cir. 2014).

23 **DISCUSSION**

24 The Trustee advanced several theories supporting his
25 request that the bankruptcy court compel Mastro to sign the
26 consent directive. He initially invoked Rule 2004 in connection
27 with Mastro's duties under § 521(a)(3) and (4); then he argued
28 that Civil Rule 45, as applied by Rule 2004(c), authorizes

1 consent directives; next, he argued that Civil Rule 26, as
2 applied to Rule 2004 by Rule 9014, authorizes consent
3 directives; and last, in his reconsideration motion, he directly
4 invoked § 105.

5 On appeal, the Trustee abandoned his Civil Rule 45
6 argument; we do not consider it further.

7 **A. Consent directives are investigatory tools.**

8 A consent directive is not necessarily or even often
9 consensual: reported decisions involve cases where a court
10 compels a person to sign the document. The signatory identifies
11 neither the contemplated recipients nor accounts in the consent
12 directive. Instead, the document generally directs any bank or
13 other financial institution that receives the consent directive
14 to disclose any accounts held by the signatory. As a result,
15 the signatory does not admit the existence of any account at any
16 particular financial institution.

17 **1. The Supreme Court found a consent directive**
18 **permissible in Doe v. United States, 487 U.S. 201**
(1988).

19 Consent directives began to receive judicial scrutiny in
20 reported decisions in the early 1980s. United States v. Ghidoni
21 involved Lawrence Ghidoni's indictment for tax evasion and the
22 government's issuance of a records subpoena to the Florida
23 branch of the Bank of Nova Scotia. 732 F.2d 814, 816 (11th Cir.
24 1984). Bank officials, concerned about bank employees' exposure
25 to criminal liability under Cayman Islands Law, suggested that
26 Ghidoni sign a consent directive. Id. The district court then
27 ordered him to sign one, Ghidoni refused to do so, and the
28 district court found him in contempt. Id.

1 The Eleventh Circuit affirmed. Id. It held, over a
2 dissent, that compelling Ghidoni to sign the consent directive
3 did not violate his Fifth Amendment privilege against self-
4 incrimination because the directive was not testimonial in
5 nature. Id. at 819. In resolving the question, the Eleventh
6 Circuit highlighted that the directive spoke in the
7 hypothetical. E.g., id. at 818 (“Rather, the directive states
8 that **if** the accounts exist”) (emphasis in original); id.
9 (“Rather, the directive merely permits the bank to disclose
10 information relating to any accounts with respect to which the
11 **bank records** indicate Ghidoni’s authority to draw (i.e., any
12 accounts with respect to which the bank **thinks** Ghidoni has
13 authority).”) (emphasis in original).

14 Other circuits followed suit. United States v. Davis,
15 767 F.2d 1025, 1040 (2d Cir. 1985); United States v. Cid-Molina,
16 767 F.2d 1131, 1133 (5th Cir. 1985).⁴ But opinions were not
17 unanimous: The First Circuit, over a dissent by then-Judge
18 Breyer, held that compelling a signature on a consent directive
19 would be testimonial. In re Grand Jury Proceedings (Ranauro),
20 814 F.2d 791, 795–96 (1st Cir. 1987). See also United States v.
21 Pedro, 662 F. Supp. 47 (W.D. Ky. 1987), vacated, 889 F.2d 1089
22 (6th Cir. 1989); Senate Select Comm. on Secret Military

24 ⁴ See also Two Grand Jury Contemnors v. United States (In
25 re Grand Jury Subpoena), 826 F.2d 1166, 1171 (2d Cir. 1987);
26 United States v. A Grand Jury Witness (In re N.D.N.Y Grand Jury
27 Subpoena # 86-0351-S), 811 F.2d 114 (2d Cir. 1987) (disapproving
28 use of consent directive that did not expressly say it was
executed under court order); United States v. Lehder-Rivas, 827
F.2d 682 (11th Cir. 1987).

