

**JUN 22 2005**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In re:	)	BAP No. NV-04-1238-MaRP
	)	NV-04-1271-MaRP
ARTHUR FILIATRAULT STOCKTON,	)	NV-04-1345-MaRP
	)	(related appeals)
Debtor.	)	
_____	)	Bk. No. 03-16451-LK
	)	Adv. No. 03-01236-LK
GREER MCCLESKEY,	)	
	)	
Appellant,	)	
	)	
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>
	)	
ARTHUR FILIATRAULT STOCKTON,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on  
January 21, 2005, at Las Vegas, Nevada

Filed - June 22, 2005

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Lloyd King, Bankruptcy Judge, Presiding.

\_\_\_\_\_

Before: MARLAR, RUSSELL<sup>2</sup> and PERRIS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when applicable under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Barry Russell, Chief Bankruptcy Judge for the Central District of California, sitting by designation.

1 **INTRODUCTION**

2  
3 Arthur Filiatrault Stockton ("Debtor") is a securities broker  
4 and former financial adviser of the appellant, Mr. Greer McCleskey  
5 ("McCleskey"). McCleskey filed a complaint and demand for  
6 arbitration ("Arbitration Claim") with the National Association of  
7 Securities Dealers ("NASD") against Debtor for breach of fiduciary  
8 duty. McCleskey then filed a proof of claim in Debtor's chapter  
9 11<sup>3</sup> bankruptcy case based on the Arbitration Claim.

10 In this appeal, McCleskey has challenged the bankruptcy  
11 court's orders which: (1) denied his motion for stay relief to  
12 arbitrate; (2) disallowed his proof of claim; and (3) dismissed  
13 his § 727(a) adversary proceeding to deny Debtor's discharge.

14 We conclude that the bankruptcy court did not abuse its  
15 discretion in denying stay relief in the absence of either a  
16 written agreement to arbitrate or any evidence that Debtor or his  
17 company were subject to the arbitration provisions of the NASD.  
18 Nor do we find error in the bankruptcy court's disallowance of  
19 McCleskey's proof of claim due to his failure to meet his burden  
20 of proof. Finally, we affirm the dismissal of McCleskey's  
21 § 727(a) complaint for lack of creditor standing.

22  
23 **FACTS**

24  
25 Debtor, a resident of Clark County, Nevada, filed a voluntary  
26 chapter 11 petition on May 23, 2003. Debtor was a licensed  
27

---

28 <sup>3</sup> Unless otherwise indicated, all references to chapter and  
section are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and all  
rule references are to the Federal Rules of Bankruptcy Procedure,  
Rules 1001-9036.

1 attorney and an experienced securities broker who had registered  
2 with the NASD in 1990. Debtor was a principal of Stockton Capital  
3 Management and Trust, Inc. ("Stockton Capital"), which was later  
4 known as Institutional Securities, Inc. and, ultimately, as  
5 Longview Investments, Inc. ("Longview"). (References to  
6 "Longview" may therefore incorporate "Stockton Capital.") Longview  
7 was an Arizona-based trust company, chartered and regulated by the  
8 Arizona Banking Department, and was not a member of the NASD.

9       Since 1996, Debtor and/or his companies managed an individual  
10 retirement account ("Longview Account") for McCleskey, a retiree  
11 in his 80s. In 1999, McCleskey put virtually all of his  
12 retirement funds, including his life savings, into the Longview  
13 Account, such that Debtor was managing over \$1 million of  
14 McCleskey's money. McCleskey gave written instructions that his  
15 account should be invested "aggressively" and acknowledged that  
16 his selection would involve "significant principal fluctuation."  
17 See Exh. A-1 to Stockton Declaration (February 26, 2004).

18       Approximately one year later, in February, 2001, the Longview  
19 Account had fallen to \$276,454.22, at which time McCleskey  
20 liquidated and closed the account.

21       In December, 2001, McCleskey filed the Arbitration Claim with  
22 NASD against Stockton Capital and Debtor, on the basis of Debtor's  
23 alleged membership in NASD, asserting that Debtor had mismanaged  
24 his funds. The Arbitration Claim was filed in Oklahoma, where  
25 McCleskey had since moved.

26       McCleskey sought damages for Debtor's alleged negligence,  
27 breach of fiduciary duty, and violations of the Oklahoma  
28 Securities Act. Under the negligence count, McCleskey alleged

1 that Debtor failed to follow his oral and written instructions,  
2 which resulted in damages of \$220,665.86. Under the breach of  
3 fiduciary duty count, McCleskey alleged that Debtor failed to  
4 properly advise him on how to diversify his account in order to  
5 avoid losses caused by declining market conditions, resulting in  
6 damages of \$512,598.30.<sup>4</sup>

7 Debtor contested the allegations as well as the arbitrability  
8 of the claim and NASD's jurisdiction. Nonetheless, arbitration  
9 went forward, discovery was conducted, and the case was set for  
10 hearing in May, 2003. As Debtor, allegedly, was preparing to file  
11 for an injunction in federal court against the NASD arbitration,  
12 his liability insurer informed him that it would not cover the  
13 arbitration costs. The arbitration hearing was stayed when Debtor  
14 filed his chapter 11 bankruptcy petition, in Nevada. Thereafter,  
15 the NASD closed the case, without prejudice.<sup>5</sup>

16 Debtor listed McCleskey as an unsecured creditor, in his  
17 bankruptcy schedules, whose claim was contingent, unliquidated and  
18 disputed. In addition, McCleskey filed a proof of claim for  
19 \$700,000 based on the Arbitration Claim.

