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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In Re

GTI CAPITAL HOLDINGS, L.L.C., an  
Arizona limited liability company dba  
ROCKLAND MATERIALS,

Debtor.

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GRANT H. GOODMAN and TERI B.  
GOODMAN, husband and wife (as  
Guarantors-Sureties for GTI Capital  
Holdings, LLC, G.H. Goodman Invest. Co.,  
LLC (Arizona limited liability companies)  
West Highland Water & Power, LLC (a  
Delaware limited liability company);  
Plaintiff,

v.  
CALIFORNIA PORTLAND CEMENT  
COMPANY (a California corporation, dba  
Arizona Portland Cement Company);  
BOMBARDIER CAPITAL, INC., EMPIRE  
SOUTHWEST, LLC (a Delaware limited  
liability company); COMERICA BANK (a  
Texas-Michigan Banking Corp.); David M.  
Reaves, Esq. (Trustee); Michael W. Carmel,  
Ltd., (Trustee Special Counsel); John R.  
Clemency, Esq. (lead counsel-joint defense  
w/CPCC, BCI, Empire S.W. Comerica  
Bank, G.E. Capital/CitiCapital  
Technologies); LEWIS & ROCA LLP;  
GREENBERG TRAURIG, LLP;

In Proceedings Under Chapter 7

Case No. 2:03-bk-07923-SSC

Adv. No. 08-ap-00464  
Adv. No. 08-ap-00471  
(consolidated)

**MEMORANDUM  
DECISION**

I. INTRODUCTION

This matter comes before the Court on a “Notice of Removal” filed with the Court on July 10, 2008 by David M. Reaves, the Chapter 7 Trustee (“Trustee”). The Notice of Removal sought the removal of two “Independent Action[s] to Vacate State Court Judgments,” (“Independent Actions”) which were filed in the Maricopa County Superior Court (“State Court”).<sup>1</sup> Accordingly, two adversary proceedings were opened on the docket in this Court.<sup>2</sup> The Court set a Scheduling Conference for August 27, 2008.<sup>3</sup>

As will be described more fully hereinafter, a number of dispositive motions were soon filed by the Defendants, which was countered with a Motion to Remand, and other relief, by the Plaintiffs. A discovery dispute soon arose which resulted in the filing of a Motion to Compel by the Plaintiffs. After a hearing on the Motion to Compel, this Court concluded that the Motion must be denied and afforded the Defendants the opportunity to seek attorneys’ fees and costs in opposing the Motion to Compel. Because the Plaintiffs subsequently withdrew the Independent Actions, in both the State and Bankruptcy Courts, the Court set a hearing to determine whether it still had the jurisdiction to award the attorneys’ fees and costs that the Defendants incurred.

After conducting a hearing on the jurisdictional issue on September 29, 2008, taking into consideration the arguments of each of the parties, the documents filed, and the entire record before the Court, the Court has set forth in this decision its findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52, Bankruptcy Rule 7052. As will be set forth more extensively hereinafter, this Court does have the subject matter jurisdiction to hear the

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**1.** The actions were entitled “Ariz.R.Civ.P. 60 Independent Action to Vacate State Court Judgments; Ariz.R.Civ.P. 65(a)(1)(2)(h)(i)(j); Injunctive Relief” in Case Nos. CV2008-04790 and CV2008-04791.

**2.** See Case Nos. 2:08-ap-00464-SSC and 2:08-ap-00471-SSC.

**3.** See Dkt. No. 8.

1 issue of sanctions concerning a discovery dispute, and the discovery dispute is a core proceeding.  
2 28 U.S.C. §§ 1334 and 157 (West 2008).

## 3 4 II. FACTUAL BACKGROUND

5 On May 8, 2003, GTI Capital Holdings, LLC, an Arizona Limited Liability  
6 Company dba Rockland Materials, and G.H. Goodman Investment Companies, LLC, an Arizona  
7 Limited Liability Company, (the "Debtors") filed their petitions for relief under Chapter 11 of the  
8 Bankruptcy Code.

