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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos. CC-10-1048-PaKiL
)	CC-10-1354-PaKiL
CERY BRADLEY PERLE,)	(Consolidated)
)	
Debtor.)	Bk. No. 01-26497-BB
_____)	
)	Adv. No. 06-01971-BB
CERY BRADLEY PERLE,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
ALFONSO FIERO,)	
)	
Appellee.)	
_____)	

Argued and Submitted on November 17, 2010
at Pasadena, California

Filed - December 6, 2010

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: Darrell Palmer of the Law Offices of Darrell Palmer
argued for Appellant Cery Bradley Perle.
Leslie Schwaebe Akins of Leslie Schwaebe Akins,
A.L.C. argued for Appellee Alfonso Fiero.

Before: PAPPAS, KIRSCHER and LYNCH,² Bankruptcy Judges.

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

² The Honorable Brian D. Lynch, United States Bankruptcy
Judge for the Western District of Washington, sitting by
designation.

1 Chapter 7³ debtor Cery Bradly Perle ("Perle") appeals the
2 decision of the bankruptcy court that a debt owed to creditor
3 Alfonso Fiero ("Fiero")⁴ is nondischargeable under §§ 523(a)(6)
4 and (19). We AFFIRM.

5
6 **FACTS**

7 The events that gave rise to the nondischargeability judgment
8 occurred in 1997 and 1998. There were two registered securities
9 broker-dealers involved in this dispute, Waldron & Co., Inc.
10 ("Waldron") and Fiero Brothers, Inc., both of which were members
11 of the National Association of Securities Dealers ("NASD").⁵
12 Perle was president and controlling stockholder of Waldron.
13 According to Perle's own testimony, no decisions at Waldron were
14 made without Perle's approval, and he controlled all operations at
15 Waldron.

16 Shopping.com ("Shopping.com" or its stock trading symbol,
17 "IBUY") was an internet retailer. In August 1997, Waldron planned
18 Shopping.com's initial public offering ("IPO") of shares. Perle
19

20
21 ³ Unless otherwise indicated, all chapter, section and rule
22 references herein are to the Bankruptcy Code, 11 U.S.C.
23 §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure,
24 Rules 1001-9037, as enacted and promulgated prior to the effective
date (October 17, 2005) of most of the provisions of the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

25 ⁴ Alfonso Fiero is the assignee of a judgment awarded to
26 brokerage firm, Fiero Brothers. Unless indicated otherwise, Fiero
refers to Alfonso Fiero, John Fiero (the owner of Fiero Brothers)
and Fiero Brothers, collectively or individually.

27 ⁵ Unless otherwise indicated, we will use the names and
28 terms of the securities industry at the time these events
occurred.

1 performed the due diligence for the IPO and participated in the
2 "road show" for potential investors. Waldron took Shopping.com
3 public on November 25, 1997.

4 During the IPO, Shopping.com raised \$11.7 million on the sale
5 of 1.3 million shares of common stock at a price of \$9.00.
6 Shopping.com shares thereafter traded publicly in the over-the-
7 counter market and prices for IBUY shares were quoted on the
8 NASD's OTC Bulletin Board.

9 Waldron was registered with NASD as the primary market maker
10 for Shopping.com. NASD required all stocks to have at least three
11 market makers, which has a precise meaning in federal securities
12 law: "The term 'market maker' means any . . . dealer who, with
13 respect to a security, holds himself out (by entering quotations
14 in an inter-dealer communications system or otherwise) as being
15 willing to buy and sell such security for his own account on a
16 regular or continuous basis." 15 U.S.C. § 74c(38). In other
17 words, a market maker posts bid and ask prices to the public and
18 must be ready to buy or sell the stock at the posted prices. The
19 NASD Bulletin Board posted all orders of market makers on a real
20 time basis.

21 From November 1997 through at least April 1998, Waldron
22 controlled nearly all of the Shopping.com shares available for
23 public trading. As of December 19, 1997, Waldron held 253,295
24 shares of Shopping.com stock in its inventory accounts, and its
25 customers held 972,320 shares. Thus, on December 19, 1997,
26 Waldron controlled 94.3 percent of the 1.3 million publicly
27 tradable shares, and never held less than 90 percent of those
28 shares from December 19, 1997 through April 3, 1998.

1 Between November 25, 1997 and March 23, 1998, Shopping.com's
2 stock price increased 255 percent, from \$9.00 to \$32.13 per share.
3 This was in spite of the company's poor financial performance.
4 For the nine-month period ending just before the IPO on October
5 31, 1998, Shopping.com had revenues of \$376,822 and losses of \$2.4
6 million; for the fiscal year ending January 31, 1998, there were
7 revenues of \$850,724 and losses of \$5.52 million; for the first
8 fiscal quarter of 1999, there were revenues of \$917,836 and a loss
9 of \$4.7 million.

10 Fiero became a registered market maker of Shopping.com stock
11 on January 28, 1998. Between January 28, 1998 and February 11,
12 1998, Fiero bought and sold Shopping.com stock, acquiring a net
13 short position of 78,432 shares with a weighted average cost of
14 \$22.89 per share. A short sale is the selling of a security that
15 the seller does not own, or any sale that is completed by the
16 delivery of a security borrowed by the seller. Provost v. United
17 States, 269 U.S. 443, 446 (1926). In other words, as of February
18 11, 1998, Fiero had sold 78,432 shares of Shopping.com that it did
19 not own.⁶

20 On February 11, 2008, Fiero was notified by its clearing firm
21 that Waldron would be effecting a "buy-in" of a large portion of
22 Fiero's short position the next day. A buy-in is a securities
23 industry procedure in which the buyer, in situations where the
24 short seller cannot deliver on a trade, is permitted to go into
25 the market to "cover," or buy the security, and charge the seller
26 the difference between the trade price and the cover price.

27
28 ⁶ This is not illegal, especially for a market maker.
However, the practice was strictly regulated by the NASD.

1 On February 12, 1998, Waldron conducted a buy-in of
2 Shopping.com stock against Fiero of 35,350 shares at \$25.25 per
3 share. Rule 1180(c)(1)(C) of NASD's Uniform Practice Code
4 requires the party who causes the buy-in to justify the price of
5 the shares "bought in" and that the shares be purchased at the
6 "best available market." The record reflects that on February 12,
7 1998, the prices at which Shopping.com were traded ranged from
8 \$21.25 to \$24.875 per share, and no transactions were recorded at
9 \$25.25. Fiero alleged that the buy-in on February 12 charged by
10 Waldron cost Fiero \$26,513 in above market prices.

