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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-11-1554-KiRnPa
)		CC-11-1476-KiRnPa
GARY OLYN ARMSTRONG,)		(Consolidated)
)		
Debtor.)	Bk. No.	11-35606-BB
_____)		
GARY OLYN ARMSTRONG,)	Adv. No.	11-02358-BB
)		
Appellant,)		
)		
v.)	M E M O R A N D U M ¹	
)		
INTERNAL REVENUE SERVICE;)		
MOTION PICTURE INDUSTRY)		
PENSION & HEALTH PLANS;)		
MOTION PICTURE INDUSTRY)		
PENSION & INDIVIDUAL ACCOUNT)		
PLAN; STATE OF CALIFORNIA)		
FRANCHISE TAX BOARD,)		
)		
Appellees.)		
_____)		

Submitted Without Oral Argument
on September 20, 2012²

Filed - April 8, 2013

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: Appellant Gary Olyn Armstrong pro se on brief;

¹ 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.

² In an order entered on July 6, 2012, the Panel determined that this matter was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP Rule 8012-1.

1 Kamala C. Harris, Paul D. Gifford, W. Dean Freeman,
2 and Marla K. Markman on brief for Appellee
3 California Franchise Tax Board; Joseph A. Hokanski
4 and Melvin Yee of Bush Gottlieb et al ALC on brief
for Appellee Motion Picture Industry Pension and
Health Plans.

5 Before: KIRSCHER, RENN³ and PAPPAS, Bankruptcy Judges.

6
7 In these consolidated appeals, appellant, chapter 7⁴ debtor
8 Gary Olyn Armstrong ("Armstrong"), appeals three orders from the
9 bankruptcy court: (1) the order dismissing his first chapter 7
10 case for failure to obtain prepetition counseling under § 109(h)
11 ("Bankruptcy Dismissal Order"); (2) the order dismissing his first
12 adversary proceeding ("Adversary Dismissal Order") against the
13 Internal Revenue Service ("IRS"),⁵ the California Franchise Tax
14 Board ("FTB"), and the Motion Picture Industry Pension & Health
15 Plans and Motion Picture Industry Pension & Individual Account
16 Plan (collectively "MPIPHP")(all three defendants collectively
17 "Defendants"); and (3) the order denying his motion to reconsider
18 the Adversary Dismissal Order (the "Reconsideration Order").

19 Because the appeal of the Bankruptcy Dismissal Order is
20 untimely, we DISMISS it for lack of jurisdiction. As for the
21 Adversary Dismissal Order, although the bankruptcy court applied
22 an incorrect standard of law when it dismissed the first adversary
23

24 ³ Hon. Thomas M. Renn, Bankruptcy Judge for the District of
Oregon, sitting by designation.

25 ⁴ Unless specified otherwise, all chapter, code and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

28 ⁵ The IRS has not appeared in this appeal.

1 proceeding, such error was harmless because the record supports
2 the court's decision not to retain jurisdiction over Armstrong's
3 related claims against Defendants, and we therefore AFFIRM.
4 However, as explained more thoroughly below, the appeal of the
5 Adversary Dismissal Order as to MPIPHP is DISMISSED as MOOT.
6 Finally, as for the Reconsideration Order, despite the legal error
7 by the bankruptcy court in dismissing Armstrong's first adversary
8 proceeding, we AFFIRM.

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 **A. The first bankruptcy case (11-35606)**

11 Armstrong worked in the motion picture and entertainment
12 industry from 1943 until 1999. Appearing pro se, Armstrong filed
13 a skeletal chapter 7 bankruptcy case on June 14, 2011. All
14 required documents not filed with the petition, including the
15 Certificate of Credit Counseling, were due by June 28, 2011.

16 Along with his skeletal petition, Armstrong filed a motion
17 seeking an exemption from prepetition credit counseling due to
18 exigent circumstances. In short, Armstrong contended that he
19 should be exempt from credit counseling because he did not use
20 credit and because he had only two alleged creditors - the IRS and
21 FTB. Armstrong also indicated that he could not afford credit
22 counseling due to his subsistent social security income, which did
23 not even cover his monthly rent. No notice of hearing was filed.

