

APR 25 2008

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | | |
|----|--------------------------------|---|----------------------------|--------------------------------|
| 6 | In re: |) | BAP Nos. | EC-06-1443-MoPaMk |
| | |) | | EC-06-1444-MoPaMk |
| 7 | AARON D. LOOS and ALICE M. |) | | (Related appeals) ¹ |
| | LOOS, |) | | |
| 8 | |) | Bk. No. | 03-24832-C7 |
| | Debtors. |) | | |
| 9 | |) | Adv. Nos. | 03-2402 |
| | |) | | 03-2403 |
| 10 | AARON D. LOOS, ALICE M. LOOS, |) | | |
| | |) | | |
| 11 | Appellants, |) | | |
| | v. |) | M E M O R A N D U M | ² |
| 12 | |) | | |
| 13 | STANLEY AYERS; BRIAN BANIQUED, |) | | |
| | |) | | |
| 14 | Appellees. |) | | |

Argued and Submitted on February 22, 2008
at Sacramento, California

Filed - April 25, 2008

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

Hon. David E. Russell, Bankruptcy Judge, Presiding

Before: MONTALI, PAPPAS and MARKELL, Bankruptcy Judges.

¹ In an earlier appeal by these parties, the Panel held that the bankruptcy court did not err in consolidating the adversary proceedings for trial. Loos v. Ayers, BAP nos. EC-04-1263 and 1264 (9th Cir. BAP August 24, 2005) ("BAP Memorandum"). We likewise treat these appeals as related.

² 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 8013-1.

1 The Looses filed a voluntary joint Chapter 7 bankruptcy
2 petition on April 29, 2003. The last day to oppose discharge and
3 to file a complaint to determine nondischargeability was July 28,
4 2003. On July 25, 2003, Baniqued and Ayers (collectively
5 "Appellees") commenced independent adversary proceedings, both
6 objecting to the Looses' discharges under § 727(c)(1)
7 ("Complaints"). Appellees made no allegations that their
8 respective debts were nondischargeable under § 523.
9 Specifically, both Ayers and Baniqued, pursuant to §§ 727(a)(3)
10 and 727(a)(5),⁵ claimed that Mr. Loos concealed, falsified or
11 failed to preserve records and invoices related to his management
12 and maintenance of their individual rental properties, and that
13 he failed to explain satisfactorily the whereabouts of certain
14 rent monies received by him.

15 The adversary proceedings were consolidated for the purposes
16 of trial, which was held on February 5, 2004. Appellees were
17 represented by the same counsel, while the Looses appeared pro
18

19 ⁵ Section 727(a) provides, in relevant part:

20 The court shall grant the debtor a discharge, unless--

21 . . .

22 (3) the debtor has concealed, destroyed, mutilated,
23 falsified, or failed to keep or preserve any recorded
24 information, including books, documents, records, and
25 papers, from which the debtor's financial condition or
26 business transactions might be ascertained, unless such
27 act or failure to act was justified under all of the
28 circumstances of the case;

 . . .

26 (5) the debtor has failed to explain satisfactorily,
27 before determination of denial of discharge under this
28 paragraph, any loss of assets or deficiency of assets
to meet the debtor's liabilities[.]

1 se. On January 30, 2004, just six days prior to trial, both
2 Ayers and Baniqued filed a pleading entitled "Supplemental
3 Filing" ("Supplements"). Appellees and the court agreed that the
4 Supplements were seeking leave to amend the Complaints to add
5 exceptions to discharge claims under § 523,⁶ based upon fraud and
6 breach of fiduciary duty, and the court treated them as such.
7 Additionally, at the start of trial, Appellees' counsel orally
8 moved to amend the Complaints to add the § 523 claims. The
9 Looses opposed the motion on the ground they did not receive
10 adequate notice under Rule 15 of the Federal Rules of Civil
11 Procedure ("FRCP") as incorporated by Rule 7015. The court
12 agreed with the Looses and denied Appellees' request. Testimony
13 was heard and evidence was presented as to the § 727 claims only.

