

MAR 13 2012

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-11-1100-MkHPa
	)		
VALLEY HEALTH SYSTEM,	)	Bk. No.	07-18293
	)		
Debtor.	)	Adv. No.	10-01566
	)		
PEGGY KIRTON; DIANE AGNELLO,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
VALLEY HEALTH SYSTEM; VALLEY	)		
HEALTH SYSTEM RETIREMENT PLAN;	)		
JOEL BERGENFELD, Trustee;	)		
VINAY M. RAO, Trustee;	)		
MICHELE BIRD, Trustee,	)		
	)		
Appellees.	)		

Argued on November 16, 2011  
at Pasadena, California  
Submitted on February 7, 2012

Filed - March 13, 2012

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

Honorable Peter H. Carroll, Chief Bankruptcy Judge, Presiding

Appearances: Gary E. Klausner of Stutman, Treister & Glatt PC  
argued for Appellee Valley Health System; Mark  
Attwood of Jackson Lewis LLP argued for Appellees  
Valley Health System Retirement Plan, and the  
following persons as trustees of the Valley Health  
System Retirement Plan: Joel Bergenfeld, Vinay M.

\*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  
3 Before: MARKELL, HOLLOWELL and PAPPAS, Bankruptcy Judges.

4 **INTRODUCTION**

5 Peggy Kirton and Diana Agnello ("Kirton Parties") are former  
6 employees of Valley Health System ("VHS") and were participants  
7 in the Valley Health System Retirement Plan ("Retirement Plan").  
8 After VHS confirmed its chapter 9<sup>1</sup> plan of adjustment, they filed  
9 in state court a petition for writ of mandamus ("Petition")  
10 against VHS and others seeking to enforce their alleged rights  
11 under the Retirement Plan. VHS removed the Petition to the  
12 bankruptcy court. Along with other named respondents, VHS then  
13 filed a Civil Rule 12(b)(6) motion to dismiss the Petition, which  
14 the bankruptcy court granted without leave to amend. The Kirton  
15 Parties filed a motion for reconsideration, which the bankruptcy  
16 court denied.

17 The Kirton Parties appeal from both the dismissal order and  
18 the order denying their motion for reconsideration. Because the  
19 bankruptcy court lacked subject matter jurisdiction over the  
20 Petition, we VACATE and REMAND.

21  
22 <sup>\*\*</sup>Even though Daniel Barness of Barness & Barness LLP filed  
23 with the BAP a calendar acknowledgment indicating that he would  
24 appear at oral argument to argue on behalf of Appellants Peggy  
25 Kirton and Diana Agnello, no one actually appeared at oral  
argument to argue on behalf of the Appellants. Accordingly, the  
panel deemed Appellants' position submitted on their briefs and  
on the record.

26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 **FACTS**

2 VHS is a local healthcare district under the California  
3 Local Health Care District Law, Cal. Health & Safety Code  
4 § 32000, et seq. See In re Valley Health System, 429 B.R. 692,  
5 700 (Bankr. C.D. Cal. 2010). VHS owned and operated one skilled  
6 nursing facility and three acute health care facilities in  
7 Riverside County, California. Id. VHS filed a chapter 9  
8 bankruptcy petition in December 2007, and the bankruptcy court  
9 entered an order for relief in the case in February 2008.

10 Pursuant to § 943, the bankruptcy court confirmed VHS's  
11 first amended plan of adjustment ("Chapter 9 Plan") by order  
12 entered April 26, 2010 ("Confirmation Order"). The Chapter 9  
13 Plan was based on the sale of substantially all of VHS's  
14 remaining assets to another entity known as Physicians for  
15 Healthy Hospitals, Inc. ("PFHH"). Among other things, the  
16 Chapter 9 Plan provided for the discharge of VHS's prepetition  
17 debts and also enjoined claimants from pursuing any action or  
18 proceeding on account of such debts.<sup>2</sup>

19 The Chapter 9 Plan specifically addressed VHS's obligations  
20 under its Retirement Plan:

21 Defined Benefit Plan Participants will be entitled to

22 \_\_\_\_\_  
23 <sup>2</sup>Neither the Chapter 9 Plan nor the accompanying first  
24 amended disclosure statement of even date were included in the  
25 parties' excerpts of record, but we have obtained copies of these  
26 and other bankruptcy court filings by accessing the bankruptcy  
27 court's electronic docket and the imaged documents attached  
28 thereto. We can take judicial notice of the contents and filing  
of these documents. See Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003)(citing  
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d  
955, 957-58 (9th Cir. 1989)).

1 the same rights and benefits to which such participants  
2 are currently entitled under the VHS Retirement Plan  
3 and the MetLife Group Annuity Contract, and such  
4 participants shall have no recourse to the District or  
5 to any assets of the District, and shall not be  
6 entitled to receive any distributions under this Plan.  
7 Instead, all unallocated amounts held by MetLife Group,  
8 pursuant to the VHS Retirement Plan and the MetLife  
9 Group Annuity Contract, will continue to be made  
available to provide retirement benefits for  
participants in the manner indicated under the  
provisions of the VHS Retirement Plan and the MetLife  
Group Annuity Contract. Accordingly, the treatment of  
Allowed Class 2C claim holders set forth herein shall  
not affect any legal, equitable or contractual rights  
to which the VHS Retirement Plan participants are  
entitled.

10 Chapter 9 Plan (Dec. 17, 2009) at 16:13-22. Based on this  
11 treatment, the Chapter 9 Plan characterized the Class 2C  
12 claimants - the Retirement Plan participants - as unimpaired and  
13 stated that they therefore had no entitlement to vote on  
14 confirmation of the plan. These same plan terms were reiterated  
15 in VHS's first amended disclosure statement, filed concurrently  
16 with the Chapter 9 Plan.

17 The record reflects that the Kirton Parties were served with  
18 advance notice of: (1) the claims bar date, (2) the court  
19 approval of the first amended disclosure statement, and (3) the  
20 confirmation hearing on the Chapter 9 Plan. The record further  
21 indicates that the Kirton Parties were sent copies of the  
22 Chapter 9 Plan and the first amended disclosure statement at the  
23 same time they were served with notice of the confirmation  
24 hearing. The Kirton Parties did not file any proofs of claims,  
25 did not object to VHS's Chapter 9 Plan, and did not otherwise  
26 participate in VHS's chapter 9 case.