11 The NASD Arbitration

12 On February 17, 1998, Fiero filed a Statement of Claim and
13 Demand for Arbitration before NASD Regulation, Inc., commencing
14 the arbitration proceeding, In the Matter of the Arbitration Among
15 Fiero Brothers, Inc. vs. Waldron & Co., Cery Perle et al.,
16 Arbitration No. 98-00587(the "NASD Arbitration"). Fiero alleged
17 that Perle and Waldron engaged in fraudulent, artificial market-
18 making activity, parking arrangements, guarantees against loss,
19 and fraudulent purchasing or "buy-ins" of Shopping.com stock on
20 February 12, 1998.

21 Fiero amended its claim in the NASD Arbitration on March 18,
22 1998, expanding the dates and number of fraudulent buy-ins to
23 include March 6, 11 and 16, 1998. Specifically, Fiero alleged
24 that on March 6, Perle and Waldron executed a buy-in against Fiero
25 of 25,455 shares at \$29 per share when the market price was
26 between 25 15/16 and 25 31/32; on March 11, Perle and Waldron
27 bought in 36,428 shares at \$36 per share, when the market price
28 was between 29 1/4 and 29 5/16; and on March 16, 38,050 of Fiero's

1 shares were bought in at \$26.50 per share, when the market price
2 was between 21 13/16 and 21 7/8.

3 The Fiero Statement of Claim as amended also alleged that
4 Waldron and Perle had manipulated the price of the Shopping.com
5 stock by (a) controlling the supply, purchasing large blocks of
6 stock to reduce the amount of shares available for public trading,
7 executing unauthorized trades and parking stock in customer and
8 fictitious accounts, and preventing customers from selling
9 Shopping.com stock in their accounts; (b) creating artificial
10 demand for the stock by issuing a false and misleading press
11 release and, while Waldron was acting as market maker, raising the
12 bid for the stock without economic justification; and
13 (c) executing a short squeeze by fraudulently buying-in
14 Shopping.com stock at above-market prices, which conduct violated
15 NASD Uniform Practice Code § 11810(c)(1) (C), 17 C.F.R. §
16 240.10.b-5, and Waldron's and Perle's fiduciary duties in the
17 execution of a securities trade.

18 As a result of the buy-ins at above market value of the
19 securities, Fiero asked the arbitrators to award compensatory
20 damages of \$510,000. For the scheme to manipulate and defraud,
21 Fiero sought \$3,250,000 for unjust enrichment.

22 Waldron and Perle asserted a cross-claim in the arbitration,
23 alleging Fiero had engaged in defamation and tortious interference
24 with business relations.

25 The arbitration panel issued its Statement of Decision on
26 September 17, 1998, awarding Fiero \$350,000 in compensatory
27 damages against Perle and Waldron, and denying Perle's cross-
28 claim. The decision contained no findings of fact or conclusions

1 of law, nor any explanation for the reasons for the award.

2 Fiero filed a petition in Los Angeles Superior Court on
3 February 10, 1999, case no. BS055659, to confirm the arbitration
4 award. The petition came on for hearing on March 17, 1999. The
5 state court noted that there was no opposition to the petition and
6 granted it, confirming the arbitration award of \$350,000 in
7 Fiero's favor against Waldron and Perle. An order granting the
8 confirmation of the NASD Arbitration Award was entered on April 6,
9 1999.

10 The SEC Investigation and District Court Action

11 On March 24, 1998, the SEC suspended trading in Shopping.com
12 for ten days, citing the "recent market activity . . . that may
13 have been the result of manipulative conduct." The SEC conducted
14 an investigation, taking testimony from the parties, including
15 Perle. Following the investigation, the SEC filed an action
16 against Perle and Waldron in the U.S. District Court for the
17 Central District of California, SEC v. Waldron & Co. and Perle,
18 No. CV 99-3299 DT, seeking injunctive relief for violating the
19 anti-fraud provisions of the federal securities laws and
20 manipulating the price of stock. Perle answered the complaint,
21 generally denying the allegations; Waldron defaulted.

22 In December 1998, the SEC filed a motion for summary judgment
23 on all its claims. Perle did not oppose the summary judgment
24 motion and it was granted. In February 1999, the District Court
25 entered a final judgment, ordering Perle to pay a \$110,000 civil
26 penalty and enjoining him from future securities law violations
27 (the "SEC Judgment"). Perle moved to vacate the SEC Judgment,
28 which motion was denied. Perle did not appeal either the SEC

1 Judgment or the denial of the motion to vacate.

2 Along with the SEC Judgment, the District Court entered very
3 thorough findings of fact and conclusions of law. The fact
4 findings included:

5 - Perle controlled and was responsible for all actions of
6 Waldron.

7 - Even before the IPO filing, Waldron was planning to
8 manipulate the supply of Shopping.com stock.

9 - Between November 1997 and at least late March 1998, Perle
10 requested and received from Shopping.com's president a
11 confidential report from Depository Trust Company, tracking which
12 brokerage firms held Shopping.com stock. Perle admitted that he
13 "personally monitored" the information in the DTC report. The
14 evidence submitted established that one of the brokerage firms
15 that Perle was tracking was Fiero.

16 - Perle through Waldron acted to control the supply of
17 Shopping.com stock by conducting unauthorized trades and parking
18 stock in its customers' accounts. Perle sold Shopping.com stock
19 to its customers without authorization, and then sold those shares
20 out of the customer accounts without authorization. Perle delayed
21 responding to or ignored customer requests to sell the
22 Shopping.com stock. Perle even created fictitious accounts to
23 park the stock.

24 - Perle and Waldron required all Waldron account
25 representatives to sign a Penalty Bid, by which the representative
26 would lose any commission on the sale of Shopping.com stock within
27 90 days of purchase.

28 - Perle directed Waldron's public relations arm to issue a

1 misleading press release urging the public to buy Shopping.com
2 stock.

3 - Because Waldron controlled over 90 percent of the publicly
4 traded shares, Waldron was able to execute a "short squeeze" by
5 which Waldron created a shortage of stock in the market and made
6 it difficult for short sellers to find stock to deliver on their
7 short sales.⁷ Waldron controlled the supply and, in fact, was the
8 buyer of most of the short sales. Waldron then charged buy-in
9 prices usually far in excess of the market price of the stocks.