20 The following proceedings are pertinent to this appeal:  
21 McCleskey's motion for stay relief; Debtor's objection to  
22

---

23 <sup>4</sup> McCleskey also alleged that Debtor was under a heightened  
24 fiduciary duty because, in 1998, McCleskey had suffered a head  
25 injury in an automobile accident and had become increasingly  
26 dependent on Debtor to manage his investment accounts due to  
memory problems. McCleskey alleged that Debtor nonetheless urged  
him to transfer all of his money into Longview.

27 <sup>5</sup> In 2003 Longview sued McCleskey in Maricopa County  
28 Superior Court, in Phoenix, Arizona for damages caused to  
Longview. McCleskey counterclaimed in that action for the same  
investment losses that are the subject of the proof of claim. The  
status of that action is unclear.

1 McCleskey's proof of claim; and Debtor's motion to dismiss  
 2 McCleskey's adversary proceeding.<sup>6</sup>

3  
 4 **Stay Relief**

5  
 6 On January 28, 2004, McCleskey filed a motion for stay relief  
 7 to prosecute the Arbitration Claim at the NASD. He sought relief  
 8 under § 362(d)(1), for "cause," maintaining that discovery was

9  
 10 <sup>6</sup> The following pleadings and orders are pertinent to these  
 11 appeals:

FILING DATE	DOCUMENT TITLE	HEARING DATE
Aug. 12, 2003	McCleskey Proof of Claim	
Jan. 28, 2004	McCleskey Motion for Relief From Automatic Stay to Allow Pending Action to Proceed	
Feb. 19, 2004	McCleskey v. Stockton, Amended Complaint, Adv. No. 03-1236, § 727(a)(2), (5), and (7)	
March 2, 2004	Debtor's Response and Opposition to Motion for Relief From Automatic Stay	March 10, 2004
March 2, 2004	Debtor's Objection to Proof of Claim	April 7, 2004
March 22, 2004	Debtor's Motion to Dismiss Amended Adversary Complaint	May 11, 2004
April 29, 2004	<b>Order</b> Denying Motion for Relief From Automatic Stay to Allow Pending Action to Proceed	
April 29, 2004	<b>Order</b> Re: Objection to Proof of Claim [Conditional]	
May 6, 2004	McCleskey's Response to Debtor's Motion to Dismiss Amended Adversary Complaint	
May 7, 2004	<b>Order</b> Denying Proof of Claim (Final)	
May 17, 2004	<b>Order</b> Dismissing Adversary Complaint, With Prejudice	

1 complete and the claim was ready for arbitration. Although the  
2 motion stated that the claim was pending at the NASD, in fact it  
3 had already been closed, without prejudice, in June, 2003.

4 McCleskey did not provide any evidence of a contract between  
5 him and Debtor or Longview containing an arbitration clause, nor  
6 did he attach a copy of the Arbitration Claim. Nor did McCleskey  
7 allege that either Debtor or Longview were members of NASD and  
8 therefore subject to its procedures for the arbitration of  
9 customer disputes.

10 Debtor filed a written opposition and declaration alleging,  
11 inter alia, that (1) McCleskey's investment agreement with  
12 Longview did not contain an arbitration provision and Debtor was  
13 not a party to any arbitration agreement with McCleskey; (2)  
14 Longview was not a member of NASD and therefore was not subject to  
15 its rules and regulations; (3) the Arbitration Claim was not  
16 pending at the NASD; (4) Debtor preserved his objections to the  
17 arbitrability of the claims; (5) Debtor had been denied insurance  
18 coverage for the arbitration, whereas his defense of the adversary  
19 proceeding in bankruptcy was insured; and (6) McCleskey's proof of  
20 claim, which could be resolved in bankruptcy court, was based on  
21 the identical claims filed with the NASD.

22 At the March 10, 2004 hearing on the motion, McCleskey's  
23 attorney argued that the bankruptcy court did not have discretion  
24 to refuse to compel arbitration. Counsel argued that it was  
25 undisputed that Debtor was a member of the NASD and therefore was  
26 required to arbitrate the dispute with McCleskey. However,  
27 counsel did not ask the court to take judicial notice of the NASD  
28 rules themselves, nor did he present any evidence of Debtor's

1 membership in NASD.<sup>7</sup>

2 The bankruptcy court denied the motion and ruled, in  
3 pertinent part:

4 THE COURT: All right. The motion will be denied. There  
5 is no arbitration agreement that would require  
6 this debtor to proceed.

