NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1245-PaBK
PLANTICA LANDSCAPE CORPORATION,	Bk. No. ND 90-16759 RR
Debtor.	Adv. No. ND 05-01019 RR
PETER J. CAVANAGH; THERESEA E. CAVANAGH,	
Appellants,	**M E M O R A N D U M**[1]
v.	
THE PEOPLE OF THE STATE OF CALIFORNIA,	
Appellee.	

Argued and Submitted on July 14, 2006,
at Pasadena, California

Filed - August 18, 2006

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

Honorable Robin Riblet, Bankruptcy Judge, Presiding.

Before: PAPPAS, BRANDT and KLEIN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

Appellants Peter and Theresea Cavanagh ("Cavanaghs") appeal from an order of the bankruptcy court abstaining from considering, and remanding, a criminal action that appellants had removed from a state court and an order denying reconsideration of the abstention-remand order. We AFFIRM.

FACTS

Plantica Landscape Corporation ("Plantica") operated a business as a California state-licensed landscape contractor. On July 7, 1990, Plantica filed for protection under chapter 11[2] of the Bankruptcy Code. Cavanaghs were Plantica's principals and officers, and managed the corporation's business activities during the pendency of the chapter 11 case. No chapter 11 trustee was appointed.

Plantica's efforts to reorganize were unsuccessful; the chapter 11 case was converted by the bankruptcy court to a chapter 7 case on September 27, 1993. A chapter 7 trustee was appointed. It appears from the record that the trustee allowed Cavanaghs to remain in charge of Plantica's business affairs for the next two years in an effort to collect its accounts receivable. However, in a letter dated January 3, 1996, the trustee revoked Cavanaghs' authority to liquidate the company's assets. On June 30, 1995, the chapter 7 trustee filed a no-asset report. The court ordered the bankruptcy case closed on August 23, 1995.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. § 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as in force prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23 ("BAPCPA").

On September 16, 1996, the District Attorney of Ventura County filed a criminal complaint against Cavanaghs alleging they had violated provisions of the California Unemployment Insurance Code. The charges included 29 felony counts of willful failure to pay withholding taxes to the California Employment Development Department ("EDD") while acting as "controlling persons" of Plantica during the bankruptcy case. The filing of these charges initiated Ventura County Superior Court Criminal Cases CR 39815A and 39815B (the "Criminal Court Cases"). Cavanaghs entered not guilty pleas to the charges.

The record is not completely clear why the criminal proceedings languished in state court for nearly ten years. During this time, Cavanaghs have filed, or sought to file, four separate legal actions in an attempt to derail the criminal prosecution.

Cavanaghs filed a chapter 13 bankruptcy case on July 5, 1996 (In re Peter Joseph Cavanagh and Theresea Eileen Cavanagh, Case No. ND 96-12668 RR). They moved to dismiss this case on August 30, 1996; that motion was granted and the bankruptcy case was closed on September 12, 1996. In November 1998, Cavanaghs moved to reopen the chapter 13 case so they could ask the court to enjoin EDD and its employees from testifying or providing documentary evidence against Cavanaghs in the Criminal Court Cases. The bankruptcy court denied the motion to reopen on January 29, 1999, and the court's decision was affirmed by this Panel on November 30, 1999. (Unpublished decision, In re Cavanagh, BAP No. CC-99-1096). On September 17, 1999, Cavanaghs attempted to commence an adversary proceeding in their closed

bankruptcy case to enjoin the Ventura County District Attorney from prosecuting the Criminal Court Cases, and to obtain a declaratory judgment that Cavanaghs did not willfully fail to pay any of the taxes at issue in the criminal action. The bankruptcy court dismissed this complaint for lack of subject matter jurisdiction because the bankruptcy case had been closed. The decision of the bankruptcy court dismissing the complaint was affirmed by this Panel on January 20, 2000 (Unpublished decision, Cavanagh v. Bradbury (In re Cavanagh), BAP No. CC-99-1554).

In March 2002, Cavanaghs filed a petition for writ of mandate in Sacramento County Superior Court, seeking to enjoin the EDD from contending in the criminal prosecution that Cavanaghs were liable for the taxes at issue, and for declaratory relief as to the validity of the tax assessments. The superior court denied the petition, and the California Court of Appeals affirmed in a published decision, Cavanagh v. Cal. Unemployment Ins. Appeals Bd., 118 Cal. App. 4th 83 (Ct. App. 2004).