10 The District Court then concluded that Perle had violated
11 three securities laws:

12 - 15 U.S.C. § 77q(a), also known as § 17(a) of the Securities
13 Act.⁸

14 - 15 U.S.C. § 78j(b), also known as § 10(b) of the Exchange
15

16
17 ⁷ "A 'short squeeze' is a situation when prices of a stock
18 or commodity futures contract start to move up sharply and many
19 traders with short positions are forced to buy stocks or
20 commodities in order to cover their positions and prevent losses.
21 This sudden surge of buying leads to even higher prices, further
22 aggravating the losses of short sellers who have not covered their
23 positions." Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275,
24 1277 (11th Cir. 2005) (quoting John Downes & Jordan Elliot
25 Goodman, BARRON'S FINANCE & INVESTMENT HANDBOOK 807 (6th ed. 2003)).

26 ⁸ 15 U.S.C. § 77q. **Fraudulent interstate transactions**
27 (a) Anti-fraud and anti-manipulation enforcement authority. It
28 shall be unlawful for any person in the offer or sale of any
securities . . . by the use of any means or instruments of
transportation or communication in interstate commerce or by use
of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue
statement of a material fact or any omission to state a material
fact necessary in order to make the statements made, in light of
the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of
business which operates or would operate as a fraud or deceit upon
the purchaser.

1 Act,⁹ and Rule 10b-5 thereunder.¹⁰

2 - 15 U.S.C. § 78o(c)(1).¹¹

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4
5 ⁹ 15 U.S.C. § 78j. **Manipulative and deceptive devices**
6 It shall be unlawful for any person, directly or indirectly, by
7 the use of any means or instrumentality of interstate commerce or
8 of the mails, or of any facility of any national securities
9 exchange-- . . . (b) To use or employ, in connection with the
10 purchase or sale of any security registered on a national
11 securities exchange or any security not so registered . . . , any
12 manipulative or deceptive device or contrivance in contravention
13 of such rules and regulations as the Commission may prescribe as
14 necessary or appropriate in the public interest or for the
15 protection of investors.

16
17 ¹⁰ 17 C.F.R. § 240.10b-5 **Employment of manipulative and**
18 **deceptive devices.** It shall be unlawful for any person, directly
19 or indirectly, by the use of any means or instrumentality of
20 interstate commerce, or of the mails or of any facility of any
21 national securities exchange, (a) To employ any device, scheme, or
22 artifice to defraud, (b) To make any untrue statement of a material
23 fact or to omit to state a material fact necessary in order to
24 make the statements made, in the light of the circumstances under
25 which they were made, not misleading, or (c) To engage in any act,
26 practice, or course of business which operates or would operate as
27 a fraud or deceit upon any person, in connection with the purchase
28 or sale of any security.

17 ¹¹ 15 U.S.C. § 78o. **Registration and regulation of brokers**
18 **and dealers.** . . .
19 (c)(1) (A) No broker or dealer shall make use of the mails or any
20 means or instrumentality of interstate commerce to effect any
21 transaction in, or to induce or attempt to induce the purchase or
22 sale of, any security . . . by means of any manipulative,
23 deceptive, or other fraudulent device or contrivance.
24 (B) No broker, dealer, or municipal securities dealer shall
25 make use of the mails or any means or instrumentality of
26 interstate commerce to effect any transaction in, or to induce or
27 attempt to induce the purchase or sale of, any municipal security
28 or any security-based swap agreement (as defined in section 206B
of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involving a
municipal security by means of any manipulative, deceptive, or
other fraudulent device or contrivance.
(C) No government securities broker or government securities
dealer shall make use of the mails or any means or instrumentality
of interstate commerce to effect any transaction in, or to induce
or to attempt to induce the purchase or sale of, any government
security or any security-based swap agreement (as defined in
section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note])
involving a government security by means of any manipulative,
deceptive, or other fraudulent device or contrivance.

1 matrix.¹³

2 Corsair filed a complaint on August 28, 2001, initiating an
3 adversary proceeding objecting to discharge of the Corsair debt
4 under §§ 523(a)(2),(4) and (6), alleging that Perle's conduct
5 giving rise to the debt was fraudulent, willful and malicious,
6 larcenous and a breach of fiduciary duty.¹⁴

7 Corsair moved for summary judgment in May 2002. The
8 bankruptcy court held a hearing on the motion on June 18, 2002.
9 Thereafter, on August 14, 2002, the court granted the motion and
10 entered its findings of fact and conclusions of law. Among the
11 fact findings were the following:

12 - The principles of issue preclusion applied to the SEC
13 Judgment and the judgment against Perle in the Corsair District
14 Court Action.

15 - The judgment against Perle in the Corsair District Court
16 Action established the willful, intentional nature of Perle's
17 conduct, as well as the fact that it violated § 10(b), Rule 10b-5,
18 and other federal securities laws.

19 - The SEC Judgment, the judgment in the Corsair District
20 Court Action, and the findings of fact and conclusions of law in

21 _____
22 ¹³ Perle did list the SEC Judgment for \$110,000 on Schedule E
23 and the matrix. Perle also listed the Corsair Judgment on
Schedule F as an unknown amount.

24 ¹⁴ A related matter to the Corsair adversary proceeding was
25 the role of Fiero's counsel, Martin P. Russo, in that proceeding.
26 On August 8, 2001, Jeff Scott, counsel for Corsair, notified Russo
27 of Perle's bankruptcy and asked Russo to co-counsel the Corsair
28 adversary proceeding. In his deposition, Russo did not recall
receiving formal notice of the bankruptcy at that time. Russo
Dep. 53:3-5 (December 29, 2008). However, he stated that he did
not think he received formal notice of the bankruptcy on behalf of
Fiero. Russo Dep. at 55:11.

1 the SEC Judgment established that Perle inflicted a willful and
2 malicious injury on Corsair within the meaning of § 523(a)(6).

3 The bankruptcy court entered final summary judgment under
4 § 523(a)(6) determining that Perle's obligation under the Corsair
5 District Court judgment was excepted from discharge. Perle
6 appealed this judgment to the Panel, but the Panel dismissed the
7 appeal on April 29, 2003, for Perle's failure to prosecute.