24 On June 27, 2011, the bankruptcy court issued an order to
25 show cause ("OSC") as to why Armstrong's chapter 7 case should not
26 be dismissed for failure to file a Certificate of Credit
27 Counseling. According to the OSC, Armstrong had not presented
28 sufficient evidence to demonstrate that he was entitled to a

1 temporary waiver of, or exemption from, the prepetition credit
2 counseling requirement under § 109(h). A hearing was set for
3 July 20, 2011, and any responses to the OSC were due by July 6.

4 On July 5, 2011, Armstrong filed a response to the OSC,
5 contending that he did not consent to the bankruptcy court's
6 jurisdiction to resolve any material disputed facts, and
7 requesting that the court review his previously-filed motion
8 seeking an exemption from prepetition credit counseling, which he
9 thought would be automatically set for hearing or forwarded to the
10 bankruptcy judge for review.

11 On July 6, 2011, the clerk issued a Final Notice instructing
12 Armstrong to file his Certificate of Credit Counseling by no later
13 than July 20, 2011, or his case would be dismissed.

14 On July 18, 2011, Armstrong filed a Certificate of Credit
15 Counseling, which stated that he completed the required course via
16 the Internet on July 17, 2011.

17 The OSC hearing went forward on July 20, 2011. According to
18 the Bankruptcy Dismissal Order entered on July 28, 2011, the
19 bankruptcy court dismissed Armstrong's chapter 7 case "for the
20 reasons set forth on the record." Armstrong did not provide a
21 copy of the transcript in the record, and it is not available on
22 the electronic docket. However, we do have a copy of the court's
23 tentative ruling issued on July 20:

24 Congress has drafted the bankruptcy code in such a way as
25 to require that an individual complete a credit
26 counseling course in order to be eligible to file
27 bankruptcy. There are a handful of exceptions to this
28 rule, none of which appear to be applicable here.
Dismiss case, as debtor failed to complete prepetition
credit counseling course and is therefore ineligible to
be a debtor in this bankruptcy case.

1 Tentative Ruling (July 20, 2011).

2 Armstrong filed a notice of appeal on September 1, 2011
3 ("First Notice of Appeal"), forty-five days after entry of the
4 Bankruptcy Dismissal Order. The First Notice of Appeal states
5 that Armstrong was appealing the "dismissal of adversary
6 proceeding after entry of default as to all defendants" and names
7 the Defendants, yet attached to the notice was only a copy of the
8 Bankruptcy Dismissal Order. Armstrong withdrew his First Notice
9 of Appeal on September 12, 2011.

10 **B. The first adversary proceeding (11-2358) and Reconsideration**
11 **Order**

12 One day after filing his first bankruptcy case, on June 15,
13 2011, Armstrong filed an adversary complaint against the IRS,⁶
14 FTB, and the MPIPHP alleging numerous claims: (1) breach of
15 contract; (2) theft; (3) fraud; (4) menace; (5) perjury of office;
16 (6) failure to adhere to rules, regulations and procedures in the
17 ascertainment, assessment and collection of taxes; (7) violation
18 of 18 U.S.C. § 24; (8) violation of 18 U.S.C. § 242; and
19 (9) violation of 5 U.S.C. § 706. Armstrong sought declaratory
20 relief that he did not owe taxes for the 1991 through 2011 tax
21 years, and requested that any notices, liens or levies against him
22 be declared void.⁷

23 In short, Armstrong alleged that the IRS and FTB improperly
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25
26 ⁶ Armstrong also sued several employees of the IRS. We refer
27 to all of these parties and the IRS collectively as the IRS.

28 ⁷ Armstrong also referenced the Social Security
Administration in his complaint, but he never named that agency as
a defendant or served it with the summons and complaint.

1 assessed and collected taxes he did not owe, which violated his
2 due process rights. Armstrong alleged that the IRS was a private
3 corporation and "resident" of Puerto Rico. Armstrong further
4 alleged that the MPIPHP had been improperly garnishing his pension
5 benefits since February 2006. In his attached "Proposed
6 Judgments," Armstrong sought approximately \$20 million in damages,
7 payable in gold or silver coins within thirty days of entry of
8 judgment. Per the summons issued on June 16, 2011, Defendants had
9 to respond to Armstrong's complaint by July 18, 2011.