14 At the close of trial, Appellees once again moved to amend
15 the Complaints to assert their exceptions to discharge under
16 § 523. This time the court granted Appellees' motion even though
17 evidence submitted went to support objections to discharge under
18 § 727. In exchange for that ruling, the court asked Appellees to
19

20 ⁶ Section 523(a) provides, in relevant part:

21 A discharge under section 727 . . . of this title does
22 not discharge an individual debtor from any debt--

23 . . .

24 (2) for money, property, services, or an extension,
25 renewal, or refinancing of credit, to the extent
26 obtained by--

(A) false pretenses, a false representation, or
actual fraud, other than a statement respecting
the debtor's or an insider's financial condition;

27 . . .

28 (4) for fraud or defalcation while acting in a
fiduciary capacity, embezzlement, or larceny[.]

1 drop their § 727 claims, and Appellees agreed. The dialogue went
2 as follows:

3 FARBER [Attorney for Appellees]: At this time I would
4 like to make a motion to amend the pleadings to amend
5 the complaint to add 523. I believe that the evidence
has clearly shown in this that 523 is an applicable
code and complaint to be added.

6 THE COURT: Are you going to waive the denial of
7 discharge?

8 FARBER: Are you going to allow me to amend 523?

9 THE COURT: I may very well allow you to amend your
10 pleadings to show 523 if you will remove your request
for denial of discharge.

11 FARBER: I do so.

12 THE COURT: All right. Very well. We will remove the
-- your request is granted.

13 BAP Memorandum, 5:12-22 (quoting Tr. Trial 175:22 - 176:11)
14 (February 5, 2004)).

15 As for its sudden change of heart, the bankruptcy court
16 explained that Mr. Loos would have lost against Appellees' § 727
17 claims, which is why it allowed the less-devastating,
18 nondischargeability claims under § 523:

19 . . . And I have a very specific reason why I
20 permitted the change at the last minute, when
previously I had ruled that it would not be permitted,
21 that is because I think you were going to lose the
other one, and that is far more devastating to you than
523(a)(2), which I think has been proven here.

22 . . . What I think the evidence clearly shows is
23 that there was an effort by you, Loos, to deceive these
parties. I think that the financial statements that
24 you gave them were wrong. I think you made up those
statements deliberately for the purpose of taking their
25 money and not giving them an honest accounting of what
happened to the money.

26 Id. at 5:26 - 6:9 (quoting Tr. Trial 176:25 - 177:17).

27 At a post-trial hearing on April 8, 2004, the bankruptcy
28 court expanded on its reasons for allowing the § 523 exceptions:

1 Now admittedly the trial started under 727 on the basis
2 that you did not adequately account for all of your
3 assets and that type of thing, but the -- but the
4 problem is that as the trial was going on it became
5 obvious, because of these false accountings, I couldn't
6 let you off the hook on the [§ 523 exceptions] because
7 you shouldn't be able to benefit from your own fraud.
8 In other words, you did provide accountings, so, you
9 know, that part of it was ok, but the accountings were
10 false, and because they were, I was, -- the only
11 alternative I guess I had was to deny your discharge,
12 but because of the facts that were presented at the
13 trial, and because of Mr. Farber's motion at the end of
14 trial, I said will you dismiss the 727 and he said yes,
15 which gave me basis for findings [sic] that the
16 particular obligation that you owe Dr. Ayers and Mr.
17 Baniqued, having been false or you committed fraud in
18 the process, the obligations were nondischargeable.
19 That's the basis of what I found.

11 Hr'g. Tr. 19:22 - 20:14 (Apr. 8, 2004).

12 Consequently, the bankruptcy court ruled in favor of
13 Appellees and determined their debts nondischargeable as to Mr.
14 Loos under §§ 523(a)(2)(A) and (a)(4).⁷ Appellees sought no
15 relief from Mrs. Loos. The court entered final judgments against
16 Mr. Loos in the two adversary proceedings on May 5, 2004, in the
17 amount of \$22,494.51 to Ayers and \$20,530.32 to Baniqued,
18 respectively. Notably, the judgments made no mention of
19

20 ⁷ Although no amended complaints were filed that replaced
21 the § 727 claims objecting to discharge with the § 523 claims of
22 nondischargeability, the court effectively permitted the
23 pleadings to be amended to conform to the proof, as permitted by
24 FRCP 15(b)(1), and Rule 7015. Pummill v. Greensfelder (In re
25 Richards & Conover Steel, Co.), 267 B.R. 602, 610 (8th Cir. BAP
26 2001) (amendment of pleadings to conform to evidence presented at
27 trial is to be liberally construed, and such amendments are to be
28 freely granted); see Samayoa v. Jodoin (In re Jodoin), 196 B.R.
845, 851 (Bankr. E.D. Cal. 1996), aff'd, 209 B.R. 132, 136 (9th
Cir. BAP 1997) (reciting same).