9 On January 19, 2007, the Debtors, then represented by Mr. Carmel, commenced  
10 an action against Comerica Bank-California ("Comerica"), seeking relief under Section 510 of  
11 the Bankruptcy Code. On April 30, 2007, the case was converted to one under Chapter 7, and  
12 David M. Reaves ("Trustee") was appointed the Trustee.<sup>4</sup> The Trustee chose to retain Mr.  
13 Carmel as his attorney concerning the Section 510 action.<sup>5</sup> On February 20, 2008, the Debtors'  
14 estate, now represented by the Trustee, and Comerica participated in Mediation before the  
15 Honorable Randolph J. Haines, which resulted in a Settlement Agreement whereby Comerica  
16 agreed to pay the estate the sum of \$950,000. The Settlement Agreement also contained a general  
17 release of all claims which the parties then had, or could have asserted, against each other in the  
18 Section 510 adversary proceeding. The Debtors' estate also executed a broad release of liability  
19 and stipulated to dismiss any other actions being asserted on behalf of the estate in other  
20 proceedings against Comerica. The Court issued an Order approving and incorporating the  
21 Settlement Agreement on March 17, 2008.

22 On or about June 20, 2008, the Plaintiffs simultaneously filed their two identical  
23 independent actions ("Independent Actions") with the Maricopa County Superior Court in  
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25 **4.** See Dkt. Entry Nos. 1457, 1461 in Administrative Case, 2:03-bk-07923-SSC  
26 (hereinafter "Administrative Case").

27 **5.** See Dkt Entry No. 1388 in Administrative Case.

1 Phoenix, Arizona. On July 10, 2008, the Trustee and his counsel filed a “Notice of Removal” to  
2 this Court.<sup>6</sup> Based on the usual procedures of this Court, the Independent Actions were assigned  
3 adversary proceeding numbers by the Court’s Clerk’s Office.<sup>7</sup> In reviewing the Complaints filed  
4 in the Independent Actions, the Court has determined that these Actions related to various other  
5 actions or motions filed in the Arizona state courts by Mr. and Ms. Goodman, in their capacity as  
6 non-debtor guarantors for various debts incurred by the Debtors.<sup>8</sup> It is unclear why West  
7 Highland was joined as a Plaintiff in the Independent Actions.

8 In the Independent Actions, several dispositive and other motions were filed as  
9 described hereinafter.

10 A. On July 10, 2008, the Trustee filed a Motion to Dismiss the Complaint. A  
11 joinder was filed by Michael Carmel, Ltd. on July 14, 2008;

12 B. On July 17, 2008, Empire Southwest, LLC and Burch & Cracchiolo, PA filed  
13 a Motion to Dismiss the Complaint;

14 C. On July 18, 2008, Lewis & Roca LLP filed a Motion to Dismiss the  
15 Complaint;

16 D. On July 21, 2008, MWMF and CPCM filed a Motion to Dismiss the  
17 Complaint;

18 E. On July 21, 2008, the Plaintiffs filed a Motion to Remand;

19 F. On July 23, 2008 the Plaintiffs filed a Motion to Convert Status Hearing to  
20 Merits Hearing;

21 G. On July 25, 2008, a Motion to Dismiss the Complaint was filed by  
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23 **6.** See Dkt. Entry No. 1 in both Adversary 08-ap-464 and 08-ap-471.

24 **7.** The only noticeable difference between the claims appears to be the case number.

25 **8.** The Independent Actions appear to be a combined action in response to Case Nos.  
26 CV2004-000669 (California Portland v. Goodman, et al.); CV2005-010579 (Bombardier Capital  
27 v. Goodman, et al.); CV2003-005802; CV2003-006484; CV2003-007563; CV2005-003271  
(Comerica Bank v. Goodman, et al.); CV2004-092589 (Empire S.W. v. Goodman, et al.).

1 Bombardier Capital, Inc.;

2 H. On July 25, 2008, a Motion to Consolidate Adversaries No. 08-ap-464 and 08-  
3 ap-471 was filed by Bombardier Capital, Inc. in Adversary No. 08-ap-464 only. A joinder was  
4 filed by MWMF and CPCM on July 29, 2008, and by Empire Southwest and the Trustee on July  
5 31, 2008;

6 I. On July 31, 2008, the Plaintiffs filed an Omnibus Response to the Motion(s) to  
7 Dismiss/Joinders; Motion to Consolidate; Removal and a Cross-Motion for Judgment as a matter  
8 of Law; Summary Judgment; Improvident/Defective Removal.

