

MAY 31 2012

NOT FOR PUBLICATION

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-11-1512-MkHKi
6	TIMOTHY R. TAYLOR,)	Bk. No.	98-38409
7	Debtor.)	Adv. No.	11-02356
8	_____)		
9	TIMOTHY R. TAYLOR,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	U.S. DEPARTMENT OF JUSTICE;)		
13	U.S. DEPARTMENT OF EDUCATION;)		
14	U.S. DEPARTMENT OF HEALTH AND)		
15	HUMAN SERVICES; OFFICE OF THE)		
	INSPECTOR GENERAL,)		
	Appellees.)		
	_____)		

Submitted Without Oral Argument
On May 1, 2012

Filed - May 31, 2012

Appeal From The United States Bankruptcy Court
for the Eastern District of California

Honorable Christopher M. Klein, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Timothy R Taylor, M.D. pro se on brief;
Benjamin B. Wagner, United States Attorney, and
Jeffrey J. Lodge, Assistant United States
Attorney, on brief for Appellees.

Before: MARKELL, HOLLOWELL and KIRSCHER, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 no assets to be distributed to creditors. Shortly thereafter, in
2 March 1999, the bankruptcy court granted Taylor a discharge by
3 entering an order ("Discharge Order") containing the language set
4 forth in Official Form 18 - the version of that form in effect
5 between 1991 and 1997.³ The Discharge Order Provided:

6 IT IS ORDERED that:

7 1. The above-named debtor(s) is (are) released from all
8 dischargeable debts.

9 2. Any judgment heretofore or hereafter obtained in any
10 court other than this court is null and void as a
11 determination of the personal liability of the
12 debtor(s) with respect to any of the following:

13 (a) debts dischargeable under 11 U.S.C. § 523;

14 (b) unless heretofore or hereafter determined by order
15 of this court to be nondischargeable, debts alleged to
16 be excepted from discharge under clauses (2), (4), (6),
17 and (15) of 11 U.S.C. § 523(a);

18 (c) debts determined by this court to be discharged.

19 3. All creditors whose debts are discharged by this
20 order and all creditors whose judgments are declared
21 null and void by paragraph 2 above are enjoined from
22 instituting or continuing any action or employing any
23 process or engaging in any act to collect such debts as
24 personal liabilities of the above-named debtor(s).

25 Discharge Order (Mar. 23, 1999) at p. 1. In August 1999, the
26 bankruptcy court entered its Final Decree closing Taylor's
27 bankruptcy case.⁴

28 But that was not the end of Taylor's bankruptcy case. In
29 May 2011, Taylor filed his Contempt Motion, which the bankruptcy

30 ³The use of the outdated official form is discussed more
31 fully below. See infra note 8 and accompanying text.

32 ⁴In 2007, Taylor filed another bankruptcy case in the United
33 States Bankruptcy Court for the District of Hawaii. That
34 bankruptcy case has no bearing on Taylor's Contempt Motion or
35 this appeal.

1 court deemed to be a complaint commencing an adversary
2 proceeding.

3 Taylor named the above-captioned appellees ("Appellees") as
4 respondents to his Contempt Motion. Taylor asserted that the
5 Appellees had violated the Discharge Order by taking action to
6 collect on his discharged student loan debts. The Appellees
7 filed a motion to dismiss Taylor's Contempt Motion, arguing that
8 Taylor's student loan debt had not been discharged, and thus they
9 has not violated the Discharge Order by attempting to collect the
10 debt.⁵

11 Both sides filed additional papers in support of their
12 respective positions, and the court held a hearing on the
13 dismissal motion, after which it issued a memorandum decision
14 essentially agreeing with the Appellees' position. Based on its
15 memorandum decision, the court entered on September 19, 2011, an
16 order denying Taylor's Contempt Motion and dismissing the
17 adversary proceeding. Taylor timely filed his appeal on
18 September 21, 2011.

19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
22 § 158.

23 ISSUE

24 Did the bankruptcy court err when it dismissed Taylor's
25

26 ⁵The Appellee's alternately requested judgment on the
27 pleadings under Civil Rule 12(c). The bankruptcy court did not
28 grant any relief on that basis, so we will not discuss it any
further.