8 The Fiero Adversary Proceeding

9 John Fiero, owner of Fiero Brothers, stated in his deposition
10 in this action that Fiero did not receive notice of Perle's
11 bankruptcy until sometime in 2005. Once informed, Alfonso Fiero,
12 the appellee herein, moved to reopen the Perle bankruptcy case on
13 October 10, 2006, and filed his nondischargeability complaint
14 under §§ 523(a)(6) and (19). Perle answered the complaint,
15 generally denying the allegations, and asserting affirmative
16 defenses, including that the complaint was not timely filed.

17 On September 30, 2009, Fiero and Perle each moved for summary
18 judgment. Fiero claimed that there were no triable issues of
19 material fact as to all elements of the claims under §§ 523(a)(6)
20 and (19). Fiero submitted an evidentiary record including
21 portions of the NASD Arbitration evidence, the SEC Judgment, and
22 the Corsair District Court Action and judgment; the Martinsen
23 declaration that tied Fiero to the short squeeze executed by
24 Perle; and the deposition of Gillespie, Perle's office manager,
25 that Perle knew that Fiero was short when Perle executed the short
26 squeeze.

27 In defense, Perle's motion relied principally on § 523(a)(3)
28 and Rule 4007(c)'s statute of limitations, arguing that Fiero's

1 complaint was untimely as to § 523(a)(6). Additionally, Perle
2 argued that his alleged wrongdoing under the securities laws
3 occurred before the enactment of § 523(a)(19), and that provision
4 should not be applied retroactively.

5 The bankruptcy court held a hearing on both summary judgment
6 motions on December 17, 2009. A transcript of that hearing is in
7 the record. Before the hearing, the bankruptcy court had issued a
8 Tentative Ruling, granting Fiero's motion and denying Perle's
9 motion. The bankruptcy court's Tentative Ruling applied issue
10 preclusion to the findings, conclusions, judgment and orders
11 entered in the SEC Judgment proceeding, the Corsair District Court
12 Action, the Corsair Adversary Proceeding, and the NASD Arbitration
13 proceeding.

14 At the hearing, the bankruptcy court first allowed oral
15 argument on Perle's summary judgment motion and then affirmed its
16 Tentative Ruling denying the motion. Oral argument then proceeded
17 on Fiero's motion. As to Perle's argument that the NASD
18 Arbitration panel made no findings and awarded less than Fiero
19 requested, the bankruptcy court firmly rejected this argument:

20 All of the theories set forth in Fiero's statement of
21 claims are for damages attributable to debtor's market
22 manipulation, resulting in a short squeeze, and the
23 excessive amounts Fiero was required to pay to cover the
24 short positions as a result. The arbitrator did not
25 make specific factual findings as to whether this
26 conduct by debtor was willful or malicious, but specific
27 factual findings about the identical conduct have been
28 made that are sufficient for this purpose. . . . The
allegation is that the debtor caused plaintiff to buy
stock of Shopping.com at prices that he knew his company
had artificially and unlawfully inflated. On these
facts, the defendant cannot seriously dispute that he
knew injury to plaintiff would necessarily result. The
arbitration award sets forth the amount of the damage
that resulted. In addition, because the same conduct
qualifies as the kind of conduct contemplated by section

1 290 F.3d 1140, 1142 (9th Cir. 2002); Maaskant v. Peck (In re
2 Peck), 295 B.R. 353, 360 (9th Cir. BAP 2003). A mixed question
3 exists when the facts are established, the rule of law is
4 undisputed, and the issue is whether the facts satisfy the legal
5 rule. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th
6 Cir. 1997). De novo means review is independent, with no deference
7 given to the trial court's conclusion. Rule 8013.

8
9 **DISCUSSION**

10 **I.**

11 **The bankruptcy court did not err in determining that the NASD**
12 **Arbitration Award was nondischargeable under § 523(a)(6).**

13 This appeal comes to the Panel for review of competing claims
14 for summary judgment: an award of summary judgment in favor of
15 Fiero concluding that there were no genuine issues of material
16 fact, and that issue preclusion applied to prevent relitigation of
17 the elements of Fiero's nondischargeability claims under
18 §§ 523(a)(6) and (19); and denial of summary judgment to Perle,
19 who alleged that there were disputed facts, including whether
20 Fiero had notice of Perle's bankruptcy in time to commence a
21 timely action under § 523(a)(6).¹⁶

22 Summary judgment shall be granted "if the pleadings, the
23 discovery and disclosure materials on file, and any affidavits
24 show that there is no genuine issue as to any material fact and

25
26 ¹⁶ In Perle's opening brief, he states that he disputes 23 of
27 the "106 material facts" Fiero presented in his Separate Statement
28 of Undisputed Facts presented to the bankruptcy court with Fiero's
summary judgment motion. However, Perle does not identify for us
and discuss what those disputed facts are, other than the notice
question.

1 that the movant is entitled to judgment as a matter of law."
2 Civil Rule 56(c)(2), as incorporated by Rule 7056; Barboza v. New
3 Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).
4 The trial court does not weigh evidence in resolving such motions,
5 but rather determines only whether a material factual dispute
6 remains for trial. Covey v. Hollydale Mobilehome Estates, 116 F.3d
7 830, 834 (9th Cir. 1997). A dispute is genuine if there is
8 sufficient evidence for a reasonable fact finder to hold in favor
9 of the non-moving party, and a fact is "material" if it might
10 affect the outcome of the case. Far Out Prods., Inc. v. Oskar,
11 247 F.3d 986, 992 (9th Cir. 2001) (citing Anderson v. Liberty
12 Lobby, Inc., 477 U.S. 242, 248-49 (1986)). The initial burden of
13 showing there is no genuine issue of material fact rests on the
14 moving party. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).
15 If the non-moving party bears the ultimate burden of proof on an
16 element at trial, that party must make a showing sufficient to
17 establish the existence of that element in order to survive a
18 motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S.
19 317, 322-23 (1986).

20 A. Whatever knowledge Russo had regarding the bankruptcy
21 filing of Perle was not imputed to Fiero.

22 We first examine whether there was a disputed material fact
23 that Fiero had actual knowledge of Perle's bankruptcy case in time
24 to timely file an action to determine the dischargeability of his
25 claim against Perle under § 523(a)(6).¹⁷ In other words,

26 ¹⁷ Although Perle appears to argue that notice of the
27 bankruptcy would apply to all nondischargeability actions,
28 § 523(a)(3)(B) only applies to actions under § 523(a)(2)(4) and
(continued...)