27 On October 14, 2010, VHS issued a notice that the asset sale  
28 to PFHH had closed on October 13, 2010, and that October 13,

1 2010, was the effective date of the Chapter 9 Plan.

2       Meanwhile, back in August 2010, a few months after the  
3 confirmation of VHS's Chapter 9 Plan, the Kirton Parties filed  
4 their Petition in the Riverside County Superior Court (Case No.  
5 RIC 10017129). The Petition named the following parties as  
6 respondents:

- 7 • VHS, which the Kirton Parties alternately identified as a  
8 public entity and community hospital, and as a "California  
9 Local Health Care District."<sup>3</sup>
- 10 • The Retirement Plan, which the Kirton Parties alternately  
11 referred to as a public employee retirement entity, and as  
12 "an independent sui juris entity with constitutionally  
13 mandated fiduciary duties to the [Kirton Parties]." See  
14 Petition (Aug. 26, 2010) at ¶¶ 1, 2.<sup>4</sup>
- 15 • Joel Bergenfeld, Michele Bird and Vinay Rao, as individuals  
16 and as trustees of the Retirement Plan (collectively,

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17  
18 <sup>3</sup>The Kirton Parties sometimes referred to VHS as "Valley  
19 Health Systems." See Petition (Aug. 26, 2010) at ¶ 1; Appellants'  
Opening Brief (May 25, 2011) at p.6 n.4 (emphasis added).

20 <sup>4</sup>The Kirton Parties sometimes identified the Retirement Plan  
21 as the "Valley Health Systems Retirement Plan." See Petition  
22 (Aug. 26, 2010) at ¶ 3 (emphasis added). At times, the Kirton  
23 Parties have argued that there might be two or more entities with  
24 similar sounding names and that some of these entities might not  
25 be independent of VHS while others allegedly are independent of  
26 VHS. However, the entirety of the record makes clear that there  
27 is only one relevant retirement plan, and that is the Retirement  
28 Plan, from which the Kirton Parties' retirement benefits  
allegedly arose. Indeed, the Kirton Parties have conceded on  
appeal that the document establishing the Retirement Plan is part  
of the record, attached as Exhibit 1 to the Declaration of Joel  
Bergenfeld, filed in support of VHS's Civil Rule 12(b)(6) motion  
to dismiss. See Appellants' Opening Brief (May 25, 2011) at  
6:6-14.

1 "Trustees").

- 2 • Met Life, Inc. ("Met Life"), as the administrator of the  
3 Retirement Plan.

4 The Petition enumerated four causes of action based on the  
5 following common allegations: (1) violation of the Retirement  
6 Plan; (2) violation of the California Constitution; (3) breach of  
7 contract; and (4) declaratory relief. The Petition's prayer for  
8 relief sought, among other things, the issuance of a peremptory  
9 writ of mandate directing the respondents to fund the Retirement  
10 Plan as required by law, to disclose VHS's underfunding and  
11 violations of the Retirement Plan and the California  
12 Constitution, to cease any concealment of  
13 underfunding/violations, and to prosecute any actions allowed or  
14 required to conserve the Retirement Plan's assets.

15 The gravamen of the Petition was that VHS allegedly  
16 underfunded the Retirement Plan to the tune of \$100 million. The  
17 Petition further alleged that all of the respondents breached  
18 their respective duties to prevent or disclose (or both) VHS's  
19 underfunding of the Plan. Supposedly, these duties arose from  
20 the Plan itself and California Constitution Art. XVI, Sec. 17.<sup>5</sup>

21 On September 22, 2010, VHS filed a notice of removal  
22 pursuant to 28 U.S.C. § 1452(a) and Rule 9027, effectively  
23 removing the Petition from the state court to the bankruptcy  
24 court. VHS, the Trustees and the Retirement Plan (collectively,  
25 "VHS Defendants") then filed, in October 2010, a motion to  
26

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27 <sup>5</sup>Due to its length, we reprint California Constitution Art.  
28 XVI, Sec. 17, in an appendix to this memorandum.

1 dismiss the Petition under Civil Rule 12(b)(6) (made applicable  
2 in adversary proceedings by Rule 7012(b)).

3 First and foremost, the VHS Defendants argued that VHS's  
4 Chapter 9 Plan and the Confirmation Order had discharged VHS's  
5 obligations to fund the Retirement Plan. The VHS Defendants also  
6 argued, among other things: (1) the Trustees had no contractual  
7 or fiduciary obligations to the Kirton Parties under the  
8 Retirement Plan; (2) the Retirement Plan did not have the legal  
9 capacity to sue or be sued; (3) the Kirton Parties did not comply  
10 with the pre-filing requirements of the California Government  
11 Claims Act; (4) both VHS and the Trustees are immune from  
12 liability; and (5) the Kirton Parties failed to plead the  
13 requisite elements for mandamus relief or for relief under the  
14 causes of action alleged.

15 The notice of motion accompanying the VHS Defendants' motion  
16 to dismiss warned the Kirton Parties that, under Rule 9013-1(h)  
17 of the Local Bankruptcy Rules of the United States Bankruptcy  
18 Court for the Central District of California ("Local Bankruptcy  
19 Rules"), the court might treat a failure to file an opposition to  
20 the motion to dismiss as consent to the relief requested in the  
21 motion.

22 The Kirton Parties never filed an opposition to the motion  
23 to dismiss. However, on January 3, 2011, on the eve of the  
24 hearing on the motion to dismiss, the Kirton Parties did file a  
25 pleading entitled "Class Action - Plaintiffs' First Amended  
26 Complaint For Damages and Injunctive Relief." The First Amended  
27 Complaint was founded upon the same basic alleged misconduct as  
28 the Petition. The only essential differences were the addition

1 of class action allegations and several new causes of action  
2 based on the same alleged misconduct.