1 Contempt Motion?

2 **STANDARD OF REVIEW**

3 We review de novo the bankruptcy court's dismissal under
4 Civil Rule 12(b)(6). Barnes v. Belice (In re Belice), 461 B.R.
5 564, 572 (9th Cir. BAP 2011). "When we conduct a de novo review,
6 'we look at the matter anew, the same as if it had not been heard
7 before, and as if no decision previously had been rendered,
8 giving no deference to the bankruptcy court's determinations.'" Id.
9 (quoting Charlie Y., Inc. v. Carey (In re Carey), 446 B.R.
10 384, 389 (9th Cir. BAP 2011)).

11 **DISCUSSION**

12 **A. Applicable Standards For Motions To Dismiss**

13 This panel applies the same legal standards to Civil
14 Rule 12(b)(6) motions as do all federal courts.⁶ In re Belice,
15 461 B.R. at 573. We therefore accept as true all well-pleaded
16 allegations contained in the plaintiff's initial pleading, but we
17 need not accept as true "conclusory statements, statements of
18 law, or unwarranted inferences cast as factual allegations." Id.
19 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007)).

20 As the Supreme Court has explained:

21 To survive a motion to dismiss, a complaint must
22 contain sufficient factual matter, accepted as true, to
23 state a claim to relief that is plausible on its
24 face. . . . A claim has facial plausibility when the
25 plaintiff pleads factual content that allows the court
26 to draw the reasonable inference that the defendant is
27 liable for the misconduct alleged. . . . Threadbare
28 recitals of the elements of a cause of action,
supported by mere conclusory statements, do not
suffice.

27 ⁶Rule 7012(b) makes Civil Rule 12(b) applicable in adversary
28 proceedings.

1 Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)
2 (citations and internal quotation marks omitted).

3 Importantly, we may use judicially noticed facts to
4 establish that a complaint does not state a claim for relief, see
5 Intri-Plex Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1052
6 (9th Cir. 2007), and we properly can take judicial notice of
7 documents filed in Taylor's underlying bankruptcy case. O'Rourke
8 v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955,
9 957-58 (9th Cir.1989). The Panel also may consider exhibits
10 attached to and referenced in the complaint. Stengel v.
11 Medtronic Inc., 676 F.3d 1159, ___, 2012 WL 1255040, at *7 (9th
12 Cir. 2012); Durning v. First Boston Corp., 815 F.2d 1265, 1267
13 (9th Cir. 1987).

14 **B. Merits of Appeal**

15 Section 524 governs the effect of a discharge in bankruptcy.
16 In relevant part, this section specifies that the discharge
17 "operates as an injunction against the commencement or
18 continuation of an action, the employment of process, or an act,
19 to collect, recover or offset" a discharged debt. In turn, § 523
20 governs the dischargeability of particular types of debt, and
21 § 523(a)(8) specifically provides that most types of student loan
22 debt are nondischargeable unless the nondischargeability of that
23 debt would cause the debtor undue hardship. As this Panel
24 previously has explained, § 523(a)(8) "furthers congressional
25 policy to ensure that such loans, extended solely on the basis of
26 the student's future earnings potential, cannot be discharged by
27 recent graduates who then pocket all of the future benefits
28 derived from their education." Nys v. Educ. Credit Mgmt. Corp.

1 (In re Nys), 308 B.R. 436, 441 (9th Cir. BAP 2004).

