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OF THE NINTH CIRCUIT**5**
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**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:) BAP No. CC-17-1000-LSTa
TONY PHAM; LINDSIE KIM PHAM,) Bk. No. 8:12-bk-18847-CB
Debtors.) Adv. No. 8:12-ap-01619-CB

JONATHAN T. NGUYEN,)
Appellant,)
v.) **M E M O R A N D U M***
JEFFREY IAN GOLDEN,)
Chapter 7 Trustee,)
Appellee.)

Argued and Submitted on September 29, 2017
at Pasadena, California

Filed - November 6, 2017

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Richard Lawrence Antognini argued for Appellant;
Ashley M. McDow of Baker & Hostetler LLP argued
for Appellee.

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

*This 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.

INTRODUCTION

This is the second appeal arising from the bankruptcy court's award of sanctions for discovery abuses. Before the first appeal, the bankruptcy court awarded attorney's fees to Appellee Jeffrey I. Golden ("Trustee") and against Debtors Tony Pham and Lindsie Kim Pham and their former counsel, Appellant Jonathan Nguyen. Debtors were nonparty witnesses in the Trustee's adversary proceeding to avoid and recover allegedly fraudulent transfers of real property. The attorney's fees were sought and imposed as a sanction under local rules for failure to comply with the Trustee's subpoenas for depositions and document production and for counsel's failure to meaningfully meet and confer with Trustee's counsel. This Panel vacated and remanded the sanctions award, holding that the bankruptcy court had erred in relying on local bankruptcy rules as authority for the sanctions and because its findings were insufficient to support the sanctions under the appropriate authority. Pham v. Golden (In re Pham), 536 B.R. 424 (9th Cir. BAP 2015).

On remand, the Trustee and Debtors, but not Nguyen, submitted supplemental briefing. Although the Trustee cited Civil Rule 45¹ and the court's inherent power as a basis for the sanctions against Debtors and Nguyen, the bankruptcy court reimposed the sanctions solely under Civil Rule 37(a)(5).

¹Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure. "LBR" references are to the Local Bankruptcy Rules for the U.S. Bankruptcy Court for the Central District of California.

1 (applicable via Rule 7037) against Nguyen only. The court also
2 denied Debtors' motion to vacate the original sanctions order
3 and for an order requiring the Trustee to turn over the
4 sanctions paid.

5 In reimposing the sanctions after remand, the bankruptcy
6 court improperly relied on Civil Rule 37(a)(5) as the sole
7 source of authority for the sanctions award, and its findings do
8 not support the sanctions award. Therefore, we VACATE and
9 REMAND the amended sanctions order. We REVERSE in part the
10 bankruptcy court's order denying Debtor's motion to vacate the
11 original sanctions order because, although the request to vacate
12 was moot, the request to turn over the funds was not.

13 **FACTS**

14 The Panel's prior opinion contained a detailed factual
15 recitation that we need not repeat here. In summary, and as
16 noted above, Debtors were nonparty witnesses in an adversary
17 proceeding brought by the Trustee to avoid and recover allegedly
18 fraudulent transfers of condominium units by Mrs. Pham to the
19 defendants. Nguyen represented defendants and Debtors.

20 During the course of discovery in the adversary proceeding,
21 the Trustee issued subpoenas to Debtors under Civil Rule 45,
22 commanding them to appear for depositions and to produce
23 documents. For reasons that are detailed in the Panel's prior
24 opinion, the Trustee's counsel did not complete Mrs. Pham's
25 examination, and Mr. Pham did not appear for deposition or
26 produce documents. Additionally, Nguyen did not cooperate in
27 scheduling a meet and confer or in preparing a joint discovery
28 stipulation. The Trustee ultimately filed a motion to compel,

1 which the bankruptcy court granted. The bankruptcy court also
2 granted the Trustee's request for attorney's fees, ordering
3 Nguyen and Debtors to pay the Trustee \$17,515 "as a sanction for
4 abusive conduct in the course of discovery pursuant to Local
5 Bankruptcy Rules 1001-1(f), 7026-1(c), and 9011-3" (the
6 "Sanctions Order").