3 At the January 4, 2011 hearing on the motion to dismiss, the  
4 bankruptcy court noted that the Kirton Parties never filed a  
5 written opposition to the dismissal motion, even though the  
6 motion was filed and served over two months before, on  
7 October 22, 2010.<sup>6</sup> The court further noted that Local Bankruptcy  
8 Rule 9013-1(h) permitted the court to treat the Kirton Parties'  
9 failure to file a written opposition as consent to the relief  
10 requested in the dismissal motion. The court also determined  
11 that the Kirton Parties' amended complaint, filed on the eve of  
12 the January 4, 2011 hearing, contravened national and local  
13 bankruptcy rules requiring in advance either the opposing  
14 parties' written consent to the amendment or leave of court.  
15 Accordingly, the bankruptcy court declined to consider the  
16 amended complaint. Based on these findings and rulings, and  
17 based on all of the arguments made in the dismissal motion, the  
18 court granted the motion to dismiss without leave to amend.

19 The Kirton Parties objected to the proposed dismissal order  
20 lodged by the VHS Defendants. The Kirton Parties argued that the  
21 proposed order attempted to grant relief beyond that sought in  
22 the dismissal motion and to resolve matters not properly before  
23 the court. The Kirton Parties also argued that it would be  
24 improper for the bankruptcy court to grant the dismissal motion  
25

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26 <sup>6</sup>Nor did the Kirton Parties ever file a motion for remand.  
27 Local Bankruptcy Rule 9027-1(c) provides: "A motion for remand  
28 must be filed with the clerk of the bankruptcy court not later  
than 30 days after the date of filing of the notice of removal."



1 in favor of parties who had not been expressly named as movants  
2 in the dismissal motion. According to the Kirton Parties,  
3 granting the dismissal motion in favor of the unnamed parties  
4 would violate the Kirton Parties' due process rights. Finally,  
5 the Kirton Parties argued that the California Constitution  
6 deprived the bankruptcy court of jurisdiction over the Retirement  
7 Plan. The court overruled the Kirton Parties' objections and  
8 entered the form of order that the VHS Defendants had lodged.

9 The Kirton parties then filed a motion for reconsideration,  
10 which essentially reiterated the same arguments that the Kirton  
11 Parties had made in their objection to the proposed order. After  
12 the parties filed opposition and reply papers, the bankruptcy  
13 court ruled on the reconsideration motion without holding a  
14 hearing, in a memorandum of decision entered on February 24,  
15 2011.

16 In its memorandum decision, the bankruptcy court first noted  
17 that it had subject matter jurisdiction over the litigation and  
18 that the matter was a core proceeding under 28 U.S.C.  
19 § 157(b)(2)(A), (I), (B), (L) and (O). The court next classified  
20 the motion for reconsideration as a motion under Civil Rule 59(e)  
21 to alter or amend the judgment and stated the legal standards  
22 applicable to such motions.<sup>7</sup>

23 After summarizing the VHS Defendants' arguments in favor of  
24 dismissal and the Kirton Parties' arguments in favor of  
25 reconsideration of the dismissal order, the bankruptcy court  
26

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27 <sup>7</sup>Rule 9023 makes Civil Rule 59(e) applicable in adversary  
28 proceedings.

1 explained why it considered the Petition fatally deficient and  
2 why the reconsideration motion should be denied. The court first  
3 focused on VHS, its obligations to the Kirton Parties, and the  
4 effect of the confirmed, effective Chapter 9 Plan on those  
5 obligations. According to the court, VHS only had one retirement  
6 plan - the Retirement Plan - and VHS's only alleged pension  
7 obligations to the Kirton Parties arose from the Retirement Plan  
8 and were contractual in nature. The court also noted that VHS  
9 had not incurred any new pension obligations under the Retirement  
10 Plan since 1999 because VHS had frozen the accrual of new pension  
11 benefits as of May 4, 1999. As a result, the court ruled that  
12 the alleged pension obligations all arose prior to VHS's  
13 bankruptcy filing and thus had been discharged by VHS's Chapter 9  
14 Plan. The court also ruled that any objections or questions that  
15 the Kirton Parties could have raised concerning their treatment  
16 under VHS's Chapter 9 Plan were barred by the doctrine of claim  
17 preclusion.

18 The bankruptcy court next addressed its decision to dismiss  
19 the Petition as against Met Life, which had not joined in the VHS  
20 Defendants' dismissal motion. According to court, even though  
21 Met Life had not joined in the dismissal motion, Met Life was in  
22 the same position as the VHS Defendants vis-à-vis the Petition,  
23 so it was permissible for the court to dismiss the Petition as  
24 against Met Life as well. The court did not specify the precise  
25 grounds for dismissal that Met Life shared with the VHS  
26 Defendants. Moreover, with the exception of VHS, the court did  
27 not specifically describe why the Petition failed to state a  
28 claim as against any of the other named respondents. However, a

1 fair reading of the court's rulings and comments in their  
2 entirety demonstrate that the court concluded, in part, that the  
3 Petition failed to allege sufficient facts from which the court  
4 reasonably could infer that any of the named respondents had a  
5 legally enforceable duty which they had breached and which had  
6 caused the harm alleged in the Petition. This is the common  
7 grounds for dismissal that all of the named respondents  
8 apparently shared.

9 The bankruptcy court then rejected the Kirton Parties'  
10 jurisdictional arguments. According to the court, it had subject  
11 matter jurisdiction over the Petition because it affected "the  
12 interpretation, implementation, consummation, execution or  
13 administration of a confirmed plan." Mem. Dec. (Feb. 24, 2011),  
14 at p. 11 (quoting State of Montana v. Goldin (In re Pegasus Gold  
15 Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005)). In addition, the  
16 court stated that, if the Kirton Parties believed that removal of  
17 the Petition to the bankruptcy court was improper, the Kirton  
18 Parties should have filed a remand motion within the time  
19 prescribed by Local Bankruptcy Rule 9027-1(c). The court further  
20 noted that the Kirton Parties had not, as required by Rule  
21 9027(e)(3), responded to the VHS Defendants' allegation that the  
22 removed Petition was a core bankruptcy proceeding under 28 U.S.C.  
23 § 157(b)(2)(A), (B) and (L).