10 The complaint and summons were sent to Defendants on June 21,
11 2011. For the MPIPHP, the complaint and summons were mailed to
12 "Pension Department, Motion Picture Industry Pension and Health
13 Plans 11365 Ventura Blvd. #300 Studio City, California 91604."
14 For the IRS, the complaint and summons were mailed to "Internal
15 Revenue Service 7 Tabonuco Street Guaynabo, Puerto Rico 00968."
16 For the FTB, the summons and complaint were mailed to "State of
17 California Franchise Tax Board 9646 Butterfield Way Sacramento,
18 California 95827." When none of the Defendants responded by
19 July 18, 2011, on July 19 Armstrong requested and received from
20 the clerk entries of default against Defendants under Rule
21 7055(a).

22 Armstrong moved for default judgment against the Defendants
23 on August 8, 2011. In his attached declaration, Armstrong stated
24 that all parties were properly served, that they had failed to
25 timely respond, and that he had obtained a default against each of
26 them. Armstrong contended he was entitled to approximately
27 \$14 million in damages.

28 On August 18, 2011, counsel for MPIPHP, only recently

1 becoming aware of Armstrong's suit, attempted to contact Armstrong
2 to inform him that his complaint and summons were not properly
3 served, and to ask him to set aside the default so the matter
4 could be adjudicated on the merits. Despite attempts to reach
5 Armstrong by phone, messenger and FedEx, counsel received no
6 response from Armstrong.

7 On August 22, 2011, MPIPHP filed a unilateral status report
8 stating that it would file a motion to set aside the default for
9 defective service, lack of subject matter jurisdiction, and
10 because Armstrong's chapter 7 case had been dismissed on July 28,
11 2011. MPIPHP further intended to file a motion to dismiss the
12 adversary proceeding under Civil Rule 12(b)(6).

13 The bankruptcy court held a status conference on August 23,
14 2011. According to the court's tentative ruling, it was prepared
15 to dismiss the adversary proceeding:

16 It appears that defaults were entered in error, as the
17 docket does not reflect evidence that defendants were
18 served with copies of the summons and complaint.
19 Underlying bankruptcy case was dismissed on July 28,
20 2011, based on debtor's failure to obtain prepetition
21 credit counseling. In light of the nature of this
22 complaint, dismissal of the underlying bankruptcy case
23 deprives this court of jurisdiction to adjudicate the
24 relevant claims. Enter order dismissing adversary
25 proceeding.

26 Tentative Ruling (Aug. 23, 2011). We have no transcript from the
27 August 23 hearing in the record, but it is available on the
28 bankruptcy court's electronic docket.⁸ Armstrong, the MPIPHP and
the FTB appeared. The bankruptcy court explained that its

⁸ The Panel can take judicial notice of documents filed with
the bankruptcy court through the electronic docketing system.
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989).

1 jurisdiction was limited and, because Armstrong's chapter 7 case
2 had been dismissed, it no longer had jurisdiction to adjudicate
3 the suit. The court then dismissed the adversary proceeding for
4 lack of jurisdiction, but told Armstrong that he could file a
5 second bankruptcy case and a second adversary complaint:

6 So the Court will prepare -- an order dismissing action
7 for lack of subject matter jurisdiction.

8 If you bring a new bankruptcy, file a new bankruptcy and
9 that one sticks, you could file a new lawsuit. But in
10 this bankruptcy, this lawsuit has to go away because I
11 don't have a bankruptcy anymore. I don't have any more
12 jurisdiction.

13 There are certain things that I keep after cases have
14 been dismissed. This isn't one of them.

15 Hr'g Tr. (Aug. 23, 2011) 5:13-21. The bankruptcy court entered
16 the Adversary Dismissal Order on September 2, 2011.

17 Meanwhile, on September 1, 2011, Armstrong had filed his
18 First Notice of Appeal after the court's oral ruling, which
19 mentioned the Adversary Dismissal Order but included only a copy
20 of the Bankruptcy Dismissal Order. Under Rule 8002(b), the
21 premature First Notice of Appeal appealing the Adversary Dismissal
22 Order was cured when that order was entered on September 2.
23 However, Armstrong withdrew the First Notice of Appeal.

24 Deciding to pursue an alternative course, Armstrong filed a
25 timely motion to reconsider the Adversary Dismissal Order on
26 September 14, 2011. Armstrong argued that when the bankruptcy
27 court dismissed his chapter 7 case and the adversary proceeding,
28 it violated the U.S. and California constitutions, the Judiciary
Act of 1789, sections of Title 18 and various Judicial Cannons.
Armstrong also challenged the constitutionality of § 109(h).