7 Nguyen and Debtors jointly appealed the Sanctions Order to
8 this Panel. By then, Debtors had complied with the subpoenas,
9 so the only issue on appeal was whether the sanctions award was
10 appropriate. In a published opinion, Pham v. Golden
11 (In re Pham), 536 B.R. 424 (9th Cir. BAP 2015), the Panel
12 vacated and remanded the Sanctions Order, holding that the
13 bankruptcy court had abused its discretion in awarding discovery
14 sanctions under LBR 1001-1(f), 7026-1(c), and 9011-3 because
15 those rules did not provide the proper legal basis for discovery
16 sanctions against nonparties and their counsel.

17 In its opinion, the Panel noted that Civil Rule 37(a)(5)
18 authorizes an award of expenses, including attorney's fees,
19 incurred for a motion to compel a nonparty's attendance at a
20 deposition. In re Pham, 536 B.R. at 431. Noting that much of
21 the conflict in the case had stemmed from securing Debtors'
22 appearance for depositions and Nguyen's alleged interference
23 with Mrs. Pham's deposition, the Panel stated, "Debtors and
24 Nguyen could have been sanctioned for attorney's fees under
25 Civil Rule 37(a)(5) for any failure to comply with the

1 subpoenas.”² Id. But because the bankruptcy court’s findings
2 were not sufficient to support sanctions under Civil Rule 37,
3 the Panel vacated and remanded for further proceedings. Id. at
4 434.

5 After remand, Debtors, represented by their new counsel,³
6 filed a motion under Civil Rule 60(b) (applicable via Rule 9024)
7 to vacate as void the Sanctions Order and for turnover of the
8 sanctions, which Nguyen had paid.⁴ The Trustee opposed the
9 motion, arguing that the BAP had not only vacated but remanded
10 the Sanctions Order; the Trustee thus requested an opportunity
11 to brief alternate grounds for the sanctions and to retain the
12 sanctions pending a further ruling by the bankruptcy court. At
13 the hearing on the matter, the bankruptcy court orally denied
14 Debtors’ motion and set a briefing schedule and a further
15 hearing.

16 In the Trustee’s supplemental brief, he argued that
17 sanctions could be imposed against Debtors under Civil
18 Rule 45(g) and the court’s inherent power. The Trustee did not
19 specifically request sanctions against Nguyen, but he alleged
20

21 ²As discussed below, Civil Rule 37(a)(5)(A) authorizes an
22 award of expenses, including attorney’s fees, for a nonparty’s
23 failure to attend a deposition, but it does not authorize such an
24 award for a nonparty’s failure to comply with a document
production request.

25 ³Nguyen withdrew as counsel for Debtors and Defendants while
the first appeal was pending.

26 ⁴The BAP’s mandate was docketed in the adversary proceeding
27 on January 4, 2016. For reasons that are not clear from the
28 record, the bankruptcy court took no action on the mandate until
Debtors filed their motion to vacate in May 2016.

1 that both Debtors and Nguyen engaged in bad faith conduct and
2 requested that the court enter an order: (1) affirming its prior
3 award of sanctions under Civil Rule 45 and Rule 9016 and the
4 court's inherent authority; and (2) making specific findings
5 regarding the violations of the subpoenas and the bad faith
6 nature of the Debtors' and Nguyen's conduct.

7 Debtors filed an opposition, arguing that the Trustee had
8 not complied with the procedures required for a contempt finding
9 under Civil Rule 45 and that Debtors had not acted in bad faith.
10 Debtors also objected to the amount of the sanctions as
11 "exceptionally high and unjustified." Nguyen did not file a
12 brief. The Trustee filed a reply arguing that he was not
13 required to seek an order to compel compliance before seeking
14 sanctions under Civil Rule 45, that Debtors had received
15 adequate notice of the sanctions motion, and that sanctions
16 against Debtors and Nguyen were substantively justified.

17 At the hearing on September 6, 2016, Nguyen did not appear.
18 The Trustee argued for the first time that sanctions could be
19 imposed under Civil Rule 37(a)(5), citing the Panel's prior
20 opinion. After hearing argument, the bankruptcy court decided,
21 based on its recollection of events, that sanctions solely
22 against Nguyen were appropriate:

23 I'd be quite happy just sanctioning the attorney here
24 for what happened because he . . . was doing things
25 that were just totally inappropriate, including
26 questioning the Court's ability to send out a notice
27 to the Defendants in an action. . . . I don't know
how much the Debtors were involved in the shenanigans,
but the attorney knew what he was doing was
inappropriate. It was not what an officer of the
court does.

