

JUL 15 2013

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-12-1386-DKiPa
	)	
ATECO, INC.,	)	Bk. No. 10-22623-MT
	)	
Debtor.	)	Adv. No. 11-01198-MT
	)	
_____	)	
LAW OFFICES OF JOHN F.L. HEBB,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
ATECO, INC.,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on June 20, 2013  
at Pasadena, California

Filed - July 15, 2013

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

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Appearances: John F.L. Hebb argued for Appellant Law Offices of  
John F.L. Hebb; Steven J. Krause of Ananda & Krause,  
APLC, argued for Appellee Ateco, Inc.

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Before: DUNN, KIRSCHER and PAPPAS, Bankruptcy Judges.

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

1 For the second time, Appellant Law Offices of John F.L. Hebb  
2 ("Hebb") has invoked the jurisdiction of this Panel in conjunction  
3 with his attorney fee dispute with Debtor/Appellee, Ateco, Inc.  
4 ("Ateco"). The briefs and the record submitted by the parties  
5 obscure the limited issues on appeal, i.e., whether the bankruptcy  
6 court erred when it determined that the Federal Arbitration Act<sup>2</sup>  
7 ("FAA") did not apply to the dispute between the parties, and  
8 whether Hebb waived any right he might have had under the California  
9 Arbitration Act. We AFFIRM.

10 I. FACTS

11 The dispute between the parties stems from Ateco's  
12 dissatisfaction with the legal services Hebb rendered on its behalf  
13 beginning in 2002. In September 2002, Ateco entered into an  
14 Attorney-Client Retainer Agreement ("Retainer Agreement") with Hebb,  
15 pursuant to which Hebb was to represent Ateco "in investigating,  
16 negotiating, enforcing and/or advising regarding: [Ateco's] rights,  
17 settlement possibilities and any causes of action arising out of  
18 [Ateco's] business dealings with R.A. Hales . . . ." (Emphasis in  
19 the original.) The Retainer Agreement provided that Hebb's hourly  
20 rate was \$225.00, which represented a "special discount from  
21 [Hebb's] customary \$300-\$325 hourly rate." The Retainer Agreement  
22 also purported to grant Hebb a lien on Ateco's claim or recovery  
23 against Hales:

24 [Hebb] is hereby given a lien on the said claim or cause

25 \_\_\_\_\_  
26 <sup>2</sup> 9 U.S.C. §§ 1-16.

1 of action, on any recovery by way of settlement, and on  
2 any judgment that may be obtained, for the sum and/or  
3 share hereinbefore mentioned due [Hebb], and it is further  
4 agreed that [Hebb] shall have all permissible general,  
5 possessory, or retaining liens, and all permissible  
6 special or charging liens known to common law.

7 On Ateco's behalf, Hebb initiated litigation against Hales  
8 ("Hales Litigation") in the Ventura County (California) Superior  
9 Court ("State Trial Court"). Hebb filed three complaints in the  
10 Hales Litigation. The first two were dismissed by demurrer. When  
11 the second amended complaint was facing a motion for judgment on the  
12 pleadings, Ateco retained new counsel ("the Hathaway Firm") to  
13 represent it in the Hales Litigation. Despite the Hathaway Firm's  
14 representation of Ateco in the Hales Litigation, it does not appear  
15 that Ateco terminated Hebb's services. Ateco contends that Hebb's  
16 work product was so defective his services were no longer used after  
17 the Hathaway Firm was retained; Hebb disagrees.

18 The Hales Litigation resulted in judgment in Ateco's favor in  
19 the amounts of \$333,743 for compensatory damages and \$159,000 for  
20 punitive damages. Hebb and the Hathaway Firm thereafter filed  
21 separate motions for attorney's fees in the Hales Litigation.  
22 Following a hearing, the State Trial Court granted all fees  
23 requested by the Hathaway Firm (\$334,276.50), but took under  
24 submission Hebb's request for attorneys fees in the amount of  
25 \$510,873, billed at the rate of \$300 per hour. The State Trial  
26 Court ultimately determined that the reasonable value of Hebb's  
services was \$200,000 and granted Hebb's attorney fee motion in that  
amount through a minute order entered February 26, 2006.