This is evident from the above-quoted colloquy between
Appellees' counsel and the court at the end of trial, and
consistent with the fact that final judgments of
nondischargeability were entered against Mr. Loos on May 5, 2004.

1 dismissing Appellees' § 727 claims, or that Mr. Loos prevailed on
2 the § 727 claims against him.

3 The Looses filed a timely Notice of Appeal on May 17, 2004.
4 Because there were no other pending challenges to the Looses'
5 discharges, on May 21, 2004, the Clerk of Court entered a
6 discharge as to both and the case was closed. There was no
7 appeal of that discharge order; thus, it is a final order.

8 Mr. Loos appealed the judgments of nondischargeability.
9 Appellees did not cross-appeal the elimination of the § 727
10 claims (having been agreed to at trial) nor appeal the May 21,
11 2004 grant of discharge.

12 On August 24, 2005, the BAP vacated the two judgments of
13 nondischargeability and, for reasons not evident to us in the
14 record, remanded to the bankruptcy court with instructions to set
15 aside the withdrawal of the § 727 Complaints and enter findings
16 and judgments as appropriate under §§ 727(a)(3) and (a)(5). BAP
17 Memorandum, 14:11-14. The BAP reasoned that the Looses were
18 substantially prejudiced when the § 727(a) objections to
19 discharge morphed into claims under § 523(a) at the eleventh hour
20 of trial. It reversed the judgments of nondischargeability and
21 remanded the action to the bankruptcy court with instructions
22 that it enter findings, conclusions and a decision on the
23 Appellees' original § 727(a) claims. BAP Memorandum, 13:8-14:8.

24 The remand hearing was held on October 23, 2006, without any
25 new evidence presented. On November 17, 2006, the court
26 fulfilled the BAP's instruction and entered judgments in the two
27 adversary proceedings denying Mr. Loos his discharge under
28 §§ 727(a)(3) and (a)(5). Later, both judgments were amended on

1 December 5, 2006, to revoke his discharge under §§ 727(a)(3) and
2 (a)(5). Copies of the two judgments were docketed in Mr. Loos's
3 main Chapter 7 case. This is a critical problem in the case.
4 Appellees filed no motion to amend the judgments, but somehow the
5 court became aware that judgments under § 727(a) were
6 inappropriate since the Looses already received their discharges
7 in May, 2004. Furthermore, other than their captions, the
8 amended judgments are identical in substance to the original
9 ones. The Looses timely appealed.

10 **JURISDICTION**

11 The bankruptcy court had jurisdiction under 28 U.S.C.
12 §§ 157(b)(2)(I), (J) and 1334. We have jurisdiction under 28
13 U.S.C. § 158.

14 **ISSUE**

15 Did the bankruptcy court err when it revoked Mr. Loos's
16 discharge?

17 **STANDARD OF REVIEW**

18 A bankruptcy court's application of basic rules of procedure
19 and construction of the Bankruptcy Code present questions of law
20 the BAP reviews de novo. All Points Capital Corp. v. Meyer (In
21 re Meyer), 373 B.R. 84, 87 (9th Cir. BAP 2007) (citing Ruvacalba
22 v. Munoz (In re Munoz), 287 B.R. 546, 550 (9th Cir. BAP 2002)).

23 **DISCUSSION**

24 Although the BAP vacated and remanded these adversary
25 proceedings to the bankruptcy court for findings under
26 §§ 727(a)(3) and (a)(5), subsections applicable only to
27 objections to discharge, the bankruptcy court eventually entered
28 two amended judgments revoking Mr. Loos's discharge. Without

1 reaching the merits of Appellees' objections to discharge, we
2 conclude that procedurally the bankruptcy court's subsequent
3 revocation of Mr. Loos's discharge was improper and remand is
4 necessary.