1 Assistance to Iran v. Secord, 664 F. Supp. 562, 565 (D.D.C.),
2 vacated, 933 F. Supp. 1 (D.D.C. 1987); United States v. Cook,
3 678 F. Supp. 1292 (N.D. Ohio 1987); In re Grand Jury
4 Investigation (Doe), 599 F. Supp. 746 (S.D. Tex. 1984).

5 As a result, issues related to the constitutionality of a
6 consent directive worked their way up to the Supreme Court,
7 which concluded in Doe v. United States that a consent directive
8 was not testimonial in nature and, thus, did not violate the
9 signer's Fifth Amendment privilege. 487 U.S. 201, 214-19
10 (1988). Only Justice Stevens dissented. Id. at 219 (Stevens,
11 J., dissenting).

12 **2. Doe controls our evaluation of Mastro's**
13 **constitutionality argument.**

14 Mastro does not question the Trustee's proposed form of
15 consent directive. Instead, he asserts that recent developments
16 in the act-of-production doctrine undercut Doe's holding and
17 make Justice Stevens's dissent the better view.

18 But vague allusion to developments in the law and a half-
19 hearted, paragraph-long discussion do not rise to the level of a
20 cognizable argument justifying deviation from Supreme Court
21 authority. We appreciate that Mastro wants to preserve his
22 constitutionality argument for appeal. But we are bound by Doe,
23 and Mastro cites no case that even suggests that Doe is no
24 longer good law. Cf. In re Various Grand Jury Subpoenas, 248 F.
25 Supp. 3d 525, 527-29 (S.D.N.Y. 2017) (concluding that the
26 "Consent Directive Does Not Violate the Fifth Amendment" and
27 citing Doe, 487 U.S. at 215). Accordingly, because Doe holds
28 that consent directives are not testimonial, we reject Mastro's

1 argument that an order compelling execution of a consent
2 directive would violate his Fifth Amendment privilege against
3 self-incrimination.

4 **3. Courts in non-bankruptcy cases rely on various sources**
5 **of authority to issue consent directives.**

6 In Doe, the Fifth Circuit held that the All Writs Act (28
7 U.S.C. § 1651) allowed the district court to issue the consent
8 directive. 487 U.S. at 205 n.3. Because the petitioner did not
9 challenge that conclusion on appeal, the Supreme Court did not
10 address it. Id.

11 After Doe, reported decisions began to define the authority
12 for issuance of consent directives with more precision. Some
13 courts relied on the All Writs Act, but many were reluctant to
14 rely on it exclusively because the All Writs Act is not an
15 independent source of jurisdiction: to invoke it, the court must
16 have some other jurisdictional basis. E.g., In re Grand Jury
17 Proceedings, Yanagihara Grand Jury, 709 F. Supp. 192, 194 (C.D.
18 Cal. 1989) ("The court agrees that jurisdiction may not rest on
19 the All Writs Act alone."). See United States v. Denedo, 556
20 U.S. 904, 913 (2009) ("[T]he All Writs Act and the extraordinary
21 relief the statute authorizes are not a source of subject-matter
22 jurisdiction."); Doe v. INS, 120 F.3d 200, 204-05 (9th Cir.
23 1997).

24 In the context of criminal proceedings, the recalcitrant
25 witness statute, 28 U.S.C. § 1826, which governs grand jury
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1 witnesses, emerged as the primary jurisdictional hook.⁵ Both
2 the Ninth and Second Circuits held that the recalcitrant witness
3 statute vested the district court with authority to compel and
4 enforce a consent directive. In re Grand Jury Proceedings
5 (Shams), 873 F.2d 238 (9th Cir. 1989); In re Doe, 860 F.2d 40,
6 49 (2d Cir. 1988).⁶ As a result, both circuits declined to
7 consider if the All Writs Act, in isolation, was sufficient.
8 Shams, 873 F.2d at 239 n.1; In re Doe, 860 F.2d at 49.

9 The Second Circuit additionally held that the district
10 court's inherent supervisory power over a grand jury provided
11 the district court with the power to enforce a consent
12 directive. In re Doe, 860 F.2d at 49.