In its brief in this appeal, Appellee (the "People") alleges that in 2004, Cavanaghs filed a fourth civil action seeking to escape the criminal prosecution, this time a petition for writ of mandate in Los Angeles County Superior Court.[3] This petition allegedly again sought to enjoin EDD from contending in the

[3] The facts concerning the first three actions described above (the two proceedings in the bankruptcy court and the superior court and court of appeals decisions) are amply supported by the record. We have no documentation in the record concerning the 2004 Los Angeles Superior Court action. This suit was mentioned in a brief submitted to the bankruptcy court, and again in Appellee's Brief. Neither reference includes case numbers or dates. Cavanaghs did not dispute these allegations in their Reply Brief.

criminal prosecution that Cavanaghs were liable for the taxes at issue and asked for declaratory relief as to the validity of the assessments. According to the People, the superior court denied the petition because it violated article XIII, sec. 32, of the California Constitution, which bars litigating the validity of a tax prior to its payment.

On November 15, 2004, Cavanaghs moved to reopen the Plantica bankruptcy case to "obtain relief against California EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD) and/or its officials, the VENTURA COUNTRY DISTRICT ATTORNEY and/or its officials for acts taken to coerce the Cavanaghs to personally pay . . . taxes purportedly incurred as administrative expenses by Plantica." The record indicates that both the Ventura County District Attorney and the Attorney General of California received notice of the attempt to reopen the bankruptcy case. The bankruptcy court held a hearing on the motion to reopen on December 14, 2004, and the motion was granted by order dated January 3, 2005.[4]

On January 31, 2005, Cavanaghs filed a notice in the Criminal Court Cases purporting to remove them to the bankruptcy court in connection with the Plantica bankruptcy case. The People promptly filed a motion in the bankruptcy court to remand the cases to state court. A hearing on the motion to remand was set for April 5, 2005.

During the interval between the removal and the hearing on

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[4] There is no transcript of the hearing on December 14, 2004, in the record. However, the bankruptcy court later commented that "The reopening of the chapter 7 case is only an administrative or ministerial act and is not foretelling of anything with respect to the merits of what might be pursued once the case is reopened." Tr. Hr'g 7:9-12 (April 5, 2005).

the motion to remand, on March 3, 2005, the Ventura County Superior Court conducted a hearing in the Criminal Court Cases. At that hearing, Peter Cavanagh withdrew his not guilty pleas and entered guilty pleas to counts 2 and 20 of the criminal complaint. In exchange for Peter Cavanagh's guilty plea to these two counts, the People agreed to ask that all other pending charges against him be dismissed.[5]

Count 2 of the complaint, to which Peter Cavanagh pled guilty, alleges as follows:

> On or about November 3, 1992, in the above named judicial district, the crime of violation of UNEMPLOYMENT INSURANCE CODE SECTION 2110, a felony, was committed by PETER J. Cavanagh and THERESEA E. CAVANAGH, being an individual member, officer or manager of an employing unit, they did knowingly withhold deductions for disability insurance from remuneration paid to said employing unit's workers and did willfully and unlawfully fail to pay said deductions to the Employment Development Department on or before the day they became delinquent.

And Count 20 of the complaint alleges as follows:

> On or about May 3, 1994, in the above named judicial district, the crime of violation of UNEMPLOYMENT INSURANCE CODE SECTION 2110, a Felony, was committed by PETER J. CAVANAGH and THERESEA E. CAVANAGH, being an individual member, officer or manager of an employing unit, they did knowingly withhold deductions for disability insurance from remuneration paid to said employing unit's workers and did willfully and unlawfully fail to pay said deductions to the Employment Development Department on or before the date they became delinquent.

Section 2110 of the California Unemployment Insurance Code provides that:

> Any employing unit, including any individual member of a

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[5] While not reflected in our record, Peter Cavanagh confirmed at oral argument that Theresea Cavanagh entered into a similar plea arrangement, and had also entered a guilty plea concerning the charges pending against her in state court.