1 according to Perle, the NASD Arbitration Award should be
2 discharged because Fiero did not file a timely discharge action as
3 required by § 523(a)(3)(B).¹⁸

4 Significantly, Perle never argues that Fiero had actual
5 knowledge of his bankruptcy case. Rather, Perle argues that
6 Fiero's one-time attorney, Russo, had actual knowledge of the case
7 in sufficient time to file a timely nondischargeability action,
8 and that this knowledge is imputed to Fiero. Perle bases this
9 argument on several grounds: that Russo is the "MPR Law Practice"
10 listed on the creditor's matrix in connection with the Corsair
11 District Court Action; that Russo was representing Corsair in the
12 Corsair Adversary Proceeding where he necessarily was aware that
13 Perle was in bankruptcy; and that Russo was the New York State
14 designated agent for service of process on Fiero from 2000 to
15 2004. None of Perle's arguments have merit.

16 As to the argument that Russo may have received written or
17 oral notice of the Perle bankruptcy in connection with his
18 representation of Corsair, the bankruptcy court expressed

19

20

21 ¹⁷(...continued)
22 (6). It does not apply to nondischargeability under § 523(a)(19).

22

23

24 (a) A discharge under section 727, 1141, 1228(a),
25 1228(b), or 1328(b) of this title does not discharge an individual
26 debtor from any debt- . . . (3)neither listed nor scheduled under
27 section 521(1) of this title, with the name, if known to the
28 debtor, of the creditor to whom such debt is owed, in time to
permit- . . . (B) if such debt is of a kind specified in paragraph
(2), (4), or (6) of this subsection, timely filing of a proof of
claim and timely request for a determination of dischargeability
of such debt under one of such paragraphs, unless such creditor
had notice or actual knowledge of the case in time for such timely
filing and request[.]

1 astonishment that notice regarding one client would require
2 attorneys to search their client list for other possible
3 creditors: "Just to expect that a law firm, whenever they got a
4 notice for one client, should have to somehow figure out that it
5 relates to some other client I don't think is reasonable, and I
6 certainly don't think there's any authority for that proposition."
7 Tr. Hr'g 11:17-22 (December 17, 2009).

8 To its credit, there is clear authority supporting the
9 bankruptcy court's position. Indeed, an attorney given notice of
10 the bankruptcy on behalf of a particular client is not called upon
11 to review all of his or her files to ascertain whether any other
12 clients may also have a claim against the debtor. "Notice sent to
13 an authorized attorney or agent must at least signify the client
14 for whom it is intended so that the attorney can know whom to
15 advise[.]" Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985);
16 Seifert v. Rice (In re Rice), ___ B.R. ___, 2010 Bankr. LEXIS 639
17 *5 (Bankr. E.D. N.C. 2010) (same) ; accord Carpet Servs. v.
18 Hutchison (In re Hutchison), 187 B.R. 533, 536 (Bankr. S.D. Tex.
19 1995).

20 The bankruptcy court had evidence that Russo had not
21 represented Fiero in the NASD Arbitration for three years
22 at the time of Perle's bankruptcy filing. Thus, information Russo
23 might have obtained regarding Perle's bankruptcy was not within
24 the "scope and duration" of Russo's retention as Fiero's attorney
25 in the NASD Arbitration Award, and such knowledge would not be
26 imputed to Fiero. Bell v. Brown, 557 F.2d 849 (D.C. Cir. 1977)
27 ("Notice is not imputed to the client unless it comes to the
28 attorney within the duration and scope of the attorney-client

1 relationship.")(emphasis added). And the New York law that
2 generally governs the attorney-client relationship between a New
3 York-licensed lawyer (Russo) and a New York corporation (Fiero)
4 instructs that an attorney's knowledge is imputed to the client
5 only when the attorney "is employed to represent a principal with
6 respect to a given matter and acquires knowledge material to that
7 representation." Veal v. Geraci, 23 F.3d 722, 725 (2d Cir. 1994).

8 Finally, Russo's designation by Fiero as its agent for
9 service of process, even if true, would only obligate him or his
10 firm to deliver process to his client that is properly addressed
11 in accordance with New York or Federal Civil Procedure
12 requirements. N.Y. BUS. & CORP. LAW § 305; N.Y.C.P.L.R. § 318.
13 There is nothing in the New York statutory or case law that would
14 impose an obligation on a designated agent to communicate anything
15 other than the process documents to a client.

16 We conclude that the bankruptcy court did not err in ruling
17 that there was no authority for Perle's argument that whatever
18 knowledge Russo might have had about the Perle bankruptcy was
19 imputed to his client, Fiero. The law is to the contrary, and
20 since this question is resolved as a matter of law, it is not a
21 disputed material fact, and the bankruptcy court did not err in
22 denying summary judgment to Perle.¹⁹

23

24

25 ¹⁹ Perhaps Perle understood the tenuousness of his argument
26 as evidenced by his offer to submit expert testimony to the
27 bankruptcy court that Russo had an obligation under New York
28 ethics rules to communicate this information to his client. The
court, however, correctly ruled that it had no need for expert
testimony on a question of law. Nationwide Transp. Fin. v. Cass
Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008).

1 B. The bankruptcy court did not err in applying issue
2 preclusion to establish the elements of
nondischargeability under § 523(a)(6).

3 The bankruptcy court determined that whether Fiero's claim
4 against Perle arose from willful and malicious conduct to support
5 an exception to discharge under § 523(a)(6) had been fully
6 litigated and decided in Fiero's favor in the SEC Judgment
7 proceeding, the Corsair District Court Action, the Corsair
8 Adversary Proceeding, and the NASD Arbitration. Our first task is
9 to determine if issue preclusion applies to these decisions.

