NOT FOR PUBLICATION

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
CERY BRADLEY PERLE,	Adv. No. 06-01971-BB
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.

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[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.

Chapter 7[3] debtor Cery Bradly Perle ("Perle") appeals the decision of the bankruptcy court that a debt owed to creditor Alfonso Fiero ("Fiero")[4] is nondischargeable under §§ 523(a)(6) and (19). We AFFIRM.

FACTS

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

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

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[3] Unless otherwise indicated, all chapter, section and rule references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, 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.

[4] Alfonso Fiero is the assignee of a judgment awarded to 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.

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

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

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

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

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

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

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

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

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

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

The NASD Arbitration

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

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

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

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

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

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

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

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

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

The SEC Investigation and District Court Action

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

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

Judgment or the denial of the motion to vacate.

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] 15 U.S.C. § 77q. **Fraudulent interstate transactions**
(a) Anti-fraud and anti-manipulation enforcement authority. It 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.

Act,[9] and Rule 10b-5 thereunder.[10]

- 15 U.S.C. § 78o(c)(1).[11]

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

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

[11] 15 U.S.C. § 78o. **Registration and regulation of brokers and dealers**. . . .
(c)(1) (A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . by means of any manipulative, deceptive, or other fraudulent device or contrivance.
(B) No broker, dealer, or municipal 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 attempt to induce the purchase or sale of, any municipal security 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.

The Corsair District Court Action

Besides Fiero, there were other short sellers who were allegedly harmed by the activities of Perle and Waldron. Two of the short sellers were Corsair Capital Partners ("Corsair") and Alternative Investments, L.P. ("AI"). Between February 20 and March 12, 1998, Corsair and AI sold short approximately 32,800 shares of Shopping.com at an average price of $24 per share. Then, between March 16 and May 27, 1998, Waldron bought in Corsair's and AI's shares at prices up to $13.25 more than the weighted average market price of the shares on the dates of sale. In March 1999, Corsair and AI filed suit against Perle in the U.S. District Court for the Central District of California, Case No. SA-CV 99-459 AHS, alleging federal and state securities law violations. Perle filed an answer but the District Court struck the answer for his failure to appear at trial. A default judgment was entered against Perle for $685,825.00, based on the District Court's finding that Perle had violated § 10(b) and Rule 10-b5 (the "Corsair District Judgment"). Perle did not appeal.

The Bankruptcy Filing and Corsair Adversary Proceeding

On May 25, 2001, Perle filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. Perle did not list Fiero as a creditor, or the NASD Arbitration Award to Fiero as a debt on Schedules E or F.[12] Perle did not notify Fiero of the filing of the bankruptcy, and Perle did not list Fiero on the creditor

[12] Perle did list "NASD/NASD Regulation" as a creditor on Schedule E. However, this was listed as a "1999 Arbitration" of unknown amount. The NASD Arbitration occurred in 1998 and was for an undisputed sum of $350,000.

matrix.[13]

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

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

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

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

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

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[13] Perle did list the SEC Judgment for $110,000 on Schedule E and the matrix. Perle also listed the Corsair Judgment on Schedule F as an unknown amount.

[14] A related matter to the Corsair adversary proceeding was the role of Fiero's counsel, Martin P. Russo, in that proceeding. On August 8, 2001, Jeff Scott, counsel for Corsair, notified Russo of Perle's bankruptcy and asked Russo to co-counsel the Corsair 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.

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

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

The Fiero Adversary Proceeding

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

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

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

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

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

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

> All of the theories set forth in Fiero's statement of claims are for damages attributable to debtor's market manipulation, resulting in a short squeeze, and the excessive amounts Fiero was required to pay to cover the short positions as a result. The arbitrator did not make specific factual findings as to whether this conduct by debtor was willful or malicious, but specific factual findings about the identical conduct have been 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

523(a)(19), it is nondischargeable under that section as well.

The court tentatively accepted Fiero's proposed findings of fact, and allowed Perle a reasonable time to object to those findings.

On February 1, 2010, the bankruptcy court entered its judgment determining that the NASD Arbitration Award was nondischargeable under §§ 523(a)(6) and (19). Perle filed a timely notice of appeal on February 9, 2010.[15]

JURISDICTION

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

ISSUES

1. Whether the bankruptcy court erred in determining that the NASD Arbitration Award was nondischargeable under § 523(a)(6).

2. Whether the bankruptcy court erred in determining that the NASD Arbitration Award was nondischargeable under § 523(a)(19).