> partnership employing unit, any officer of a corporate or association employing unit, any manager or managing member of a limited liability company, or any other person having charge of the affairs of a corporate, association, or limited liability company employing unit, that knowingly withholds the deductions required by this division from remuneration paid to its workers, and willfully fails or is willfully financially unable to pay such deductions to the department on the date on which they become delinquent is in violation of this chapter.

CAL. UNEMPLOYMENT INS. CODE § 2110 (emphasis added).

At the April 5, 2005 hearing, the bankruptcy court granted the People's motion to remand the Criminal Court Cases to the state court. In addition to reciting the procedural background of the case, the material facts and the reasons for its decision on the record, the bankruptcy court entered an Order Remanding Criminal Case to State Court on April 22, 2005, which recited:

> 1. This action is an action in a criminal case in the Ventura County Superior Court and is an exercise of police power and therefore does not meet the removal requirements of 28 U.S.C. § 1452.
>
> 2. Abstention is mandatory under 28 U.S.C. § 1334(c)(2).
>
> 3. Even if abstention is not mandatory, the Court should and will abstain under the permissive abstention requirements of 28 U.S.C. § 1334(c)(1).

On May 2, 2005, Cavanaghs filed a motion to reconsider the court's order remanding the Criminal Court Cases to state court. The bankruptcy court denied the motion in an unsigned order on May 18, 2005. Cavanaghs timely filed this appeal on May 31, 2005. Pursuant to a limited remand issued by the Panel on December 1, 2005, the bankruptcy court entered written findings and an order concerning the motion for reconsideration on December 30, 2005. Its order denying reconsideration provided:

> The Court finds that the Cavanaghs' Motion for

> Reconsideration merely reargues issues which were already ruled on. There is no showing of mistake, surprise, or excusable neglect; there is no newly discovered evidence presented by this motion; there is no allegation of fraud or misconduct; and there are no grounds demonstrated for reconsideration.

Peter (and, apparently, Theresea) Cavanagh has now been sentenced in the Criminal Court Cases. The counts of the criminal complaint to which they did not plead guilty have been dismissed by the superior court. See Minute Order, People v. Cavanagh, Peter J., Case no. CR39815A F A (June 15, 2005).

REQUESTS FOR JUDICIAL NOTICE

Information concerning the June 15, 2005, hearing and sentencing were not a part of the original record on appeal. Cavanaghs filed a Request for Judicial Notice (the "First Judicial Notice Request") on February 7, 2006, asking that the Panel consider as part of the record: 1)the Minute Order of the superior court on June 15, 2005; 2) the Minute Order concerning Restitution on July 15, 2005; 3) a one-page statement Cavanaghs allege is a "victim's statement"; and 4) a copy of the bankruptcy court's December 30, 2005, order denying reconsideration.

A federal court may take judicial notice of facts that are not subject to reasonable dispute. FED. R. EVID. 201. The Ninth Circuit has instructed that the Panel "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

The minute orders from the Criminal Court Cases dated June

15, and July 15, 2005, meet the Robinson Rancheria standards for judicial notice in that they reliably reflect proceedings in the state court that have a direct relation to the appeals in this case. The People have not objected to Cavanagh's judicial notice request concerning these documents. Therefore, the request is granted and the Panel takes judicial notice of the minute orders of the superior court entered on June 15, and July 15, 2005.

In contrast, we decline to take notice of the alleged "victim statement." This document is unsigned and appears to be part of a larger document. In addition, Cavanaghs have not explained the relevance of this document to the issues before the Panel. Because of our concern that the document may be subject to reasonable dispute, and since it has not been established that the document has a direct relation to matters at issue before us, we think it fails the requirements of Fed. R. Evid. 201 and Robinson Rancheria. Therefore, we decline to take judicial notice of the alleged "victim statement."

Finally, it is not necessary for the Panel to take judicial notice of the bankruptcy court's order denying Cavanagh's motion for reconsideration because it is automatically designated part of the record on appeal. FED. R. BANKR. P. 8006.