 The bankruptcy court entered the Reconsideration Order

1 denying Armstrong's motion on September 30, 2011. Although
2 Armstrong's reconsideration motion attempted to challenge the
3 Bankruptcy Dismissal Order and the Adversary Dismissal Order, the
4 Reconsideration Order addressed only the Adversary Dismissal
5 Order. The court denied reconsideration for Armstrong's failure
6 to assert grounds to grant it. Armstrong appealed the Adversary
7 Dismissal Order and the Reconsideration Order on October 11, 2011
8 ("Second Notice of Appeal"). Although the notice appears to also
9 appeal the Bankruptcy Dismissal Order by reference, it sought
10 appeal only for the order entered on "September 30, 2011" - the
11 date of the Reconsideration Order. To further complicate matters,
12 only a copy of the Reconsideration Order was attached.

13 **C. The second bankruptcy case (11-46301) and second adversary**
14 **proceeding (11-2693)⁹**

15 On August 25, 2011, prior to filing his Second Notice of
16 Appeal and after entry of the Bankruptcy Dismissal Order,
17 Armstrong filed a second chapter 7 case. This filing included a
18 copy of the Certificate of Credit Counseling Armstrong had filed

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20 ⁹ MPIPHP has filed a request asking the Panel to take
21 judicial notice of Armstrong's second bankruptcy case and second
22 adversary proceeding. Items not before the bankruptcy court
23 generally will not be considered unless they pertain to mootness
24 that arose after the order on appeal. See Graves v. Myrvang
25 (In re Myrvang), 232 F.3d 1116, 1119 (9th Cir. 2000); Kirshner v.
26 Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988). Because
27 these subsequent events have rendered at least some of the appeals
28 at issue moot, we exercise our discretion to consider them.
Accordingly, MPIPHP's request is GRANTED to the extent that the
Panel will take notice of the fact of the filings and documents
contained in the second bankruptcy case and second adversary
proceeding. However, no extrajudicial facts mentioned in those
documents shall be deemed conclusively established as a result of
granting this request. See Wetherbee v. Willow Lane, Inc.
(In re Bestway Prods., Inc.), 151 B.R. 530, 540-41 n.3 (Bankr.
E.D. Cal. 1993); cf. Lee v. City of L.A., 250 F.3d 668, 690 (9th
Cir. 2001).

1 in his first case on July 18, 2011. Also, prior to filing his
2 Second Notice of Appeal but after the first adversary proceeding
3 had been dismissed (although the Adversary Dismissal Order had not
4 yet been entered), Armstrong filed a second adversary complaint
5 asserting the same claims against the same Defendants. FTB was
6 the only party to file an answer. No party filed a motion for
7 summary judgment.

8 On October 25, 2011, MPIPHP moved to be dismissed from the
9 second adversary proceeding under Civil Rule 12(b)(6). According
10 to MPIPHP, in January 2006 it received a Notice of Levy on Wages,
11 Salary, and Other Income directing it to turn over Armstrong's
12 entire pension benefit to the IRS. MPIPHP has complied with the
13 IRS levy since that time, repeatedly notifying Armstrong that it
14 was required under federal law to honor the levy and suggesting to
15 Armstrong that he resolve the matter with the IRS. MPIPHP
16 contended that 26 U.S.C. § 6332(e) provides broad immunity from
17 liability to third parties acting in accordance with an IRS levy.
18 Therefore, Armstrong had no cognizable claim against MPIPHP or its
19 employees for honoring the levy and turning over Armstrong's
20 pension benefits to the IRS. After a hearing on December 13,
21 2011, the bankruptcy court entered an order granting MPIPHP's
22 motion to dismiss, with prejudice, on December 15, 2011.

23 Meanwhile, on November 17, 2011, the IRS filed its own motion
24 to dismiss the second adversary proceeding under Civil
25 Rule 12(b)(1), (2), (5) and (6) contending: (1) lack of personal
26 and subject matter jurisdiction due to Armstrong's failure to
27 serve the complaint and summons in accordance with Rule 7004 and
28 Civil Rule 4(i); (2) injunctive relief from the collection of

1 taxes was barred by the Anti-Injunction Act; and (3) Armstrong
2 failed to allege any facts to show he was entitled to relief.
3 However, before any order could be entered on the IRS's motion to
4 dismiss, Armstrong filed a voluntary notice of dismissal of the
5 second bankruptcy case and the second adversary proceeding on
6 November 22, 2011.¹⁰ The FTB, the only defendant to file an
7 answer, filed a stipulation giving consent to the dismissal on
8 December 19, 2011.