10 Looking first to the SEC Judgment, this is the decision of a
11 federal district court. The preclusive effect of a federal court
12 decision is determined by federal common law. Taylor v. Sturgell,
13 533 U.S. 880, 890 (2008); W. Sys., Inc. v. Ulloa, 958 F.2d 864,
14 871 (9th Cir. 1992). The elements of issue preclusion in federal
15 common law are: (1) the issue was actually decided by a court in
16 an earlier action, (2) the issue was necessary to the judgment in
17 that action, (3) there was a valid and final judgment, and (4) the
18 person against whom issue preclusion is asserted in the present
19 action was a party or in privity with a party in the previous
20 action Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th
21 Cir. 2008); see also Christopher Klein, Lawrence Ponoroff, & Sarah
22 Borrey, Principles of Preclusion and Estoppel in Bankruptcy Cases,
23 79 AM. BANKR. L.J. 839, 852 (2005).

24 The first and second elements of issue preclusion are
25 addressed below. As to the third element, the SEC Judgment was a
26 valid and final judgment. George v. City of Morrow Bay (In re
27 George), 318 B.R. 729, 733 (9th Cir. BAP 2004) (finality occurs
28 when a federal court enters judgment disposing of all claims). As

1 to the fourth element, Perle was the named defendant in the SEC
2 Judgment litigation, and the party against whom the judgment and
3 fines were assessed.

4 A creditor bears the burden of proving that its claim against
5 a debtor is excepted from discharge under § 523(a)(6) by a
6 preponderance of the evidence. Harmon v. Kobrin (In re Harmon),
7 250 F.3d 1240, 1246 (9th Cir. 2001); see also Grogan v. Garner,
8 498 U.S. 279, 284 (1991). Section 523(a)(6) provides: "(a) A
9 discharge under 727 . . . of this title does not discharge an
10 individual debtor from any debt - . . . (6) for willful and
11 malicious injury by the debtor to another entity or to the
12 property of another entity." The issue of Perle's willful and
13 malicious conduct was also fully litigated in the SEC Judgment
14 litigation, and necessary to that judgment. Whether a particular
15 debt is for willful and malicious injury by the debtor to another
16 or the property of another under section 523(a)(6) requires
17 application of a two-pronged test to the conduct giving rise to
18 the injury: the creditor must prove that the debtor's conduct in
19 causing the injuries was both willful and malicious. Barboza v.
20 New Form, Inc. (In re Barboza), 545 F.3d 702,711 (9th Cir.
21 2008)(citing Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47
22 (9th Cir. 2002) and requiring the application of a separate
23 analysis in each prong of "willful" and "malicious").

24 In this context, to show that a debtor's conduct is willful
25 requires proof that the debtor deliberately or intentionally
26 injured the creditor or the creditor's property, and that in doing
27 so, the debtor intended the consequences of his act, not just the
28 act itself. Kawaauhau v. Geiger, 523 U.S. 57, 60-61; In re Su,

1 290 F.3d at 1143. The debtor must act with a subjective motive to
2 inflict injury, or with a belief that injury is substantially
3 certain to result from the conduct. Id.

4 For conduct to be malicious, the creditor must prove that
5 the debtor: (1) committed a wrongful act; (2) done intentionally;
6 (3) which necessarily causes injury; and (4) was done without
7 just cause or excuse. Id.

8 Whether a debtor's conduct is willful and malicious under
9 section 523(a)(6) is a question of fact reviewed for clear
10 error. Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d
11 862, 869 (9th Cir. 2001).

12 In this case, the issue of Perle's willful and malicious
13 conduct was fully litigated in the SEC Judgment litigation, and
14 necessary to that judgment. The district court determined that
15 Perle had orchestrated a "short squeeze" which damaged those
16 parties which had taken short positions in Shopping.com stock.
17 Among other findings, the district court found that this behavior
18 was a necessary element entering judgment for violation of, among
19 other laws, Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)
20 and Rule 10-b5 thereunder (17 C.F.R. § 240.10b-5).²⁰

21 Perle, by engaging in the conduct described above
22 [creating the short squeeze and damaging the short
23 sellers], indirectly or directly, in connection with the
24 purchase or sale of securities, by the use of the means
25 or instrumentalities of interstate commerce . . . with
scienter . . . engaged in acts, practices or courses of
business which operated or would operate as a fraud or
deceit upon other persons, in violation of Section 10(b)
of the Exchange Act and Rule 10b-5 thereunder.

26 Findings of Fact and Conclusions of Law Re: Plaintiff Securities
27

28 ²⁰ For the text of this law and rule, see supra, nn.9 and 10.

1 and Exchange Commission's Motion for Summary Judgment Against Cery
2 B. Perle at p. 26, ¶ 3 (C.D. Cal., May 3, 1999) (emphasis added).

3 The United States Supreme Court has held that violations of
4 § 10(b) necessarily involve intentional and willful misconduct.
5 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200 (1976) ("§ 10-b was
6 intended to proscribe . . . intentional misconduct.") This
7 conclusion is reinforced by a trial court's ruling that a party
8 acted with scienter, as the district court did in the SEC
9 Judgment. Id. at. 190 ("Scienter is the intent to deceive,
10 manipulate or defraud.") Thus, the SEC Judgment meets the first
11 requirement in Geiger for willfulness, that it be willful,
12 intentional misconduct. The second element under Geiger is that
13 Perle acted "with a subjective motive to inflict injury, or with a
14 belief that injury is substantially certain to result from the
15 conduct." Although Fiero was not a party to the SEC Judgment, the
16 SEC introduced evidence that (1) as part of a short squeeze, Perle
17 executed buy-ins of Fiero stock on the four occasions alleged in
18 the NASD Arbitration; and (2) Perle knew that Fiero would be
19 damaged as a result of the short squeeze.

20 Thomas Martinsen, an Examiner with the Pacific Regional
21 Office of the Securities and Exchange Commission, submitted a
22 sworn declaration as part of the SEC Judgment litigation
23 proceedings. Martinsen had been assigned to investigate a
24 complaint that Perle and Waldron controlled and dominated the
25 market for Shopping.com stock. Among Martinsen's conclusions
26 were:

27 Waldron was able to make money from these buy-in
28 transactions because of its control of over 90% of the
publicly tradable IBUY shares. Beginning in late

1 January 1998. . . Waldron purchased large amounts of
2 IBUY stock[], reducing the number of available shares.
3 In fact, Waldron was on the buy side of most of the
4 short sale transactions. When it came time to produce
5 the shares of IBUY they had sold to Waldron, the short
6 sellers could not because Waldron already had most of
7 the stock in its inventory and retail accounts. Because
8 of their failure to produce the stock they had sold to
9 Waldron, Waldron then "bought in" the short sellers,
filling the buy-ins from its own inventory. . . . This
strategy of controlling the supply of a security and
buying-in short sellers with one's own inventory is
called a "short squeeze." Attached as Exhibit 7 and
incorporated herein is a true and correct copy of a
spreadsheet prepared by members of the [SEC staff]
reflecting the profits Waldron realized from the buy-
ins.