24 Finally, the bankruptcy court concluded that the  
25 deficiencies in the Petition "could not possibly be cured," so  
26 dismissal without leave to amend was appropriate. In so  
27 concluding, the court apparently relied on the numerous grounds  
28 for dismissal that the VHS Defendants asserted in their dismissal

1 motion, but the court did not specify which of the Petitions'  
2 deficiencies were incurable.

3 Based on its memorandum decision, the bankruptcy court  
4 entered an order on February 24, 2011, denying the  
5 reconsideration motion. On March 6, 2011, the Kirton Parties  
6 filed a timely notice of appeal of both the dismissal order and  
7 the order denying reconsideration.

### 8 JURISDICTION

9 We have jurisdiction over this appeal pursuant to 28 U.S.C.  
10 § 158. We discuss the bankruptcy court's jurisdiction below.

### 11 ISSUE

12 Did the bankruptcy court have jurisdiction over the removed  
13 Petition?

### 14 STANDARD OF REVIEW

15 We review issues concerning the bankruptcy court's  
16 jurisdiction de novo. See Rosson v. Fitzgerald (In re Rosson),  
17 545 F.3d 764, 769 n.5 (9th Cir. 2008); see also Cal. Franchise  
18 Tax Bd. v. Wilshire Courtyard (In re Wilshire Courtyard),  
19 459 B.R. 416, 423 (9th Cir. BAP 2011).

### 20 DISCUSSION

21 **The bankruptcy court lacked subject matter**  
22 **jurisdiction over the removed petition.**

23 We begin with a review of the relevant jurisdictional  
24 statutes because bankruptcy jurisdiction is "'grounded in, and  
25 limited by, statute.'" Battle Ground Plaza, LLC v. Ray (In re  
26 Ray), 624 F.3d 1124, 1130 (9th Cir. 2010) (quoting Celotex Corp.  
27 v. Edwards, 514 U.S. 300, 307 (1995)).

28 Under 28 U.S.C. § 1334(b), the federal district courts have

1 "original but not exclusive jurisdiction" over "all civil  
2 proceedings arising under title 11, or arising in or related to  
3 cases under title 11." In turn, 28 U.S.C. § 157 provides the  
4 means by which the district courts share their bankruptcy  
5 jurisdiction with the bankruptcy courts. In accordance with the  
6 referral process authorized in 28 U.S.C. § 157(a), virtually all  
7 federal district courts have "referred" to the bankruptcy courts  
8 all of those matters over which the district courts hold  
9 bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334.

10 As used in the bankruptcy jurisdiction statutes, the terms  
11 "arising under title 11" and "arising in a case under title 11"  
12 both have well-defined meanings. A proceeding to enforce a right  
13 to relief created by title 11 "arises under" title 11. In re  
14 Wilshire Courtyard, 459 B.R. at 424 (citing Harris v. Wittman  
15 (In re Harris), 590 F.3d 730, 737 (9th Cir. 2009)). Wilshire  
16 Courtyard also identified when a civil proceeding "arises in" a  
17 bankruptcy case:

18 proceedings "arising in" bankruptcy cases, for purposes  
19 of the jurisdictional statute, are . . . those that,  
20 although not based on any right granted in title 11,  
21 would not exist outside a bankruptcy case, such as  
22 matters related to the administration of the bankruptcy  
23 estate.

24 Id. (citing Maitland v. Mitchell (In re Harris Pine Mills),  
25 44 F.3d 1431, 1435-37 (9th Cir. 1995)).

26 As the parties seeking to invoke federal court jurisdiction,  
27 the VHS Defendants had the burden to establish facts supporting  
28 the federal court's subject matter jurisdiction. See Hunter v.  
Philip Morris USA, 582 F.3d 1039, 1042 (9th Cir. 2009).

Generally speaking, to determine whether removal jurisdiction

1 exists, the court must look at the well-pleaded allegations of  
2 the complaint in order to ascertain whether it raises any  
3 bankruptcy law issues, without reference to any anticipated  
4 defenses that might be raised in response to the complaint.  
5 Miles v. Okun (In re Miles), 430 F.3d 1083, 1088 (9th Cir. 2005).

6 Outside the removal context, subject matter jurisdiction is  
7 determined based on circumstances as they existed when the  
8 complaint was filed. See Buenting v. Crystal Cascades Civil, LLC  
9 (In re Crystal Cascades Civil, LLC), 398 B.R. 23, 28 (Bankr. D.  
10 Nev. 2008). In contrast, in the context of removal, subject  
11 matter jurisdiction ordinarily is determined based on  
12 circumstances existing at the time of removal. Abada v. Charles  
13 Schwab & Co., Inc., 300 F.3d 1112, 1117 (9th Cir. 2002) (citing  
14 O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1379 (9th Cir.  
15 1988)). However, when the federal court determines the merits of  
16 the removed action without any remand motion, or without  
17 immediate appeal from the denial of a remand motion, the  
18 appellate court reviewing the trial court's merits determination  
19 also must consider "whether the federal court would have had  
20 jurisdiction had the case been filed in federal court in the  
21 posture it had at the time of the entry of the final judgment."  
22 See O'Halloran, 856 F.2d at 1379 n.2 (quoting Lewis v. Time Inc.,  
23 710 F.2d 549, 552 (9th Cir.1983), abrogated on other grounds as  
24 recognized in Unelko Corp. v. Rooney, 912 F.2d 1049, 1052-53 (9th  
25 Cir. 1990)).

26 Having reviewed the relevant jurisdictional statutes and  
27 having noted some ground rules for assessing the bankruptcy  
28 court's jurisdiction, we are ready to consider the jurisdictional

1 issue raised in this appeal: the extent of the bankruptcy court's  
2 post-confirmation jurisdiction to interpret and enforce its own  
3 orders. The United States Court of Appeals for the Ninth Circuit  
4 recently addressed this issue in In re Ray, 624 F.3d at 1131-36.  
5 Because we believe that Ray controls the outcome of the appeal  
6 before us, we examine Ray in detail.