1 Hebb thereafter asserted an attorney's lien against any payment  
2 due Ateco in the Hales Litigation. Ateco disputed Hebb's right to  
3 assert a lien, contending it already had paid him \$250,000 in  
4 attorney's fees. Sometime in 2008, Hebb initiated a state court  
5 proceeding ("Fee Litigation") against Ateco and its principal based  
6 upon the Retainer Agreement. Trial in the Fee Litigation was  
7 scheduled to commence September 20, 2010. On August 17, 2010, the  
8 parties stipulated ("Arbitration Stipulation")<sup>3</sup> to submit the Fee  
9 Litigation to binding arbitration, notwithstanding the absence of an  
10 arbitration provision in the Retainer Agreement, with the result  
11 that the imminent trial date in the Fee Litigation was vacated. The  
12 Arbitration Stipulation provided that the fee dispute was to be  
13 submitted to a private arbitrator using JAMS ADR or ADR Services,  
14 Inc., and that arbitration was to be completed no later than  
15 November 15, 2010.

16 Ateco filed a chapter 11<sup>4</sup> petition on October 5, 2010

17

18 <sup>3</sup> As relevant to this appeal, the Arbitration Stipulation  
19 provides:

19

20 1. The within case shall be submitted to binding  
21 arbitration before a private arbitrator mutually selected  
22 by the parties using JAMS ADR or ADR Services, Inc. The  
23 parties agree to select an arbitrator and complete the  
24 arbitration on or before November 15, 2010. Costs of  
arbitration are to be borne equally by [Hebb] on the one  
hand and [Ateco and its principal] on the other  
hand. . . .

25 <sup>4</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
(continued...)

1 ("Petition Date"), staying arbitration proceedings under the  
2 Arbitration Stipulation.<sup>5</sup> Hebb filed a proof of claim ("Claim") in  
3 Ateco's bankruptcy case, asserting entitlement to \$324,546 in unpaid  
4 attorney's fees plus \$1,087,867.29 for "interest and alleged future  
5 'tort causes of action.'" On March 1, 2011, Ateco objected ("Claim  
6 Objection") to Hebb's Claim, on the bases that (1) Hebb failed to  
7 provide any evidence he had a valid secured claim, and (2) that the  
8 State Trial Court had determined in the Hales Litigation that Hebb's  
9 attorneys fees were \$200,000. Hebb did not respond to the Claim  
10 Objection, but instead, on March 2, 2011, filed a motion for relief  
11 from the automatic stay ("Relief From Stay Motion") to allow  
12 arbitration proceedings to go forward. On March 17, 2011, Ateco  
13 filed an adversary complaint ("Adversary Proceeding") against Hebb  
14 seeking (1) a determination of the validity of Hebb's asserted lien,  
15 and (2) disallowance of Hebb's claim. Ateco also alleged claims  
16 against Hebb based upon breach of fiduciary duty, professional  
17 negligence, breach of contract, fraud, and unjust enrichment.

18 The bankruptcy court heard the Relief from Stay Motion on  
19 April 7, 2011 ("April 7 Hearing"), at which time it took the  
20 position that judicial economy would not be served by sending the  
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22 <sup>4</sup>(...continued)  
23 all "Local Bankruptcy Rule" references are to the Local Bankruptcy  
24 Rules of the Bankruptcy Court for the Central District of  
25 California.

25 <sup>5</sup> No arbitration proceeding had been initiated as of the  
26 Petition Date.

1 fee dispute to arbitration. The bankruptcy court set a further  
2 briefing schedule on the Relief From Stay Motion, giving Hebb until  
3 May 5, 2011, to submit a further brief on the issue, and Ateco until  
4 June 16, 2011, to respond. At the April 7 Hearing, the Bankruptcy  
5 Court also joined the Claim Objection with the Adversary Proceeding  
6 ("Substantive Proceedings") and set a schedule for filing documents  
7 which would allow a summary judgment motion from Ateco to be heard  
8 on July 26, 2011 ("July 26 Hearing") in the Substantive Proceedings  
9 in conjunction with the further hearing on the Relief From Stay  
10 Motion.