On May 17, 2006, Cavanaghs filed another Request for Judicial Notice (the "Second Judicial Notice Request") in which they ask us to consider two documents relating to a motion for sanctions filed in state court by Cavanaghs against the Ventura County District Attorney for violations of the automatic stay. Again, Cavanaghs have not established how these documents relate to the issues in this appeal. We decline to grant the Second Judicial Notice

Request.

JURISDICTION

As we note below, we doubt the bankruptcy court had subject matter jurisdiction over the removed action under 28 U.S.C. § 1334. However, we have jurisdiction to review the bankruptcy court's orders abstaining and remanding the action to state court under 28 U.S.C. § 158(a)(1) and (b). We exercise our appellate jurisdiction mindful that bankruptcy court orders of abstention and remand can be reviewed only by a district court or a bankruptcy appellate panel and not by a court of appeals or by the Supreme Court. 28 U.S.C. §§ 1334(d), 1447(d) & 1452(b); Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995); McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

ISSUES ON APPEAL[6]

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[6] Cavanaghs submitted 27 issues on appeal, most of which we believe are irrelevant. We have distilled Cavanaghs' list to the two dispositive issues we deem appropriate for review. In addition, shortly after oral argument in this appeal, on July 18, 2006, Peter Cavanagh filed a letter with the clerk purporting to address several questions asked by Panel members during argument. We deem this letter to be, in effect, a post-argument brief. While our local rules are silent on the propriety of this submission, as authorized by 9th Cir. BAP R. 8018(b)-1, we elect to apply FED. R. APP. P. 28(c), which provides that "[u]nless the court permits, no further briefs [after appellant's reply brief] may be filed." Cavanagh did not request, nor did the Panel grant, permission to make further submissions. We therefore decline to consider the arguments in Cavanagh's post-argument letter brief.

We also observe that Cavanagh's briefs and arguments have as their fundamental premise the idea that only the bankruptcy court can determine Plantica's and their liability for withholding during the pendency of the bankruptcy case. While it is true that only the bankruptcy court could allow a claim for withholding and tax against Plantica's estate, 28 U.S.C. § 959(b) requires

(continued...)

1. Whether the bankruptcy court erred in abstaining from deciding and remanding the Criminal Court Cases to the state court.

2. Whether the court abused its discretion in denying the Cavenaghs' motion for reconsideration.

STANDARDS OF REVIEW

A trial court's decisions to decline to exercise discretionary jurisdiction and to remand a removed action on that account are reviewed for abuse of discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 289 (1995); United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1111-12 (9th Cir. 2001); In re McCarthy, 230 B.R. at 416. To the extent that mandatory abstention turns on a question of jurisdiction, including whether it is "related to" but does not "arise in" a case under title 11 and does not "arise under title 11," review is de novo. Honigman, Miller, Schwartz & Cohn v. Weitzman (In re DeLorean Motor Co.), 155 B.R. 521, 524 (9th Cir. BAP 1993). To the extent mandatory abstention turns on factual determinations of whether an action has been commenced, and can be timely adjudicated, in a forum of appropriate jurisdiction, review is for clear error. Cf. Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.), 205 B.R. 231, 234

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[6](...continued)
trustees, receivers and managers to "manage and operate . . . according to the requirements of the valid laws of the State . . . in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." See, e.g., In re White Crane Trading Co., 170 B.R. 694, 701-02 (Bankr. E.D. Cal. 1994) (consumer protection laws apply to retail sales by debtor merchant).

(9th Cir. BAP 1997).

Denial of a motion in the nature of reconsideration is reviewed for abuse of discretion. Arrow Elecs. Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000). An abuse of discretion may be based on an incorrect legal standard, or a clearly erroneous view of the facts, or a ruling that leaves the reviewing court with a definite and firm conviction that there has been a clear error of judgment. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125 (9th Cir. BAP 2005).

DISCUSSION

1. The bankruptcy court did not err in abstaining from deciding and remanding the Criminal Court Cases to state court.

We conclude the bankruptcy court did not err in abstaining from deciding the Criminal Court Cases removed to bankruptcy court by Cavanaghs under both the discretionary and mandatory abstention doctrines. In other words, these constituted adequate, independent bases for abstention.

A.

"Discretionary" (or "permissive") abstention from hearing proceedings that are within federal bankruptcy jurisdiction under 28 U.S.C. § 1334(b) is authorized by § 1334(c)(1) based on the "interest of justice," the "interest of comity with State courts," or "respect for state law."