7 The claim can be resolved in the bankruptcy  
8 court, . . .

9 Tr. of Proceedings (March 10, 2004), p. 15:5-9.

10 An order denying the motion for stay relief was entered on  
11 April 29, 2004, and it was timely appealed. This appeal was  
12 designated BAP No. NV-04-1345.

13

14 **Claim Objection**

15

16 McCleskey's proof of claim for \$700,000 was based on  
17 Debtor's alleged liability for contingent and unliquidated damages  
18 pursuant to the Arbitration Claim for alleged negligence and  
19 breach of fiduciary duty in the sale of securities. In support of  
20 his proof of claim, McCleskey attached a copy of the Arbitration  
21 Claim.

22 On March 2, 2004, Debtor filed an objection, pursuant to  
23 Rules 3003 and 3007 (claims allowance), asserting that McCleskey  
24 failed to state a claim upon which any relief could be granted.  
25 Debtor further contended that the complaint was conclusory and did  
26 not allege sufficient material facts for relief.

27 A hearing was set for April 7, 2004, and copies of the

28

---

<sup>7</sup> Months later, in another proceeding, McCleskey provided documentation that Debtor and Stockton Capital had been members of NASD in 1990. (See below.) See Response to Motion to Dismiss § 727 Adversary Proceeding (May 6, 2004), Exh. B - CRD Files for Debtor and Stockton Capital.

1 objection and hearing notice were mailed to McCleskey and his  
2 attorney. McCleskey did not file a written response. At the  
3 hearing, however, McCleskey's counsel argued that the proof of  
4 claim was adequate proof of Debtor's liability for the negligence  
5 and breach of fiduciary duty counts. He further maintained that  
6 Debtor's objection was procedurally defective and should have been  
7 filed as an adversary proceeding.

8         Nonetheless, the bankruptcy court found the lack of a  
9 responsive pleading by McCleskey to be fatal. The court gave  
10 McCleskey an opportunity to file a late response on the condition  
11 that he compensate Debtor's Arizona and Nevada counsel for their  
12 time and expense for the current hearing. In accordance with this  
13 ruling, the "Order Re: Objection to Proof of Claim" was entered on  
14 April 29, 2004. It imposed a "sanction" of \$2,500 upon McCleskey  
15 and further ordered: "[S]hould [McCleskey] pay the sanctions as  
16 set forth herein by April 16, 2004, [McCleskey] shall be entitled  
17 to file a responsive pleading to the objection to claim, which  
18 shall be heard on May 11, 2004 . . . . [S]hould [McCleskey fail to  
19 pay the sanctions as set forth herein by April 16, 2004 . . . , he  
20 shall be precluded from filing a responsive pleading to the  
21 objection to claim and Debtor's objection to claim shall be  
22 summarily granted."

23         McCleskey timely appealed this order, refused to pay the  
24 sanctions, and did not file a responsive pleading. Therefore, on  
25 May 7, 2004, the bankruptcy court's "Ex Parte Motion and Order  
26 Denying Proof of Claim" summarily sustained Debtor's objection.  
27 McCleskey's notice of appeal of these claim orders was deemed  
28 timely.<sup>8</sup> This appeal was designated BAP No. NV-04-1238.

---

<sup>8</sup> McCleskey's notice of appeal of the interlocutory April 29, 2004 order was timely, but he filed an untimely notice of  
(continued...)





1 Debtor's NASD membership file showing that Debtor was registered  
2 as a broker with NASD in 1990; and (3) Stockton Capital's NASD  
3 membership file showing that the firm was registered with NASD in  
4 1989 and 1990. Finally, McCleskey also asked the bankruptcy court  
5 to take judicial notice of the NASD Code of Arbitration Procedure  
6 ("NASD Code"), which provides that disputes in connection with a  
7 member's business shall be submitted to arbitration at the  
8 insistence of a customer.

9 A hearing on the motion to dismiss was held on May 11, 2004.  
10 The court granted the motion to dismiss for the reason that the  
11 fraud allegations were not pleaded with particularity, as required  
12 by Fed. R. Civ. P. 9(b). The court also denied McCleskey's  
13 request to stay the adversary proceeding pending resolution of the  
14 Arbitration Claim. An order dismissing McCleskey's complaint  
15 against Debtor was entered on May 17, 2004. McCleskey timely  
16 appealed the order, which was designated BAP No. NV-04-1271.

17 The three appeals were then jointly set for hearing.

### 18 ISSUES

- 19
- 20
- 21 1. Whether the bankruptcy court erred in refusing to take  
22 judicial notice of the NASD Code and in denying  
23 McCleskey stay relief to arbitrate a noncore<sup>10</sup> breach of  
24

---

25 <sup>10</sup> State law contract claims against a bankruptcy debtor are  
26 "noncore" matters, which may be related to the bankruptcy case but  
27 which do not invoke a substantive right created by the Bankruptcy  
28 Code. See Piombo Corp. v. Castlerock Props. (In re Castlerock  
Props.), 781 F.2d 159, 161-62 (9th Cir. 1986); Krasnoff v.  
Marshack (In re Gen. Carriers Corp.), 258 B.R. 181, 189 (9th Cir.  
BAP 2001) (explaining core and noncore claims). For arbitration  
purposes, noncore matters "are those that do not involve issues of  
law unique to bankruptcy or substantive rights created exclusively  
(continued...)