28 Since he's the one who paid, what do you think,

1 [counsel], of somehow forming the order to comply with
2 what BAP said, that I can't do it under the Local
3 Rule, and making it only against the attorney? I'm
quite happy with that.

4 Hr'g Tr. (Sept. 6, 2016) at 13:8-14:8. The court further
5 remarked:

6 Mr. Nguyen caused a lot of problems, and I - what do
7 you think, [counsel], I mean, since he is the one who
8 paid the sanctions, and, frankly, as far as I can
tell, he's the one who caused a lot of these problems,
I am happy with an order that says it's Mr. Nguyen who
has to pay. . . .

9
10 Id. at 17:7-12.

11 After noting that it could impose sanctions under Civil
12 Rule 37(a)(5), Civil Rule 45, and its inherent powers, the court
13 stated that it would enter an amended order reimposing the
14 sanctions against Nguyen only. Thereafter, the bankruptcy court
15 entered its amended order (the "Amended Sanctions Order"), but
16 it imposed sanctions solely under Civil Rule 37(a)(5), finding
17 that:

18 Prior Counsel is properly sanctioned for, among other
19 things, representing both Debtors and Defendants,
20 engaging in bad faith conduct by withholding documents
21 responsive to properly issued subpoenas, and
22 interfering in the examination of Lindsie Kim Pham. In
23 aggravation, the Court notes that Debtors, not
24 Defendants, were directing the course of the adversary
litigation and that Prior Counsel was not properly
representing the interests of Defendants. In
particular, the Court notes that Prior Counsel
vehemently opposed the sending of any notices by the
Court directly to Defendants (an apparent attempt to
keep Defendants ignorant as to the course of the
litigation).

25 The award of sanctions of \$17,515.00
26 ("Sanctions") in favor of the Trustee is due and
27 proper sanctions to compensate the bankruptcy estate
28 for the harm resulting from the conduct of Prior
Counsel. As was stated in Pham, et al., v. Golden
(In re Pham), 536 B.R. 424 (9th Cir. BAP 2015), the

1 BAP opinion remanding this matter, "Debtors and Nguyen
2 could have been sanctioned for attorney's fees under
3 Civil Rule 37(a)(5) for any failure to comply with the
4 subpoenas." This Court now grants the Motion pursuant
5 to Civil Rule 37(a)(5). The Court orders the
6 Sanctions to be paid by Prior Counsel. Debtors shall
7 not be liable for the Sanctions.

8 The bankruptcy court also entered an order denying Debtors'
9 motion to vacate the Sanctions Order and for turnover. Nguyen
10 timely appealed both orders.

11 **JURISDICTION**

12 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
13 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
14 § 158. Orders imposing sanctions on nonparties for failure to
15 comply with discovery are final for purposes of appeal.

16 Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 n.3
17 (9th Cir. 1983).

18 **ISSUES**

19 Whether Nguyen waived his right to appeal the Amended
20 Sanctions Order or the denial of the Debtors' motion to vacate.

21 Whether the bankruptcy court abused its discretion in
22 reaffirming the sanctions award against Nguyen under Civil
23 Rule 37(a)(5).

24 Whether the bankruptcy court abused its discretion in
25 denying Debtors' motion to vacate and for turnover.

26 **STANDARD OF REVIEW**

27 The bankruptcy court's imposition of discovery sanctions is
28 reviewed for abuse of discretion, Stipp v. CML-NV One, LLC
(In re Plise), 506 B.R. 870, 876 (9th Cir. BAP 2014) (citing
Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1156 (9th
Cir. 2003)), as is its ruling on a motion to vacate. See

Tennant v. Rojas (In re Tennant), 318 B.R. 860, 866 (9th Cir. BAP 2004).

A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are clearly erroneous.

TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

DISCUSSION

As discussed below, we decline to deem Nguyen's arguments on appeal waived for failure to participate in the proceedings after remand because he did not have adequate notice that sanctions under Civil Rule 37(a)(5) were being sought against him. While the court's inherent power could have formed the basis for the sanctions, its findings were insufficient for us to affirm on that basis.