STANDARD OF REVIEW

"Whether a claim is nondischargeable presents mixed issues of law and fact and is reviewed de novo." Carrillo v. Su (In re Su),

[15] On July 1, 2010, after briefing had commenced in this appeal, the bankruptcy court entered findings of fact and conclusions of law regarding Fiero's motion for summary judgment. Perle separately appealed this order. The Panel consolidated the appeals as they dealt with the same subject matter. Although the bankruptcy court's entry of findings after an appeal was in progress is somewhat irregular, it appears that Perle has not been prejudiced. The Panel has examined the post-appeal findings and compared them to the proposed findings submitted to the bankruptcy court before entry of the summary judgment. The changes in the findings are minor and consistent with the rulings the bankruptcy court made on the record on December 19, 2009.

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

DISCUSSION

I.

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

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

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

[16] In Perle's opening brief, he states that he disputes 23 of the "106 material facts" Fiero presented in his Separate Statement 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.

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

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

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

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

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

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

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

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

[18] § 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt– . . . (3)neither listed nor scheduled under section 521(1) of this title, with the name, if known to the 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[.]

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

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

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

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

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

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

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[19] Perhaps Perle understood the tenuousness of his argument as evidenced by his offer to submit expert testimony to the bankruptcy court that Russo had an obligation under New York 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).

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

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

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

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

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

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

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

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

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

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

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

> Perle, by engaging in the conduct described above [creating the short squeeze and damaging the short sellers], indirectly or directly, in connection with the purchase or sale of securities, by the use of the means 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.

Findings of Fact and Conclusions of Law Re: Plaintiff Securities

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

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

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

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

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

> January 1998. . . Waldron purchased large amounts of IBUY stock[], reducing the number of available shares. In fact, Waldron was on the buy side of most of the short sale transactions. When it came time to produce the shares of IBUY they had sold to Waldron, the short sellers could not because Waldron already had most of the stock in its inventory and retail accounts. Because of their failure to produce the stock they had sold to 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.

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

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

> SEC: How did you gain an understanding it might have been because of the short squeeze?
>
> Gillespie: We knew that Fieros had sold stock which they couldn't possibly own.
>
> SEC: And how did you know that?
>
> Gillespie: From Mr. Perle and from these sheets that he

> spoke about [see above regarding the DTC reports], the sheets that he spoke about, being the underwriter sheets, and knowing where the stock was.
>
> . . .
>
> SEC: How did Waldron know it was Fiero that was involved in the short squeeze?
>
> Gillespie: They were market makers and they would specifically be on the box selling stock to our Trading Department.

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

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

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

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

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

> Was the conduct that occurred . . . willful and malicious conduct, and for that I've got the District Court action [—] the SEC action. . . . Just looking at the [SEC] District Court action . . . there are findings in that about the intentional conduct here of the . . . market manipulation that resulted in the short squeeze . . . 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.

Hr'g Tr. 7:7–20.

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

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[21] On appeal, Perle argues that the equitable doctrine of laches bars the nondischargeability complaint. According to Perle, Fiero should have filed the complaint five years earlier and so should not be allowed to reopen the bankruptcy case and file the nondischargeability complaint after so long. The bankruptcy court addressed this concern by noting that laches (continued...)

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

II.

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

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

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

[22] § 523 **Exceptions to discharge**
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt– . . . (19) that--
(A) is for--
(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the 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.

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

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

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

Perle had argued, based on one of the few decisions to address the applicability of new § 523(a)(19), Smith v. Gibbons (In re Gibbons), 289 B.R. 588 (Bankr. S.D.N.Y. 2003), that Congress meant the new discharge exception to apply in bankruptcy cases filed prior to its July 31, 2002 effective date only if that 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,

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

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

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

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

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

> [A] bankruptcy court should apply the law in effect at the time a discharge action is adjudicated to assess whether to grant or deny a debtor's discharge [of a particular debt]. Here, the only reason the adversary proceeding was not pending at the time section 523(a)(19) was enacted was because the debtor failed to give the plaintiff notice of his bankruptcy filing. Thus, section 523(a)(19) should be applied to this now pending discharge proceeding. The law in effect now includes section 523(a)(19). The conduct alleged was illegal and wrongful at the time it occurred. None of the facts and circumstances surrounding this case give rise to any reason to depart from the general rule that the Court should apply the exceptions to discharge in 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

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

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

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

CONCLUSION

We AFFIRM the judgment of the bankruptcy court.[24]

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