

MAY 27 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos. AZ-15-1165-JuKuJa
)	AZ-15-1166-JuKuJa
CAPITAL OPTIONS, LLC,)	AZ-15-1167-JuKuJa
)	(Related Appeals)
Debtor.)	
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)	Bk. No. 2:12-bk-12-13416-GBN
CAPITAL OPTIONS, LLC,)	
)	Adv. Nos. 2:14-ap-00158-GBN
Appellant,)	2:14-ap-00166-GBN
)	
v.)	MEMORANDUM*
)	
C. DENNIS LOOMIS; BAKER)	
HOSTETLER, LLP; GEORGE H.)	
GOLDSMITH; G2, LLC,)	
)	
Appellees.)	
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Argued and Submitted on May 20, 2016
at Phoenix, Arizona

Filed - May 27, 2016

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: H. Lee Horner Jr. of Goldstein, Horner & Horner,
Attorneys PLLC argued for appellant Capital
Options, LLC; Steven D. Jerome of Snell & Wilmer
LLP argued for appellees C. Dennis Loomis and
Baker Hostetler, LLP; Warren John Stapleton of
Osborn Maledon, PA argued for appellees George H.
Goldsmith and G2, LLC.

* 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 8024-1.

1 Before: JURY, KURTZ, and JAIME,** Bankruptcy Judges.

2 In these related appeals chapter 11¹ debtor, Capital
3 Options, LLC (CO), appeals from (1) the order dismissing its
4 adversary complaint against George H. Goldsmith (Goldsmith) and
5 G2, LLC (G2) with prejudice, and the order denying
6 reconsideration of that order (BAP No. AZ-15-1167); (2) the
7 order dismissing its adversary complaint against C. Dennis
8 Loomis (Loomis) and Baker Hostetler, LLP (Baker) without
9 prejudice (BAP No. AZ-15-1165); and (3) the order denying
10 confirmation of CO's plan of reorganization, granting G2's
11 motion to dismiss CO's bankruptcy case without prejudice, and
12 denying CO's motion to extend the statute of limitations to file
13 avoidance and turnover actions (Plan Denial Order) (BAP No.
14 AZ-15-1166).²

15 In BAP No. 15-1167, CO sought declaratory relief against
16 Goldsmith and G2 regarding its rights under G2's oral operating
17 agreement. CO alleged that it held a 50% membership interest in
18 G2 thereby entitling it to half of any distributions.
19 Goldsmith, G2's purported sole member, disputed this contention.

21 ** Hon. Christopher D. Jaime, United States Bankruptcy Judge
22 for the Eastern District of California, sitting by designation.

23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure and "Civil Rule" references are to the Federal Rules of
27 Civil Procedure.

28 ² On May 25, 2015, CO moved to consolidate the three
appeals. On June 30, 2015, the BAP issued an order denying
consolidation because the orders on appeal were different and the
underlying parties and proceedings were not identical.

1 The membership issue was never adjudicated because the
2 bankruptcy court decided that CO's request for declaratory
3 relief regarding its membership interest was essentially for
4 breach of the oral operating agreement and time barred under
5 California's two-year statute of limitations pertaining to oral
6 contracts. The court rejected CO's tolling arguments and
7 dismissed the adversary proceeding against Goldsmith and G2 with
8 prejudice. The bankruptcy court subsequently denied CO's motion
9 for reconsideration in which CO raised new arguments for the
10 first time.

11 In BAP No. 15-1165, CO filed an adversary proceeding
12 against Loomis and Baker, seeking turnover of G2's records and
13 estate property owed to it based on its asserted 50% membership
14 interest in G2. The complaint also alleged claims for avoidance
15 of fraudulent transfers and fiduciary misconduct. The
16 bankruptcy court found that all the claims asserted were
17 dependent on CO's alleged membership interest in G2,
18 adjudication of which the court previously decided was time
19 barred. The court dismissed the adversary proceeding on this
20 ground because without a membership interest CO could not
21 possibly prevail. The dismissal was without prejudice in the
22 event CO reversed the Goldsmith/G2 dismissal through its appeal.

23 In BAP No. 15-1166, because CO proposed to fund its plan of
24 reorganization (Plan) with proceeds won from the Loomis/Baker
25 litigation, the bankruptcy court found that the Plan was not
26 feasible and administrative claims could not be paid in full on
27 the effective date once the Loomis/Baker complaint was
28 dismissed. The bankruptcy court denied confirmation of CO's

1 Plan and also granted G2's motion to dismiss the bankruptcy case
2 without prejudice in the event CO prevailed in the Goldsmith/G2
3 matter on appeal.