A clarification regarding the application of Civil Rule 37(a)(5) is required, as it appears the bankruptcy court may have misinterpreted the Panel's prior opinion. There, the Panel stated, "Civil Rule 37(a)(5) authorizes an award of expenses, including attorney's fees, incurred **for a motion to compel the nonparty's attendance.**" In re Pham, 536 B.R. at 431 (emphasis added). The authorities cited in support of that proposition - Pennwalt Corp., 708 F.2d at 494 n.4, and Civil Rule 30(d)(2) - deal exclusively with a nonparty's failure to appear for a deposition and do not apply to a nonparty's failure to produce documents. Later in the opinion, the Panel stated: "Debtors and Nguyen could have been sanctioned for attorney's fees under Civil Rule 37(a)(5) for any failure to comply with

1 the subpoenas." In re Pham, 536 B.R. at 431. And in the
2 opinion's conclusion, the Panel stated, "because the bankruptcy
3 court applied incorrect standards of law and failed to make the
4 necessary findings required under Rule 7052 for us to affirm
5 under Rule 37, we VACATE and REMAND the Compel Order for further
6 proceedings consistent with this opinion." Id. at 434.

7 These last two quotes, read in isolation, imply that Civil
8 Rule 37(a)(5) authorizes an award of attorney's fees incurred in
9 seeking an order to compel Debtors to appear at their
10 depositions **and** to produce documents. But those quotes must be
11 read in the context of the Panel's initial reference to Civil
12 Rule 37(a)(5), which made clear that, as applied to nonparties,
13 the rule authorizes an attorney's fee award only with respect to
14 a motion to compel appearance at a deposition. The Panel's
15 subsequent references to Civil Rule 37(a)(5) thus applied only
16 to Mr. Pham's failure to appear for deposition and Nguyen's
17 alleged interference with Mrs. Pham's deposition and not for any
18 failure to produce documents.

19 As discussed below, although Civil Rule 45 is the proper
20 authority for sanctioning a nonparty's failure to produce
21 documents, the procedural requirements of that rule were not
22 followed.

23 Finally, the bankruptcy court correctly denied Debtors'
24 motion to vacate, but it erred in denying their motion for
25 turnover of the sanctions paid.

1 **A. Although Nguyen did not participate in the proceedings**
2 **after remand, we will not deem waived his arguments on**
3 **appeal.**

4 The Trustee argues that Nguyen waived his right to appeal
5 the Amended Sanctions Order because he did not file a
6 supplemental brief or otherwise participate in the proceedings
7 after remand despite being served with the relevant papers. But

8 the Trustee's supplemental briefing was, at best, ambiguous
9 regarding whether sanctions were being sought against Nguyen.

10 In the introduction to his initial supplemental brief, the
11 Trustee requested "that the Court order the **Debtors** to pay the
12 Estate the sum of \$17,515.00 - the amount of the prior sanctions
13 award - for failing to comply with the deposition and document
14 request subpoenas." (Emphasis added). And in the conclusion to
15 that brief, the Trustee requested:

16 that the Court enter an order: (1) affirming its prior
17 award of sanctions in the Second Sanctions Order under
18 Fed. R. Civ. P. 45 and Fed. R. Bankr. P. 9016 as well
19 as the Court's inherent authority to sanction bad
20 faith conduct; (2) making specific findings regarding
21 the violations of the Debtor Subpoenas and the bad
22 faith nature of the Debtors' and Defense Counsel's⁵
23 conduct

24 Even though the brief contained allegations of bad faith on
25 Nguyen's part, it simply was not clear that sanctions were being
26 sought specifically and solely against Nguyen.

27 Moreover, Nguyen did not have notice that sanctions could
28 be imposed under Civil Rule 37(a)(5). The Trustee's briefs did
29 not cite that rule as a basis for the sanctions; the Trustee's

5The Trustee identified Nguyen as "Defense Counsel" in the introduction to the supplemental brief.