1 fiduciary duty claim.

2  
3 2. Whether the bankruptcy court erred in disallowing  
4 McCleskey's proof of claim based upon a procedural  
5 failure and in conditioning a cure of such defect upon  
6 McCleskey's payment of sanctions to Debtor.

7  
8 3. Whether the bankruptcy court's dismissal of McCleskey's  
9 § 727(a) complaint should be affirmed due to a lack of  
10 standing.<sup>11</sup>

11  
12 **STANDARDS OF REVIEW**

13  
14 We review issues of law under the de novo standard, and  
15 findings of fact for clear error. See Dawson v. Wash. Mut. Bank,  
16 F.A. (In re Dawson), 390 F.3d 1139, 1145 (9th Cir. 2004). We also  
17 interpret the Bankruptcy Code de novo. See Einstein/Noah Bagel  
18 Corp. v. Smith (In re BCE West, L.P.), 319 F.3d 1166, 1170 (9th  
19 Cir. 2003).

20 "Determinations of arbitrability, like the interpretation of  
21 any contractual provision, are subject to de novo review."

22  
23 <sup>10</sup>(...continued)  
24 by the Bankruptcy Code," even if they arise in a 28 U.S.C.  
25 § 157(b) core proceeding. Slipped Disc Inc. v. CD Warehouse Inc.  
26 (In re Slipped Disc Inc.), 245 B.R. 342, 346 (Bankr. N.D. Iowa  
27 2000). See also Ins. Co. of N. Am. v. NGC Settlement Trust &  
Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.), 118 F.3d  
1056, 1069 (5th Cir. 1997); MCI Telecomm. Corp. v. Gurga (In re  
Gurga), 176 B.R. 196, 199 (9th Cir. BAP 1994).

28 <sup>11</sup> While both parties have raised other issues going to the  
merits of the dismissal for failure to state a claim, it is  
unnecessary for us to reach them in view of our disposition of the  
standing issue.

1 Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 474  
2 (9th Cir. 1991). The bankruptcy court's decision whether to  
3 compel or enforce an arbitration agreement is a matter of law,  
4 which we review de novo. See Quackenbush v. Allstate Ins. Co.,  
5 121 F.3d 1372, 1380 (9th Cir. 1997); Gurga, 176 B.R. at 199 (9th  
6 Cir. BAP 1994).

7 The bankruptcy court's decision to deny stay relief is  
8 committed to its sound discretion, Beguelin v. Volcano Vision,  
9 Inc. (In re Beguelin), 220 B.R. 94, 97 (9th Cir. BAP 1998), and  
10 its evidentiary rulings are also reviewed for an abuse of  
11 discretion, Ardmor Vending Co. v. Kim (In re Kim), 130 F.3d 863,  
12 865 (9th Cir. 1997). In addition, the bankruptcy court has broad  
13 discretion to apply its local rules. See Katz v. Pike (In re  
14 Pike), 243 B.R. 66, 69 (9th Cir. BAP 1999). A court abuses its  
15 discretion if it relies upon an erroneous interpretation of the  
16 law. J.P. Morgan Inv. Mgmt., Inc. v. U.S.T. (In re Martech USA,  
17 Inc.), 188 B.R. 847, 849 (9th Cir. BAP 1995), aff'd, 90 F.3d 408  
18 (9th Cir. 1996).

19 The bankruptcy court's dismissal of an adversary proceeding  
20 for failure to state a claim is reviewed de novo. Fernandez v.  
21 G.E. Capital Mortgage Servs., Inc. (In re Fernandez), 227 B.R.  
22 174, 177 (9th Cir. BAP 1998), aff'd mem., 208 F.3d 220 (9th Cir.  
23 2000). Lack of standing is a "subspecies" of a Rule 12(b)(6)  
24 dismissal for failure to state a claim. Stoll v. Quintanar (In re  
25 Stoll), 252 B.R. 492, 495 (9th Cir. BAP 2000).

1 **DISCUSSION**

2  
3 **A. Stay Relief**

4  
5 McCleskey contends that the bankruptcy court erred in  
6 refusing to lift the stay so that his Arbitration Claim could be  
7 prosecuted against Debtor at the NASD, in Oklahoma. McCleskey  
8 argues that the bankruptcy court applied the incorrect legal  
9 standard in failing to take judicial notice of and enforce the  
10 mandatory NASD arbitration provisions.