11 On April 27, 2011, prior to the deadline for filing his  
12 additional brief on the Relief From Stay Motion, Hebb filed his  
13 first appeal to this Panel ("First Appeal"), requesting that the  
14 Panel direct the bankruptcy court to grant the Relief From Stay  
15 Motion to allow immediate arbitration of the fee dispute. On  
16 June 23, 2011, the Panel in the First Appeal granted a stay of the  
17 Substantive Proceedings and remanded to the bankruptcy court to  
18 determine "whether the [Arbitration Stipulation] made in the state  
19 court proceedings is subject to the [Federal Arbitration Act], and  
20 if so, is there any valid basis to deny arbitration." The  
21 bankruptcy court held the July 26 Hearing, and in light of the  
22 remand from the Panel, orally granted the Relief From Stay Motion  
23 and continued the summary judgment proceedings on the Substantive  
24 Proceedings to November 9, 2011 ("November 9 Hearing") to allow  
25 arbitration proceedings to conclude before ruling on Ateco's summary  
26 judgment motion.

1           Ultimately the Panel dismissed the First Appeal as moot because  
2 the bankruptcy court had granted the Relief From Stay Motion.<sup>6</sup>  
3 However, it was a complicated process getting to that dismissal  
4 based substantially on the action, or more precisely, the inaction,  
5 of Hebb. As the prevailing party, Hebb was required by Local  
6 Bankruptcy Rule 9021-1(1) to prepare and submit an order granting  
7 the Relief From Stay Motion. He did not. On December 29, 2011, the  
8 Panel, noting that no order had yet been entered granting the Relief  
9 From Stay Motion, issued a remand order ("Remand Order"), which  
10 directed Hebb to file a written response stating why the First  
11 Appeal should not be dismissed as moot in light of the bankruptcy  
12 court's July 26, 2011 ruling on the Relief From Stay Motion. The  
13 Remand Order also informed Hebb he could request and obtain an order  
14 granting the Relief From Stay Motion so that he could proceed with  
15 binding arbitration. Despite the Remand Order, Hebb still did not  
16 submit an order for the bankruptcy court to sign as required by  
17 Local Bankruptcy Rule 9021-1(1). Instead, on January 17, 2012,  
18 after learning of the Remand Order, the bankruptcy court entered its  
19 own order ("Relief From Stay Order").

20           The Relief From Stay Order provided that it applied to "the  
21 following non-bankruptcy case or administrative proceeding" and  
22 identified the Fee Litigation as follows:

23           Case name: Hebb vs. Ateco, Inc., et al.  
24           Court or agency where pending: LA County

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25  
26           <sup>6</sup> The First Appeal was dismissed on February 7, 2012.

1 The Relief From Stay Order further provided:

2 5. Movant may proceed in the non-bankruptcy forum to  
3 final judgment (including any appeals) in accordance with  
4 applicable non-bankruptcy law.

5 6.a. Movant is granted leave to continue with arbitration  
6 and liquidate the amount of the claim.

7 The state court held a status hearing in the Fee Litigation on  
8 September 14, 2011, at which time the state court dismissed the Fee  
9 Litigation based upon (1) the existence of the Arbitration  
10 Stipulation and (2) the bankruptcy court's grant of relief from stay  
11 to allow the parties to proceed to arbitration. Hebb did not appear  
12 at the status hearing in the Fee Litigation but contends that he was  
13 aware of the intended disposition of the Fee Litigation, having  
14 "consulted with" the state court prior to the hearing. Thereafter,  
15 Hebb requested the assistance of the bankruptcy court in selecting  
16 an arbitrator and compelling arbitration, which the bankruptcy court  
17 ultimately denied because (1) relief from stay had been granted to  
18 proceed to arbitration in the Fee Litigation, and (2) Hebb had  
19 provided no authority for the bankruptcy court to compel the  
20 arbitration where relief from stay had been granted.