2 Taylor contends that his student loan debt was discharged
3 under § 523(a)(8), and that the Appellees violated the Discharge
4 Order, which enjoined them from attempting to collect the
5 discharged debt.⁷ Taylor's contention hinges on a single
6 assumption: that he previously obtained a determination that his
7 student loans were dischargeable under § 523(a)(8). In assuming
8 that the bankruptcy court previously determined the
9 dischargeability of his student loans, Taylor relies on the
10 Discharge Order. According to Taylor, the Discharge Order on its
11 face provided for the discharge of all of his student loan debt.
12 Taylor in essence claims that, by using the Official Form 18
13 discharge order in effect between 1991 and 1997 ("Old Official
14 Form") instead of the Official Form 18 discharge order in effect
15 thereafter ("New Official Form"), the bankruptcy court granted
16 him a broader discharge that included a discharge of his student
17 loan debt.⁸

18 Taylor's claim is refuted by the Advisory Committee Notes
19 ("Notes") accompanying Official Form 18. The Notes make it clear
20 that no substantive change in the scope of the discharge was

21
22 ⁷According to Taylor, some of his student loans were "HEAL"
23 loans, which are governed by 42 U.S.C. § 292f(g), instead of
24 § 523(a)(8). We discuss Taylor's HEAL loans below, at the
conclusion of our discussion of Taylor's non-HEAL student loans.

25 ⁸Rule 4004(e) directs bankruptcy courts to issue discharge
26 orders conforming to the official form. Apparently, at the time
27 the bankruptcy court granted Taylor's discharge in 1999, it had
28 not yet switched over from the Old Official Form to the New
Official Form. However, as explained below, the use of the Old
Official Form did not substantively alter the scope of Taylor's
discharge.

1 intended by the 1997 amendment of Official Form 18. Rather, the
2 Notes explain that the amendments were made to simplify the form
3 and to make the preexisting meaning, scope and effect of the
4 standard bankruptcy discharge more understandable:

5 The discharge order has been simplified by deleting
6 paragraphs which had detailed some, but not all, of the
7 effects of the discharge. These paragraphs have been
8 replaced with a plain English explanation of the
9 discharge. This explanation is to be printed on the
10 reverse of the order, to increase understanding of the
11 bankruptcy discharge among creditors and debtors.

12 Advisory Committee Note accompanying the 1997 amendment of
13 Official Form 18 (West 2011).⁹

14 In any event, the language in the Old Official Form simply
15 is not susceptible to Taylor's interpretation. Taylor argues
16 that the following text from that form should be construed as
17 discharging his student loans:

- 18 1. The above-named debtor is released from all
19 dischargeable debts.
- 20 2. Any judgment heretofore or hereafter obtained in
21 any court other than this court is null and void
22 as a determination of the personal liability of
23 the debtor with respect to any of the following:

24 (a) debts dischargeable under 11 U.S.C. § 523;

25 Old Official Form (West 1997) (emphasis added). Taylor's
26 argument apparently is based on the following logic: the language
27 of the Old Official Form provided for the discharge of all
28 "dischargeable" debts, and his debt was dischargeable under
§ 523(a)(8) because he had proven by way of his Discharge

⁹Indeed, the New Official Form's plain-language explanation makes it abundantly clear that "[d]ebts for most student loans" generally are nondischargeable in chapter 7. See reverse side of Official Form 18 (West 2011).

1 Declaration that excepting his student loan debt from discharge
2 would cause him undue hardship. But Taylor's logic flies in the
3 face of the plain and well-accepted meaning of § 523(a)(8). It
4 is beyond cavil that student loan debt covered by § 523(a)(8) is
5 nondischargeable, unless and until the debtor obtains the
6 bankruptcy court's determination that such debt is dischargeable
7 based on a court finding of undue hardship. As one leading
8 bankruptcy treatise explained:

9 Section 523(a)(8) is the "hardship" provision, which
10 allows the court to discharge an otherwise
11 nondischargeable student loan if excepting the debt
12 from discharge will impose an undue hardship on the
13 debtor or the debtor's dependents. This exemption from
14 the exception to discharge requires the bankruptcy
15 judge to determine whether payment of the debt will
16 cause undue hardship on the debtor and his dependents,
17 thus defeating the "fresh start" concept of the
18 bankruptcy laws. There may well be circumstances that
19 justify failure to repay a student loan, such as
20 illness or incapacity. When the court finds that such
21 circumstances exist, it may order the debt discharged.

22 The Supreme Court has stated that section 523(a)(8) is
23 "self-executing" and that "[u]nless the debtor
24 affirmatively secures a hardship determination, the
25 discharge order will not include a student loan debt."
26 In other words, student loan debt remains due until
27 there is a [court] determination that the loan is
28 dischargeable.