5 Pursuant to § 727(a) a Chapter 7 debtor obtains a general
6 discharge of all debts arising prepetition, subject to the
7 exceptions to discharge of § 523. A party may object to the
8 debtor's general discharge pursuant to § 727(a), or object to the
9 dischargeability of a specific debt pursuant to § 523(a).

10 A debtor's discharge granted under § 727(a) can be revoked
11 under § 727(d) only upon request of the trustee, a creditor, or
12 the U.S. Trustee, and after notice and a hearing if the grounds
13 for revocation listed exist.⁸ See Walsh v. Bracken (In re
14 Davitch), 336 B.R. 241, 253 (Bankr. W.D. Pa. 2006); and Markovich
15 v. Samson (In re Markovich), 207 B.R. 909, 913 (9th Cir. BAP

17 ⁸ Section 727(d), as applicable in this case, provides:

18 On request of the trustee, a creditor, or the United
19 States trustee, and after notice and a hearing, the
20 court shall revoke a discharge granted under subsection
(a) of this section if--

21 (1) such discharge was obtained through the fraud of
22 the debtor, and the requesting party did not know of
23 such fraud until after the granting of such discharge;

24 (2) the debtor acquired property that is property of
25 the estate, or became entitled to acquire property that
26 would be property of the estate, and knowingly and
27 fraudulently failed to report the acquisition of or
entitlement to such property, or to deliver or
surrender such property to the trustee; or

28 (3) the debtor committed an act specified in subsection
(a) (6) of this section.

1 1997). Revocation is limited to actions in which the debtor (1)
2 obtained his discharge through fraud unknown to the party
3 requesting the revocation until after discharge; (2) acquired or
4 became entitled to property of the estate and then knowingly and
5 fraudulently failed to report or deliver it to the bankruptcy
6 trustee; or (3) refused to obey a court order or to testify.
7 However, revocation is an extraordinary remedy, and is construed
8 liberally in favor of the debtor and strictly against those
9 objecting to discharge. Bowman v. Belt Valley Bank (In re
10 Bowman), 173 B.R. 922, 924 (9th Cir. BAP 1994); see First Beverly
11 Bank v. Adeb (In re Adeb), 787 F.2d 1339, 1342 (9th Cir. 1986).
12 Furthermore, under § 727(e) and Rule 9024, a revocation action
13 against a Chapter 7 debtor must be commenced within one year
14 after the discharge is granted.⁹

15 Appellees dropped their § 727 claims at the end of trial and
16 agreed to judgments under § 523(a). They made no further efforts
17 to set aside the later-granted discharge either before or after
18 the appeal, or ever sought to revoke Mr. Loos's discharge under
19 § 727(d).

20 Because of the procedural problems present in this record,
21 Mr. Loos should not lose his discharge. It is unclear why the

22
23 ⁹ Section 727(e) provides:

24 The trustee, a creditor, or the United States trustee
25 may request a revocation of a discharge--
26 (1) under subsection (d)(1) of this section within one
27 year after such discharge is granted; or
28 (2) under subsection (d)(2) or (d)(3) of this section
before the later of--
(A) one year after the granting of such discharge; and
(B) the date the case is closed.

1 bankruptcy court revoked Mr. Loos's discharge, considering
2 revocation was never requested nor were the elements of any
3 subsection of § 727(d) pled or proven. Consequently, we believe
4 it was improper for the bankruptcy court to revoke Mr. Loos's
5 discharge entered pursuant to findings under §§ 727(a)(3) and
6 (a)(5).

7
8 **I. The revocation order was improper because neither Ayers nor**
9 **Baniqued ever filed the necessary complaint to revoke Mr.**
10 **Loos's discharge under § 727(d).**

11
12 An action for revocation of a discharge order is an
13 adversary proceeding which must be commenced by filing a
14 complaint. Rule 7001(4). Since neither Ayers nor Baniqued did
15 so, we examine whether the court, sua sponte, can revoke Mr.
16 Loos's discharge.