9 After a hearing on December 13, 2011, on December 22, 2011,
10 the bankruptcy court entered an order dismissing the second
11 adversary proceeding, with prejudice, as to the remaining
12 defendants - the IRS and FTB. An order dismissing the second
13 bankruptcy case was entered on that same date. These orders were
14 not appealed.

15 II. JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
17 and 157(b)(2)(A), (c)(1). We address herein our jurisdiction
18 under 28 U.S.C. § 158.

19 III. ISSUES

- 20 1. Is the appeal of the Bankruptcy Dismissal Order untimely?
- 21 2. Did the bankruptcy court err in dismissing the first
22 adversary proceeding for lack of subject matter jurisdiction?
- 23 3. Did the bankruptcy court abuse its discretion in not granting
24 Armstrong's motion to reconsider the Adversary Dismissal Order?

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26

27 ¹⁰ For reasons unknown, Armstrong's dismissal notice did not
28 get docketed in the second adversary proceeding until December 21,
2011. This notice was never filed in the second bankruptcy case.

1 **IV. STANDARDS OF REVIEW**

2 The timeliness of a notice of appeal is a question of law we
3 review de novo. Saunders v. Band Plus Mortg. Corp.

4 (In re Saunders), 31 F.3d 767 (9th Cir. 1994)(per curiam).

5 Mootness is also a question of law reviewed de novo. S. Ore.

6 Barter Fair v. Jackson Cnty. Ore., 372 F.3d 1128, 1133 (9th Cir.

7 2004)(citing Ore. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116 (9th

8 Cir. 2003)). "The basic question in determining mootness is

9 whether there is a present controversy as to which effective

10 relief can be granted." Feldman v. Bomar, 518 F.3d 637, 642 (9th

11 Cir. 2008)(citation omitted).

12 We review de novo a dismissal of a complaint for lack of

13 subject matter jurisdiction under Civil Rule 12(b)(1). Davis v.

14 Courington (In re Davis), 177 B.R. 907, 910 (9th Cir. BAP 1995).

15 A bankruptcy court's decision to decline to exercise

16 jurisdiction over related proceedings following dismissal of the

17 underlying bankruptcy case is reviewed for an abuse of discretion.

18 Id. Likewise, denial of a motion for reconsideration is reviewed

19 for an abuse of discretion. Ta Chong Bank Ltd. v. Hitachi High

20 Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir. 2010). A

21 bankruptcy court abuses its discretion if it applied the wrong

22 legal standard or its findings were illogical, implausible, or

23 without support in the record. TrafficSchool.com, Inc. v. Edriver

24 Inc., 653 F.3d 820, 832 (9th Cir. 2011).

25 We may affirm a dismissal on "any basis fairly supported by

26 the record." Corrie v. Caterpillar, Inc., 503 F.3d 974, 979 (9th

27 Cir. 2007).

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9 **V. DISCUSSION**

10 Armstrong raises forty-seven issues on appeal (with
11 reservation to raise five more at a later date), nearly all of
12 which go to the merits of his claims against the Defendants. None
13 of those issues are properly before us. What we must decide is
14 whether the record supports the bankruptcy court's decision with
15 respect to each of the three orders on appeal. We address each
16 order in turn.

17 **A. The appeal of the Bankruptcy Dismissal Order is untimely.**

18 The FTB and MPIPHP contend that Armstrong's appeal of the
19 Bankruptcy Dismissal Order is untimely and that we lack
20 jurisdiction over the matter. We agree.

21 Under Rule 8002(a), a notice of appeal must be filed within
22 14 days of the entry of the order being appealed. The provisions
23 of Rule 8002 are jurisdictional, and the untimely filing of a
24 notice of appeal deprives the appellate court of jurisdiction to
25 review the bankruptcy court's order. Anderson v. Mouradick
26 (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994).

27 The Bankruptcy Dismissal Order was entered on July 28, 2011.
28 Armstrong did not file his First Notice of Appeal until
September 1, 2011 - forty-five days later. More importantly, the
First Notice of Appeal made no direct reference to the Bankruptcy
Dismissal Order of July 28; it referred only to the Adversary
Dismissal Order, which had not yet been entered. Nonetheless, a
copy of the Bankruptcy Dismissal Order was attached to the First
Notice of Appeal. Even if that somehow "cured" any potential
defects in the First Notice of Appeal, the appeal of the
Bankruptcy Dismissal Order was still untimely.