11 It is now well-settled law that federal courts must give  
12 deference to the Federal Arbitration Act (FAA), which established  
13 a federal policy favoring arbitration, and rigorously enforce  
14 agreements to arbitrate. See Quackenbush, 121 F.3d at 1380;  
15 Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969, 971-72 (9th  
16 Cir. 1992) (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S.  
17 220, 226 (1987) and Dean Witter Reynolds, Inc. v. Byrd, 470 U.S.  
18 213, 221 (1985)). Further, "questions of arbitrability must be  
19 addressed with a healthy regard for the federal policy favoring  
20 arbitration" with "any doubts concerning the scope of arbitrable  
21 issues ... resolved in favor of arbitration." Moses H. Cone Mem.  
22 Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

23 When faced with a demand for arbitration, whether or not it  
24 is made in the context of a core bankruptcy proceeding, the  
25 bankruptcy court must make two determinations: (1) whether the  
26 parties agreed to arbitrate the dispute at issue; and (2) whether  
27 Congress intended to preclude a waiver of the judicial remedies  
28 for the statutory rights at issue. Gurga, 176 B.R. at 199 (citing

1 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.  
2 614, 627-28 (1985)). See also Mor-Ben Ins. Mkts. Corp. v. Trident  
3 Gen. Ins. Co. (In re Mor-Ben Ins. Mkts. Corp.), 73 B.R. 644, 648  
4 (9th Cir. BAP 1987) (fact that issues arise in bankruptcy context  
5 does not invalidate arbitration agreement).

6 McCleskey, as the moving party, had the burden of going  
7 forward with evidence of an enforceable agreement to compel  
8 arbitration as well as an initial showing of "cause" for stay  
9 relief. See Hon. B. Russell, Bankruptcy Evidence Manual § 301.100  
10 (2004 ed.) (citing Am. Freight Sys., Inc. v. Consumer Prods.  
11 Assocs. (In re Am. Freight Sys., Inc.), 164 B.R. 341, 345 (D. Kan.  
12 1994)); 11 U.S.C. §§ 362(d) and (g); 3 Collier on Bankruptcy  
13 ¶ 362.10, p. 362-117 (Alan N. Resnick & Henry J. Sommer eds., 15th  
14 ed. rev. 2004).

15 McCleskey's motion for stay relief was deficient in several  
16 ways. He did not present any argument concerning the mandatory  
17 nature of the arbitration request, but, instead, argued that the  
18 bankruptcy court should use its discretion to find cause for  
19 lifting the stay. The factual allegations incorrectly stated that  
20 an arbitration proceeding was "pending" at the NASD, when, in  
21 fact, it had been closed due to the bankruptcy filing. More  
22 importantly, McCleskey did not allege that he had any arbitration  
23 agreement with Debtor or Longview.

24 Debtor's opposition to the motion included evidence that  
25 there was no arbitration agreement in McCleskey's investment  
26 contract with Stockton Capital or Longview.

27 It was not until the hearing on the motion that McCleskey's  
28 counsel raised the legal argument that the bankruptcy court lacked

1 discretion in this matter, citing Scobee Combs Funeral Home, Inc.  
2 v. E.F. Hutton & Co., 711 F. Supp. 605 (S.D. Fla. 1989).

3 In Scobee Combs, the District Court for the Southern District  
4 of Florida interpreted the NASD provision which requires members  
5 to arbitrate on the demand of their customer and treats the  
6 customer as a third-party beneficiary of the contract between NASD  
7 and the member. Id. at 606. The district court held that the  
8 required writing was the NASD Manual, not a signed agreement  
9 between the parties to the suit, and that the NASD Manual  
10 compelled binding arbitration. Id. at 608 (citing Drexel Burnham  
11 Lambert Inc. v. Pyles, 701 F. Supp. 217, 220 (N.D. Ga. 1988) (same  
12 result)). See also Spear, Leeds & Kellogg v. Cent. Life Assur.  
13 Co., 85 F.3d 21, 26-27 (2d Cir. 1996) (applying the principle of  
14 third-party beneficiary to the insurer of a New York Stock  
15 Exchange member).

16 However, McCleskey's counsel neither presented a copy of the  
17 opinion to the court nor requested that the court take judicial  
18 notice of the NASD Code.

19 McCleskey now contends that the court erroneously failed to  
20 take judicial notice of the Scobee Combs opinion and NASD Code.  
21 We disagree. McCleskey failed to meet his burden of presenting  
22 the appropriate evidence or legal authority to the court in a  
23 timely fashion. Mere mention by counsel at the stay relief  
24 hearing of the NASD Code does not constitute evidence. See Kim,  
25 13 F.3d at 865. Furthermore, the evidence of an agreement to  
26 arbitrate between Debtor and McCleskey was not proven. Therefore,  
27 to the extent that the bankruptcy court did not take judicial  
28 notice of the opinion and NASD Code,<sup>12</sup> it did not abuse its

---

<sup>12</sup> We take judicial notice of the NASD Code of Arbitration Procedure, §§ 10100-10407, available at [www.nasd.com](http://www.nasd.com).

1 discretion.