The question of § 1334(c)(1) discretionary abstention is reviewed for abuse of discretion through a matrix of twelve

considerations: (1) effect of abstention on efficient administration of the estate; (2) extent to which state law issues predominate over bankruptcy issues; (3) difficulty or unsettled nature of applicable law; (4) presence of a related proceeding in nonbankruptcy court; (5) federal jurisdictional basis other than § 1334; (6) degree of relation to the main bankruptcy case; (7) substance of an asserted "core" proceeding; (8) feasibility of severing state claims from bankruptcy matters; (9) burden on bankruptcy docket; (10) the policy discouraging forum shopping; (11) right to jury trial; (12) presence of nondebtor parties. Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.), 935 F.2d 1071, 1075 (9th Cir. 1991).

A balancing of competing factors is typical. In order to find an abuse of discretion, there needs to be an imbalance that is sharply against the result achieved by the bankruptcy court. Id. at 1078. It is not essential that the bankruptcy court have expressly considered each factor. Id. at 1075 n.3.

Application of that matrix in this instance supports the court's decision in favor of discretionary abstention.

(1) Effect on efficient administration of the estate – the bankruptcy court correctly decided that the outcome of the Criminal Court Cases would have no impact on the administration of the Plantica bankruptcy estate since that administration had long since been completed.

(2) Extent to which state law predominates – the bankruptcy court found that this was a criminal case, not a civil action, arising solely under state law. Therefore, state law controlled disposition of all the issues.

(3) Difficult or unsettled nature of applicable law – the bankruptcy court did not consider the issues raised in the Criminal Court Cases particularly difficult, but even so, appropriately deferred to the state court to address questions of state criminal law.

(4) Presence of related proceeding commenced in state court – the court found that the Criminal Court Cases originated in the state courts and were pending there.

(5) A jurisdictional basis other than 28 U.S.C. § 1334 – the bankruptcy court correctly observed that no other federal jurisdictional basis existed to entertain the Criminal Court Cases, and that it did not have jurisdiction under § 1334.

(6) Degree of relatedness of the proceeding to the main bankruptcy case – the bankruptcy court decided, and we agree, that any connection between the bankruptcy case and the Criminal Court Cases was remote, at best.

(7) Substance rather than form if a core proceeding – the bankruptcy court found that the Criminal Court Cases were not core proceedings.

(8) Feasibility of severing state law claims from core proceedings – the court found there were no core bankruptcy proceedings to be severed.

(9) Burden on the bankruptcy court's docket – the court considered that immaterial.

(10) Likelihood of forum shopping – The court decided, based upon ample evidence in the record, that Cavanaghs had done everything possible to avoid the state court prosecution for the previous nine years. We concur: there was substantial evidence

to suggest that Cavanaghs were attempting to avoid the state court forum in hopes of litigating with the People in what they perceived as a more favorable forum, the bankruptcy court.

(11) Existence of a right to jury trial – the bankruptcy court found that EDD might have a right to a jury trial in the state court, but not in bankruptcy. In any event, since these were criminal charges, Cavanaghs would clearly have a right to a jury trial in state court.

(12) Presence of nondebtor parties – the bankruptcy court found that there was no debtor party in the state court action since Plantica, not Cavanaghs, was the debtor in the case to which the Criminal Court Cases had been removed.

In short, the balance tipped sharply in favor of abstention, which is exactly what the bankruptcy court ruled. Hence, it did not abuse its discretion in declining to decide and remanding the Criminal Court Cases to state court under 28 U.S.C. § 1334(c)(1).

B.

"Mandatory" abstention is governed by 28 U.S.C. § 1334(c)(2), which specifies that a bankruptcy court must abstain from hearing certain proceedings that are otherwise within its bankruptcy jurisdiction.