29 4 Collier On Bankruptcy ¶ 523.14[2] (Alan N. Resnick and Henry J.
30 Sommer eds. 16th ed. 2011) (emphasis added) (quoting Tenn.
31 Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004)).

32 Taylor never obtained a bankruptcy court finding that his
33 student loan debt would impose upon him undue hardship or a court
34 determination that his student loans were exempt from the
35 exception to discharge covering his student loans. Taylor
36 apparently believes that the Old Official Form included an
37 exemption from the general nondischargeability of student loan
38

1 debt and an implicit finding that excepting the student loan debt
2 from discharge would cause undue hardship. But we simply cannot
3 and will not read into the Old Official Form such an exemption
4 and finding, particularly when neither the exemption nor the
5 finding are apparent on the face of the form. To accept Taylor's
6 view would stand § 523(a)(8) on its head, and undermine the plain
7 meaning and purpose of the statute.

8 Taylor also claims that, under United Student Aid Funds,
9 Inc. v. Espinosa, 130 S.Ct. 1367 (2010), this court should hold
10 that his student loan debts were discharged. But Espinosa does
11 not help Taylor. Taylor would have us hold that a confirmed
12 chapter 13 plan providing for the discharge of student loan debt
13 (as was at issue in Espinosa) is the functional equivalent of the
14 Discharge Declaration he attached to his chapter 7 petition. But
15 there is no equivalency between his Discharge Declaration and a
16 confirmed chapter 13 plan. As Espinosa explained, a proposed
17 chapter 13 plan becomes effective when the bankruptcy court
18 enters an order confirming that plan, "and will result in a
19 discharge of the debts listed in the plan if the debtor completes
20 the payments the plan requires" Id. 1374 (citing
21 §§ 1324, 1325, 1328(a)).

22 Taylor has not cited us to any statute or rule that would
23 give his Discharge Declaration a legal effect similar to a
24 confirmed plan. Nor are we aware of any. The key here is that
25 the bankruptcy court never took any judicial action granting the
26 request Taylor made "for discharge of [his] student loan debts."
27 Discharge Declaration (Nov. 30, 1998) at ¶ 19.

28 Taylor's other arguments on appeal similarly lack merit.

1 All of them are based on the premise that he obtained a finding
2 of undue hardship and a determination of nondischargeability,
3 which he did not, as we have held above.¹⁰

4 In sum, nothing in the Discharge Order or elsewhere in the
5 record would have allowed the bankruptcy court, or this Panel on
6 appeal, to conclude that Taylor's student loan debt had been
7 discharged. The discharge injunction under § 524 thus did not
8 apply to Taylor's student loan debt, so there was no violation of
9 a court order on which the bankruptcy court could have held the
10 Appellees in contempt. Accordingly, the bankruptcy court did not
11 err in denying Taylor's Contempt Motion.

12 **C. Other Matters**

13 **1. HEAL Loans**

14 The parties' papers indicate that at least some of Taylor's
15 student loans were lent to him under the Health Education
16 Assistance Loan Act ("HEAL"). HEAL loans are subject to even
17 more stringent requirements before they can be discharged in
18 bankruptcy. See 42 U.S.C. § 292f(g);¹¹ see also 4 Collier On
19

20 ¹⁰The parties and the bankruptcy court spent a great deal of
21 time and effort discussing the procedures that should be utilized
22 to obtain a discharge of student loan debt and also discussing
23 the nature and extent of notice that must be given. But these
24 issues are irrelevant to our analysis and resolution of this
25 appeal. No amount of notice given and no procedure followed
26 changes the dispositive fact that the bankruptcy court never made
27 a finding of undue hardship and never granted Taylor's request
28 for a discharge of his student loans.

26 ¹¹42 U.S.C. § 292f(g) provides:

27 (g) Conditions for discharge of debt in bankruptcy
28 Notwithstanding any other provision of Federal or State
(continued...)