10 Martinsen Dec. at 5. Exhibit 7 to the Martinsen declaration,
11 included in the excerpts of record in this appeal, lists all buy-
12 in transactions executed by Perle of IBUY stock as part of his
13 short squeeze. This list specifically identifies the four
14 transactions between Waldron and Fiero at issue in the NASD
15 Arbitration (on February 11, March 6, 11 and 16, 1998). For each
16 of these transactions, the exhibit lists the number of shares
17 bought in, the buy-in price, the actual market price, and the
18 amount of Waldron's profit. The numbers in the SEC staff report
19 regarding the buy-ins of Fiero shares by Waldron are consistent
20 with those alleged in the NASD Arbitration.

21 In addition, that Perle knew that Fiero would be damaged as a
22 result of the short squeeze was shown by the testimony of Kevin
23 Gillespie, the office manager of Perle:

24 SEC: How did you gain an understanding it might have
been because of the short squeeze?

25 Gillespie: We knew that Fieros had sold stock which they
26 couldn't possibly own.

27 SEC: And how did you know that?

28 Gillespie: From Mr. Perle and from these sheets that he

1 spoke about [see above regarding the DTC reports], the
2 sheets that he spoke about, being the underwriter
3 sheets, and knowing where the stock was.

3 . . .

4 SEC: How did Waldron know it was Fiero that was involved
5 in the short squeeze?

6 Gillespie: They were market makers and they would
7 specifically be on the box selling stock to our Trading
8 Department.

9 Gillespie Dep. 59:2-22 (June 3, 1998). Therefore, the SEC
10 Judgment clearly supports a conclusion that Perle intentionally
11 and willfully orchestrated the short squeeze, that he targeted
12 short sellers, specifically including Fiero, and knew that injury
13 was substantially certain to result from his conduct. The SEC
14 Judgment meets the requirements for willfulness under § 523(a)(6).

15 That Perle's conduct was malicious is almost self-evident.
16 The district court found Perle's actions violated several
17 securities laws, which are by definition "wrongful acts." Perle's
18 acts were committed intentionally, as discussed in the previous
19 paragraph. They also necessarily caused injury; a short squeeze
20 by definition is an attempt to force parties to sell stock from a
21 disadvantaged position. And Perle has never attempted to justify
22 his actions.

23 In short, the SEC Judgment alone establishes in the present
24 case that Perle engaged in willful and malicious conduct by
25 orchestrating a short squeeze that injured Fiero. In other words,
26 all the required issues for an exception to discharge were fully
27 litigated in the district court action, these findings were
28 necessary elements in the judgment finding Perle in violation of
securities laws, the SEC Judgment is a final judgment, and Perle,

1 the only defendant in that action, was the party against whom
2 issue preclusion is asserted. Consequently, the SEC Judgment was
3 preclusive on the issue of Perle's willful and malicious conduct.

4 Because issue preclusion is clearly available to the
5 bankruptcy court based solely upon the SEC Judgment, and the court
6 did not discuss the preclusive effects of the other three
7 judgments separately from the SEC Judgment, we need not examine
8 whether the other three judgments had issue preclusive effect.
9 Indeed, the bankruptcy court indicated at the motion hearing that
10 it was primarily relying on the SEC Judgment for preclusion as to
11 the willful and malicious conduct:

12 Was the conduct that occurred . . . willful and
13 malicious conduct, and for that I've got the District
14 Court action [-] the SEC action. . . . Just looking at
15 the [SEC] District Court action . . . there are findings
16 in that about the intentional conduct here of the . . .
market manipulation that resulted in the short squeeze .
17 . . and frankly there isn't any dispute that Fiero was
short in the stock and had to cover and, as a result,
had to pay more as a result of the short squeeze.

17 Hr'g Tr. 7:7-20.

18 Having established that issue preclusion is available to the
19 bankruptcy court, the next step is to determine if the court
20 abused its discretion in deciding to apply issue preclusion. The
21 bankruptcy court found that there were no legal or equitable
22 grounds that would prevent it from applying issue preclusion and
23 we agree.²¹ Thus, the bankruptcy court did not err in determining

24 _____
25 ²¹ On appeal, Perle argues that the equitable doctrine of
26 laches bars the nondischargeability complaint. According to
27 Perle, Fiero should have filed the complaint five years earlier
and so should not be allowed to reopen the bankruptcy case and
28 file the nondischargeability complaint after so long. The
bankruptcy court addressed this concern by noting that laches

(continued...)

1 that the parties were precluded from relitigating the issue of
2 willful and malicious conduct, and the bankruptcy court did not
3 err granting summary judgment to Fiero that the NASD Arbitration
4 Award was excepted from discharge under § 523(a)(6).

6 **II.**

7 **The bankruptcy court did not err in determining that**
8 **the NASD Arbitration Award was excepted from discharge**
9 **under § 523(a)(19).**

10 The bankruptcy court ruled that Perle's debt to Fiero was
11 also excepted under § 523(a)(19),²² which excepts debts from

12 _____
13 ²¹(...continued)

14 would only apply equitably if Fiero had known about the bankruptcy
15 petition in time to file the timely complaint. Hr'g Tr. 15:14-21.
16 By its ruling that Fiero had no timely notice, the bankruptcy
17 court determined that laches could not apply. This is consistent
18 with controlling case law, that will only apply laches against a
19 party for lack of diligence in pursuing its rights. Costello v.
20 United States, 365 U.S. 265, 282 (1961).

21 ²² § 523 **Exceptions to discharge**

22 (a) A discharge under section 727, 1141, 1228(a), 1228(b), or
23 1328(b) of this title does not discharge an individual debtor from
24 any debt- . . . (19) that--

25 (A) is for--

26 (i) the violation of any of the Federal securities laws
27 (as that term is defined in section 3(a)(47) of the
28 Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)]), any
of the State securities laws, or any regulation or order
issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in
connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the
petition was filed, from--

(i) any judgment, order, consent order, or decree entered
in any Federal or State judicial or administrative
proceeding;

(ii) any settlement agreement entered into by the debtor;
or

(iii) any court or administrative order for any damages,
fine, penalty, citation, restitutionary payment, disgorgement
payment, attorney fee, cost, or other payment owed by the
debtor.