7 In Ray, the debtor and Jessen, his business partner, owned a  
8 shopping center called Battleground Plaza Shopping Mall ("Mall")  
9 and an adjacent parcel of undeveloped land ("Adjacent Land").  
10 Id. at 1127. Ray filed a chapter 11 bankruptcy case in August  
11 2000, and the bankruptcy court confirmed Ray's third amended plan  
12 in March 2002. Id. at 1127-28. Meanwhile, back in December  
13 2000, Ray and Jessen had agreed to sell the Mall to a company  
14 known as Battle Ground Plaza, LLC ("BGP"). Id. at 1127. The  
15 sale agreement also gave BGP a right of first refusal to purchase  
16 the Adjacent Land. Ray's confirmed plan acknowledged the agreed-  
17 upon sale of the Mall to BGP, but noted that the sale had not yet  
18 closed. Id. at 1128. The plan also referenced Ray's intention  
19 to sell his interest in the Adjacent Land to either Jessen, BGP  
20 or some third party. Id.

21 In 2005, Ray and Jessen agreed to sell the Adjacent Land to  
22 a man named Maldonado. When Ray and Jessen notified BGP of the  
23 proposed sale agreement, BGP asserted that its first refusal  
24 rights were not "ripe" because the Mall sale still had not yet  
25 closed. Ray and Jessen then executed the sale agreement with  
26 Maldonado, and Ray obtained bankruptcy court approval for the  
27 sale of the Adjacent Land to Maldonado. BGP did not object to  
28 this first sale motion, but when Ray sought bankruptcy court

1 approval a second time (to account for an agreed-upon reduction  
2 of the purchase price by \$5,000), BGP this time objected, stating  
3 that it now desired to exercise its first refusal rights. Id.

4 The bankruptcy court overruled BGP's objection and, again,  
5 approved the sale, free and clear of all liens and encumbrances,  
6 including BGP's first refusal rights. Id. at 1128-29. The  
7 bankruptcy court in relevant part found that BGP had not properly  
8 exercised its first refusal rights because its proposal to  
9 purchase the Adjacent Land did not mirror Ray and Jessen's sale  
10 agreement with Maldonado; rather, BGP's purchase proposal  
11 purported to extend the sale closing date and purported to give  
12 BGP the option to back out of the proposed purchase during a set  
13 period of time. Id. at 1129. BGP did not appeal either of the  
14 bankruptcy court's sale orders. Ultimately, the sale of the  
15 Adjacent Land closed. The sale proceeds enabled Ray to pay off  
16 his remaining obligations under his chapter 11 plan, and his  
17 bankruptcy case was closed in December 2005. Id.

18 Several months later, BGP learned for the first time that,  
19 as part of the sale of the Adjacent Land, Ray and Jessen had  
20 granted an easement to Maldonado that gave the Adjacent Land  
21 "valuable cross-parking rights" in the Mall's parking areas.  
22 Believing that the undisclosed easement materially changed the  
23 dynamics of the exercise of its first refusal rights, BGP filed a  
24 state court breach of contract action against Ray, Jessen and  
25 Maldonado seeking damages and specific performance of its first  
26 refusal rights. Id. The state court "remanded" the lawsuit to  
27 the bankruptcy court, which concluded that it had subject matter  
28 jurisdiction over the lawsuit because the lawsuit necessitated



1 the interpretation and enforcement of the bankruptcy court's  
2 prior sale orders. Ultimately, the bankruptcy court entered  
3 summary judgment against BGP and denied BGP's reconsideration  
4 motion. Id. According to the bankruptcy court, the breach of  
5 contract lawsuit amounted to an impermissible collateral attack  
6 on the court's prior sale order entered in November 2005,  
7 overruling BGP's objection and approving the sale of the Adjacent  
8 Land free and clear of BGP's first refusal rights. Id.

9 In an unpublished memorandum decision, this Panel held that  
10 the bankruptcy court had subject matter jurisdiction pursuant to  
11 28 U.S.C. § 1334(b), because the breach of contract lawsuit  
12 "required resolution of a substantial question of bankruptcy law,  
13 i.e., the impact of the bankruptcy court's November 2005 Sale  
14 Order, arising under section 363(b)" of the Bankruptcy Code.  
15 Battle Ground Plaza, LLC v. Jessen (In re Ray), BAP No. WW-08-  
16 1104-KaJuPa, at p. 18 (mem. dec. 9th Cir. BAP Dec. 31, 2008).  
17 The Panel also held that the bankruptcy court had ancillary  
18 jurisdiction because the breach of contract lawsuit implicated  
19 and potentially could undermine the bankruptcy court's prior sale  
20 orders. Id. at 14-16. Ultimately, the Panel affirmed the  
21 bankruptcy court, concluding in part that the bankruptcy court  
22 retained jurisdiction to interpret and enforce its own orders.  
23 Id.

24 The Ninth Circuit disagreed with the Panel's jurisdictional  
25 analysis. According to the Ninth Circuit, the bankruptcy court  
26 had no jurisdiction over BGP's state court breach of contract  
27 action. The Ninth Circuit considered each of the potential  
28 grounds of bankruptcy court jurisdiction and opined that none of

1 them gave the bankruptcy court jurisdiction over BGP's breach of  
2 contract lawsuit.

3 First, the Ray court determined that the breach of contract  
4 lawsuit did not arise under title 11 or arise in a case under  
5 title 11. Ray held that the breach of contract lawsuit did not  
6 arise under title 11 because the lawsuit's existence did not  
7 depend on any substantive bankruptcy law provision; rather, the  
8 lawsuit merely sought to invoke BGP's state-law contract rights.  
9 Id. at 1131. Ray also held that the breach of contract lawsuit  
10 did not arise in a case under title 11 because it was not an  
11 administrative matter unique to the bankruptcy process; rather,  
12 the lawsuit had an existence independent of the debtor's  
13 bankruptcy case. Id.