13 Reported cases discuss the appropriateness of consent
14 directives outside situations involving a grand jury less
15 frequently, but government agencies such as the Commodity
16 Futures Trading Commission, the Federal Trade Commission, the
17 Consumer Financial Protection Bureau, the Securities and
18 Exchange Commission, and the Internal Revenue Service use them.

20 ⁵ See In re Grand Jury Proceedings, 709 F. Supp. at 194
21 ("Exercise of this court's jurisdiction is nonetheless
22 permissible under 28 U.S.C. § 1826 (1982). Through this
23 statute, Congress authorized courts to compel a recalcitrant
24 witness to testify in front of a grand jury and to provide
necessary documents. The order in this case is intended to
produce just that result." (footnote omitted)).

25 ⁶ Marsoner v. United States (In re Grand Jury
26 Proceedings), 40 F.3d 959, 966 (9th Cir. 1994) ("Marsoner's
27 challenges to the district court's order compelling him to sign
the directive do not constitute just cause for his refusal to do
so. See 28 U.S.C. § 1826(a). Accordingly, the district court
28 did not abuse its discretion by holding Marsoner in contempt.").

1 Each of these agencies is vested by statute with investigatory
2 powers, including the ability to issue subpoenas and compel
3 testimony of witnesses.⁷ And each can rely on such powers in
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5 ⁷ The Commodity Futures Trading Commission and the Federal
6 Trade Commission request and receive restraining orders that
7 also direct individuals to sign a "Consent to Release of
8 Financial Records" forms; the Consumer Financial Protection
9 Bureau has done so as well. E.g., Fed. Trade Comm'n v. BunZai
10 Media Grp., Inc., No. CV 15-4527-GW(PLAx), 2015 WL 5305243, 2015
11 U.S. Dist. LEXIS 123139 (C.D. Cal. Sept. 9, 2015); Consumer Fin.
12 Prot. Bureau v. Morgan Drexen, Inc., No. SACV 13-01267-JLS
13 (JEMx), 2015 U.S. Dist. LEXIS 186915 (C.D. Cal. Apr. 30, 2015);
14 U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC,
15 No. 6:09-CV-508-ORL-28DAB, 2010 WL 11508133, 2010 U.S. Dist.
16 LEXIS 149233 (M.D. Fla. Apr. 20, 2010).

17 The Commodity Futures Trading Commission likely bases its
18 use of consent directives on 7 U.S.C. § 9, which provides that
19 it may: "subpoena witnesses, compel their attendance, take
20 evidence, and require the production of any books, papers,
21 correspondence, memoranda, or other records that the Commission
22 deems relevant or material to the inquiry[]"; and require the
23 "attendance of witnesses and the production of any such
24 records" 7 U.S.C. § 9(5)&(6).

25 Similarly, the Federal Trade Commission likely grounds its
26 use of consent directives in 15 U.S.C. § 49, which provides it
27 with the power "to require by subpoena the attendance and
28 testimony of witnesses and the production of all such
documentary evidence relating to any matter under
investigation." 15 U.S.C. § 49.

And the Internal Revenue Service relies on 26 U.S.C. § 7602
for using consent directives directed at foreign financial
institutions. That section allows the IRS to summon persons and
have them produce "such books, papers, records, or other data .
. . as may be relevant or material . . ." 26 U.S.C.
§ 7602(a)(2).

Other agencies where case law identifies use of consent
directives have similar statutorily-based investigative powers.
The Consumer Financial Protection Bureau may "issue subpoenas
for the . . . production of relevant papers, books, documents,
or other material" 12 U.S.C. § 5562(b)(1). The
Securities and Exchange Commission may "subpena

(continued...)

1 requesting and obtaining a consent directive.