9 The Court entered an Order on August 4, 2008 setting oral argument on the  
10 Motion to Consolidate the Adversary Proceedings for August 27, 2008. This Order also denied  
11 the request of the Plaintiffs that the Bankruptcy Rule 7016 Conference be converted into a  
12 hearing on the merits.<sup>9</sup> The August 4 Order allowed for discovery consistent with the Federal  
13 Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. A separate hearing on  
14 the Trustee and Trustee's Counsel's Motions to Dismiss was set for September 11, 2008. The  
15 remaining Motions were set for hearing on September 17, 2008.

16 According to Mr. Goodman, the Plaintiffs attempted to schedule consensual  
17 depositions on "numerous occasions" both prior, and subsequent, to the issuance of the August 4  
18 Scheduling Order.<sup>10</sup> There were no responses, other than by Brent Gardner through his counsel,  
19 Mr. Halloran. Accordingly, the Plaintiffs "issued, signed, served, and filed" subpoenas, by  
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23 **9.** The Court had entered an order scheduling a Bankruptcy Rule 7016 Conference on  
24 August 4, 2008. *See* Dkt. Entry No. 46 in Adv No. 08-ap-464 and Dkt Entry No. 36 in Adv. No.  
25 08-ap-471. The August 4 Order denied the Plaintiffs' request to convert the scheduling  
26 conference to a hearing on the merits. Hence, the Motion described in Paragraph F above was  
27 denied.

**10.** Mr. Goodman submitted a few emails around the August 4, 2008 date in support of  
this allegation.

1 electronic means, on the night of August 10, 2008 in both Independent Actions.<sup>11</sup> The Plaintiffs  
2 filed a “Motion to Compel Subpoenaed Depositions and Documents” (“Motion to Compel”) on  
3 August 11, 2008, followed by a “Motion for Accelerated Hearing” on the Motion to Compel on  
4 August 12, 2008. The Court scheduled a hearing for August 27, 2008 concerning the Motion to  
5 Compel. Several Defendants filed responses to the Motion to Compel, requesting the Court deny  
6 the Motion, issue a protective order prohibiting further discovery by the Plaintiffs, and award  
7 attorneys’ fees pursuant to Fed. R. Civ. P. 37, which is incorporated into the Bankruptcy Rules  
8 as Rule 7037.

9           The Court held the Scheduling Conference, along with the hearings regarding the  
10 Motion to Consolidate and Motion to Compel on August 27, 2008. The Court entered its  
11 decision on the record, granting the Motion to Consolidate, but denying the Motion to Compel.  
12 Furthermore, the Court granted the Defendants’ request for a protective order as to discovery  
13 prior to the hearings on the dispositive motions. The Court, however, withheld its decision  
14 regarding the appropriateness of attorneys’ fees for the Defendants who opposed the Motion to  
15 Compel, and instead ordered the parties to submit affidavits regarding the fees and costs within  
16 one week. Additionally, the Court set a hearing regarding the Defendants’ request for attorneys’  
17 fees for September 29, 2008.

18           Subsequent to the August 27, 2008 hearings, but prior to the September 29, 2008  
19 hearing, the Plaintiffs withdrew their complaints that had been filed with the Arizona state court,  
20 and filed a “Notice of Complaint Withdrawal” with this Court. In an order dated September 16,  
21 2008, this Court dismissed the Independent Actions without prejudice, and set a hearing for  
22 September 29, 2008 to determine whether as a result of the dismissal of the Independent Actions,  
23 the Court still had subject matter jurisdiction to entertain the Defendants’ request for attorneys’  
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27 **11.** See Dkt. Entry Nos. 48 in Adversary Case 08-ap-00464-SSC and 38 in Adversary  
Case 08-ap-00471-SSC.

1 fees and costs.<sup>12</sup> The parties presented their arguments, at the time of the September 29 hearing,  
2 and the issue was deemed under advisement thereafter.

### 3 4 III. DISCUSSION

5 The Plaintiffs argue that the Court never had the subject matter jurisdiction to  
6 hear the discovery dispute, or, in the alternative, even if the Court had the requisite jurisdiction,  
7 the Court lost said jurisdiction upon dismissal of the case. Accordingly, the Plaintiffs contend  
8 that the Court may not entertain a request for attorneys' fees by the Defendants.