4 For the reasons explained below:

5 (1) We conclude that the bankruptcy court properly
6 dismissed the complaint in the Goldsmith/G2 matter on statute of
7 limitations grounds. We also conclude that the court did not
8 abuse its discretion in denying CO's motion for reconsideration
9 of its dismissal order. We thus AFFIRM the bankruptcy court's
10 ruling in BAP No. 15-1167;

11 (2) We further conclude that the bankruptcy court did not
12 err in dismissing the Loomis/Baker adversary proceeding in its
13 entirety. The court properly found that the claims for relief
14 were all dependent upon CO establishing its 50% membership
15 interest in G2. CO could not establish such an interest when
16 its claim was based on a breach of the oral operating agreement
17 and was time barred. Accordingly, we AFFIRM the bankruptcy
18 court's dismissal of the Loomis/Baker adversary complaint in BAP
19 No. 15-1165; and

20 (3) We also conclude that the bankruptcy court properly
21 denied confirmation of CO's Plan on feasibility and other
22 grounds. In addition, the bankruptcy court did not abuse its
23 discretion in dismissing the underlying bankruptcy case without
24 prejudice. Therefore, we AFFIRM the Plan Denial Order in BAP
25 No. 15-1166.

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1 I. FACTS

2 A. Prepetition Events

3 1. Dispute over CO's membership interest in G2

4 G2 was formed in 2003 in California, but it is unclear who
5 was involved in its formation. It was either Goldsmith alone,
6 Goldsmith and Donna Stephenson (Stephenson), or Goldsmith and
7 Rich Gurnett (Gurnett). G2 was an asset recovery firm that
8 helped victims of financial fraud determine the perpetrators of
9 the fraud and recapture the misappropriated funds.³

10 The record suggests that Stephenson and Goldsmith were the
11 initial members of G2, each owning 50%. CO was not an initial
12 member since it was formed several years after the formation of
13 G2. The parties do not dispute that G2's operating agreement
14 was oral.

15 When G2 was formed, Goldsmith's ex-girlfriend, Ida Fung
16 (Fung) filed the original Articles of Organization (AO) with the
17 California Secretary of State. Fung checked the box on the AO
18 form that showed management of G2 was vested in one manager.
19 Fung signed and filed a subsequent amendment to the AO with no
20 box checked regarding how G2 was managed.

21 Stephenson later filed a "Statement of Information" with
22 the California Secretary of State from 2003 to 2007 that listed
23 Goldsmith as the manager of G2 and the only member. However,
24 for the tax years 2003 through 2006, G2 filed partnership tax
25 returns with the Internal Revenue Service and California

26
27 ³ Due to the nature of the business, Goldsmith used the
28 alias "Henry George" and Gurnett went by the alias of "Rich
Douglas."

1 Franchise Tax Board which reflected that the right to share in
2 50% of the profits was held by each member and identified
3 Goldsmith and Stephenson as members. For these years,
4 Stephenson served as the tax matters partner of G2 and allegedly
5 managed G2 together with Goldsmith and Gurnett.

6 Some years after G2 was formed, Stephenson and Gurnett
7 established CO, an Arizona limited liability company, allegedly
8 for estate planning purposes as to Stephenson's 50% membership
9 interest in G2. Gurnett and Stephenson maintained that CO
10 succeeded to Stephenson's membership interest in G2, but there
11 is no documentation in the record that shows how that occurred.
12 Nonetheless, tax returns for 2007, 2008 and 2009 showed that CO
13 held a 50% interest in G2 for all purposes with Goldsmith as the
14 other 50% member.

15 In an email dated December 10, 2007, Goldsmith acknowledged
16 that Stephenson was a member in G2 and owned 50% of G2 that was
17 "owned" by CO. He also acknowledged at various times in 2008
18 and 2009 that "Rich Douglas" was a co-owner and co-founder of
19 G2, or that CO was entitled to 50% of the G2 revenues.

20 By the end of 2007, relations between the parties soured.
21 According to Gurnett, Goldsmith asked Stephenson to "cook G2's
22 books" so that Goldsmith could pay off some of his personal
23 debts out of G2's account to reduce his income tax liability.
24 Gurnett also alleged that Goldsmith engaged in other "illegal
25 schemes." Goldsmith allegedly informed Gurnett that he would no
26 longer work with Gurnett, effectively ending G2. From Gurnett's
27 perspective, the parties agreed to wind up G2's affairs.
28 However, Gurnett maintains that while he was hospitalized,

1 Goldsmith took over G2, removed Gurnett and Stephenson as
2 administrators, changed all their passwords, and told service
3 providers that they were no longer with the company.

4 On September 10, 2008, Stephenson filed a "Limited
5 Liability Company Certificate of Amendment" with the California
6 Secretary of State showing that G2 was managed by all its
7 members. She signed the form as a member. Goldsmith contends
8 that this filing was fraudulent.