In Krasnoff v. Marshack (In re Gen. Carriers Corp.), 258 B.R. 181, 189 (9th Cir. BAP 2001), the Panel adopted the seven-part test for determining whether mandatory abstention was appropriate under this statute articulated in World Solar Corp. v. Steinbaum (In re World Solar Corp.), 81 B.R. 603, 606 (Bankr. S.D. Cal. 1988). For mandatory abstention to apply, the following must exist: (1) A timely motion to abstain; (2) a purely state law

question; (3) a non-core proceeding; (4) a lack of independent federal jurisdiction absent the petition under title 11; (5) a state court action which, (6) may be timely adjudicated; and (7) the existence of a state forum of appropriate jurisdiction.

The bankruptcy court examined each of these factors at the hearing on April 5, 2005. And, like the bankruptcy court, we conclude all the requirements for mandatory abstention are satisfied here. While Cavanaghs' removal effort was likely nine years late, the People's motion to remand was timely. State criminal law issues, not bankruptcy law questions, predominate in the Criminal Court Cases. The bankruptcy court determined that the Criminal Court Cases did not constitute core proceedings in the bankruptcy court, and that the state actions could not have been commenced in federal court in the absence of a bankruptcy filing. The Criminal Court Cases were originally commenced in state court, and adjudication of the state action would be timely -- indeed, it now appears that the state action is concluded. Finally, although not specifically addressed by the bankruptcy court, the California superior court undoubtedly has jurisdiction to hear criminal cases.

The Panel concurs with the analysis of the bankruptcy court, and agrees that the requirements for mandatory abstention were met in this case. As a result, under 28 U.S.C. § 1334(c)(2), the bankruptcy judge correctly remanded the Criminal Court Cases to state court.

C.

In addition to these factors favoring abstention and remand, the bankruptcy court, as indicated in its order directing the

remand, was properly concerned that it lacked statutory jurisdiction to entertain the Criminal Court Cases under 28 U.S.C. § 1452(a). This jurisdictional concern provided yet another compelling justification to abstain from deciding the cases and to remand them to state court.

The statutory authority for removal of claims related to bankruptcy cases provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a) (emphasis added).

The Ninth Circuit has held that criminal cases are not "civil actions" within the meaning of the removal statutes. Michaels v. California, 216 F.2d 617 (9th Cir. 1954). Only civil actions may be removed pursuant to 28 U.S.C. § 1452(a). Security Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999 (9th Cir. 1997).

Here, there is little doubt that the Criminal Court Cases are criminal cases. The complaint filed against Cavanaghs in superior court lists 29 felony counts. No civil claims have been asserted against Cavanaghs in these actions. If further evidence of the criminal nature of the actions was needed, Peter Cavanagh's guilty plea to two counts was entered under § 829(a) of the California Penal Code, and he was later sentenced to probation, a penalty that can only be imposed in a criminal proceeding. We concur with the bankruptcy judge that the Criminal Court Cases are likely

criminal cases that could not be removed to the bankruptcy court pursuant to 28 U.S.C. § 1452(a).

We are mindful that Cavanaghs contend that they are permitted to bypass the obstacle posed by the criminal nature of the state court proceedings because they contend they were only removing a "claim or cause of action." To be sure, § 1452(a) differs from the basic federal removal statute, 28 U.S.C. § 1441, in that it refers to removing a "claim or cause of action" such that it is plausible to argue that only a portion of an action be removed. Nevertheless, Cavanaghs' argument is not persuasive because it does not account for the requirements in § 1452(a) that the removed "claim or cause of action" be, first, "in a civil action" and, second, not in "a civil action by a governmental unit to enforce such governmental unit's police or regulatory power." 28 U.S.C. § 1452(a).

The bankruptcy court also correctly concluded in its order that, in asserting the criminal charges against Cavanaghs, the People were invoking the State's police power, thus further disqualifying the Criminal Court Cases from removal under § 1452(a). The Ninth Circuit construes the phrase "police or regulatory power" consistently for purposes of both the exception to the automatic stay under § 362(b)(4) and in the context of 28 U.S.C. § 1452. City & County of San Francisco v. PG&E Corp., 433 F.3d 1115, 1123 (9th Cir. 2006) ("Section 1452 and 11 U.S.C. § 362(b)(4) were designed specifically to work in tandem. Therefore, interpretation of these two provisions should be consonant."). Generally, as used in the these statutes, "[police power] refer[s] to the enforcement of state laws affecting health,

morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court." Hillis Motors, Inc. v. Haw. Auto Dealers' Ass'n, 997 F.2d 581, 591 (9th Cir. 1993).