9 Those Defendants seeking attorneys' fees contend that the Court had the subject  
10 matter jurisdiction to hear the discovery dispute upon the removal of the Independent Actions to  
11 this Court and that even though the Actions were dismissed, the Court retains the necessary  
12 jurisdiction to make a determination as to their request for attorneys' fees.

13 For the reasons set forth hereinafter, the Court concludes that it had jurisdiction  
14 over the discovery dispute upon removal of the Independent Actions to this Court, and that  
15 despite the dismissal of the Actions, the Court may still entertain the Defendants' request for  
16 attorneys' fees.

#### 17 A. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE 18 TRUSTEE IS A NAMED DEFENDANT.

19 A trustee acting in his or her official capacity may not be sued in a court without  
20 leave of the court that approves the appointment of the trustee. *See* Barton v. Barbour, 104 U.S.  
21 126, 136-37, 26 L.Ed. 672 (1881); Leonard v. Vrooman, 383 F.2d 556, 560 (9<sup>th</sup> Cir. 1967). *cert.*  
22 *denied*, 390 U.S. 925, 88 S.Ct. 856, 19 L.Ed.2d 985 (1968); Kashani v. Fulton (In re Kashani),  
23 190 B.R. 875 (9<sup>th</sup> Cir. BAP 1995). This rule is subject to a limited exception that provides:

24 Trustees, receivers or managers of any property, including debtors-  
25 in-possession, may be sued, without leave of the court appointing  
26 them, with respect to any of their acts or transactions in carrying  
27 on business connected with such property. Such actions shall be

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12. *See* Dkt. Entry No. 103.

1 subject to the general equity power of such court so far as the same  
2 may be necessary to the ends of justice, but this shall not deprive a  
litigant of his right to trial by jury.

3 28 U.S.C. § 959(a). This limited exception applies to a trustee's "acts or transactions in  
4 conducting the debtor's business in the ordinary sense of the words or in pursuing that business  
5 as an operating enterprise." Muratore v. Darr, 375 F.3d 140, 144 (1<sup>st</sup> Cir.2004), *quoted in In re*  
6 Crown Vantage, Inc., 421 F.3d 963 (9<sup>th</sup> Cir. 2005). Additionally, it has long been accepted that  
7 the trustee is an officer of the court that approved the appointment of the trustee. In re Kashani,  
8 190 B.R. 875, 884 (9<sup>th</sup> Cir. BAP 1995). Therefore, as an officer, unless the trustee is being sued  
9 for actions taken while conducting the debtor's business, the trustee may remove any state action  
10 against him or her to "the district court of the United States for the district and division  
11 embracing the place wherein it is pending. . . ." 28 U.S.C. § 1442(a)(3).<sup>13</sup>

12 In filing their lawsuit in the Arizona state court, the Plaintiffs named the Trustee  
13 as a Defendant. While it is not entirely clear why it was necessary to name the Trustee as a  
14 Defendant, the Plaintiffs argued that the Trustee and Comerica had entered into the Settlement  
15 Agreement which somehow relieved the Plaintiffs of any liability that they were subject to as a  
16 result of being guarantors on the Debtors' loans. Apparently the Plaintiffs felt that the Trustee's  
17 involvement in reaching the Settlement Agreement with Comerica required naming him as a  
18 necessary party to the Independent Actions. For purposes of this Decision, what is critical is that  
19 the Trustee was named as a Defendant in the Independent Actions without the approval or  
20 consent of this Court. It is also clear that since the Debtors ceased their business operations  
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22 **13.** 28 U.S.C. § 1442(a)(3) (West 2008) provides as follows:

23 **(a)** A civil action or criminal prosecution commenced in a State court against any of the  
24 following may be removed by them to the district court of the United States for the district and  
25 division embracing the place wherein it is pending:

26 ...