21 When the bankruptcy court issued a show cause order why both  
22 the bankruptcy case and the adversary proceeding should not be  
23 dismissed since the parties were making no attempt to resolve the  
24 dispute through arbitration, Hebb moved the state court to vacate  
25 the dismissal of the Fee Litigation.

26 The state court held a hearing on the motion on April 18, 2012.  
At that time the state court clarified that the Relief From Stay



1 Order was broad enough to encompass resolution of the fee dispute  
2 outside of the bankruptcy court, construed the motion to vacate as a  
3 request to set a trial date on the merits, and offered a trial date  
4 of July 2, 2012, contending that the parties should have been nearly  
5 ready for trial at the time they entered the Arbitration  
6 Stipulation. Hebb declined to proceed to trial, insisting instead  
7 upon arbitration, and withdrew his motion to vacate on the record.  
8 Hebb apparently was acting under the impression that a motion to  
9 compel arbitration could be a separate proceeding such that he no  
10 longer needed the Fee Litigation in light of the existence of the  
11 Arbitration Stipulation.

12 Hebb finally initiated arbitration proceedings through JAMS on  
13 April 20, 2012. Thereafter, Ateco took the position that the  
14 Arbitration Stipulation was ineffective in the face of the dismissal  
15 of the litigation in which it arose. Ateco alternatively asserted  
16 that the Arbitration Stipulation expired on its own terms when  
17 arbitration was not completed by November 15, 2010, and that Hebb,  
18 through his delay in initiating arbitration, had waived his right to  
19 arbitrate the fee dispute.

20 On May 9, 2012 ("May 9 Hearing"), the bankruptcy court,  
21 apprised of the recent proceedings in the State Trial Court, held a  
22 status hearing and took under advisement the issue of whether the  
23 bankruptcy case should be dismissed where the fee dispute,  
24 resolution of which was central to confirmation of any chapter 11  
25 plan, had stalled the case for more than 21 months.

26 On June 27, 2012, the bankruptcy court entered its Memorandum

1 Re: Whether This Case Should Be Dismissed ("Memorandum"). In the  
2 Memorandum, the bankruptcy court determined (1) the FAA did not  
3 apply to the Arbitration Stipulation, and (2) to the extent the CAA  
4 might apply to the Arbitration Stipulation, Hebb, through his delay,  
5 had waived any right to enforce the Arbitration Stipulation. In  
6 light of that waiver, the bankruptcy court set the Substantive  
7 Proceedings for resolution through summary judgment proceedings,  
8 with oral argument to be held September 5, 2012. A contemporaneous  
9 status hearing was set so that once the fee dispute was resolved,  
10 "it will be clear whether the proposed plan can proceed or not, and  
11 each of the remaining motions can be addressed in order."

12 On July 11, 2012, Hebb filed a timely motion for  
13 reconsideration of the Memorandum, which the bankruptcy court denied  
14 by its order entered July 31, 2012. In the interim, on July 30,  
15 2012, Hebb filed a premature Notice of Appeal from the Memorandum.  
16 On July 31, 2012, the bankruptcy court denied Hebb's motion for stay  
17 pending appeal. On August 1, 2012, Hebb filed an emergency motion  
18 for stay pending appeal with the Panel, which also was denied.

19 On August 29, 2012, our Clerk issued an "Order re Finality"  
20 which required Hebb to establish that the bankruptcy court's order  
21 was final such that the Notice of Appeal could confer jurisdiction  
22 on the Panel. The Panel thereafter deemed Hebb's response to the  
23 Order re Finality to be a motion for leave to appeal, which it  
24 granted by order entered October 25, 2012, in order to determine  
25 whether any alleged right Hebb had to arbitration was implicated by  
26 continuing the Substantive Proceedings in the bankruptcy court.

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II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES<sup>7</sup>

Whether the bankruptcy court erred when it determined that the FAA did not apply to the Arbitration Stipulation.