There are two alternative tests to determine whether the action of a governmental unit constitutes an exercise of its police and regulatory power in the bankruptcy context: the "pecuniary purpose" test and the "public policy" test. Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997). Satisfaction of either test will suffice to exempt the action from remand. PG&E Corp., 433 F.3d at 1124.

The pecuniary purpose test attempts to identify legal actions designed to allow a governmental unit to obtain a pecuniary advantage over creditors or potential creditors in a bankruptcy proceeding. Lockyear v. Mirant Corp., 398 F.3d 1098, 1109 (9th Cir. 2005). See also, In re Universal Life Church, 128 F.3d at 1297 ("Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of safety and welfare."). Here, there is no pending bankruptcy estate, and the People will not, by these criminal prosecutions, obtain a financial advantage over Plantica's other creditors. Indeed, as the trustee's no-asset report evidenced, Plantica has no assets for which its creditors can compete; only Cavanaghs' assets are potentially at stake in the Criminal Court Cases.

"Under the 'public policy test,' the court determines whether

the government seeks to 'effectuate public policy' or to adjudicate 'private rights.'" PG&E Corp., 433 F.3d at 1125, quoting NLRB v. Cont'l Hagen Corp., 932 F.2d 828, 833 (9th Cir. 1991); see also Lockyear, 398 F.3d at 1109. If the primary purpose of the state legal action is to effectuate public policy, then the police power exception applies. PG&E Corp., 433 F.3d at 1125.

The enforcement by the state of a penal law intended to protect and preserve the unemployment insurance rights of employees, and to deter the misuse of funds required to be withheld by managers for the benefit of employees, unquestionably effectuates public policy and promotes the public welfare. We agree with the bankruptcy court that the Criminal Court Cases seem to be a clear exercise of the police power of the state designed to deter and punish conduct that is both unlawful and seriously injurious to public welfare.

Finally, even if the Criminal Court Cases were not criminal actions, and did not constitute an exercise of the state's police powers, the bankruptcy court was correct to be concerned that it lacked jurisdiction over this dispute under 28 U.S.C. § 1334, a further requirement for removal under § 1452(a).

In § 1334(a), Congress grants bankruptcy courts, via the district courts, exclusive jurisdiction over "all cases under title 11." The Criminal Courts Cases are not bankruptcy cases, so this jurisdictional grant is of no help to Cavanaghs.

Bankruptcy courts may also exercise nonexclusive jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). While

this grant of jurisdiction is broad, the Criminal Court Cases fall outside its wide scope.

First, as noted above, the Criminal Courts Cases are not civil proceedings; they are criminal proceedings.

Second, the Criminal Court Cases do not arise "under title 11." That portion of the jurisdiction statute refers to "a cause of action created by the Bankruptcy Code, without existence outside the context of bankruptcy, and otherwise unknown to the law." Menk v. Lapaglia (In re Menk), 241 B.R. 896, 904 (9th Cir. BAP 1999). The Criminal Court Cases are not founded upon any provision of title 11, and most certainly prosecutions for willful failure to withhold or pay over contributions to the California unemployment insurance fund exist outside the context of any bankruptcy case.

And third, the Criminal Court Cases do not appear to be "related to" any bankruptcy case as that phrase has been construed in the case law. In the words of the Ninth Circuit, resolution of the Criminal Court Cases would not "conceivably have any effect on [an] estate being administered in bankruptcy." Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988). As a practical matter, but for Cavanaghs' motion to reopen the Plantica case to file the removal notice, there would be no pending bankruptcy case. There is no administration to be affected by the Criminal Court Cases.

In sum, it is doubtful the Criminal Court Cases could be removed under 28 U.S.C. § 1452(a) because the bankruptcy court would have no subject-matter jurisdiction over these cases under § 1334(a) or (b).

D.

Whenever the court lacks subject-matter jurisdiction over a removed action, remand is mandatory. 28 U.S.C. § 1447(c). The Supreme Court has held that §§ 1447 and 1452 "comfortably coexist" and may both apply in a bankruptcy removal context. Things Remembered, 516 U.S. at 127-29. It follows that lack of subject-matter jurisdiction over a matter removed under § 1452(a) requires remand under § 1447(c).