2 The Internal Revenue Service's use of a consent directive
3 was discussed and limited in United States v. Kao, 81 F.3d 114,
4 115-16 (9th Cir. 1996). The Ninth Circuit held that the IRS
5 could not compel signature of a consent directive under 26
6 U.S.C. § 7602 because so doing could allow the IRS to obtain
7 records from domestic financial institutions without notifying
8 the Kaos, thus circumventing 26 U.S.C. § 7609, which establishes
9 special procedures that the IRS must use to summon a domestic,
10 third-party record keeper. Id. at 116-17. Notwithstanding this
11 decision, the IRS continues to request consent directives where
12 it seeks information from financial institutions outside the
13 United States. E.g., United States v. Norwood, 420 F.3d 888
14 (8th Cir. 2005); United States v. Brayshaw, No. 2:14-MC-00088-
15 MCE-KJN, 2016 WL 7048033, 2016 U.S. Dist. LEXIS 171003 (E.D.
16 Cal. Oct. 20, 2016); United States v. Plath, No. 0:03-cv-60439-
17 KAM, 2003-2 U.S. Tax Cas. (CCH) P50,729 (S.D. Fla. Oct. 29,
18 2003).⁸

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20 ⁷(...continued)

21 witnesses . . . and require the production of any books, papers,
22 correspondence, memoranda, or other records which the Commission
deems relevant or material to the inquiry." 15 U.S.C. § 78u(b).

23 ⁸ The IRS's Internal Revenue Manual provides some guidance
24 on its use of consent directives. IRM 5.21.2.4 (2018) ("A
25 consent directive, also known as a disclosure directive, is a
26 document signed by the taxpayer that authorizes a third party to
27 release to a U.S. court information regarding that taxpayer that
is held by a foreign bank or a third party custodian."). The
28 manual also explains how the IRS uses judicial process to compel
a taxpayer to sign one. IRM 25.5.4.5.9 (2015) ("A summons

(continued...)

1 In the ordinary civil context, courts have also authorized
2 consent directives based on their "broad discretion" to
3 supervise discovery. See Bank of Crete v. Koskotas, No. 88-CIV-
4 8412-KMW, 1989 WL 46587, at *1, 1989 U.S. Dist. LEXIS 4289, at
5 *2-*3 (S.D.N.Y. Apr. 21, 1989) ("I hold that the issuance of an
6 order compelling defendant to sign a consent form is within the
7 court's broad discretion to supervise discovery and issue
8 appropriate orders, provided that the form of the consent does
9 not abrogate defendants' Fifth Amendment or due process
10 rights."); see also SEC v. Coll. Bound, Inc., 155 F.R.D. 1, 2
11 (D.D.C. 1994) ("District courts have broad discretion in
12 supervising discovery. An order to compel defendants to sign a
13 consent form is a permissible method of obtaining that
14 discoverable information in a civil context, provided that the
15 form of the consent does not abrogate defendants' Fifth
16 Amendment or due process rights."). And at least one court
17 required signature of a consent directive in concert with the
18 granting of a motion to compel under Civil Rule 37. See Hansel
19 'N Gretel Brand, Inc. v. Savitsky, No. 1:94-cv-04027-CSH-HBP,
20 1997 U.S. Dist. LEXIS 17615, at *1-*2, 1997 WL 698179, at *1
21 (S.D.N.Y. Nov. 10, 1997). The Bank of Crete and Hansel 'N

23 ⁸(...continued)
24 cannot be used to directly compel a taxpayer to sign a consent
25 directive. However, if a summons for the foreign records is
26 served on the taxpayer while in the United States, a federal
27 district court can enforce the summons by directly ordering the
28 taxpayer to produce the documents in his or her custody or
control. Moreover, the Service can seek an order under IRC
7402(b) compelling a taxpayer to sign a consent directive
authorizing the foreign institution to produce its records.").

1 Gretel Brand, Inc. cases are noteworthy because they do not
2 involve a government agency.

3 **B. Bankruptcy courts may compel a debtor to sign a consent**
4 **directive on the request of a chapter 7 trustee.**

5 When we consider the obligations and enforcement mechanisms
6 created by the Code and the investigatory tools available to the
7 Trustee, we conclude that the bankruptcy court had discretion to
8 authorize and enforce a consent directive at the request of the
9 Trustee.