14 Next, Ray distinguished several cases upon which the BAP,  
15 Jessen and Ray had relied.<sup>8</sup> According to Ray, in each of these  
16 cases, the plaintiff/movant was invoking substantive bankruptcy  
17 law rights or rights established in the bankruptcy court in the  
18 process of resolving the debtor's bankruptcy case. Id. at 1132-  
19 33. Ray determined that BGP's breach of contract lawsuit simply  
20 did not invoke any such rights: "the state court action is a  
21 breach of contract action claiming the Sellers did not honor the  
22 terms of the right of first refusal, which itself was created  
23 under Washington law rather than as part of the bankruptcy  
24 proceeding." Id. at 1133.

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26 <sup>8</sup>Beneficial Trust Deeds v. Franklin (In re Franklin),  
27 802 F.2d 324 (9th Cir. 1986); McCowan v. Fraley (In re McCowan),  
28 296 B.R. 1 (9th Cir. BAP 2003); Aheong v. Mellon Mortg. Co. (In re  
Aheong), 276 B.R. 233 (9th Cir. BAP 2002); Haw. Airlines, Inc. v.  
Mesa Air Group, Inc., 355 B.R. 214 (D. Haw. 2006).

1        Ray then examined whether the bankruptcy court had "related-  
2 to" jurisdiction over the breach of contract lawsuit. Ray  
3 applied the "close nexus test" adopted by the Ninth Circuit in  
4 In re Pegasus Gold Corp., 394 F.3d at 1194. Under the close  
5 nexus test, when a bankruptcy court is asked after plan  
6 confirmation to resolve a dispute, the court must determine  
7 whether "there is a close nexus to the bankruptcy plan or  
8 proceeding sufficient to uphold bankruptcy court jurisdiction  
9 over the matter." In re Ray, 624 F.3d at 1134 (citing In re  
10 Pegasus Gold Corp., 394 F.3d at 1194). In holding that BGP's  
11 breach of contract lawsuit did not satisfy the close nexus test,  
12 Ray considered significant the following facts: "the bankruptcy  
13 proceeding is over, . . . a ruling on the state court claim by  
14 the state court would not affect the bankruptcy estate, and . . .  
15 the state court claim should look to the preclusive effect of the  
16 [bankruptcy] proceeding." Id. at 1135 n.7.

17        Significantly, Ray acknowledged that, if the state court  
18 ultimately did not give preclusive effect to the rulings in the  
19 bankruptcy court's sale orders, then the sale orders might be  
20 undermined and the debtor and the bankruptcy estate might be  
21 adversely impacted. However, Ray concluded that all courts  
22 routinely face collateral attacks of orders entered in other  
23 courts and that courts facing such collateral attacks routinely  
24 reject such attacks when appropriate. Id. at 1135. As Ray put  
25 it, the state court "was perfectly capable of taking jurisdiction  
26 and assessing whether [BGP's breach of contract claim] is  
27 precluded given that the sale already had been finalized and  
28 approved in the previous proceeding." Id. at 1136.

1 Ray emphasized this point by further noting:

2 Ordinarily both issue preclusion and claim preclusion  
3 are enforced by awaiting a second action in which they  
4 are pleaded and proved by the party asserting them, and  
the first court does not get to dictate to other courts  
the preclusion consequences of its own judgment.

5 Id. at 1135 (internal quotation marks omitted) (citing Charles A.  
6 Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE &  
7 PROCEDURE § 4405 (2d ed. 1988)).

8 Finally, Ray determined that the bankruptcy court did not  
9 have ancillary jurisdiction over the breach of contract lawsuit.

10 Id. at 1136. Ray acknowledged that ancillary jurisdiction  
11 generally is available when it is necessary for the bankruptcy  
12 court to interpret or effectuate its prior orders. But Ray, in  
13 essence, ruled that ancillary jurisdiction does not allow the  
14 bankruptcy court to try a post-confirmation breach of contract  
15 lawsuit when the lawsuit did not invoke substantive bankruptcy  
16 law rights, did not raise any bankruptcy law issues, and could  
17 not affect the estate or the debtor (because the bankruptcy  
18 proceedings already had run their full course and the debtor  
19 already had received his discharge). Id.<sup>9</sup>

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21 <sup>9</sup>Recently, this Panel followed Ray and held that a  
22 bankruptcy court lacked subject matter jurisdiction to hear post-  
23 confirmation contempt proceedings commenced by the general  
24 partners of the former debtor against the California Franchise  
25 Tax Board. In re Wilshire Courtyard, 459 B.R. at 434. In one  
26 sense, the Panel went further in Wilshire Courtyard than the  
27 Ninth Circuit did in Ray. In Wilshire Courtyard, the debtor's  
28 general partners commenced a contempt proceeding in the  
bankruptcy court expressly and directly seeking interpretation  
and enforcement of the bankruptcy court's confirmation order. In  
contrast, the subject action in Ray was a garden-variety state  
law breach of contract action that the non-debtor plaintiff had  
(continued...)

1        Ray compels us to hold that the bankruptcy court here lacked  
2 jurisdiction over the Kirton Parties' Petition. The Petition  
3 contained no causes of action based either on substantive  
4 bankruptcy law or on rights created in the course of the  
5 bankruptcy case. To the contrary, the respondents' alleged  
6 obligations arose, according to the Petition, from the Retirement  
7 Plan and the California Constitution. Thus, these alleged  
8 obligations on their face arose (if at all) independent of and  
9 prior to VHS's bankruptcy filing.

10        Nor did the Petition raise any bankruptcy law issues. The  
11 Petition does not even mention VHS's bankruptcy case. There is  
12 only one apparent connection between the Petition and the  
13 bankruptcy case: the potential preclusive effect of the claims  
14 bar date, the confirmed plan, and the plan confirmation order on  
15 the causes of action stated in the Petition. Ray made it  
16 abundantly clear that this potential preclusive effect does not  
17 by itself confer any sort of subject matter jurisdiction on the  
18 bankruptcy court. Ray, 624 F.3d at 1135. As Ray put it, the  
19 state court is "perfectly capable" of assessing the preclusive  
20 effect of the bankruptcy court's prior orders and rulings, id. at  
21 1136, and the bankruptcy court "does not get to dictate to other  
22 courts the preclusion consequences of its own [rulings]." Id. at  
23 1135.

