NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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.	**M E M O R A N D U M**[1]
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[2] and PERRIS, Bankruptcy Judges.

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[1] 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.

[2] Hon. Barry Russell, Chief Bankruptcy Judge for the Central District of California, sitting by designation.

INTRODUCTION

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

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

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

FACTS

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

[3] 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.

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

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

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

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

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

that Debtor failed to follow his oral and written instructions, which resulted in damages of $220,665.86. Under the breach of fiduciary duty count, McCleskey alleged that Debtor failed to properly advise him on how to diversify his account in order to avoid losses caused by declining market conditions, resulting in damages of $512,598.30.[4]

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

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

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

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[4] McCleskey also alleged that Debtor was under a heightened fiduciary duty because, in 1998, McCleskey had suffered a head injury in an automobile accident and had become increasingly 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.

[5] In 2003 Longview sued McCleskey in Maricopa County 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.

McCleskey's proof of claim; and Debtor's motion to dismiss McCleskey's adversary proceeding.[6]

Stay Relief

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

[6] The following pleadings and orders are pertinent to these 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	**Order** Denying Motion for Relief From Automatic Stay to Allow Pending Action to Proceed	
April 29, 2004	**Order** 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	**Order** Denying Proof of Claim (Final)	
May 17, 2004	**Order** Dismissing Adversary Complaint, With Prejudice	

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

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

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

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

membership in NASD.[7]

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

> THE COURT: All right. The motion will be denied. There is no arbitration agreement that would require this debtor to proceed.
>
> The claim can be resolved in the bankruptcy court, . . .

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

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

Claim Objection

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

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

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

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[7] 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.

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

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

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

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

Dismissal of McCleskey's Adversary Proceeding

In February, 2004, McCleskey filed an amended complaint against Debtor to deny his discharge under § 727(a)(2), (5) and (7). At that time, Debtor had not yet filed a plan of reorganization. The complaint alleged that Debtor gave false testimony at his § 341 creditors' meeting,[9] failed to disclose all of his assets, "transferred, removed, or concealed assets with the intent to hinder or delay his creditors," and failed to explain the deficiency in assets.

Debtor filed a motion to dismiss the complaint on the grounds that the allegations simply parroted the statutory language of § 727, provided no supporting facts, and rested on averments of fraud but were not pleaded with particularity as required by Fed. R. Civ. P. 9(b) (incorporated by Rule 7009).

McCleskey denied that his allegations were inadequate to state a claim. He also requested that the adversary proceeding be stayed pending arbitration of his breach of fiduciary claim against Debtor at the NASD. In support of this argument, McCleskey alleged that Debtor was a member of NASD, having registered in 1990, and he attached the following documents: (1) McCleskey's investment account reports from Stockton Capital; (2)

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[8](...continued)
appeal of the final May 7, 2004 order. The nonfinality of the April 29, 2004 order was cured by the final order, which was a foregone conclusion if McCleskey did not pay the sanctions and file his response. Therefore, the notice of appeal as to the April 29, 2004 order is deemed timely in regards to the issue of final claim disallowance. See Dannenberg v. Software Toolworks Inc., 16 F.3d 1073, 1075 (9th Cir. 1994) (an order that does not fully dispose of all claims may be considered on appeal if subsequent events have rendered the order final), aff'd in part and rev'd in part, on other grounds, 50 F.3d 615 (9th Cir. 1994).

[9] McCleskey did not move under § 727(a)(4) (false oath or account), although, confusingly, he cited that section as part of the allegations under (a)(5) and (a)(7).

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

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

The three appeals were then jointly set for hearing.

ISSUES

1. Whether the bankruptcy court erred in refusing to take judicial notice of the NASD Code and in denying McCleskey stay relief to arbitrate a noncore[10] breach of

[10] State law contract claims against a bankruptcy debtor are "noncore" matters, which may be related to the bankruptcy case but which do not invoke a substantive right created by the Bankruptcy 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...)

fiduciary duty claim.