1 discharge incurred for violation of federal securities laws. In
2 this case, there is no dispute that Perle violated several
3 securities laws of the United States. The only issue for the
4 Panel is whether § 523(a)(19) applied to the NASD Arbitration
5 Award, which award was entered before the effective date of
6 § 523(a)(19), July 31, 2002.

7 The bankruptcy court directly addressed whether § 523(a)(19)
8 could be applied to Fiero's claim against Perle:

9 The applicable cases, including Gibbons, stand for the
10 proposition that Congress intended section 523(a)(19) to
11 be applicable to pending cases and that, at least where
12 the conduct in question was already unlawful at the time
13 of a new statute's enactment and the statute does not
14 reflect a Congressional intent to the contrary, a
15 bankruptcy court should apply the law in effect at the
16 time a discharge action is adjudicated to assess whether
17 to grant or deny a debtor's discharge. Here, the only
18 reason the adversary proceeding was not pending at the
19 time section 523(a)(19) was enacted was because the
20 debtor failed to give the plaintiff notice of his
21 bankruptcy filing. Thus, section 523(a)(19) should be
22 applied to this now pending discharge proceeding.

23 Perle had argued, based on one of the few decisions to
24 address the applicability of new § 523(a)(19), Smith v. Gibbons
25 (In re Gibbons), 289 B.R. 588 (Bankr. S.D.N.Y. 2003), that
26 Congress meant the new discharge exception to apply in bankruptcy
27 cases filed prior to its July 31, 2002 effective date only if that
28 bankruptcy case was "still pending on the date of enactment.'" See
id. at 593 n.8. Because Perle's bankruptcy had been closed on
March 28, 2002, and it was not pending when § 523(a)(19) became
effective on July 31, 2003, according to Perle, the new discharge
exception did not apply to him.

On the contrary, the Gibbons court clearly held that
§ 523(a)(19) applied to securities law violations by a debtor,

1 even if that misconduct occurred before the enactment of
2 § 523(a)(19). In Gibbons, Smith invested funds with Gibbons.
3 Between 1997 and 1999, she lost almost her entire investment
4 because of Gibbons' fraud and multiple violations of securities
5 laws. Smith brought an NASD arbitration proceeding in 1999 and
6 the arbitration panel issued an award in her favor on November 6,
7 2000. On July 11, 2001, Gibbons filed a petition under chapter 7
8 and on September 28, 2001, Smith brought an adversary proceeding
9 seeking nondischargeability of the arbitration award under several
10 subsections of § 523(a), which was later amended to include
11 § 523(a)(19).

12 The Gibbons court was faced with two legal questions. First,
13 did § 523(a)(19) apply retroactively to misconduct by a debtor and
14 awards granted before its enactment? The court applied the
15 controlling law on retroactive application of legislation in
16 Landgraf v. USI Film Prod., 511 U.S. 244, 268 (1994). Following
17 the teachings of Landgraf, the court analyzed both the express
18 words of § 523(a)(19) and the legislative history, and concluded
19 that Congress intended § 523(a)(19) "to apply to prior conduct
20 [and] should apply to the maximum extent possible to all existing
21 bankruptcies." In re Gibbons, 289 B.R. at 595.

22 The second question faced by the Gibbons court was whether
23 the court should apply the law of nondischargeability of debts as
24 of the petition date (which would be before enactment of
25 § 523(a)(19)), or the day it renders its decision (after
26 enactment). The Gibbons court followed the "traditional view"
27 that "the law to be applied in a nondischargeability action is the
28 law in force at the time of decision." Id. at 596 n.13.

1 That same principle was emphasized in the appeal of In re
2 Gibbons to the district court.²³ In its decision, the district
3 court affirmed the bankruptcy court, and confirmed the bankruptcy
4 court's ruling: "[D]eterminations of whether or not a debtor is
5 entitled to a discharge in bankruptcy of any given debt are
6 governed by the law in force at the time the judge passes on the
7 question of the discharge of that debt. In re Spell, 650 F.2d 375,
8 377 (2d Cir. 1981); In re Blair, 644 F.2d 69, 69 (2d Cir. 1980)."
9 In re Gibbons, 311 B.R. 402, 403 (S.D.N.Y. 2004).

10 Since Perle provided no other authority for his argument that
11 § 523(a)(19) could not be applied here and, absent a Ninth Circuit
12 rule on point, we prefer the approach in In re Gibbons. As the
13 bankruptcy court persuasively observed:

14 [A] bankruptcy court should apply the law in effect at
15 the time a discharge action is adjudicated to assess
16 whether to grant or deny a debtor's discharge [of a
17 particular debt]. Here, the only reason the adversary
18 proceeding was not pending at the time section
19 523(a)(19) was enacted was because the debtor failed to
20 give the plaintiff notice of his bankruptcy filing.
21 Thus, section 523(a)(19) should be applied to this now
22 pending discharge proceeding. The law in effect now
23 includes section 523(a)(19). The conduct alleged was
24 illegal and wrongful at the time it occurred. None of
25 the facts and circumstances surrounding this case give
26 rise to any reason to depart from the general rule that
27 the Court should apply the exceptions to discharge in
28 effect at the time it is evaluating whether or not to
except a claim from discharge. Had debtor served
plaintiff with notice of the bankruptcy filing in a
timely manner, he might have been able to have this
action concluded before section 523(a)(19) was adopted,
but he did not do so and therefore should not be
permitted to argue that this action should be resolved
under prior law as it existed at that time.

Bankruptcy Court's Tentative Ruling (December 17, 2009), confirmed

²³ Perle neglected to inform the Panel in its Gibbons'
citation that there was an appeal.

1 at Hr'g Tr. 62:14 ("My tentative ruling will stand.").

2 We conclude that the bankruptcy court did not err in
3 determining that the NASD Arbitration Award was excepted from
4 discharge under § 523(a)(19).

5

6

CONCLUSION

7

We AFFIRM the judgment of the bankruptcy court.²⁴

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27 ²⁴ Fiero has moved to strike the declaration of Thomas Fehn
28 from the excerpts of record. We did not rely on the Fehn
Declaration in reaching our decision. The motion is DENIED.