Whether the bankruptcy court abused its discretion when it determined that Hebb had waived any right to arbitration he might have had under the CAA.

IV. STANDARDS OF REVIEW

Whether a dispute is subject to the Federal Arbitration Act is a question of law we review de novo. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)(by its terms the Arbitration Act leaves no place for the exercise of discretion by a trial court). De novo review requires that we consider a matter afresh, as if no decision had been rendered previously. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

We review the bankruptcy court's determination that Hebb waived his right to arbitrate under the CAA for an abuse of discretion.

"[T]he question of waiver is one of fact, and an appellate court's

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<sup>7</sup> Hebb did not raise any issue in this appeal with respect to the denial of the motion for reconsideration. Accordingly, any such issue is waived. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (issues not specifically argued in opening brief are waived).

1 function is to review a trial court's findings regarding waiver to  
2 determine whether [they] are supported by substantial evidence.'  
3 'The appellate court may not reverse the trial court's finding of  
4 waiver unless the record as a matter of law compels finding  
5 nonwaiver.'" (Internal citations omitted). Augusta v. Keehn &  
6 Assocs., 193 Cal. App. 4th 331 (2011) (quoting Berman v. Health Net,  
7 80 Cal. App. 4th 1359, 1363-1364 (2000)).

8 We apply a two-part test to determine whether the bankruptcy  
9 court abused its discretion. United States v. Hinkson, 585 F.3d  
10 1247, 1261-62 (9th Cir. 2009)(en banc). First, we consider de novo  
11 whether the bankruptcy court applied the correct legal standard to  
12 the relief requested. Id. Then, we review the bankruptcy court's  
13 fact findings for clear error. Id. at 1262 & n.20. We must affirm  
14 the bankruptcy court's fact findings unless we conclude that they  
15 are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in  
16 inferences that may be drawn from the facts in the record.'" Id.

17 This standard of review is similar to that applied by  
18 California appellate courts. Under California law, "[a]n abuse of  
19 discretion is shown if there is no substantial basis for the trial  
20 court's ruling or the court applied an incorrect legal standard."  
21 Ibarra v. Super. Ct., \_\_\_ Cal. Rptr. 3d \_\_\_, 2013 WL 3242955 (Cal.  
22 App. 2d Dist. 2013)(citation omitted).

## 23 V. DISCUSSION

### 24 I. The FAA Does Not Apply to the Fee Dispute.

25 The FAA applies to maritime transactions or contracts  
26 "evidencing a transaction involving commerce. . . ." 9 U.S.C. § 2.

1 The FAA defines "commerce" to exclude purely intrastate contracts.  
2 9 U.S.C. § 1 ("'[C]ommerce,' as defined herein, means commerce among  
3 the several States or with foreign nations, or in any Territory of  
4 the United States or in the District of Columbia and any State or  
5 Territory or foreign nation. . . ."). Thus, the bankruptcy court  
6 did not err when it determined the FAA did not apply to the  
7 Arbitration Stipulation.

8 The dispute underlying the Arbitration Stipulation arises  
9 out of wholly intrastate legal services between a  
10 California attorney and a California client, conducted  
11 solely in a California state court. No portion of this  
12 transaction affects interstate commerce. It is  
13 inappropriate to apply the FAA to the Arbitration  
14 Stipulation.

15 Memorandum at 11:20-23.

16 II. Hebb Waived Any Right He Might Have Had to Compel Arbitration  
17 Under the CAA.

18 The CAA provides:

19 A written agreement to submit to arbitration an existing  
20 controversy or a controversy thereafter arising is valid,  
21 enforceable and irrevocable, save upon such grounds as  
22 exist for the revocation of any contract.

23 Cal. Code Civ. Proc. § 1281. As noted by the bankruptcy court,  
24 waiver not only is a ground for revocation of contracts generally,  
25 it is an explicit basis upon which the right to arbitration may be  
26 denied.