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

3. Whether the bankruptcy court's dismissal of McCleskey's § 727(a) complaint should be affirmed due to a lack of standing.[11]

STANDARDS OF REVIEW

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

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

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[10](...continued)
by the Bankruptcy Code," even if they arise in a 28 U.S.C. § 157(b) core proceeding. Slipped Disc Inc. v. CD Warehouse Inc. (In re Slipped Disc Inc.), 245 B.R. 342, 346 (Bankr. N.D. Iowa 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).

[11] 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.

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

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

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

DISCUSSION

A. Stay Relief

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

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

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

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

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

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

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

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

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

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

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

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

[12] We take judicial notice of the NASD Code of Arbitration Procedure, §§ 10100-10407, available at www.nasd.com.

discretion.

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

The NASD Code provides, in pertinent part:

> **10301. Required Submission**
>
> (a) Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer. A claim involving a member in the following categories shall be ineligible for submission to arbitration under the Code unless the customer agrees in writing to arbitrate the claim after it has arisen:
>
> i. A member whose membership is terminated, suspended, canceled, or revoked;
>
> ii. A member that has been expelled from the NASD; or
>
> iii. A member that is otherwise defunct. . . .[13]

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

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

> **10101. Matters Eligible for Submission**
>
> This Code of Arbitration Procedure is prescribed and adopted . . . for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association . . . :
>
> (a) between or among members;
>
> (b) between or among members and associated persons;
>
> (c) between or among members or associated persons and public customers, or others; . . . .

Id., Rule 10101 (1998).

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

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[13] Essentially, Debtor argues that whether or not Stockton Capital had a membership with NASD, Longview does not.

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

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

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

B. Proof of Claim

The burdens of proof in a claim allowance proceeding are well established. A proof of claim is deemed allowed unless a party in interest objects under § 502(a). The proof of claim is "strong enough to carry over a mere formal objection without more." Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (citation omitted). To defeat the claim, the objecting party must produce sufficient evidence and "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." Id. If the objecting party comes forward with sufficient evidence to negate one or more of the sworn facts in the proof of claim, then the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell), 223 F.3d 1035, 1039 (9th Cir. 2000). "The ultimate burden of persuasion remains at all times upon the claimant." Id.

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

[14] No separate adversary proceeding had been filed by McCleskey to determine the merits of the Arbitration Claim. 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.

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

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

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

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[15] **LR 3007. CLAIMS - OBJECTIONS.**

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

(1) The objection must identify the holder of the claim, the amount of the claim and the date the claim was filed;

(2) The objection must contain a statement setting forth the grounds for the objection; and

(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.

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

(continued...)

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

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

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

Local Rule 1001 provided authority for the bankruptcy court's

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[15](...continued)
is opposed, a written response must be both filed and served upon the objecting party at least five (5) days prior to the scheduled hearing so that the objecting party has five (5) business days notice of the response.

(c) Hearing on objections. If a written response is not timely 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.

decision:[16]

> (d) Procedures outside the rules. These rules are not intended to limit the discretion of the court in any 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.
>
> (e) Sanctions for noncompliance with rules. Failure of counsel or of a party to comply with these rules, with the Federal Rules of Civil Procedure or with the Federal Rules of Bankruptcy Procedure, or with any order of the court may be grounds for imposition of any and all sanctions, including, without limitation, the imposition of monetary sanctions.

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

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

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

[17] We have under advisement Debtor's motion to strike this argument as well as McCleskey's due process argument, which were both raised for the first time in his reply brief. Previously, we gave Debtor the opportunity to file a supplemental brief in 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.

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

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

C. Adversary Proceeding

Lastly, McCleskey challenges the bankruptcy court's dismissal of his § 727(a) complaint[18] against Debtor, with prejudice.

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[18] Section 727 is made applicable in a chapter 11 case by § 1141(d)(3), which provides:

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

(continued...)

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

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

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[18](...continued)

> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

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

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

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**.