

AUG 18 2006

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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NOT FOR PUBLICATION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

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In re:)	BAP No.	CC-05-1245-PaBK
)		
PLANTICA LANDSCAPE)	Bk. No.	ND 90-16759 RR
CORPORATION,)		
)	Adv. No.	ND 05-01019 RR
Debtor.)		
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PETER J. CAVANAGH; THERESEA)		
E. CAVANAGH,)		
)		
Appellants,)		
)	MEMORANDUM¹	
v.)		
)		
THE PEOPLE OF THE STATE OF)		
CALIFORNIA,)		
)		
Appellee.)		
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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.

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.

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

6
7 **FACTS**

8 Plantica Landscape Corporation ("Plantica") operated a
9 business as a California state-licensed landscape contractor. On
10 July 7, 1990, Plantica filed for protection under chapter 11² of
11 the Bankruptcy Code. Cavanaghs were Plantica's principals and
12 officers, and managed the corporation's business activities during
13 the pendency of the chapter 11 case. No chapter 11 trustee was
14 appointed.

15 Plantica's efforts to reorganize were unsuccessful; the
16 chapter 11 case was converted by the bankruptcy court to a chapter
17 7 case on September 27, 1993. A chapter 7 trustee was appointed.
18 It appears from the record that the trustee allowed Cavanaghs to
19 remain in charge of Plantica's business affairs for the next two
20 years in an effort to collect its accounts receivable. However,
21 in a letter dated January 3, 1996, the trustee revoked Cavanaghs'
22 authority to liquidate the company's assets. On June 30, 1995,
23 the chapter 7 trustee filed a no-asset report. The court ordered
24 the bankruptcy case closed on August 23, 1995.

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. § 101-1330 and to
28 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").

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

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

16 Cavanaghs filed a chapter 13 bankruptcy case on July 5, 1996
17 (In re Peter Joseph Cavanagh and Theresea Eileen Cavanagh, Case
18 No. ND 96-12668 RR). They moved to dismiss this case on August
19 30, 1996; that motion was granted and the bankruptcy case was
20 closed on September 12, 1996. In November 1998, Cavanaghs moved
21 to reopen the chapter 13 case so they could ask the court to
22 enjoin EDD and its employees from testifying or providing
23 documentary evidence against Cavanaghs in the Criminal Court
24 Cases. The bankruptcy court denied the motion to reopen on
25 January 29, 1999, and the court's decision was affirmed by this
26 Panel on November 30, 1999. (Unpublished decision, In re
27 Cavanagh, BAP No. CC-99-1096). On September 17, 1999, Cavanaghs
28 attempted to commence an adversary proceeding in their closed

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

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

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

23
24 ³ The facts concerning the first three actions described
25 above (the two proceedings in the bankruptcy court and the
26 superior court and court of appeals decisions) are amply supported
27 by the record. We have no documentation in the record concerning
28 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.

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

7 On November 15, 2004, Cavanaghs moved to reopen the Plantica
8 bankruptcy case to "obtain relief against California EMPLOYMENT
9 DEVELOPMENT DEPARTMENT (EDD) and/or its officials, the VENTURA
10 COUNTRY DISTRICT ATTORNEY and/or its officials for acts taken to
11 coerce the Cavanaghs to personally pay . . . taxes purportedly
12 incurred as administrative expenses by Plantica." The record
13 indicates that both the Ventura County District Attorney and the
14 Attorney General of California received notice of the attempt to
15 reopen the bankruptcy case. The bankruptcy court held a hearing
16 on the motion to reopen on December 14, 2004, and the motion was
17 granted by order dated January 3, 2005.⁴

18 On January 31, 2005, Cavanaghs filed a notice in the Criminal
19 Court Cases purporting to remove them to the bankruptcy court in
20 connection with the Plantica bankruptcy case. The People promptly
21 filed a motion in the bankruptcy court to remand the cases to
22 state court. A hearing on the motion to remand was set for April
23 5, 2005.

24 During the interval between the removal and the hearing on
25

26 ⁴ There is no transcript of the hearing on December 14,
27 2004, in the record. However, the bankruptcy court later
28 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).

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

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

10 On or about November 3, 1992, in the above named
11 judicial district, the crime of violation of
12 UNEMPLOYMENT INSURANCE CODE SECTION 2110, a felony, was
13 committed by PETER J. Cavanagh and THERESEA E. CAVANAGH,
14 being an individual member, officer or manager of an
15 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.

16 And Count 20 of the complaint alleges as follows:

17 On or about May 3, 1994, in the above named judicial
18 district, the crime of violation of UNEMPLOYMENT
19 INSURANCE CODE SECTION 2110, a Felony, was committed by
20 PETER J. CAVANAGH and THERESEA E. CAVANAGH, being an
21 individual member, officer or manager of an employing
22 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.