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24        <sup>9</sup>(...continued)  
25 filed in state court. Yet we still held in Wilshire Courtyard  
26 that Ray was apposite and that the bankruptcy court lacked  
27 jurisdiction over the contempt proceeding. As we held in  
28 Wilshire Courtyard, the absence of substantive bankruptcy law  
issues and the dispute's lack of any potential effect on the  
debtor, the plan and the estate were dispositive. Id.

1           Because neither the Kirton Parties nor the VHS Defendants  
2 discussed either Ray or Wilshire Courtyard in their appeal  
3 briefs, we issued an order giving the parties the opportunity to  
4 file supplemental briefs discussing the impact of these cases on  
5 this appeal. In its supplemental brief, the VHS Defendants  
6 asserted that this matter meets Pegasus Gold Corp.'s "close  
7 nexus" test (and is distinguishable from Ray) because the Kirton  
8 Parties' Petition could have a profound impact on VHS's Chapter 9  
9 Plan. The VHS Defendants further asserted that the bankruptcy  
10 court had jurisdiction because here, unlike in Ray, the Petition  
11 did not raise solely state law issues but also raised bankruptcy  
12 law issues. Finally, the VHS Defendants claimed that Ray is  
13 distinguishable because, there, the debtor's plan had been fully  
14 administered and the bankruptcy case closed, whereas here the  
15 plan has not been fully administered and the case is still open.  
16 We will address each of these contentions in turn.

17           As we indicated above, the VHS Defendants' close nexus  
18 argument hinges on the impact they say the Petition might have on  
19 the Chapter 9 Plan. According to the VHS Defendants, this  
20 potential impact distinguished Ray because the Ninth Circuit in  
21 Ray concluded that BGP's state court lawsuit "would have had no  
22 impact on the debtor, its property or the implementation of its  
23 plan."<sup>10</sup>

24           However, we disagree with the VHS Defendants' interpretation

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26           <sup>10</sup>Appellee's Supplemental Brief (Dec. 15, 2011) at p. 12;  
27 see also id. at p. 13 (stating that dispute in Ray "would have  
28 had no impact on the debtor, its property or its ability to pay  
creditors"); id. at p. 14 (stating that the dispute in Ray "would  
have had no impact on the estate itself).

1 of Ray. It ignores Ray's pivotal comments on the role the state  
2 court must play in deciding what preclusive effect (if any) to  
3 give to the bankruptcy court's prior rulings. Id. at 1134 n.7,  
4 1135. Simply put, we acknowledge that, if the state court here  
5 does not give the bankruptcy court's prior rulings preclusive  
6 effect, the Petition may impact VHS, its Chapter 9 Plan, or other  
7 creditors. But Ray acknowledged similar concerns, and yet left  
8 the preclusion issues squarely in the hands of the state court.<sup>11</sup>

9 We also disagree with the VHS Defendants' second argument,  
10 that the bankruptcy court had jurisdiction because the Kirton  
11 Parties' Petition raised bankruptcy law issues. To the contrary,  
12 the Petition was based solely on state-law rights allegedly  
13 arising from the Retirement Plan and the California Constitution,  
14 rights that arose (if at all) prior to and wholly independent of  
15 VHS's bankruptcy case. That VHS ultimately might want to assert  
16 as a defense to the Petition rights it acquired in the course of  
17 its bankruptcy case is of no moment. As we stated above, the  
18 focus in determining the bankruptcy court's removal jurisdiction  
19 is on the well-pled allegations of the Petition and not on any  
20 defense the VHS Defendants anticipate they might want to assert  
21 in response. See In re Miles, 430 F.3d at 1088.

22 The VHS Defendants also attempt to distinguish Ray by  
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24 <sup>11</sup>If, in the process of ruling on the Petition, the state  
25 court misinterprets the plan, the confirmation order or any of  
26 the bankruptcy court's other orders, VHS then might be able to  
27 seek relief from the bankruptcy court, provided that the state  
28 court's ruling implicates substantive bankruptcy law issues or  
impacts VHS or its plan. See Huse v. Huse-Sporssem, A.S. (In re  
Birting Fisheries, Inc.), 300 B.R. 489, 500-01 (9th Cir. BAP  
2003).

1 comparing the status of VHS's Chapter 9 Plan and the status of  
2 its bankruptcy case with the status of Ray's chapter 11 plan and  
3 his bankruptcy case. In Ray, at the time BGP sued Ray and others  
4 in state court for breach of BGP's first refusal rights with  
5 respect to the sale of the Adjacent Land, Ray's plan had been  
6 fully administered and his bankruptcy case had been closed.  
7 624 F.3d at 1129. In contrast, according to the VHS Defendants,  
8 distributions under VHS's Chapter 9 Plan are in progress now, and  
9 its bankruptcy case is still open. However, in terms of finding  
10 (or not) the requisite close nexus between the Petition and VHS's  
11 bankruptcy case, the current status of the VHS bankruptcy case  
12 and the Chapter 9 Plan simply are not critical under the  
13 circumstances.<sup>12</sup> Rather, under the facts of this case, it is the  
14 entry of the court's confirmation order (and any preclusive  
15 effect that order and the Chapter 9 Plan might have) that are  
16 crucial in considering the potential impact of the Petition on  
17 VHS's bankruptcy case. In short, the distinctions that the VHS  
18 Defendants have pointed to are not significant for purposes of  
19 ascertaining whether "related to" jurisdiction exists here.

20 Nor can these case status and plan status distinctions  
21 support a conclusion that ancillary jurisdiction exists. Ray  
22 stands for the proposition that there can be no ancillary  
23 bankruptcy jurisdiction (nor any other type of bankruptcy  
24 jurisdiction) in a postconfirmation breach of contract lawsuit,  
25 when the complaint does not raise any issues of bankruptcy law,

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26  
27 <sup>12</sup>See generally In re Ray, 624 F.3d at 1132 n.5 (noting that  
28 whether the underlying bankruptcy case is open or closed does not  
control).