27 **(3)** Any officer of the courts of the United States, for any act under color of office or in  
the performance of his duties;



1 years ago, the Debtors had no operating business which would have allowed the Plaintiffs to sue  
2 the Trustee under the limited exception as outlined under 28 U.S.C. § 959(a).<sup>14</sup> The Settlement  
3 Agreement to which the Plaintiffs refer in their Independent Actions resolved a number of  
4 disputes or claims that the bankruptcy estates had as to one of their creditors, Comerica.  
5 Consequently, Section 959(a) does not apply. The Plaintiffs, to have brought the Independent  
6 Actions, were required to first seek leave of this Court, which they did not do. Since the  
7 Plaintiffs failed to seek such leave, the Trustee properly removed the Independent Actions to this  
8 Court pursuant to Section 1442(a)(3). Accordingly, this Court did have subject matter  
9 jurisdiction over these Independent Actions.

10  
11 **B. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE**  
12 **CASE INVOLVES A SETTLEMENT AGREEMENT THAT WAS**  
13 **ENTERED INTO AND APPROVED BY ORDER OF THIS COURT.**

14 The Courts must ensure that their orders are interpreted and executed in the  
15 manner intended. Accordingly, bankruptcy courts have the authority to assert ancillary  
16 jurisdiction when another court is interpreting a bankruptcy court's order. *See In re Fibermark,*  
17 *Inc.*, 369 B.R. 761 (Bankr.D.Vt. 2007). Ancillary jurisdiction may be asserted for two purposes:

18 (1) to permit disposition by a single court of claims that are, in  
19 varying respects and degrees, factually interdependent, and (2) to  
20 enable a court to function successfully, that is, to manage its  
21 proceedings, vindicate its authority, and effectuate its decrees[.]

22 *Kokkonen v. Guardian Life Ins. Co. Of America*, 511 U.S. 375, 380-81, 114 S.Ct. 1673, 128  
23 L.Ed.2d 391 (1994). Moreover, "bankruptcy courts have inherent or ancillary jurisdiction to  
24 interpret and enforce their own orders wholly independent of the statutory grant in 28 U.S.C. §  
25 1334." *In re Chateaugay Corp.*, 201 B.R. 48, 62 (Bankr.S.D.N.Y.1996), *aff'd* 213 B.R. 633  
26 (S.D.N.Y.1997). Relevant to this Court's analysis of its subject matter jurisdiction, as it relates  
27 to the Settlement Agreement, is the portion of the *Kokkonen* decision which states that although

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14. The dockets in the Debtors' case reflect the sale of the Debtors' business early in 2004.

1 the particular district court did not have ancillary jurisdiction to enforce a settlement agreement:

2 [t]he situation would be quite different if the parties' obligation to  
3 comply with the terms of the settlement agreement had been made  
4 part of the order of dismissal – either by separate provision. . . or  
5 by incorporating the terms of the settlement agreement in the  
6 order. In that event, a breach of the agreement would be a  
7 violation of the order, and ancillary jurisdiction to enforce the  
8 agreement would exist. . . . The judge's mere awareness and  
9 approval of the terms of the settlement agreement do not suffice to  
10 make them part of his order.

11 at 381, 114 S.Ct. 1673.

12 As part of their Independent Actions, the Plaintiffs sought enforcement, by  
13 another court, of this Court's Order incorporating the Settlement Agreement between the  
14 bankruptcy estate and Comerica. The Plaintiffs argued that the broad release language  
15 contained in the Settlement Agreement applied to them as guarantors, thereby releasing the  
16 Plaintiffs from any liability guaranteed by them as to the unpaid debts of the Debtors. Moreover,  
17 the Plaintiffs argued that the Settlement Agreement not only released them from their guaranty  
18 obligations to Comerica, but also released them from their guaranty obligations to all creditors,  
19 arguing that since the creditors had previously acted in a "joint defense" against the Debtors, the  
20 creditors, as a group, were bound by the actions of their individual members. Consequently, the  
21 Plaintiffs theorize that the Settlement Agreement between the Trustee and Comerica acted as a  
22 release from their guaranty liability of the Plaintiffs on all of their debts. The Court need not,  
23 once again, analyze and offer an opinion as to the merits of the Settlement Agreement or the  
24 Plaintiff's current arguments as to how that Agreement somehow relieved them of all liability on  
25 their guaranties. It is enough that the Plaintiffs delved into the issue of the interpretation of the  
26 Settlement Agreement in their Independent Actions. By so acting, the Plaintiffs requested  
27 another court to interpret what this Court had done and what it had set forth in one of its order.  
As a result, this Court had the ability to entertain subject matter jurisdiction over the Independent  
Actions by asserting its ancillary jurisdiction to interpret its own order. The fact that the  
Plaintiffs ultimately decided to withdraw their Independent Actions does not vitiate this Court's  
initial subject matter jurisdiction.