10 **1. The Code imposes statutory investigatory duties on**
11 **trustees and statutory disclosure obligations on**
12 **debtors.**

13 A chapter 7 trustee is under a statutory duty to, among
14 other things, collect "the property of the estate" and
15 "investigate the financial affairs of the debtor"
16 11 U.S.C. § 704(a)(1)&(4). Property of the estate includes a
17 debtor's foreign bank accounts. See Hong Kong & Shanghai
18 Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th
19 Cir. 1998).

20 A chapter 7 debtor also has various, Code-imposed duties.
21 11 U.S.C. § 521(a). A debtor must "surrender to the trustee all
22 property of the estate and any recorded information, including
23 books, documents, records, and papers, relating to property of
24 the estate" 11 U.S.C. § 521(a)(4). That includes bank
25 accounts, even foreign accounts. And in the § 521(a)(4)
26 context, a debtor's disclosure obligations are heightened: she
27 must surrender information to the trustee even if she has not
28

1 been granted immunity under § 344. Id.⁹ In addition, a debtor
2 has a duty to cooperate with the chapter 7 trustee “as necessary
3 to enable the trustee to perform the trustee’s duties under this
4 title” 11 U.S.C. § 521(a)(3).

5 Thus, the Trustee’s investigatory powers resemble those of
6 the governmental agencies that utilize consent directives. Like
7 those agencies, the Trustee has a statutory authorization to
8 require production of documents in the furtherance of an
9 investigatory duty also created by statute.

10 And a debtor’s duty to provide information and to cooperate
11 in this investigation is at least as clear as that of a party
12 subject to regulation by a governmental agency.

13 **2. Section 105 and Rule 2004 provide broad authority to a**
14 **bankruptcy court and allow it to enter orders carrying**
out Code-imposed obligations.

15 The Code and Rules provide powers and tools that allow a
16 trustee to meet her responsibilities to investigate a debtor’s
17 financial affairs and to collect and liquidate a debtor’s
18 estate.

19 **Section 105.** Section 105(a) vests bankruptcy courts
20 with broad residual power: “The court may issue any order,
21 process, or judgment that is necessary or appropriate to carry
22 out the provisions of this title.” 11 U.S.C. § 105(a). And
23 bankruptcy courts have “broad authority” under § 105(a) “to take
24 any action that is necessary or appropriate to prevent an abuse
25

26 ⁹ Section 344, in turn, provides that “[i]mmunity for
27 persons required to submit to examination . . . or to provide
28 information in a case under this title may be granted under part
V of title 18.” 11 U.S.C. § 344.

1 of process” Marrama v. Citizens Bank of Mass., 549 U.S.
2 365, 375 (2007) (internal quotation marks omitted). Section
3 105(a) thus “confers authority to ‘carry out’ the provisions of
4 the Code” Law v. Siegel, 134 S. Ct. 1188, 1194 (2014).

5 We long ago held that § 105(a) encompassed the powers of
6 the All Writs Act in bankruptcy proceedings. Ad Hoc Protective
7 Comm. for 10½% Debenture Holders v. Itel Corp. (In re Itel
8 Corp.), 17 B.R. 942, 945 (9th Cir. BAP 1982). Indeed, both
9 § 105(a) and the All Writs Act serve similar purposes.¹⁰

10 Although we recognize the breadth of § 105, we conclude, by
11 analogy to those cases rejecting use of the All Writs Act as the
12 sole basis for issuance of a consent directive, that it cannot
13 justify issuance of a consent directive in isolation. Despite
14 its broad language, § 105(a) is not a “roving commission to do
15 equity.” Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325
16 F.3d 1168, 1175 (9th Cir. 2003) (internal quotation marks
17 omitted). It cannot be used to take “action that the Code
18 prohibits.” Law, 134 S. Ct. at 1194.

19 But § 105 does not operate in isolation when a trustee
20 requests a consent directive; instead, it operates in concert
21 with the Code’s investigatory and disclosure requirements. A
22 consent directive order under § 105 would enable the trustee’s

23
24 ¹⁰ Consider the relevant texts: Section 105(a) allows the
25 bankruptcy court to “issue any order, process, or judgment that
26 is necessary or appropriate to carry out the provisions of this
27 title.” 11 U.S.C. § 105(a). The All Writs Act permits “all
28 courts established by Act of Congress” to “issue all writs
necessary or appropriate in aid of their respective
jurisdictions and agreeable to the usages and principles of
law.” 28 U.S.C. § 1651(a).