1 Armstrong's motion to reconsider, filed on September 14,
2 2011, does not save this untimely appeal either. In his motion,
3 Armstrong challenged both the Adversary Dismissal Order and the
4 Bankruptcy Dismissal Order. In its Reconsideration Order entered
5 on September 30, 2011, the bankruptcy court addressed only the
6 Adversary Dismissal Order. Armstrong's Second Notice of Appeal,
7 filed on October 11, 2011, made reference to the Bankruptcy
8 Dismissal Order, the Adversary Dismissal Order, and the
9 Reconsideration Order, but he attached only a copy of the
10 Reconsideration Order to the notice. At best, Armstrong's attempt
11 to challenge the Bankruptcy Dismissal Order in his motion to
12 reconsider could only be treated as a motion for relief from
13 judgment under Civil Rule 60(b), incorporated by Rule 9024,
14 because it was not filed within 14 days of entry of the Bankruptcy
15 Dismissal Order. See Civil Rule 59(e), incorporated by Rule 9023.

16 Under Rule 8002(b)(4), a motion under Rule 9024 only tolls
17 the appeal time of the underlying order when it is filed within
18 14 days after entry of the order. While Armstrong's motion to
19 reconsider tolled the appeal time of the Adversary Dismissal Order
20 because it was filed just twelve days after entry of that order,
21 it did not toll the appeal time of the Bankruptcy Dismissal Order
22 because the motion was filed some 49 days after entry of that
23 order.

24 Accordingly, because Armstrong's appeal of the Bankruptcy
25 Dismissal Order is untimely, we must DISMISS it for lack of
26 jurisdiction. As a result, we cannot consider any of the
27 arguments Armstrong raises with respect to dismissal of the first
28 bankruptcy case, including the propriety of § 109(h).

1 B. The bankruptcy court erred in assuming that it lacked subject
2 matter jurisdiction over the first adversary proceeding due
3 to the dismissal of the first bankruptcy case, but such error
4 was harmless.

5 Bankruptcy courts have jurisdiction over all civil
6 proceedings arising under Title 11, or arising in or related to
7 cases under Title 11. 28 U.S.C. § 1334(b). Here, the suit at
8 issue involved a mix of claims based on both federal and state
9 law. However, because none of the claims invoke a substantive
10 right created by federal bankruptcy law, they do not "arise under"
11 Title 11. Eastport Assocs. v. City of L.A. (In re Eastport
12 Assocs.), 935 F.2d 1071, 1076 (9th Cir. 1991). Similarly, because
13 all of these claims could exist outside of bankruptcy, they do not
14 "arise in" Title 11. Id. Therefore, any jurisdiction the
15 bankruptcy court had over Armstrong's claims could only consist of
16 "related to" jurisdiction.

17 "An action is related to bankruptcy if the outcome could
18 alter the debtor's rights, liabilities, options, or freedom of
19 action (either positively or negatively) and which in any way
20 impacts upon the handling and administration of the bankrupt
21 estate." Great W. Sav. v. Gordon (In re Fietz), 852 F.2d 455, 457
22 (9th Cir. 1988)(quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994
23 (3d Cir. 1984)); Linkway Inv. Co. v. Olsen (In re Casamont
Investors, Ltd.), 196 B.R. 517, 521 (9th Cir. BAP 1996).

24 Conceivably, the outcome of Armstrong's claims could have altered
25 his rights and liabilities. As a result, the bankruptcy court had
26 related to jurisdiction over the first adversary proceeding.

27 Based on the bankruptcy court's statements at the status
28 conference on August 23, 2011, and in the Adversary Dismissal

1 Order, it concluded that it lacked subject matter jurisdiction
2 over the first adversary proceeding because Armstrong's first
3 bankruptcy case had been dismissed. This was erroneous.