On petition of a party to an arbitration agreement  
alleging the existence of a written agreement to arbitrate  
a controversy and that a party thereto refuses to  
arbitrate such controversy, the court shall order the  
petitioner and respondent to arbitrate the controversy if  
it determines than an agreement to arbitrate the  
controversy exists, unless it determines that:

1           (a) The right to compel arbitration has been  
2           waived by the petitioner. . . .

3 Cal. Code Civ. Proc. § 1281.2 (emphasis added).

4           The issue of waiver under the CAA is not novel. The Supreme  
5 Court of California has identified the factors a trial court must  
6 consider in determining whether a right to arbitration has been  
7 waived:

8           In determining waiver, a court can consider: (1) whether  
9 the party's actions are inconsistent with the right to  
10 arbitrate; (2) whether the litigation machinery has been  
11 substantially invoked and the parties were well into  
12 preparation of a lawsuit before the party notified the  
13 opposing party of an intent to arbitrate; (3) whether a  
14 party either requested arbitration enforcement close to  
15 the trial date or delayed for a long period before seeking  
16 a stay; (4) whether a defendant seeking arbitration filed  
17 a counterclaim without asking for a stay of the  
18 proceedings; (5) whether important intervening steps [e.g.  
19 taking advantage of judicial discovery procedures not  
20 available in arbitration] had taken place; and (6) whether  
21 the delay affected, misled, or prejudiced, the opposing  
22 party.

23 St. Agnes Med. Ctr. v. PacifiCare of Cal., 31 Cal. 4th 1187, 1196  
24 (2003)(internal quotation marks and citations omitted).

25           The bankruptcy court observed that waiver under the CAA is  
26 commonly found "where the party seeking arbitration has . . .  
unreasonably delayed in seeking arbitration." Memorandum at  
12:25-26 (citing Augusta, 193 Cal. App 4th at 337). However, the  
bankruptcy court also noted the existence of a strong public policy  
favoring arbitration as a counterpoint to waiver. Memorandum at  
12:15-18 (citing St. Agnes Med. Ctr., 31 Cal. 4th at 1195).

          Under the unreasonable delay standard, Hebb was responsible to  
"timely seek relief either to compel arbitration or dispose of the

1 lawsuit." Lewis v. Fletcher Jones Motor Cars, Inc., 2012 Cal. App.  
2 LEXIS 489 \*10 (Cal. App. 4th Dist. 2012). The bankruptcy court  
3 reviewed Hebb's actions in seeking arbitration and concluded that  
4 they supported a finding that Hebb had waived his right to  
5 arbitration under the CAA.

6 First, Hebb waited approximately five months after Ateco filed  
7 its bankruptcy case to file the Relief From Stay Motion. Second,  
8 after the Panel issued its remand in the First Appeal, the  
9 bankruptcy court orally granted the Relief From Stay Motion at the  
10 July 26 Hearing. Hebb thereafter failed completely to pursue the  
11 entry of an order which would allow him to proceed with arbitration.  
12 He was on notice through the bankruptcy court's local rules that, as  
13 the prevailing party, the responsibility to submit an order was his.  
14 Hebb did not act as required under the local rules. Neither did he  
15 act when, in the First Appeal, we brought the lack of an order to  
16 his attention and reminded him that he could request the order from  
17 the bankruptcy court. Ultimately, the bankruptcy court itself  
18 prepared and entered the Relief From Stay Order on January 17, 2012.  
19 Hebb is accountable for the nearly six-months delay in the entry of  
20 the Relief From Stay Order.