23 Section 2110 of the California Unemployment Insurance Code
24 provides that:

25 Any employing unit, including any individual member of a

26 _____
27 ⁵ While not reflected in our record, Peter Cavanagh
28 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.

1 partnership employing unit, any officer of a corporate
2 or association employing unit, any manager or managing
3 member of a limited liability company, or any other
4 person having charge of the affairs of a corporate,
5 association, or limited liability company employing
6 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.

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

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

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

20 On May 2, 2005, Cavanaghs filed a motion to reconsider the
21 court's order remanding the Criminal Court Cases to state court.
22 The bankruptcy court denied the motion in an unsigned order on May
23 18, 2005. Cavanaghs timely filed this appeal on May 31, 2005.
24 Pursuant to a limited remand issued by the Panel on December 1,
25 2005, the bankruptcy court entered written findings and an order
26 concerning the motion for reconsideration on December 30, 2005.
27 Its order denying reconsideration provided:

28 The Court finds that the Cavanaghs' Motion for

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

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

12 **REQUESTS FOR JUDICIAL NOTICE**

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

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

The minute orders from the Criminal Court Cases dated June

1 15, and July 15, 2005, meet the Robinson Rancheria standards for
2 judicial notice in that they reliably reflect proceedings in the
3 state court that have a direct relation to the appeals in this
4 case. The People have not objected to Cavanagh's judicial notice
5 request concerning these documents. Therefore, the request is
6 granted and the Panel takes judicial notice of the minute orders
7 of the superior court entered on June 15, and July 15, 2005.

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

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

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

1 Request.

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3

JURISDICTION

4 As we note below, we doubt the bankruptcy court had subject
5 matter jurisdiction over the removed action under 28 U.S.C.
6 § 1334. However, we have jurisdiction to review the bankruptcy
7 court's orders abstaining and remanding the action to state court
8 under 28 U.S.C. § 158(a)(1) and (b). We exercise our appellate
9 jurisdiction mindful that bankruptcy court orders of abstention
10 and remand can be reviewed only by a district court or a
11 bankruptcy appellate panel and not by a court of appeals or by the
12 Supreme Court. 28 U.S.C. §§ 1334(d), 1447(d) & 1452(b); Things
13 Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995); McCarthy
14 v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

15

16

ISSUES ON APPEAL⁶

17

18 ⁶ Cavanaghs submitted 27 issues on appeal, most of which we
19 believe are irrelevant. We have distilled Cavanaghs' list to the
20 two dispositive issues we deem appropriate for review. In
21 addition, shortly after oral argument in this appeal, on July 18,
22 2006, Peter Cavanagh filed a letter with the clerk purporting to
23 address several questions asked by Panel members during argument.
24 We deem this letter to be, in effect, a post-argument brief.
25 While our local rules are silent on the propriety of this
26 submission, as authorized by 9th Cir. BAP R. 8018(b)-1, we elect
27 to apply FED. R. APP. P. 28(c), which provides that "[u]nless the
28 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.

25 We also observe that Cavanagh's briefs and arguments have as
26 their fundamental premise the idea that only the bankruptcy court
27 can determine Plantica's and their liability for withholding
28 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

28

(continued...)

1 (9th Cir. BAP 1997).

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

11 12 **DISCUSSION**

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

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

21 A.

22 "Discretionary" (or "permissive") abstention from hearing
23 proceedings that are within federal bankruptcy jurisdiction under
24 28 U.S.C. § 1334(b) is authorized by § 1334(c) (1) based on the
25 "interest of justice," the "interest of comity with State courts,"
26 or "respect for state law."

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

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

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

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

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

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

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

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

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

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

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

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

23 (9) Burden on the bankruptcy court's docket - the court
24 considered that immaterial.

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

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

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

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

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

17 B.

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

22 In Krasnoff v. Marshack (In re Gen. Carriers Corp.), 258 B.R.
23 181, 189 (9th Cir. BAP 2001), the Panel adopted the seven-part
24 test for determining whether mandatory abstention was appropriate
25 under this statute articulated in World Solar Corp. v. Steinbaum
26 (In re World Solar Corp.), 81 B.R. 603, 606 (Bankr. S.D. Cal.
27 1988). For mandatory abstention to apply, the following must
28 exist: (1) A timely motion to abstain; (2) a purely state law

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

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

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

26 C.

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

1 remand, was properly concerned that it lacked statutory
2 jurisdiction to entertain the Criminal Court Cases under 28 U.S.C.
3 § 1452(a). This jurisdictional concern provided yet another
4 compelling justification to abstain from deciding the cases and to
5 remand them to state court.

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

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

18 28 U.S.C. § 1452(a) (emphasis added).