1 does not invoke any rights either based on substantive bankruptcy  
2 law or created in the course of the bankruptcy case, and does not  
3 impact the debtor, the estate or the plan. In other words, there  
4 can be no ancillary jurisdiction over an action when the action  
5 in question is not sufficiently connected to a prior action over  
6 which the court had jurisdiction. See Fed. Sav. & Loan Ins.  
7 Corp. v. Ferrante, 364 F.3d 1037, 1041-42 (9th Cir. 2004). In  
8 light of Ray, we cannot find here that there is sufficient  
9 connection between the Petition and VHS's bankruptcy case to  
10 establish that the bankruptcy court had ancillary jurisdiction  
11 over the Petition.

12 We also note that the Chapter 9 Plan included lengthy and  
13 broad jurisdiction retention provisions. Among other things, the  
14 plan purported to have the bankruptcy court retain jurisdiction:  
15 "to hear and determine all disputes or controversies arising in  
16 connection with or related to this Plan or the Confirmation Order  
17 or the interpretation, implementation, or enforcement of this  
18 Plan or the Confirmation Order or the extent of any entity's  
19 obligations incurred in connection with or released under this  
20 Plan or the Confirmation Order." Chapter 9 Plan (Dec. 17, 2009)  
21 at 26:14-17. Notwithstanding the above, Ray ruled that a  
22 jurisdiction retention provision, by itself, cannot confer  
23 jurisdiction on the bankruptcy court. See In re Ray, 624 F.3d at  
24 1136 n.8.

25 Even though the Kirton Parties never filed a remand motion,  
26 they did not waive the argument that the bankruptcy court lacked  
27 subject matter jurisdiction; the Kirton Parties could make that  
28 argument, and did make that argument, at other times during the

1 course of the proceedings and on appeal. See O'Halloran, 856  
2 F.2d at 1379 (stating that an argument regarding the court's  
3 subject matter jurisdiction could not be waived and could be  
4 raised at any time).<sup>13</sup>

5 Accordingly, because the bankruptcy court lacked subject  
6 matter jurisdiction over the removed Petition, we must VACATE its  
7 judgment dismissing the Petition under Civil Rule 12(b)(6).

#### 8 CONCLUSION

9 For the reasons set forth above, we VACATE the bankruptcy  
10 court's order under Civil Rule 12(b)(6) dismissing the Kirton  
11 Parties' Petition because it lacked subject matter jurisdiction  
12 over this dispute. We REMAND this matter to the bankruptcy court  
13 with instructions to remand the Petition to the state court.

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22 <sup>13</sup>While we ultimately reach the same result as that urged by  
23 the Kirton Parties in their supplemental brief, that the  
24 bankruptcy court lacked jurisdiction over the Petition, the  
25 Kirton Parties asserted this result follows from the following  
26 facts: (1) they did not actively participate in VHS's bankruptcy  
27 case; (2) the Chapter 9 Plan stated that their Retirement Plan  
28 rights were unaffected; and (3) the Chapter 9 Plan deprived them  
the right to vote for or against the plan. It suffices for us to  
say that we disagree with the Kirton Parties' jurisdictional  
analysis and instead rely on our own analysis, which mirrors  
Ray's analysis.

1 Appendix

2 California Constitution Art. XVI, Sec. 17, provides in part:

3 Notwithstanding any other provisions of law or this  
4 Constitution to the contrary, the retirement board of a  
5 public pension or retirement system shall have plenary  
6 authority and fiduciary responsibility for investment  
7 of moneys and administration of the system, subject to  
8 all of the following:

9 (a) The retirement board of a public pension or  
10 retirement system shall have the sole and exclusive  
11 fiduciary responsibility over the assets of the public  
12 pension or retirement system. The retirement board  
13 shall also have sole and exclusive responsibility to  
14 administer the system in a manner that will assure  
15 prompt delivery of benefits and related services to the  
16 participants and their beneficiaries. The assets of a  
17 public pension or retirement system are trust funds and  
18 shall be held for the exclusive purposes of providing  
19 benefits to participants in the pension or retirement  
20 system and their beneficiaries and defraying reasonable  
21 expenses of administering the system.

22 (b) The members of the retirement board of a  
23 public pension or retirement system shall discharge  
24 their duties with respect to the system solely in the  
25 interest of, and for the exclusive purposes of  
26 providing benefits to, participants and their  
27 beneficiaries, minimizing employer contributions  
28 thereto, and defraying reasonable expenses of

1 administering the system. A retirement board's duty to  
2 its participants and their beneficiaries shall take  
3 precedence over any other duty.

4 (c) The members of the retirement board of a  
5 public pension or retirement system shall discharge  
6 their duties with respect to the system with the care,  
7 skill, prudence, and diligence under the circumstances  
8 then prevailing that a prudent person acting in a like  
9 capacity and familiar with these matters would use in  
10 the conduct of an enterprise of a like character and  
11 with like aims.

12 (d) The members of the retirement board of a  
13 public pension or retirement system shall diversify the  
14 investments of the system so as to minimize the risk of  
15 loss and to maximize the rate of return, unless under  
16 the circumstances it is clearly not prudent to do so.

17 (e) The retirement board of a public pension or  
18 retirement system, consistent with the exclusive  
19 fiduciary responsibilities vested in it, shall have the  
20 sole and exclusive power to provide for actuarial  
21 services in order to assure the competency of the  
22 assets of the public pension or retirement system.

23 \* \* \*

24 (h) As used in this section, the term "retirement  
25 board" shall mean the board of administration, board of  
26 trustees, board of directors, or other governing body  
27 or board of a public employees' pension or retirement  
28 system; provided, however, that the term "retirement

1 board" shall not be interpreted to mean or include a  
2 governing body or board created after July 1, 1991  
3 which does not administer pension or retirement  
4 benefits, or the elected legislative body of a  
5 jurisdiction which employs participants in a public  
6 employees' pension or retirement system.

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