21 Even then, Hebb took no appropriate action to pursue  
22 arbitration until the bankruptcy court issued its order to show  
23 cause. While during this time Hebb did request that the bankruptcy  
24 court compel arbitration, that action was not within the realm of  
25 the bankruptcy court's authority where relief from stay had been  
26 granted to proceed to arbitration through the Fee Litigation and

1 therefore was meaningless other than to delay and confuse the  
2 proceedings. We also note that the state court was prepared to try  
3 the Fee Litigation by July 2, 2012, which would have "disposed of  
4 the lawsuit." Instead, Hebb chose to withdraw the dispute from the  
5 purview of the state court and initiate an arbitration despite  
6 protestations from Ateco regarding the continuing validity of the  
7 Arbitration Stipulation, thus again delaying any ultimate resolution  
8 of the dispute.<sup>8</sup>

9 The bankruptcy court cited numerous California state court  
10 decisions in which a party was found to have waived its right to  
11 arbitration based on delays significantly shorter than the  
12 twenty-one months involved in the fee dispute here. See, e.g.,  
13 Lewis, 2012 Cal. App. LEXIS 489 (less than five months); Augusta,  
14 193 Cal. App 4th 331 (six-and-one-half months); Adolph v. Coastal  
15 Auto Sales, Inc., 184 Cal. App. 4th 1443 (2010) (six months);  
16 Guess?, Inc. v. Super. Ct., 79 Cal. App. 4th 553, 556 (2000) (less  
17 than four months); Kaneko Ford Design v. Citipark, Inc., 202 Cal.  
18 App. 3d 1220, 1228-29 (1988) (five-and-one-half months). These  
19 cases adequately support the bankruptcy court's fact finding that  
20 Hebb's delay in exercising his right to arbitrate under the CAA was

21 \_\_\_\_\_  
22 <sup>8</sup> An additional, affirmative, waiver of his right to  
23 arbitrate the fee dispute under the CAA is reflected in Hebb's  
24 argument to the bankruptcy court at the November 9 Hearing, where he  
25 states his understanding that only the FAA applied to the  
26 Arbitration Stipulation. See Tr. of November 9, 2011 Hr'g at  
10:13-11:19. It appears this also was the basis for Hebb's  
withdrawal of his motion to vacate dismissal of the Fee Litigation  
in the state court.



1 unreasonable.

2 In evaluating whether a delay is sufficient to support a  
3 finding that a party has waived its rights under the CAA, California  
4 courts also consider not only whether the delay was unreasonable,  
5 but whether it was prejudicial to the other party. See Augusta,  
6 193 Cal. App 4th at 337, 340-42. Here, Ateco has pending a  
7 relatively small chapter 11 case. It is self-evident that the  
8 prospects for a reorganization do not get better the longer a case  
9 lingers. As the bankruptcy court stated numerous times, until the  
10 Fee Dispute is resolved, no determination can be made whether  
11 Ateco's reorganization efforts ultimately will be viable. Ateco has  
12 been further prejudiced by the excessive cost it has incurred in  
13 responding to Hebb's uncertainty about how, and even where, to  
14 proceed to enforce the Arbitration Stipulation.

15 Under these circumstances, we cannot determine that the  
16 bankruptcy court abused its discretion when it found that Hebb had  
17 waived his right to arbitration under the CAA.<sup>9</sup>

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19 \_\_\_\_\_  
20 <sup>9</sup> Hebb filed his proof of claim in Ateco's bankruptcy case,  
21 and Ateco objected to the claim. Pursuant to 28 U.S.C.  
22 § 157(b)(2)(B), allowance or disallowance of Hebb's claim is a core  
23 proceeding, notwithstanding that state law might be applied to  
24 resolve the fee dispute. Under Ninth Circuit precedent, the  
25 bankruptcy court had discretion to decline to enforce the  
26 Arbitration Stipulation in a core proceeding if arbitration would  
conflict with the underlying purposes of the Bankruptcy Code.  
Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation  
Co.), 671 F.3d 1011 (9th Cir. 2012). Thorpe Insulation stands as an  
alternative basis upon which the bankruptcy court could have  
proceeded to resolve the fee dispute, independent of any waiver by  
Hebb under the CAA.

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VI. CONCLUSION

The bankruptcy court correctly determined that the Arbitration Stipulation was not subject to the FAA, where it did not implicate interstate commerce. The bankruptcy court did not abuse its discretion when it determined that Hebb waived his right to enforce the Arbitration Stipulation under the CAA through his dilatory lack of action over a prolonged period. We AFFIRM.