1 § 704 investigation of the debtor's financial affairs; and it is
2 consistent with a debtor's § 521 obligation to cooperate with
3 this investigation.

4 In short, bankruptcy courts may use § 105(a) to issue a
5 consent directive and carry out the provisions of §§ 704 and
6 521.

7 **Rule 2004.** Rule 2004 is the basic discovery device in
8 bankruptcy cases. In re Subpoena Duces Tecum, 461 B.R. 823, 829
9 (Bankr. C.D. Cal. 2011).¹¹ It allows broad examination relating
10 to "the acts, conduct, or property or to the liabilities and
11 financial condition of the debtor, or to any matter which may
12 affect the administration of the debtor's estate, or to the
13 debtor's right to a discharge." Fed. R. Bankr. P. 2004(b); see
14 also id. (discussing scope of examination in chapter 11, 12, and
15 13 cases).

16 As the Rule's text makes clear, the scope of a Rule 2004
17 examination is "unfettered and broad"; the rule essentially
18 permits a "fishing expedition." In re Subpoena Duces Tecum,
19 461 B.R. at 829 (quoting and citing In re GHR Energy Corp.,
20 33 B.R. 451, 453-54 (Bankr. D. Mass 1983)). And the examination
21 may "extend to third parties who have had dealings with the
22 debtor." In re Fin. Corp. of Am., 119 B.R. 728, 733 (Bankr.
23 C.D. Cal. 1990).

24 We acknowledge that Rule 2004 is not without limits. It

25
26 ¹¹ Indeed, the "sweeping general examination" of debtors is
27 "traceable to the first bankruptcy statute enacted by the
28 English Parliament more than 450 years ago." In re Symington,
209 B.R. 678, 683 (Bankr. D. Md. 1997). Bankruptcy examinations
thus predate modern federal civil procedure. Id. at 684.

1 should not be used "to abuse or harass" In re Enron
2 Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002); cf. Fed. R.
3 Bankr. P. 9011(b)(1). Nor should it "stray into matters which
4 are not relevant to the basic inquiry." In re Mittco, Inc.,
5 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984).¹² Thus, we stop short of
6 a determination that Rule 2004, in isolation, would justify
7 issuance of a consent directive to anyone other than a chapter 7
8 trustee.¹³ But where, as here, it enables the financial affairs
9 investigation required by the Code, it is firmly tethered to the
10 Trustee's § 704 statutory duties. Thus, issuance of a consent
11 directive in connection with a Rule 2004 examination request is
12 entirely consistent with the broad inquiry into a debtor's
13 financial affairs authorized by the Code.

14 **3. Case law allowing use of consent directives in other**
15 **contexts supports our determination that they are**
16 **appropriate in a bankruptcy context.**

17 Our view that the statutory rights and duties created by
18 the Code provide a basis for issuance of a consent directive is
19 bolstered by our review of regulatory agencies' use of consent
20 directives. Various statutes provide these agencies with
21 investigatory obligations and authority and the ability to
22 summon persons and to obtain production of documents and data.

23 ¹² E.g., In re Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill.
24 1985) ("It is clear that Rule 2004 may not be used as a device
25 to launch into a wholesale investigation of a non-debtor's
26 private business affairs."); In re Fin. Corp. of Am., 119 B.R.
at 733 ("Matters having no relationship to the debtor's affairs,
or the administration of the bankruptcy estate are not proper
subjects of a Rule 2004 examination.").

27 ¹³ Or other trustee vested with similar responsibilities by
28 the Code.

1 Based on this authority, even without a tool such as a Rule 2004
2 examination, the agencies use consent directives to conduct
3 statutorily required investigation.¹⁴

4 A chapter 7 trustee, similarly, is statutorily tasked with
5 investigating financial affairs and collecting estate property,
6 and Rule 2004 allows a trustee to compel the production of
7 documents. Thus, a trustee uses a consent directive in the same
8 manner as the agencies discussed above.