It is, however, not essential to the question of remand in this instance that there be a definitive determination regarding subject-matter jurisdiction. The mere existence of a fairly debatable or unsettled point regarding such jurisdiction may be taken into account by the bankruptcy court in determining whether there is an "equitable ground" for remand under § 1452(b). Chambers v. Marathon Home Loans (In re Marathon Home Loans), 96 B.R. 296, 300 (E.D. Cal. 1989) (remand); cf. In re Eastport Assocs., 935 F.2d at 1075 (abstention).

For all these reasons, we conclude that the bankruptcy court's concern that it lacked subject-matter jurisdiction provided yet another basis to remand as well as to abstain from deciding the Criminal Court Cases, to state court.[7]

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[7] While it did not expressly rely upon such grounds, the bankruptcy court also could have disclaimed jurisdiction over the Criminal Court Cases because Cavanaghs' Notice of Removal was late-filed under 28 U.S.C. § 1446(b) or (c)(1). Those provisions, which prescribe the procedure to remove a civil or criminal action to federal court, require, with limited inapplicable exceptions, that the notice of removal be filed no later than thirty days after the summons is served on the defendant in a civil action, or after the defendant is arraigned in state court in a criminal action. Here, the criminal complaint initiating the Criminal

(continued...)

Simply put, we see no reason to disagree with the bankruptcy court's analysis of the discretionary abstention factors, or of mandatory abstention, or to disturb its conclusion that remand of the Criminal Court Cases to state court was appropriate under 28 U.S.C. § 1452, if not also mandatory under § 1447(c).

2. The bankruptcy court did not abuse its discretion in denying the Cavanaughs' motion for reconsideration.

A court may reconsider an earlier order or judgment upon a showing of (1) mistake, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances that would justify relief. FED. R. CIV. P. 60(b), incorporated by FED. R. BANKR. P. 9024; School Dist. No. 1J v. AC&S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Reconsideration is not justified if the "new" evidence could have reasonably been discovered prior to the court's earlier ruling. Hopkins v. Andaya, 958 F.2d 881, 887 (9th Cir. 1992).

The bankruptcy court issued an order denying the motion for reconsideration on December 30, 2005. As discussed above, the court refused to reconsider because ". . . the Cavanaghs' Motion for Reconsideration merely reargues issues which were already ruled on. There is no showing of mistake, surprise, or excusable

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[7](...continued)
Court Cases against Cavanaghs was filed on September 18, 1996, while Cavanaghs' Notice of Removal was not filed until January 31, 2005. It appears that the filing of the Notice was not timely under § 1446, and no showing has been offered by Cavanaghs to excuse the tardy filing.

neglect; there is no newly discovered evidence presented by this motion; there is no allegation of fraud or misconduct; and there are no grounds demonstrated for reconsideration."

We have reviewed the motion for reconsideration. The Panel agrees with the bankruptcy court that Cavanaghs' motion offers no new grounds to support removal of the Criminal Court Cases to the bankruptcy court. In fact, in their motion for reconsideration, they state that "the Cavanaghs have submitted this evidence [regarding the police power argument] to this Court approximately seven times since 1998. . . ." Because Cavanaghs simply repeat the same legal arguments previously made to, and rejected by, the bankruptcy court, the court did not abuse its discretion in denying the motion for reconsideration.

CONCLUSION

We AFFIRM the bankruptcy court's decision in all respects.[8]

[8] In the interests of judicial economy, we have disposed of this appeal on the merits. However, we also note that the issues raised by Cavanaghs in this appeal may be moot. At the time the bankruptcy court issued its original decision to abstain and remand, Peter Cavanagh had entered a guilty plea to two criminal counts as part of a plea arrangement. Now, based upon the record and Peter Cavanagh's representations at oral argument, it appears both Cavanaghs have entered guilty pleas, been sentenced by the state court, and the remaining counts pending against them have been dismissed. Under these circumstances, it is at best doubtful that there remain any issues to resolve in the Criminal Court Cases, nor any live controversy for the bankruptcy court to adjudicate, nor any effective relief to be afforded to Cavanaghs.