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

24 Here, there is little doubt that the Criminal Court Cases are
25 criminal cases. The complaint filed against Cavanaghs in superior
26 court lists 29 felony counts. No civil claims have been asserted
27 against Cavanaghs in these actions. If further evidence of the
28 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

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

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

16 The bankruptcy court also correctly concluded in its order
17 that, in asserting the criminal charges against Cavanaghs, the
18 People were invoking the State's police power, thus further
19 disqualifying the Criminal Court Cases from removal under
20 § 1452(a). The Ninth Circuit construes the phrase "police or
21 regulatory power" consistently for purposes of both the exception
22 to the automatic stay under § 362(b)(4) and in the context of 28
23 U.S.C. § 1452. City & County of San Francisco v. PG&E Corp., 433
24 F.3d 1115, 1123 (9th Cir. 2006) ("Section 1452 and 11 U.S.C.
25 § 362(b)(4) were designed specifically to work in tandem.
26 Therefore, interpretation of these two provisions should be
27 consonant."). Generally, as used in the these statutes, "[police
28 power] refer[s] to the enforcement of state laws affecting health,

1 morals, and safety, but not regulatory laws that directly conflict
2 with the control of the res or property by the bankruptcy court."
3 Hillis Motors, Inc. v. Haw. Auto Dealers' Ass'n, 997 F.2d 581, 591
4 (9th Cir. 1993).

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

13 The pecuniary purpose test attempts to identify legal actions
14 designed to allow a governmental unit to obtain a pecuniary
15 advantage over creditors or potential creditors in a bankruptcy
16 proceeding. Lockyear v. Mirant Corp., 398 F.3d 1098, 1109 (9th
17 Cir. 2005). See also, In re Universal Life Church, 128 F.3d at
18 1297 ("Under the pecuniary purpose test, the court determines
19 whether the government action relates primarily to the protection
20 of the government's pecuniary interest in the debtor's property or
21 to matters of safety and welfare."). Here, there is no pending
22 bankruptcy estate, and the People will not, by these criminal
23 prosecutions, obtain a financial advantage over Plantica's other
24 creditors. Indeed, as the trustee's no-asset report evidenced,
25 Plantica has no assets for which its creditors can compete; only
26 Cavanaghs' assets are potentially at stake in the Criminal Court
27 Cases.

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

1 the government seeks to 'effectuate public policy' or to
2 adjudicate 'private rights.'" PG&E Corp., 433 F.3d at 1125,
3 quoting NLRB v. Cont'l Hagen Corp., 932 F.2d 828, 833 (9th Cir.
4 1991); see also Lockyear, 398 F.3d at 1109. If the primary
5 purpose of the state legal action is to effectuate public policy,
6 then the police power exception applies. PG&E Corp., 433 F.3d at
7 1125.

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

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

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

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

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

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

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

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

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

1 D.

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

9 It is, however, not essential to the question of remand in
10 this instance that there be a definitive determination regarding
11 subject-matter jurisdiction. The mere existence of a fairly
12 debatable or unsettled point regarding such jurisdiction may be
13 taken into account by the bankruptcy court in determining whether
14 there is an “equitable ground” for remand under § 1452(b).

15 Chambers v. Marathon Home Loans (In re Marathon Home Loans), 96
16 B.R. 296, 300 (E.D. Cal. 1989) (remand); cf. In re Eastport
17 Assocs., 935 F.2d at 1075 (abstention).

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

22
23 ⁷ While it did not expressly rely upon such grounds, the
24 bankruptcy court also could have disclaimed jurisdiction over the
25 Criminal Court Cases because Cavanagh’s Notice of Removal was
26 late-filed under 28 U.S.C. § 1446(b) or (c)(1). Those provisions,
27 which prescribe the procedure to remove a civil or criminal action
28 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...)

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

6
7 2. The bankruptcy court did not abuse its discretion in
8 denying the Cavanaghs' motion for reconsideration.

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

19 The bankruptcy court issued an order denying the motion for
20 reconsideration on December 30, 2005. As discussed above, the
21 court refused to reconsider because ". . . the Cavanaghs' Motion
22 for Reconsideration merely reargues issues which were already
23 ruled on. There is no showing of mistake, surprise, or excusable
24

25 _____

26 ⁷(...continued)

27 Court Cases against Cavanaghs was filed on September 18, 1996,
28 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.

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

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

14
15 **CONCLUSION**

16 We AFFIRM the bankruptcy court’s decision in all respects.⁸
17
18
19
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21

22 ⁸ In the interests of judicial economy, we have disposed of
23 this appeal on the merits. However, we also note that the issues
24 raised by Cavanaghs in this appeal may be moot. At the time the
25 bankruptcy court issued its original decision to abstain and
26 remand, Peter Cavanagh had entered a guilty plea to two criminal
27 counts as part of a plea arrangement. Now, based upon the record
28 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.