2 Even if the bankruptcy court had taken judicial notice,  
3 McCleskey's argument would fail.

4 The NASD Code provides, in pertinent part:

5 **10301. Required Submission**

6 (a) Any dispute, claim, or controversy eligible for submission  
7 under the Rule 10100 Series between a customer and a member  
8 and/or associated person arising in connection with the  
9 business of such member or in connection with the activities of  
10 such associated persons shall be arbitrated under this Code, as  
11 provided by any duly executed and enforceable written agreement  
12 or upon the demand of the customer. A claim involving a member  
13 in the following categories shall be ineligible for submission  
14 to arbitration under the Code unless the customer agrees in  
15 writing to arbitrate the claim after it has arisen:

- 11 i. A member whose membership is terminated,  
12 suspended, canceled, or revoked;
- 13 ii. A member that has been expelled from the NASD;  
14 or
- 15 iii. A member that is otherwise defunct. . . .<sup>[13]</sup>

16 NASD Code of Arbitration Procedure, Rule 10301 (2001).

17 Matters eligible for submission are, in relevant part, as  
18 follows:

19 **10101. Matters Eligible for Submission**

20 This Code of Arbitration Procedure is prescribed and  
21 adopted . . . for the arbitration of any dispute, claim,  
22 or controversy arising out of or in connection with the  
23 business of any member of the Association . . . :

- 23 (a) between or among members;
- 24 (b) between or among members and associated persons;
- 25 (c) between or among members or associated persons and  
26 public customers, or others; . . . .

26 Id., Rule 10101 (1998).

27 McCleskey did not provide any evidence that either Debtor or  
28 Longview was a member of NASD and therefore subject to the NASD

---

<sup>13</sup> Essentially, Debtor argues that whether or not Stockton Capital had a membership with NASD, Longview does not.



1 provisions. Although an arbitration proceeding had been initiated  
2 at the NASD, that fact alone was insufficient proof, since Debtor  
3 opposed it and intended to seek an injunction against the action,  
4 but instead filed a bankruptcy petition which stayed the  
5 arbitration. McCleskey did not file Debtor's NASD profile, which  
6 showed that Debtor was a registered member in 1990, until two  
7 months after the stay relief hearing (it was filed with his  
8 response to the motion to dismiss the adversary proceeding).

9       Moreover, even the fact that Debtor was an NASD member would  
10 not be dispositive evidence. Eligible disputes are those "between  
11 or among members or associated persons and public customers." In  
12 Scobee Combs, the defendant was E.F. Hutton & Co., the member  
13 firm. McCleskey's investment agreement was with Stockton Capital,  
14 which is now Longview, not with Debtor individually. Debtor  
15 testified, in his declaration, that Longview was not a member of  
16 NASD but was instead regulated by the Arizona banking department.  
17 The NASD contract term "associated person" applies to associates  
18 of member firms. See NASD Glossary of Arbitration Terms, defining  
19 "Associated Person." See generally 15 Broker-Dealer Regulation  
20 § 4.1 (Nov. 2004). Stockton Capital is defunct. Thus, McCleskey  
21 presented no viable legal theory to hold Debtor or Longview  
22 responsible under the NASD arbitration provisions by virtue of the  
23 parties' contractual obligations.

24       Therefore, the bankruptcy court did not err in refusing to  
25 grant stay relief for arbitration because there was no agreement  
26 between McCleskey and Debtor or Longview to arbitrate, either by  
27 virtue of a separate contract or the NASD regulations.

28

1 **B. Proof of Claim**

2  
3 The burdens of proof in a claim allowance proceeding are well  
4 established. A proof of claim is deemed allowed unless a party in  
5 interest objects under § 502(a). The proof of claim is "strong  
6 enough to carry over a mere formal objection without more."

7 Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991)  
8 (citation omitted). To defeat the claim, the objecting party must  
9 produce sufficient evidence and "show facts tending to defeat the  
10 claim by probative force equal to that of the allegations of the  
11 proofs of claim themselves." Id. If the objecting party comes  
12 forward with sufficient evidence to negate one or more of the  
13 sworn facts in the proof of claim, then the burden reverts to the  
14 claimant to prove the validity of the claim by a preponderance of  
15 the evidence. Lundell v. Anchor Constr. Specialists, Inc. (In re  
16 Lundell), 223 F.3d 1035, 1039 (9th Cir. 2000). "The ultimate  
17 burden of persuasion remains at all times upon the claimant." Id.

18 McCleskey's proof of claim was based on his Arbitration Claim  
19 and was prima facie valid.<sup>14</sup> Debtor filed a written objection  
20 consisting of a legal memorandum, which stated that the claim was  
21 "conclusory" and failed to state the necessary elements of claims  
22 for negligence and breach of fiduciary duty. In addition, Debtor  
23 alleged that Longview was not a member of NASD.

24  
25 \_\_\_\_\_  
26 <sup>14</sup> No separate adversary proceeding had been filed by  
27 McCleskey to determine the merits of the Arbitration Claim.  
28 Although McCleskey was a party to a § 523(a)(4) complaint, which  
would have litigated his breach of fiduciary claim, that action  
had been dismissed as to him after the other plaintiffs settled  
with Debtor. McCleskey was then allowed to file an amended  
complaint, but it eliminated the § 523(a)(4) count.