1 counsel first cited that rule at the September 6 hearing. As a
2 general rule, a court proposing to impose sanctions must "notify
3 the person charged both of the particular alleged misconduct and
4 of the particular disciplinary authority under which the court
5 is planning to proceed." Miller v. Cardinale (In re DeVille),
6 361 F.3d 539, 548 (9th Cir. 2004).

7 In DeVille, the bankruptcy court sanctioned a debtor and
8 his counsel under its inherent powers for improper filings and
9 attempts to remove an adversary proceeding from state court.
10 The sanctioned parties appealed to this Panel, arguing, among
11 other things, that they did not have sufficient notice of the
12 authority for the imposition of sanctions because the court's
13 orders to show cause referenced only Rule 9011. The BAP
14 rejected this argument, holding that the appellants had adequate
15 notice that the court's inherent authority was implicated
16 because the orders to show cause described in detail the
17 sanctionable conduct and addressed lack of good faith and
18 appellants' manipulation of the bankruptcy system to frustrate a
19 state court trial. Miller v. Cardinale (In re Deville),
20 280 B.R. 483, 497 (9th Cir. BAP 2002). The Ninth Circuit Court
21 of Appeals affirmed. In its opinion, the Court of Appeals noted
22 that the requirement for a court to give notice of an intent to
23 exercise inherent power was not absolute; rather the question
24 was whether the persons to be sanctioned under the court's
25 inherent power were provided with sufficient advance notice of
26 exactly what conduct was alleged to be sanctionable and were
27 aware that they stood accused of acting in bad faith.

28 In re Deville, 361 F.3d at 549. The Court of Appeals agreed

1 with the BAP that the bankruptcy court's orders to show cause
2 met this standard. Id. at 550.

3 The Trustee interprets DeVille as "an apt example that
4 identifying the legal basis for the imposition of sanctions is
5 not required to satisfy due process." The Court of Appeals in
6 Deville warned, however, that its holding "should not be taken
7 as an indication that this court regards a bankruptcy court's
8 non-reference to inherent power as a source of sanctioning
9 authority as a matter of little consequence." Id. at 550 n.4.
10 We are thus not persuaded that DeVille eliminated the
11 requirement that a person to be sanctioned be put on notice of
12 the authority under which sanctions are sought. Here, the
13 bankruptcy court awarded sanctions under Civil Rule 37(a)(5), a
14 basis that was not articulated in the Trustee's supplemental
15 briefing.⁶

16 There is no question that Nguyen has standing to appeal the
17 bankruptcy court's order. As the sanctioned party, Nguyen is a
18 "person aggrieved" by the bankruptcy court's order. See
19 Fondiller v. Robertson (Matter of Fondiller), 707 F.2d 441, 442
20 (9th Cir. 1983) (only those persons directly and adversely
21 affected pecuniarily by an order of the bankruptcy court have
22 standing to appeal).

23 And even if notice were sufficient, we would not deem
24

25 ⁶As noted, the prior Panel's opinion suggested that Debtors
26 and Nguyen could have been sanctioned for attorney's fees under
27 Civil Rule 37(a)(5). In re Pham, 536 B.R. at 431. That
28 observation, however, did not constitute notice that the Trustee
intended to seek - or that the bankruptcy court would order -
sanctions under that rule.

1 Nguyen's arguments waived. Although issues not presented to the
2 trial court cannot generally be raised for the first time on
3 appeal, we may consider such arguments if the issue presented is
4 purely one of law and the opposing party will suffer no
5 prejudice as a result of the failure to raise the issue below or
6 if the trial court's decision was plain error and injustice
7 would otherwise result. Enewally v. Washington Mutual Bank
8 (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

9 As explained below, the bankruptcy court's exclusive
10 reliance on Civil Rule 37(a)(5) was legal error. And no
11 prejudice will result to the Trustee for Nguyen's failure to
12 raise his arguments in the bankruptcy court. Debtors argued
13 that the Trustee did not follow the proper procedures for the
14 imposition of contempt sanctions under Civil Rule 45(g) and that
15 the facts did not support the imposition of sanctions under the
16 bankruptcy court's inherent power. Thus, the Trustee had the
17 opportunity to consider and respond to those arguments.