9 Our conclusion is similarly supported when we consider that
10 debtors' disclosure obligations are analogous to the obligations
11 of witnesses under subpoena. As we noted above, the Code
12 requires a debtor to surrender to a trustee "any recorded
13 information, including books, documents, records, and papers,
14 relating to property of the estate" 11 U.S.C.
15 § 521(a)(4). This statutory text mirrors language that the
16 Ninth Circuit has already used to justify a consent directive
17 when it held that the recalcitrant witness statute, 28 U.S.C.
18 § 1826, authorizes a district court to hold a grand jury witness
19 who refuses to sign a consent directive in contempt. Shams, 873
20 F.2d at 239. That section, in turn, refers to a witness who
21 "refuses without just cause shown to comply with an order of the
22 court to testify or provide other information, including any
23 book, paper, document, record, recording or other
24 material" 28 U.S.C. § 1826(a). Refusing to sign a

26 ¹⁴ We acknowledge the limitations the Ninth Circuit placed
27 on the IRS in Kao. But the Code does not contain any
28 restriction analogous to 26 U.S.C. § 7609 or applicable to
discovery in relation to foreign bank accounts.

1 consent directive, then, must be contemptuous because it is
2 refusal to "provide other information," as plainly required by
3 statute.

4 The statutory texts are similar. Both statutes'
5 illustrative, "including" list refer to "books," "documents,"
6 "records," and "papers." The recalcitrant witness statute goes
7 a little further and references "recording" and "other material"
8 in its illustrative list. And we acknowledge a slight wording
9 difference between the two: § 521(a)(4) refers to "recorded
10 information" while 28 U.S.C. § 1826(a) refers to "other
11 information." But the account information sought by a consent
12 directive falls under each term; it is both recorded information
13 and other information. Thus, to the extent 28 U.S.C. § 1826(a)
14 authorizes the use of a consent directive, so would § 521(a)(4).

15 Rule 2004 serves as an additional bridge between §§ 521 and
16 704, as it provides trustees a mechanism to require debtors to
17 produce. And, again, to the extent Rule 2004 is not
18 sufficiently broad, § 105 would allow issuance of a consent
19 directive to require a debtor to fulfill a statutory duty.
20 Section 105(a) is not being used as an independent basis for the
21 consent directive; it is, rather, being used in concert with
22 §§ 521 and 704.¹⁵

24 ¹⁵ As a result, the Ninth Circuit's decision to not decide
25 whether the All Writs Act independently authorizes a consent
26 directive does not worry us. The Code affirmatively requires
27 disclosure of the information the Trustee seeks by way of
28 consent directive; so using § 105(a) to compel a debtor to sign
a consent directive for a trustee would not be an untethered use
of the section.

1 Accordingly, we hold that a bankruptcy court may use
2 § 105(a) and Rule 2004 to compel a debtor to sign a consent
3 directive in furtherance of the debtor's § 521(a)(4) obligation
4 to provide recorded information to the trustee and in
5 furtherance of a trustee's § 704 duties to investigate a
6 debtor's affairs.¹⁶

7 **4. On remand, the bankruptcy court may exercise**
8 **discretion.**

9 The bankruptcy court decided that it lacked the authority
10 to issue a consent directive. The Trustee asks us to reverse
11 that decision and to order Mastro to execute the consent
12 directive. But our conclusion that the bankruptcy court could
13 compel Mastro to sign a consent directive does not mean that a
14 consent directive should issue under the present facts. We
15 leave that decision in the first instance to the bankruptcy
16 court's discretion.

17 The bankruptcy court's discretion is at least two-fold:
18

19 _____
20 ¹⁶ Having concluded that a bankruptcy court has the
21 discretion to issue a consent directive, we briefly reject the
22 Trustee's Civil Rule 26 theory. He seeks to import civil
discovery processes to Rule 2004 by arguing that a Rule 2004
motion is a Rule 9014 contested matter.