4 Both the Ninth Circuit and this Panel have held that
5 bankruptcy courts are not automatically divested of jurisdiction
6 over related to claims when the underlying bankruptcy case has
7 been dismissed. Carraher v. Morgan Elecs., Inc. (In re Carraher),
8 971 F.2d 327, 328 (9th Cir. 1992); In re Casamont Investors, Ltd.,
9 196 B.R. at 525. In that circumstance, the bankruptcy court
10 should consider whether or not it should retain jurisdiction. Id.
11 "The bankruptcy court should consider 'economy, convenience,
12 fairness, and comity' in determining whether to abstain from
13 exercising its jurisdiction." In re Davis, 177 B.R. at 913
14 (quoting In re Carraher, 971 F.2d at 328). The weighing of these
15 factors is discretionary. In re Casamont Investors, Ltd.,
16 196 B.R. at 522 n.3.

17 While it is not completely clear from the bankruptcy judge's
18 comments at the hearing, the court apparently concluded that it
19 must dismiss the adversary proceeding because the judge thought
20 erroneously the dismissal of the underlying bankruptcy case
21 deprived it of jurisdiction. It should have considered, but did
22 not, the above factors in making its decision whether to retain
23 jurisdiction over Armstrong's claims in the first adversary
24 proceeding. However, rather than remanding this matter to the
25 bankruptcy court for its analysis, we believe the record fairly
26 supports its decision not to retain jurisdiction over Armstrong's
27 related claims, which we discuss below.

28 1. Judicial economy. The first adversary proceeding had

1 been pending about six weeks when the first bankruptcy case was
2 dismissed. Compare In re Casamont Investors, Ltd., 196 B.R. at
3 523 (adversary proceeding pending two months at time of dismissal
4 did not favor retention; retention of jurisdiction is improper
5 when the initiation of the dispute is recent), with
6 In re Carraher, 971 F.2d at 327 (adversary proceeding pending six
7 years at time of dismissal weighed in favor of retention). During
8 that time, no action had been taken other than filing the
9 complaint, the entry of defaults on the Defendants (which were
10 likely entered in error due to bad service), a motion for default
11 judgment and a status report. No discovery had occurred, no
12 motions for summary judgment had been filed and no trial had been
13 commenced. Compare In re Casamont Investors, Ltd., 196 B.R. at
14 520 (no summary judgment motions filed at time of bankruptcy
15 dismissal), with In re Carraher, 971 F.2d at 327 (parties had
16 substantially litigated action before dismissal and court invested
17 its judicial resources). This factor weighs in favor of not
18 retaining jurisdiction over the first adversary proceeding.

19 2. Convenience. The first adversary proceeding had been
20 pending only six weeks at the time of dismissal of the first
21 bankruptcy case, with little activity. Further, nothing prevented
22 Armstrong from filing another bankruptcy case and another
23 adversary proceeding (which he did) or from filing his complaint
24 in state or district court. The inconvenience of having to
25 re-file a complaint in another court does not warrant retention of
26 jurisdiction. In re Casamont Investors, Ltd., 196 B.R. at 524.
27 This factor disfavors retention.

28 3. Fairness. Again, because the first adversary proceeding

1 had been pending only six weeks, the parties were not prejudiced
2 by dismissal. See In re Carraher, 971 F.3d at 328 (proceeding
3 dragged on for six years); Fid. & Deposit Co. of Md. v. Morris
4 (In re Morris), 950 F.2d 1531, 1534 (11th Cir. 1992)(more than
5 four years); Smith v. Commercial Banking Corp. (In re Smith),
6 866 F.2d 576, 580 (3d Cir. 1989)(more than four years). This
7 factor also supports dismissal of the adversary proceeding.

8 4. Comity. To the extent Armstrong challenged the FTB and
9 MPIPHP under state law, comity weighs in favor of dismissal. As
10 for the IRS, since Armstrong's claims against it are federal in
11 nature, comity is less of an issue. However, nothing in the
12 record suggests that the bankruptcy court had a specialized
13 knowledge of federal tax law. Moreover, no bankruptcy issues were
14 alleged in Armstrong's complaint. Thus, we conclude that this
15 factor either disfavors retention or could be considered neutral.

16 Overall, the above factors would support a bankruptcy court's
17 decision not to retain jurisdiction over the first adversary
18 proceeding. Accordingly, it did not abuse its discretion in
19 dismissing it, and we AFFIRM the Adversary Dismissal Order.¹¹

20 However, this appeal presents a different issue when it comes
21 to the MPIPHP. MPIPHP contends that the appeal of the Adversary
22 Dismissal Order is moot because it was dismissed in the second
23 adversary proceeding. We agree. In Armstrong's second adversary
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25 ¹¹ Armstrong has had more than one chance, through the motion
26 for reconsideration and this appeal, to articulate a basis for
27 opposing the dismissal. His argument has relied only on the entry
28 of the defaults, a legally inadequate basis for retaining
jurisdiction over the adversary proceeding. In addition, he had
an opportunity in the second adversary proceeding to assert the
same claims against the same defendants.