1 The bankruptcy court sustained Debtor's objection because  
2 McCleskey did not respond in writing to the objection, and without  
3 additional briefing and evidence the court could not determine any  
4 merit to the claim. McCleskey contends that the court erroneously  
5 required him to respond to the objection because the objection was  
6 neither an adversary proceeding nor a "motion." McCleskey is  
7 missing the mark.

8 The objection complied with the federal and local rules for  
9 initiating a contested matter. The Advisory Committee Note to  
10 Rule 3007 provides that "[t]he contested matter initiated by an  
11 objection to a claim is governed by Rule 9014 . . . ." Fed. R.  
12 Bankr. P. 3007. Rule 9014 classifies the objection as a "motion."

13 The local bankruptcy court rules provide the format for  
14 meeting respective burdens of proof. Local Rule 3007 provides, in  
15 pertinent part, that a claim objection need only set forth the  
16 "grounds for the objection" and that an uncontested claim  
17 objection may be granted without receiving arguments or evidence.  
18 Bankr. Ct. D. Nev. Local Rule 3007(a)(2).<sup>15</sup> Moreover if an

---

19  
20 <sup>15</sup> **LR 3007. CLAIMS - OBJECTIONS.**

21 (a) Form of objection. An objection to claim is a contested matter  
22 governed by LR 9014. In addition, the following procedures shall  
apply:

- 23 (1) The objection must identify the holder of the claim, the  
24 amount of the claim and the date the claim was filed;
- 25 (2) The objection must contain a statement setting forth the  
26 grounds for the objection; and
- 27 (3) Unless grounds are stated for objecting to the entire  
claim, the objection must state the amount of the claim  
which is not in dispute.

28 (b) Responses to objection to claims. If an objection to a claim  
(continued...)

1 objection is opposed, a written response "must" be filed and  
2 served upon the objecting party. Id., Local Rule 3007(b).

3 Local Rule 9014 governs the procedure for a hearing and the  
4 filing of briefs, legal memoranda, affidavits, declarations, and  
5 exhibits. It does not require evidence to be filed with the  
6 objection memorandum. See Bankr. Ct. D. Nev. Local Rule  
7 9014(d)(1) ("The motion must state the facts upon which it is  
8 based and must contain a legal memorandum. If affidavits/  
9 declarations are used, they must be filed with the motion,  
10 attached as exhibits and tabbed appropriately.").

11 Therefore, once Debtor filed his compliant claim objection,  
12 the burden of going forward switched to McCleskey, but he did not  
13 file a response. Thus, the bankruptcy court would not have abused  
14 its discretion if it had immediately sustained the objection. See  
15 Pike, 243 B.R. at 69 (bankruptcy court has broad discretion to  
16 apply its local rules). Instead, it gave McCleskey leave to file  
17 an untimely response on the condition that he pay a \$2,500  
18 sanction for Debtor's attorneys' fees.

19 Local Rule 1001 provided authority for the bankruptcy court's  
20  
21

---

22 <sup>15</sup>(...continued)  
23 is opposed, a written response must be both filed and served upon  
24 the objecting party at least five (5) days prior to the scheduled  
25 hearing so that the objecting party has five (5) business days  
26 notice of the response.

27 (c) Hearing on objections. If a written response is not timely  
28 filed and served, the objection may be granted by the court  
without calling the matter and without receiving arguments or  
evidence. If a response is timely filed and served, the initial  
hearing may be treated by the court as a status and scheduling  
hearing. . . .

Bankr. Ct. D. Nev. Local Rule 3007.

1 decision:<sup>16</sup>

2 (d) Procedures outside the rules. These rules are not  
3 intended to limit the discretion of the court in any  
4 respect. The court may, upon a showing of good cause,  
waive any of these rules, or make such additional orders  
as it may deem appropriate and in the interests of justice.

5 (e) Sanctions for noncompliance with rules. Failure of  
6 counsel or of a party to comply with these rules, with the  
7 Federal Rules of Civil Procedure or with the Federal Rules  
of Bankruptcy Procedure, or with any order of the court  
8 may be grounds for imposition of any and all sanctions,  
including, without limitation, the imposition of monetary  
sanctions.

9 Bankr. Ct. D. Nev. Local Rule 1001.

10 McCleskey argues, for the first time in his reply brief, that  
11 the bankruptcy court was required to find bad faith before  
12 imposing the sanction.<sup>17</sup> While bad faith is a necessary component  
13 of a court's inherent sanctioning power under § 105(a), see  
14 Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir.  
15 2003), that provision was not applicable here. McCleskey clearly  
16 violated the local bankruptcy court rules. The order to pay  
17 Debtor's attorneys' fees was a lesser sanction than outright  
18 disallowance, which the court also could have granted. By giving

---

20  
21 <sup>16</sup> The fact that the bankruptcy court did not cite the local  
22 rules was harmless error. Attorneys and their clients are charged  
with knowledge or constructive knowledge of the applicable rules.  
23 See Stallcop v. Kaiser Foundation Hosps., 820 F.2d 1044, 1050 (9th  
Cir. 1987).