1 C. ALTHOUGH THE PLAINTIFFS WITHDREW THEIR COMPLAINTS  
2 PRIOR TO THE HEARING TO DETERMINE ATTORNEYS' FEES  
3 PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 37(a)(5)(B),  
4 THE COURT NONETHELESS HAS JURISDICTION TO HEAR THE  
5 MATTER.

6 The Plaintiffs commenced the Independent Actions in the Arizona state court on  
7 June 20, 2008. Summonses were timely issued and sent to the named Defendants. The Trustee,  
8 as a named Defendant, received a summons from the State Court and promptly filed a Notice of  
9 Removal with this Court along with “copies of all process, pleadings. . . and minute entries and  
10 orders filed in the [state] litigation prior to removal, plus. . . a copy of the docket for the removed  
11 litigation from the court where the removed litigation is pending.” Local Rules of Bankruptcy §  
12 9027-1(c).

13 Upon receiving the Notice of Removal, this Court promptly set a Bankruptcy  
14 Rule 7016 scheduling conference. However, prior to the Scheduling Conference, several  
15 pleadings were filed including: (i) several Motions to Dismiss; (ii) a Motion to Remand; and (iii)  
16 a Motion to Consolidate the Adversary Proceedings. The Court entered an Order setting these  
17 matters for hearing and provided for that discovery which could be conducted by the parties that  
18 was consistent with the Federal Rules of Civil Procedure and the Bankruptcy Rules.

19 The Plaintiffs misinterpreted the Court’s Order as a grant of broad authority to  
20 perform whatever discovery they felt was necessary at the time. Accordingly, the Plaintiffs  
21 served subpoenas on the Defendants, via electronic means, on the night of August 10, 2008. The  
22 subpoenas requested the presence of the Defendants in order for the Plaintiffs to perform  
23 depositions, and further required the Defendants to bring various documents for the Plaintiffs to  
24 review. Critically, before giving the Defendants an opportunity to respond, the Plaintiffs filed a  
25 Motion to Compel pursuant to Bankruptcy Rule 7037, which incorporates Fed. R. Civ. P. 37.

26 A hearing took place on the Plaintiffs’ Motion to Compel. The Court, in its oral  
27 decision denying the Motion to Compel, made it clear that it had several concerns with the  
actions the Plaintiffs took in completing “jurisdictional discovery.” The Court stated that it did

1 not understand why, given the pending dispositive motions, any discovery was necessary until  
2 those motions had been heard by the Court. To the extent that any discovery was necessary, the  
3 Order limited same to “whatever discovery [was] appropriate and consistent with the Federal  
4 Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.” Because the Court is  
5 not always aware when the parties to an adversary proceeding have their initial “meet and confer  
6 conference,” as required by Fed. R. Civ. P. 26(f), it assumes that the parties will have that initial  
7 conference, discuss discovery issues, if necessary, and set up a procedure to ensure that any  
8 discovery that may be necessary is handled in an expedited and appropriate manner. What is  
9 different in this matter is that the Plaintiffs “papered” the Defendants with their discovery  
10 requests, demanded that the Defendants contact them to arrange numerous depositions and the  
11 turnover of documents, and then moved to an accelerated request to compel the discovery  
12 without even bothering to set up the initial Fed. R. Civ. P. 26(f) meet and confer. Thus, the  
13 Plaintiffs failed to comply with the very Federal Rule that would have allowed any limited  
14 discovery on the subject matter jurisdictional issue. Since no meeting took place with the  
15 Defendants, the Plaintiffs were premature in their discovery attempts.