18 **B. The bankruptcy court erred in reaffirming the sanctions
19 award under Civil Rule 37(a)(5).**

20 Civil Rule 37(a)(5)(A) provides that if a motion to compel
21 is granted or discovery requests are complied with after the
22 filing of a motion to compel, "the court must, after giving an
23 opportunity to be heard, require the party or deponent whose
24 conduct necessitated the motion, the party or attorney advising
25 that conduct, or both to pay the movant's reasonable expenses
26 incurred in making the motion, including attorney's fees." But
27 the court is not to order such payment if "(i) the movant filed
28 the motion before attempting in good faith to obtain the

1 disclosure or discovery without court action; (ii) the opposing
2 party's nondisclosure, response, or objection was substantially
3 justified; or (iii) other circumstances make an award of
4 expenses unjust."

5 In the Panel's prior opinion, it noted that attorney's fees
6 incurred for a motion to compel the Phams' attendance at their
7 depositions could have been awarded under Civil Rule 37(a)(5).
8 See In re Pham, 536 B.R. at 431. The Panel declined to affirm
9 the sanctions on that basis because the bankruptcy court's
10 findings were insufficient to support a sanctions award under
11 Civil Rule 37(a)(5): "the Compel Order provides no findings of
12 fact to support the court's decision to sanction Appellants for
13 'abusive conduct in the course of discovery.'" Id. at 434.

14 On remand, the bankruptcy court imposed sanctions under
15 Civil Rule 37(a)(5) based on the prior Panel's remarks. But the
16 only finding made by the bankruptcy court that was relevant to
17 sanctions under that rule was that Nguyen had interfered in
18 Mrs. Pham's deposition. As noted, the Trustee's brief did not
19 put Nguyen on notice that sanctions were being sought against
20 him under Civil Rule 37(a)(5); thus Nguyen was not afforded the
21 opportunity to present any argument or evidence to justify his
22 conduct.⁷

23 Additionally, the bankruptcy court erred in relying on

24
25 ⁷In the prior Panel's opinion, it noted that Nguyen's
26 interference in Ms. Pham's deposition consisted of an
27 "insignificant number of times" where Nguyen tried to clarify or
28 correct a question or answer, mainly because no equivalent word
existed in Vietnamese for the English word Trustee's counsel was
using or the interpreter had used terminology different from
Trustee's counsel's. In re Pham, 536 B.R. at 427 n.6.

1 Civil Rule 37(a)(5) to sanction Nguyen for failure to produce
2 documents requested by subpoena because that rule does not
3 authorize sanctions for a nonparty's failure to produce
4 documents. Pennwalt Corp., 708 F.2d at 494 n.4. As explained
5 long ago by the Eighth Circuit Court of Appeals:

6 The purpose of Rule 37 is to provide the mechanism by
7 which Rules 26 to 36 can be made effective. It is of
8 limited application when applied to non-parties. It
9 can only be used to order a non-party to answer
written and oral questions under Rules 30 and 31. It
has no application to a non-party's refusal to produce
documents.

10 Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1341 (8th Cir.
11 1975).

12 The sole basis for enforcing a nonparty's compliance with a
13 subpoena duces tecum for the production of documents is Civil
14 Rule 45. See In re Plise, 506 B.R. at 877-78; see also Pennwalt
15 Corp., 708 F.2d at 494, and Fisher, 526 F.2d at 1341. That rule
16 provides in part that "[t]he court . . . may hold in contempt a
17 person who, having been served, fails without adequate excuse to
18 obey the subpoena or an order related to it." Civil Rule 45(g).
19 Civil Rule 45 also grants procedural protections to nonparty
20 witnesses. "A nonparty served with a subpoena has three
21 options: it may (1) comply with the subpoena, (2) serve an
22 objection on the requesting party in accordance with Civil
23 Rule 45(c)(2)(B), or (3) move to quash or modify the subpoena in
24 accordance with Civil Rule 45(c)(3)." In re Plise, 506 B.R. at
25 878. If the nonparty serves an objection or moves to quash the
26 subpoena, the requesting party must obtain a court order
27 directing compliance before seeking contempt sanctions for
28 noncompliance. See Pennwalt Corp., 708 F.2d at 494 & n.5. But

1 if, as here, the nonparty fails to object to a subpoena, the
2 proper procedure is for the requesting party to seek an order of
3 contempt under Civil Rule 45(g). See Fisher, 526 F.2d at 1342;
4 U.S. S.E.C. v. Hyatt, 621 F.3d 687, 694 (7th Cir. 2010).