1 Bankruptcy, supra, at ¶ 523.14[7].

2 Taylor argued both in the bankruptcy court and on appeal
3 that, under the differing standards and rules applicable to HEAL
4 loans, they are subject to discharge unless the HEAL creditor
5 takes affirmative action in the debtor's bankruptcy case. In
6 effect, Taylor claims that the nondischargeability of HEAL loans,
7 unlike other student loans, is not self-executing. Again, Taylor
8 has it wrong. The nondischargeability of HEAL loans is self-
9 executing, just like other student loans. See U.S. v. Wood,
10 925 F.2d 1580, 1582-83 (7th Cir. 1991). In other words, HEAL
11 loans are not dischargeable in bankruptcy, unless the bankruptcy
12 court determines that the debtor has pleaded and proven all three
13 of the requirements for discharge set forth in 42 U.S.C.

14 § 292f(g). See, e.g., Woody v. U.S. Dep't of Justice (In re
15 Woody), 494 F.3d 939, 955 (10th Cir. 2007) (holding that debtor's
16 HEAL loans were not dischargeable because debtor had not met his

17 ¹¹(...continued)

18 law, a debt that is a loan insured under the authority
19 of this subpart may be released by a discharge in
20 bankruptcy under any chapter of Title 11, only if such
discharge is granted--

21 (1) after the expiration of the seven-year period
22 beginning on the first date when repayment of such loan
23 is required, exclusive of any period after such date in
which the obligation to pay installments on the loan is
24 suspended;

25 (2) upon a finding by the Bankruptcy Court that the
nondischarge of such debt would be unconscionable; and

26 (3) upon the condition that the Secretary shall not
27 have waived the Secretary's rights to apply subsection
28 (f) of this section to the borrower and the discharged
debt.

1 burden of proof to establish one of the elements necessary to
2 enable the court to discharge a HEAL loan - unconscionability);
3 Rice v. United States (In re Rice), 78 F.3d 1144, 1150-52 (6th
4 Cir. 1996) (same).

5 In short, regardless of whether Taylor's student loans were
6 HEAL Loans, our analysis and resolution of this appeal does not
7 change. The Appellees have not violated the discharge
8 injunction, so the bankruptcy court properly denied Taylor's
9 Contempt Motion.

10 **2. Equity and § 105(a)**

11 Taylor also has claimed that, under general principles of
12 equity and § 105(a), this Panel should hold that the Discharge
13 Order discharged his student loan debt. But neither equity nor
14 § 105(a) entitle either this Panel or the bankruptcy court to
15 depart from the result mandated by statute. Both the bankruptcy
16 court and this Panel must exercise their authority within the
17 confines of the laws that Congress has enacted. See Saxman v.
18 Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1175 (9th
19 Cir. 2003) (holding that bankruptcy court's equitable powers and
20 § 105(a) do not give court "roving commission to do equity" when
21 determining the dischargeability of student loans; rather, the
22 court must satisfy itself that the requirements of § 523(a)(8)
23 have been met); see also In re Rice, 78 F.3d at 1151 (holding
24 that neither "equity" nor § 105(a) permit a bankruptcy court to
25 deviate from Congress's statutory scheme governing the
26 nondischargeability of student loans).

27 **3. Taylor's In Forma Pauperis Status**

28 On November 14, 2011, a BAP motions panel issued an order

1 transferring this appeal under Ninth Circuit BAP Rule 8001(e)-1
2 to the United States District Court for the Eastern District of
3 California ("District Court") for the limited purpose of
4 obtaining a ruling from the District Court on Taylor's
5 application to proceed in forma pauperis. In response, on
6 November 15, 2011, the District Court entered an order granting
7 Taylor's in forma pauperis request, thereby effectively waiving
8 the requirement that Taylor pay the \$298 fee for filing his
9 appeal.

10 Subsequently, on December 1, 2011, the bankruptcy court
11 issued a certification under 28 U.S.C. § 1915(a)(3) stating that
12 this appeal is frivolous and was not taken in good faith.
13 Appellees claim in their appeal brief that, in light of the
14 bankruptcy court's certification, "Taylor cannot proceed in forma
15 pauperis and the appeal must be dismissed." We disagree.
16 Regardless of the bankruptcy court's belated certification, we
17 have no jurisdiction or authority to review the District Court's
18 order granting Taylor in forma pauperis status. In other words,
19 even if we were to assume that the District Court improvidently
20 granted in forma pauperis status to Taylor, we are in no position
21 to either ignore or second-guess the District Court's decision.