16           At the hearing on the Motion to Compel, the Court was also concerned with the  
17 fact that the Plaintiffs felt it was necessary to depose Defendants’ counsel. The Court is at a loss  
18 to determine how counsel would have any relevant information on a subject matter jurisdictional  
19 issue even if the appropriate meet and confer under Fed. R. Civ. P. 26(f) had occurred. Also of  
20 concern to the Court at the hearing was the fact that none of the Defendants was afforded any  
21 opportunity to even advise the Plaintiffs of any discovery issues. Indeed the Plaintiffs filed the  
22 Motion to Compel roughly one day after they served the Defendants with the discovery requests.  
23 Under the Local Rules of this Court, no motion to compel, or similar type of motion dealing with  
24 a discovery dispute, is to be filed unless there is a sincere effort by the party filing the motion to  
25 resolve the dispute, and the attorney certifies what those sincere efforts were. See Local Rule  
26 9013-1(e). In reviewing the Motion to Compel filed by the Plaintiffs, this Court concludes that  
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1 there were minimal, and certainly not sincere, efforts by the Plaintiffs to resolve the issues  
2 presented. Given the time frame between the electronic discovery requests and the Plaintiffs'  
3 filing of the Motion to Compel, the Defendants were not even afforded an appropriate  
4 opportunity to respond to the subpoenas.

5           Given this background, does the withdrawal of the Independent Actions by the  
6 Plaintiffs somehow absolve them of any responsibility or liability for their potential discovery  
7 abuses? Upon denial of a motion to compel, the Court:

8                     must, after giving an opportunity to be heard, require the movant,  
9                     the attorney filing the motion, or both to pay the party or deponent  
10                    who opposed the motion its reasonable expenses incurred in  
11                    opposing the motion, including attorney's fees. But the court must  
12                    not order this payment if the motion was substantially justified or  
13                    other circumstances make an award of expenses unjust.

14 Fed. R. Civ. P. 37(a)(5)(B); Bankruptcy Rule 7037. At the conclusion of the hearing on the  
15 Motion to Compel, the Court denied the Motion, granted the Defendants' request for a protective  
16 order, and permitted the Defendants to submit a request for attorneys' fees and costs in opposing  
17 the Plaintiffs' Motion. This allowed the Defendants the opportunity to prepare their affidavits on  
18 the attorneys' fees and costs incurred and afforded the Plaintiffs the opportunity to challenge the  
19 reasonableness of the fees and costs requested and to present their argument as to whether the  
20 Motion to Compel was "substantially justified" or there were other "circumstances" which  
21 would make such "an award of expenses unjust." The Court set a hearing for September 29,  
22 2008.

23           Prior to the hearing date, the Plaintiffs withdrew their Independent Actions in the  
24 State Court, and filed a Notice of Complaint Withdrawal with this Court. The Court entered an  
25 Order dismissing the case without prejudice on September 16, 2008 and set a hearing for  
26 September 29, 2008 to determine whether the Court could still award the attorneys' fees of the  
27 Defendants even though the Independent Actions had been dismissed.

          While the Court has been unable to find any direct authority on this matter, the  
issues involved in this analysis are similar to those issues involved in an analysis of Fed. R. Civ.

1 P. 11. Rule 11 was amended in 1993. Prior to the amendments, Rule 11 contained mandatory  
2 language requiring courts to assess sanctions against an attorney, law firm, or party that filed  
3 certain documents with the court for any improper reason. Under the prior version of the Rule,  
4 the Supreme Court held:

5 [i]n order to comply with Rule 11's requirement that a court 'shall'  
6 impose sanctions 'if a pleading, motion, or other paper is signed in  
7 violation of the rule,' a court must have the authority to consider  
whether there has been a violation of the signing requirement  
regardless of the dismissal of the underlying action.

8 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed 359 (1990).

9 In 1993, Rule 11 was amended in two respects. First, the language of Rule 11 is  
10 now discretionary, which allows, but does not require, the courts to assess sanctions against  
11 those parties that file papers with the court for an improper reason. Additionally, the Rule now  
12 provides a safe harbor provision requiring the parties seeking sanctions to provide the non-  
13 moving party with a copy of the proposed Rule 11 motion 21 days before filing the motion with  
14 the court. The non-moving party then has 21 days in which to withdraw its pleading or paper.  
15 Fed. Rul. Civ. P. 11(c)(2). If, for instance, the non-moving party withdraws its complaint within  
16 the time allotted, the other party may not file a motion for sanctions with the court.<sup>15</sup>