5 In the contempt proceeding, the nonparty witness is
6 entitled to the "basic requirements of due process - adequate
7 notice and proper hearing . . ." Fisher, 526 F.2d at 1342.
8 And "the moving party has the burden of showing by clear and
9 convincing evidence that the contemnors violated a specific and
10 definite order of the court." Knupfer v. Lindblade
11 (In re Dyer), 322 F.3d 1178, 1190-91 (9th Cir. 2003) (citation
12 omitted).

13 Rule 9020 provides that Rule 9014 governing contested
14 matters is applicable to motions for contempt in bankruptcy
15 proceedings. In the Central District of California, LBR 9020-1
16 prescribes the procedure for obtaining an order of contempt:

17 Unless otherwise ordered by the court, contempt
18 proceedings are initiated by filing a motion that
19 conforms with LBR 9013-1 and a lodged order to show
cause. Cause must be shown by filing a written
explanation why the party should not be held in
contempt and by appearing at the hearing.⁸

20 LBR 9020-1(a). The lodged order must "clearly identify" the
21 allegedly contemptuous conduct, the possible sanctions, and the
22 grounds for sanctions. LBR 9020-1(c). The order to show cause
23

24
25 ⁸Although LBR 9020-1 refers to an order to show cause why
26 "the party" should not be held in contempt, the rule does not
27 appear to be limited to contempt against parties to the
28 litigation. For example, the rule requires "[p]ersonal service
of the issued order to show cause . . . on any entity not
previously subject to the personal jurisdiction of the court."
LBR 9020-1(e) (2).

1 must set a hearing on the matter.

2 On remand, the Trustee invoked Civil Rule 45 as a basis for
3 the sanctions. And the bankruptcy court seemed to acknowledge
4 that Civil Rule 45 was applicable. See Hr'g Tr. (Sept. 6, 2017)
5 at 18:2-15. The court, however, did not cite Civil Rule 45 in
6 its written order. In any event, the Trustee did not follow the
7 requisite procedure for obtaining an order of contempt, and the
8 bankruptcy court could not have based the sanctions award on
9 Civil Rule 45 without first affording Nguyen the procedural
10 protections of that rule.

11 **C. The bankruptcy court's findings were insufficient to
12 support an award of sanctions under its inherent power.**

13 The Trustee cited the court's inherent power as alternate
14 authority for the sanctions and, again, the bankruptcy court
15 acknowledged at the hearing that it could impose sanctions on
16 that basis. Id. at 18:10-11. Federal courts, including
17 bankruptcy courts, have inherent power to impose sanctions for a
18 broad range of willful or improper litigation conduct.

19 In re Dyer, 322 F.3d at 1196. This inherent power includes the
20 authority to sanction the conduct of a nonparty who participates
21 in abusive litigation practices or whose actions or omissions
22 cause the parties to incur additional expenses. Corder v.
23 Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1994).

24 Although a federal court is not prohibited from sanctioning
25 bad faith conduct by means of its inherent power simply because
26 that conduct could be sanctioned under a statute or court rule,
27 if a court rule governs the conduct at issue, the trial court
28 should ordinarily rely on the rule rather than its inherent

1 power. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991). But
2 "if, in the informed discretion of the court, neither the
3 statute nor the Rules are up to the task, the court may safely
4 rely on its inherent power." Id. Those circumstances include
5 the situation where the procedures for obtaining relief under
6 the applicable rule were not followed. See In re DeVille,
7 280 B.R. at 494 (concluding that Rule 9011 sanctions could not
8 support the bankruptcy court's sanctions award in part because
9 the proper procedures were not followed), aff'd, 361 F.3d 539
10 (9th Cir. 2004). Rule 45 not being available because proper
11 procedures were not followed, it would have been appropriate for
12 the bankruptcy court to invoke its inherent power.