17 Section 727(d) expressly specifies that revocation can be
18 sought only by a creditor, a trustee, or the U.S. Trustee. In re
19 Davitch, 336 B.R. at 253 ("Relying on the plain, unambiguous
20 language of § 727(d), courts have consistently held that
21 revocations of a debtor's discharge may be requested only by a
22 trustee, a creditor, or the U.S. Trustee.") (emphasis added)
23 (citing In re Nader, 1998 WL 767459 (Bankr. E.D. Pa. 1998)); see
24 also In re Markovich, 207 B.R. at 913, and see Charles J. Tabb,
25 The Law of Bankruptcy § 10.32 (1997) (court cannot sua sponte
26 revoke a discharge).

27 In Markovich, this Panel addressed the issue whether the
28 court, sua sponte, under its inherent equitable powers, can

1 revoke a discharge. In that case, the bankruptcy court entered a
2 Chapter 7 debtor's discharge, but several months later determined
3 a complainant's debt as nondischargeable under § 523(a)(2)(A).
4 The debtor wanted to revoke his discharge order so he could
5 convert his case to Chapter 13. Besides holding that a debtor
6 does not have standing to seek a revocation, this Panel held that
7 a court lacks inherent equitable power to revoke a discharge
8 outside the framework of § 727(d). In re Markovich, 207 B.R. at
9 913. The equity powers of the bankruptcy court cannot be used to
10 override specific statutory provisions in the Code. Id., (citing
11 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct.
12 963, 968, 99 L. Ed. 2d. 169 (1988)). Therefore, relying on the
13 plain, unambiguous language of § 727(d), and the rule set out in
14 Markovich, Davitch and Norwest, the court itself is not among
15 those which may take such action, and the bankruptcy court erred
16 when it revoked Mr. Loos's discharge sua sponte.

17
18 **II. The revocation order was improper because there are no**
19 **findings under § 727(d) making revocation proper.**

20
21 Not only was a complaint to revoke Mr. Loos's discharge
22 never filed under § 727(d), but no evidence was ever offered that
23 he is culpable under any of the three enumerated reasons in
24 § 727(d) that could result in revocation.

25 Section 727(d) allows for revocation of discharge when
26 requested by an authorized party under only the three
27 circumstances noted above - none of which occurred here.

28 Furthermore, the court cannot circumvent the enumerated reasons

1 under 727(d) and revoke a debtor's discharge pursuant to its
2 equitable powers provided by § 105(a). See Disch v. Rasmussen,
3 417 F.3d 769, 778 (7th Cir. 2005) (“[S]uch a broad interpretation
4 of § 105(a) would make the list of grounds for revoking a
5 discharge found in § 727(d) meaningless; anything not in the list
6 could come in through the back door of § 105(a).”).

7 The allegations in Appellees' Complaints, citing
8 §§ 727(a) (3) and (a) (5), did not give rise to revocation under
9 §§ 727(d) (1), (2) or (3) because:

- 10 1. If there was any fraud committed by Mr. Loos, Appellees
11 never alleged fraud that they did not know of until after
12 the grant of discharge. In fact, they relied solely on the
13 prepetition events that supported their ill-fated § 523
14 claims. In any event, they did not seek revocation within
15 the one-year time limit of § 727(e),¹⁰ thus eliminating
16 § 727(d) (1);
- 17 2. Mr. Loos has not been charged with having acquired, nor
18 becoming entitled to acquire, property of the estate, nor
19 failing to disclose said property to the trustee,
20 eliminating § 727(d) (2); and
- 21 3. Appellees' Complaints did not state a claim under
22 § 727(a) (6), eliminating revocation under § 727(d) (3).

23 The record indicates Mr. Loos's discharge was revoked, but
24 provides no findings or conclusions to support that judgment

25
26 ¹⁰ The court entered Mr. Loos's discharge order on May 21,
27 2004. Pursuant to § 727(e) and Rule 9024, any action by Ayers or
28 Baniqued to revoke Mr. Loos's discharge had to be filed before
May 21, 2005. Nothing was filed. Appellees were long-ago time
barred from such an action.