17 However, in comparing the current language of Rule 11 with that of Fed. R. Civ.  
18 P. 37, Bankruptcy Rule 7037, this Court concludes that Fed. R. Civ. P. 37 is more similar, in its  
19 language and effect, to the language in Rule 11 prior to its amendment. Under Fed. R. Civ. P.  
20 37(a)(5), when a party files a motion to compel, the court must award sanctions to either the  
21 party opposing the discovery, or the party seeking discovery, unless either party may show

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23  
24 **15.** In response to these amendments to Rule 11, the courts now allow a motion for  
25 sanctions to “be filed with the court after judgment [only if] the moving party . . . first [serves]  
26 the motion for sanctions on the offending party twenty-one (21) or more days prior to [the] final  
27 judgment.” Hamil v. Mobex Managed Servs. Co., 208 F.R.D. 247, 250 (N.D.Ind.2002).  
Accordingly, under Rule 11, as amended, the courts have denied a party the right to file a motion  
for sanctions if it was not presented to the non-moving party more than 21 days prior to the case  
being dismissed. See Ridder v. City of Springfield, 109 F.3d 288 (6<sup>th</sup> Cir. 1997).

1 special circumstances that make such an award unwarranted. Fed. R. Civ. P. 37(a)(5)(A), (B).  
2 Just as with the prior version of Rule 11, Rule 37 contains mandatory language and no safe  
3 harbor provision other than the special circumstances as described in the Rule. Given the  
4 changes to Rule 11, Congress could have acted to amend any other Federal Rules which had  
5 similar mandatory language. That has not happened. Accordingly, the Court finds the reasoning  
6 in the Cooter decision to be instructive. Under the Cooter analysis, this Court has not only the  
7 ability, but also the obligation, to hear the Defendants' Motion for Sanctions or request for  
8 attorneys' fees and costs although the Independent Actions have been dismissed.

9           Moreover, allowing a party to avoid sanctions before the Court has had an  
10 opportunity to determine whether a discovery abuse has occurred, by the voluntary withdrawal  
11 of an adversary proceeding, would certainly invalidate the purpose of Fed. R. Civ. P. 37(a)(5)(B)  
12 and be against public policy. If this Court does not have the subject matter jurisdiction to  
13 determine whether attorneys' fees and costs are warranted for a discovery abuse in the  
14 Independent Actions, no court will have jurisdiction to hear the matter. Such a result is  
15 unacceptable. It would allow a wrongdoer to never be held accountable.

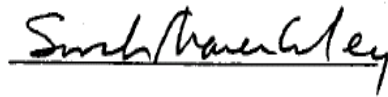
16           To the extent that there still remains any ambiguity for this Court to hear the issue  
17 as to the award of the Defendants' attorneys' fees and costs, this Court will amend its order  
18 which dismissed the Independent Actions without prejudice for the limited purpose of hearing  
19 and resolving the issue of whether the Defendants are entitled to attorneys' fees and costs. The  
20 Court may, *sua sponte*, always review and amend its orders so long as no intervening rights have  
21 vested. In this case, the Court knows of no change in the rights or positions of the parties that  
22 would be affected by this limited amendment to the Dismissal Order. In re Lenox, 902 F.2d 737  
23 (9<sup>th</sup> Cir. 1990).

#### 24 IV. CONCLUSION

25           Based upon the foregoing, this Court concludes that it has subject matter  
26 jurisdiction to hear the Independent Actions and that as a part of its ancillary jurisdiction, this  
27

1 Court had the ability to hear the Motion to Compel filed by the Plaintiffs. As a result of the  
2 denial of the Motion to Compel, the Court has the subject matter jurisdiction to hear the  
3 Defendants' request for attorneys' fees and costs under Fed. R. Civ. P. 37 (a)(5)(B). The Court's  
4 ability to hear the Defendants' request under Fed. R. Civ. P. 37 (a)(5)(B) continues even though  
5 the Plaintiffs withdrew the Independent Actions after this Court's decision denying the  
6 Plaintiffs' Motion to Compel. The Court will set a further hearing on the Defendants' request  
7 for attorneys' fees and costs by separate order of this Court.

8  
9 DATED this 19<sup>th</sup> day of November, 2008.

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13 The Honorable Sarah Sharer Curley  
14 United States Bankruptcy Judge

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16 BNC TO NOTICE  
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