23 A Rule 2004 motion is only sometimes – and not always – a
24 contested matter, and a contested matter is not required before
a bankruptcy court authorizes a Rule 2004 examination. In re
25 Subpoena Duces Tecum, 461 B.R. at 831. As a result, when the
Trustee filed his motion, he did not necessarily have Civil
26 Rule 26 at his disposal; it thus did not support issuance of the
consent directive when the motion was filed.

27 And in any event, the contest in an opposed Rule 2004
28 examination involves the right to the examination itself, not
the particular tool used for examination.

1 (1) should the Rule 2004 consent directive order issue?; and
2 (2) how should it issue? The underlying bankruptcy case has a
3 decidedly international bent; the consent directive involves
4 international institutions, so consideration of international
5 comity may be involved in answering the first question. See,
6 e.g., Shams, 873 F.2d at 239-40 (considering Swiss law);
7 Marsoner, 40 F.3d at 964 (considering Austrian law).

8 The second question matters because a Rule 2004 examination
9 "does not offer the procedural safeguards available under the
10 Federal Rules of Civil Procedure" In re Dinubilo, 177
11 B.R. at 939. See id. at 939-40 and 940 n.12 (comparing
12 procedures); Simon v. FIA Card Servs., N.A., 732 F.3d 259, 268
13 n.6 (3d Cir. 2013) ("Rule 2004 examinations . . . are subject to
14 few of the procedural safeguards normally applicable to
15 discovery under the Federal Rules of Civil Procedure." (internal
16 quotation marks omitted)). So in some circumstances it may be
17 appropriate for the bankruptcy court to "borrow" procedural
18 protections from the Civil Rules and apply them to Rule 2004
19 examinations. In re Valley Forge Plaza Assocs., 109 B.R. 669,
20 675 (Bankr. E.D. Pa. 1990).

21 We do not have the bankruptcy court's familiarity with the
22 case. It may yet, exercising its discretion, appropriately deny
23 the consent directive request. We conclude here only that it
24 wrongly ruled that it lacked any discretion.

25 **C. The bankruptcy court erred when it denied the Trustee's**
26 **reconsideration motion.**

27 Based on the above, we also conclude that the bankruptcy
28

1 court erred in denying the Trustee's reconsideration motion.¹⁷

2 **CONCLUSION**

3 The bankruptcy court denied the Trustee's motion because it
4 thought that it lacked the authority to compel a debtor to sign
5 a consent directive. This was legal error; bankruptcy courts
6 have that power. This conclusion, however, does not mean that
7 the bankruptcy court must compel Mastro to do so. Accordingly,
8 we REVERSE the bankruptcy court's order and REMAND for further
9 proceedings consistent with this opinion.

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17 ¹⁷ Whether an order denying a Rule 2004 examination is a
18 final order is unclear. Lynch v. Malloy (In re Lynch), 544 B.R.
19 444, 448 (10th Cir. BAP 2016) ("Appellate courts have reached
20 different conclusions on whether an order for a Rule 2004
21 examination is a discrete dispute that sufficiently concludes a
22 'proceeding.' ") (gathering cases). So a case-by-case analysis
is warranted. Cf. id. at 449. Here, at the hearing, the
bankruptcy court suggested the order was interlocutory: it
invited the Trustee to submit additional authority and indicated
that it might reconsider the ruling.

23 The Trustee submitted additional authority with his
24 reconsideration motion; the bankruptcy court, however,
25 interpreted and denied the motion as a Civil Rule 59(e) motion.
26 But courts "have inherent power to modify their interlocutory
27 orders before entering a final judgment." Balla v. Idaho State
28 Bd. of Corr., 869 F.2d 461, 465 (9th Cir. 1989). So, to the
extent the order was interlocutory, the bankruptcy court erred
when it applied Civil Rule 59(e). Cf. Balla, 869 F.2d at 466
("Rule 59(e) clearly contemplates entry of judgment as a
predicate to any motion." (internal quotation marks omitted)).