1 under § 727(d). Because there is no evidence supporting a
2 revocation under § 727(d), and the fact that Mr. Loos's discharge
3 order was entered over two-and-a-half years earlier and no one
4 took any action to vacate that order, it was improper for the
5 bankruptcy court to revoke his discharge pursuant to findings and
6 conclusions under §§ 727(a)(3) and (a)(5).

7
8 **III. The revocation order was improper because Mr. Loos received**
9 **no notice or hearing required by § 727(d).**

10
11 Based upon the record before us, not only was a § 727(d)
12 complaint never filed, but the bankruptcy court entered the
13 revocation order without giving Mr. Loos any prior notice.

14 The plain language of § 727(d) requires the court to provide
15 notice and a hearing as to a debtor's discharge revocation.
16 Notice is the bedrock of any procedurally proper bankruptcy case.
17 Westchester Surplus Lines Ins. Co. v. Surfside Resort & Suites,
18 Inc. (In re Surfside Resort & Suites, Inc.), 344 B.R. 179, 187
19 (Bankr. M.D. Fla. 2006) (citing the general principle of notice
20 in Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314,
21 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) (The "right to be heard
22 has little reality or worth unless one is informed that the
23 matter is pending and can choose for himself whether to appear or
24 default, acquiesce or contest.")). Furthermore, "whatever . . .
25 powers remain in the bankruptcy courts must and can only be
26 exercised within the confines of the Bankruptcy Code." Norwest
27 Bank Worthington, 485 U.S. at 206.

28 Here, the court clearly exceeded its authority under the

1 Bankruptcy Code by failing to provide notice or a hearing to Mr.
2 Loos prior to the revocation order. Such action prevented Mr.
3 Loos from appearing, defaulting, acquiescing or contesting the
4 revocation, thereby violating his due process rights granted
5 under the Code. This was improper.

6 **CONCLUSION**

7 At the end of trial, the bankruptcy court found Appellees'
8 particular debts were nondischargeable under §§ 523(a)(2)(A) and
9 (a)(4). The two similar rulings were final on their face and
10 said nothing to prevent the Looses from receiving their
11 discharges under § 727(a). "[I]t is permissible as a procedural
12 matter for a court to grant a discharge when no complaint
13 objecting to discharge has been filed at the expiration of the
14 60-day period, notwithstanding a pending claim seeking to exempt
15 a particular debt from discharge." Disch, 417 F.3d at 775
16 (citing the Administrative Office of the United States Courts,
17 Bankruptcy Clerk's Manual (1997)). In other words, "[i]t is
18 entirely possible for a debtor with nondischargeable debts to
19 receive a discharge." 6 Collier on Bankruptcy, § 727.01[1] at
20 727-728 (15th ed. rev. 2007).

21 To this day, the bankruptcy court has not vacated the
22 discharge order. Thus we have a final discharge order entered in
23 2004, followed by a revocation of that discharge in 2006, despite
24 the absence of any effort by Appellees to vacate it or to follow
25 proper procedure to revoke it. Neither Appellees nor anyone else
26 has suggested that the entry of discharge was a clerical error
27 requiring correction. It is not our place to enter or direct the
28 entry of such an order. However, FRCP 60(b), as incorporated by

1 Rule 9024, provides that a court can vacate an order it entered
2 as a result of mistake, inadvertence, excusable neglect, fraud,
3 or to conform to newly discovered evidence, or for any other
4 reason justifying relief from the operation of a judgment. In In
5 re Cisneros, 994 F.2d 1462, 1467 (9th Cir. 1993), the Ninth
6 Circuit held that if a discharge order was entered by the
7 bankruptcy court under a misapprehension to the facts of the
8 case, the court can vacate that discharge pursuant to Rule 60(b),
9 applicable to bankruptcy cases under Rule 9024. Thus, if Mr.
10 Loos's discharge was entered in error, then there are proper
11 procedures available for the bankruptcy court to vacate it.

12 Based upon the foregoing reasons, we REVERSE and REMAND.¹¹
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25
26 ¹¹ Our disposition does not prevent Appellees from
27 requesting the court to vacate the discharge order on remand.
28 Any such request, however, would of course have to be consistent
with this disposition and applicable procedure, and be subject to
whatever defenses Mr. Loos may assert.