13 Before imposing inherent power sanctions on a nonparty, the
14 court must make an explicit finding of bad faith or improper
15 purpose. In re Dyer, 322 F.3d at 1196-97; Pennwalt Corp.,
16 708 F.2d at 494.⁹ Although the Amended Sanctions Order did not
17 reference the court's inherent power as authority for the
18 sanctions, the court found that Nguyen acted in bad faith by,
19 among other things, "withholding documents responsive to
20 properly issued subpoenas, and interfering in the examination of
21 Lindsie Kim Pham." We may affirm on any basis supported by the
22 record, Caviata Attached Homes, LLC v. U.S. Bank, N.A.
23 (In re Caviata Attached Homes, LLC), 481 B.R. 34, 44 (9th Cir.
24 BAP 2012), but these findings were not sufficiently specific to

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26 ⁹The Ninth Circuit has not addressed whether a movant
27 seeking sanctions under the court's inherent power must show bad
28 faith by a preponderance of the evidence or by clear and
convincing evidence. Lahiri v. Universal Music & Video Dist.
Corp., 606 F.3d 1216, 1219 (9th Cir. 2010).

1 support an award of sanctions under the court's inherent power.
2 A bad faith finding necessarily requires an inquiry into the
3 motivation behind the offending conduct. See In re Dyer,
4 322 F.3d at 1196-97 (questioning bankruptcy court's finding of
5 bad faith in violating the automatic stay when there was no
6 finding that the offending individuals were aware that their
7 actions violated the stay, noting that "[m]ere ignorance or
8 inadvertence is not enough to support a sanction award under the
9 inherent authority.").

10 At the September 6 hearing, the bankruptcy court stated
11 that Nguyen "knew what he was doing was inappropriate." It was
12 not clear, however, what conduct the court referred to, and that
13 comment was not converted into a formal finding of fact. In the
14 Amended Sanctions Order, the court cited Nguyen's dual
15 representation of Debtors and Defendants, noting that

16 Debtors, not Defendants, were directing the course of
17 the adversary litigation and . . . [Nguyen] was not
18 properly representing the interests of Defendants. In
19 particular, the Court notes that [Nguyen] vehemently
opposed the sending of any notices by the Court
directly to Defendants (an apparent attempt to keep
Defendants ignorant as to the course of the
litigation).

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21 This finding could not have supported an award of sanctions
22 under the court's inherent power because Nguyen had no notice
23 that this conduct was a basis for the sanctions being sought.
24 Due process requires advance notice of the nature of the conduct
25 and the accusation of bad faith. See In re DeVille, 361 F.3d at
26 548 ("Ordinarily a court proposing to impose sanctions notifies
27 the person charged both of the particular alleged misconduct and
28 of the particular disciplinary authority under which the court

1 is planning to proceed.").

2 **D. The bankruptcy court erred in denying Debtors' request for**
turnover of the sanctions paid.

4 Debtors' motion to vacate was moot to the extent it sought
5 vacation of the Sanctions Order; the prior Panel's mandate had
6 already vacated that order. The bankruptcy court, however,
7 erred in not ordering the Trustee to return the sanctions paid
8 by Nguyen. In fact, it is not clear to us why the Trustee did
9 not immediately return the funds upon receiving notice of the
10 mandate. Vacating the Sanctions Order eliminated any legal
11 basis for the Trustee to retain those funds - the effect was the
12 same as if the Sanctions Order never existed. See Camreta v.
13 Greene, 563 U.S. 692, 713 (2011) (vacatur strips the decision
14 below of its binding effect and clears the path for future
15 litigation). Accordingly, the bankruptcy court erred in not
16 requiring the Trustee to turn over the funds as requested by
17 Debtors.

18 **CONCLUSION**

19 For all of these reasons, we VACATE and REMAND the Amended
20 Sanctions Order for further proceedings in accordance with this
21 disposition. As noted above, vacatur strips the Amended
22 Sanctions Order of its effect and requires the Trustee to return
23 the sanctions to the appropriate person(s)¹⁰ and restart the
24 process of requesting sanctions. We REVERSE the bankruptcy
25 court's denial of Debtors' motion for an order requiring the

27 ¹⁰The record reflects that Nguyen paid the sanctions, but it
28 was unclear whether the Debtors reimbursed Nguyen for any or all
of the sanctions paid.

1 Trustee to turn over the sanctions.
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