24 <sup>17</sup> We have under advisement Debtor's motion to strike this  
25 argument as well as McCleskey's due process argument, which were  
26 both raised for the first time in his reply brief. Previously, we  
27 gave Debtor the opportunity to file a supplemental brief in  
28 response, which he then filed. We hereby deny the motion to  
strike for two reasons: (1) although McCleskey did not object to  
the sanction on these grounds in bankruptcy court, he filed a  
timely notice of appeal of the April 29, 2004 conditional sanction  
order; and (2) any lack of notice or prejudice caused by raising  
these issues in his reply brief has been cured by Debtor's  
responsive supplemental brief.

1 McCleskey another chance, the payment of \$2,500 was a choice for  
2 McCleskey, which he alone controlled and voluntarily rejected.  
3 Moreover, viewing the bankruptcy court's conditional order through  
4 the prism of due process, the order did not result in any  
5 prejudice to McCleskey because he has not argued that he would  
6 have filed a response but for the sanction. See Reyes-Melendez v.  
7 I.N.S., 342 F.3d 1001, 1006 (9th Cir. 2003) (constitutional due  
8 process claim requires showing of prejudice, "which means that the  
9 outcome of the proceeding may have been affected by the alleged  
10 violation"). To the contrary, McCleskey incorrectly maintains  
11 that such response was not required.

12 In summary, McCleskey's failure to respond to the claim  
13 objection foreclosed an evidentiary hearing in the contested  
14 matter, which had been set into motion by Debtor's objection. We  
15 therefore conclude that the bankruptcy court did not err in  
16 sustaining Debtor's claim objection in the absence of the required  
17 response, which McCleskey had been given the opportunity to file.

### 18 19 **C. Adversary Proceeding**

20  
21 Lastly, McCleskey challenges the bankruptcy court's dismissal  
22 of his § 727(a) complaint<sup>18</sup> against Debtor, with prejudice.

23  
24 \_\_\_\_\_  
25 <sup>18</sup> Section 727 is made applicable in a chapter 11 case by  
26 § 1141(d)(3), which provides:

- 27 (3) The confirmation of a plan does not discharge a  
28 debtor if—  
(A) the plan provides for the liquidation of all or  
substantially all of the property of the estate;

(continued...)

1 We may affirm the court's decision on any ground having  
2 support in the record. See Gemtel Corp. v. Community  
3 Redevelopment Agency of Los Angeles, 23 F.3d 1542, 1546 (9th Cir.  
4 1994). Standing to object to a discharge is limited to the  
5 trustee, a creditor, or the United States trustee under  
6 § 727(a). See § 727(c)(1). Only those creditors who have claims  
7 that will be affected by the discharge can file objections to the  
8 discharge. See Stanley v. Vahlsing (In re Vahlsing), 829 F.2d  
9 565, 567 (8th Cir. 1987) (where a would-be creditor's only claim  
10 has been finally dismissed, a discharge will not even potentially  
11 affect his interests). A "creditor" is defined as an "entity that  
12 has a claim against the debtor that arose at the time of or before  
13 the order for relief concerning the debtor; . . ." 11 U.S.C.  
14 § 101(10)(A)). A "claim" is defined as a "right to payment,  
15 whether or not such right is reduced to judgment, liquidated,  
16 unliquidated, fixed, contingent, matured, unmatured, disputed,  
17 undisputed, legal, equitable, secured, or unsecured; . . ." 11  
18 U.S.C. § 101(5)(A).

19 In this case, even though Debtor listed McCleskey as a  
20 creditor in his bankruptcy schedules, the bankruptcy court  
21 disallowed his claim in its entirety, thereby disqualifying him as  
22 a creditor of the estate. Thus, McCleskey has no standing under  
23

---

24 <sup>18</sup>(...continued)

25 (B) the debtor does not engage in business after  
consummation of the plan; and

26 (C) the debtor would be denied a discharge under section  
27 727(a) of this title if the case were a case under  
chapter 7 of this title.

28 11 U.S.C. § 1141(d)(3) (emphasis added).

1 the Bankruptcy Code to continue to pursue his adversary proceeding  
2 opposing Debtor's discharge, and the bankruptcy court properly  
3 dismissed his complaint.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

The bankruptcy court did not err in issuing the three orders under review. First, McCleskey provided no evidence of an arbitration agreement and did not properly raise any other basis for mandatory arbitration. Therefore, the bankruptcy court properly denied his stay relief request for arbitration.

Next, in the claim allowance proceedings, McCleskey failed to comply with local rules and to avail himself of the bankruptcy court's order allowing him to file an untimely response on the condition that he first pay Debtor's attorneys' fees for their appearance at the initial hearing. McCleskey voluntarily forfeited an evidentiary hearing on the matter, thus permitting the bankruptcy court to disallow his claim in its entirety. Such action by the bankruptcy court was not an abuse of its discretion.

Finally, having been disqualified as a creditor of the estate, McCleskey thereafter lacked standing to prosecute the § 727(a) adversary proceeding.

The three orders on appeal are therefore **AFFIRMED**. In addition, Debtor's motion to strike, which we have taken under advisement, is **DENIED**.