22 The Appellees also suggest that, under 28 U.S.C.
23 § 1915(e)(2), this Panel should dismiss Taylor's appeal. Again,
24 we disagree. The Panel has no authority or duties under
25 28 U.S.C. § 1915 because it is not a "court of the United States"
26 within the meaning of 28 U.S.C. § 451. See Determan v. Sandoval
27 (In re Sandoval), 186 B.R. 490, 496 (9th Cir. BAP 1995); Perroton
28 v. Gray (In re Perroton), 958 F.2d 889, 896 (9th Cir. 1992).

1 In any event, our affirmance of the order on appeal renders
2 moot Appellees' arguments for dismissal of this appeal.

3 **4. Modification Of Dismissal Order**

4 At the outset of its memorandum decision, the bankruptcy
5 court made a statement that arguably could lead one to conclude
6 that the court treated Taylor's Contempt Motion as a complaint to
7 determine the dischargeability of his student loan debt:

8 This court has construed the action to be in the nature
9 of seeking a determination whether student loan debts
10 exceeding \$435,000 are excepted from discharge by
11 virtue of 11 U.S.C. § 523(a)(8).

12 Mem. Dec. (Sept. 16, 2011) at p. 1.

13 However, nothing else in its memorandum decision indicates
14 that the bankruptcy court actually treated the Contempt Motion as
15 a dischargeability action. In fact, later on in its memorandum
16 decision, the court made the following statement inconsistent
17 with its earlier construction of the Contempt Motion:

18 This court has located no case where a debtor has been
19 permitted to maintain [a nondischargeability] action
20 more than ten years after the bankruptcy case was
21 filed. If such an action were to be filed by the
22 debtor in this case, the facts asserted in the unsigned
23 declaration that was appended to the debtor's petition,
24 schedules, and statement of financial affairs would be
25 largely irrelevant. Thus, even if this action were
26 construed as an action under § 523(a)(8), it would need
27 to be dismissed.

28 Mem. Dec. (Sept. 16, 2011) at pp. 6-7 (emphasis added).

Similarly, in its December 1, 2011 certification under 28 U.S.C.
§ 1915(a)(3), the bankruptcy court stated that Taylor never
presented for judicial decision the question of whether his
student loans should be discharged under § 523(a)(8).

We also note that Taylor himself strenuously argued on

1 appeal that his Contempt Motion was not a complaint to determine
2 dischargeability of debt. We agree with Taylor on this point.
3 We know of no reason why the Contempt Motion should be construed
4 as anything other than what it purported to be on its face.

5 Notwithstanding the initial statement in the bankruptcy
6 court's memorandum decision, based on a fair reading of the
7 entire record, we conclude that the bankruptcy court did not
8 treat and dispose of the Contempt Motion as an action to
9 determine the dischargeability of Taylor's student loan debt.

10 Nonetheless, the initial language in the memorandum
11 decision, when read in conjunction with the broad dispositive
12 language in the bankruptcy court's order dismissing the Contempt
13 Motion, raises the concern that the bankruptcy court's dismissal
14 order erroneously could be construed as a dismissal of a
15 nondischargeability action. We thus consider it appropriate to
16 modify the bankruptcy court's dismissal order to clarify that it
17 should not be construed as the dismissal of a nondischargeability
18 action. See Rule 8013 (authorizing this Panel to modify
19 bankruptcy court orders and judgments). Accordingly, we hereby
20 order that the bankruptcy court's dismissal order, entered
21 September 19, 2011, shall be and is MODIFIED to include the
22 following statement: "This order shall not be construed as the
23 dismissal of a nondischargeability action."

24 **CONCLUSION**

25 For the foregoing reasons, we MODIFY the bankruptcy court's
26 dismissal order as set forth above, and as modified, we AFFIRM.