1 proceeding, which asserted the exact same claims as the first,
2 MPIPHP was successfully dismissed, with prejudice, under Civil
3 Rule 12(b)(6) based on immunity grounds under 26 U.S.C. § 6332(e).
4 No one has appealed the order granting MPIPHP's motion to dismiss
5 and the time to appeal has long since run.

6 We have jurisdiction only over actual cases and live
7 controversies. Pilate v. Burrell (In re Burrell), 415 F.3d 994,
8 998 (9th Cir. 2005). We lack jurisdiction over moot appeals.
9 I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir.
10 2001). If the appeal is moot, we must dismiss it. Id. A case is
11 moot "[i]f an event occurs while a case is pending on appeal that
12 makes it impossible for the court to grant any effectual relief
13 whatever to a prevailing party" Id. We are unable to
14 grant Armstrong any effective form of relief with respect to
15 MPIPHP. Even if we were to reverse the Adversary Dismissal Order,
16 the bankruptcy court has subsequently concluded that Armstrong
17 presented no colorable claim against MPIPHP, and the order
18 dismissing MPIPHP under Civil Rule 12(b)(6) is final.
19 Accordingly, the appeal of the Adversary Dismissal Order as to the
20 MPIPHP is DISMISSED as MOOT.¹²

21 **C. The bankruptcy court did not abuse its discretion when it**
22 **denied the motion to reconsider.**

23 Although the bankruptcy court did not articulate under which
24 rule it was treating Armstrong's motion to reconsider, we conclude
25 that it fell under Civil Rule 59(e), incorporated by Rule 9023,
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27 ¹² Alternatively, even if the appeal against MPIPHP were not
28 moot, we would affirm the Adversary Dismissal Order as to it for
the same reasons stated above.

1 since it was filed within the required 14 days.

2 A motion under Civil Rule 59(e) should not be granted, absent
3 highly unusual circumstances, unless the court is presented with
4 newly discovered evidence, committed clear error, or if there is
5 an intervening change of controlling law. 389 Orange St. Partners
6 v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). A motion for
7 reconsideration is not for rehashing the same arguments made the
8 first time or to assert new legal theories or new facts that could
9 have been raised at the initial hearing. In re Greco, 113 B.R.
10 658, 664 (D. Haw. 1990), aff'd and remanded, Greco v. Troy Corp.,
11 952 F.2d 406 (9th Cir. 1991).

12 The bankruptcy court determined that Armstrong's motion to
13 reconsider failed to advance any new evidence, or identify any
14 intervening change in the law, or to suggest any clear error by
15 the court in entering the Adversary Dismissal Order. Other than
16 contending that the bankruptcy court failed to provide any
17 findings or conclusions in all three orders, a contention we
18 reject, Armstrong does not set forth any relevant argument as to
19 why the bankruptcy court abused its discretion when it denied his
20 motion to reconsider.

21 Because the bankruptcy court apparently applied an incorrect
22 standard of law by assuming that it lacked jurisdiction over
23 Armstrong's related claims once his bankruptcy case had been
24 dismissed, one could argue that reconsideration should have been
25 granted due to the court's legal error. However, this issue was
26 never raised by Armstrong in his reconsideration motion, and,
27 since we have determined that the bankruptcy court's error was
28 harmless, we conclude that it did not abuse its discretion in

1 denying reconsideration of the Adversary Dismissal Order.

2 **D. We are unable to grant Armstrong's other requests for relief.**

3 In addition to his request to reverse the three orders at
4 issue, Armstrong asks that we order the bankruptcy court to enter
5 judgment against the Defendants as set forth in his motion for
6 default judgment. Given the record, we lack jurisdiction to grant
7 the relief the debtor requests.

8 **VI. CONCLUSION**

9 Based on the foregoing reasons, we DISMISS the appeal of the
10 Bankruptcy Dismissal Order for lack of jurisdiction, we AFFIRM the
11 Adversary Dismissal Order as to the FTB and IRS and DISMISS the
12 appeal thereof as MOOT as to MPIPHP, and we AFFIRM the
13 Reconsideration Order.

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