9 On July 22, 2009, Goldsmith filed a corrected document with
10 the California Secretary of State showing himself as the only
11 member and manager. Gurnett contends that this filing was
12 fraudulent.

13 Two weeks later, on August 5, 2009, Stephenson filed
14 another document with the California Secretary of State's office
15 on behalf of G2, again listing CO as a member. Finally on
16 April 7, 2010, Goldsmith filed another document on behalf of G2
17 showing only Goldsmith as a member in G2.

18 At some point in 2010, Goldsmith retained a different CPA
19 to prepare G2's tax returns and made himself the tax matters
20 partner on this return, without a vote from CO. At that time,
21 he reported that he was the sole member in G2 and signed the
22 return. Around the same time, G2 evidently began receiving
23 payments on account receivables.

24 **2. The joint defense and cooperation agreement**

25 To temporarily avoid litigation regarding the validity and
26 extent of CO's membership interest in G2, the parties entered
27 into a joint defense and cooperation agreement (JDCA) on
28 April 20, 2010. The agreement was for an indefinite period and

1 stated that Goldsmith denied that CO or Stephenson had any
2 ownership interest in G2. It further provided:

3 E. Capital Options, LLC, Richard Douglas Gurnett, and
4 Donna Stephenson each acknowledges that George Henry
5 Goldsmith asserts and contends (i) that neither
6 Capital Options LLC nor Donna Stephenson (collectively
7 "the Capital Parties") has any ownership interest in
8 or to G2 LLC, (ii) that neither of the Capital Parties
9 has any right to share in any fees paid or owing to
10 G2 LLC by any clients of G2 LLC, and (iii) that
11 neither of the Capital Parties has any separate or
12 independent right to direct, manage, or control the
13 enforcement or disposition of any G2 LLC claims
14 against any G2 LLC clients or any other third party.
15 Capital Options, LLC, Richard Douglas Gurnett, and
16 Donna Stephenson each deny that such assertions and
17 contentions as set forth in this Recital E are correct
18 or valid. Nonetheless, Capital Options LLC, Richard
19 Douglas Gurnett, and Donna Stephenson each
20 acknowledges and affirms that the execution and
21 performance of participation in this Agreement by
22 George Henry Goldsmith is without prejudice to and
23 shall not be asserted or relied upon as evidence in
24 opposition to his assertions and contentions as set
25 forth in this Recital E.

15 The agreement also designated Loomis, an attorney who
16 represented Goldsmith, along with his law firm Baker, as
17 attorney members in G2. Similarly, Gurnett and Stephenson's
18 attorney, Marc Epstein (Epstein), and his law firm, Gaims, Weil,
19 West & Epstein, LLP, were designated as attorney members in G2.
20 Under the agreement, the attorney members were given authority
21 to communicate and negotiate with third parties, including past
22 and present clients of G2. The attorney members were required
23 to act jointly, unanimously, and in writing to place all funds
24 which were paid to G2 into one or more bank accounts requiring
25 the signatures of all attorney members for withdrawals, subject
26 to any court order to the contrary. This "escrow" provision
27 survived termination of the agreement.

28 Paragraph K of the agreement provided:

1 Nothing in this Agreement is intended to create any
2 attorney-client relationship, fiduciary duty, or any
3 other duty of any kind between Baker Hostetler and/or
4 C. Dennis Loomis, on the one hand, and any of Capital
5 Options LLC, Richard Douglas Gurnett, and Donna
6 Stephenson, on the other hand. All parties hereto
7 agree that no such attorney-client relationship or
8 duties exist.

9 A similar paragraph applied to Epstein and his firm.

10 In July 2010, the JDCA was amended to reflect that the
11 attorney members and their clients agreed to settlement of G2's
12 claims against Dominic Cusumano (Cusumano) and Atlas Free, Inc.
13 (Atlas Free). The amendment further provided that the "client
14 members" would cause G2 to distribute all settlement funds
15 received from Cusumano and Atlas Free, directly or indirectly,
16 within two days of receipt of such funds, 50% to Goldsmith and
17 50% to CO, with no deduction for attorneys' fees, costs, or
18 otherwise. The amendment did not specify how proceeds from any
19 of G2's remaining potential recoveries would be distributed. It
20 further provided that the parties intended to resolve their
21 disputes at some time in the future through negotiation,
22 mediation, arbitration or court action.

23 **3. The Cusumano and Atlas Free settlement funds**

24 On August 6, 2010, Loomis sent an email to Epstein which
25 stated that rather than distributing the Cusumano and Atlas Free
26 settlement funds, estimated to be around \$375,000, in the manner
27 set forth in the amended JDCA, Goldsmith believed that the funds
28 should be applied to G2's and its individual member/defendants'

1 legal costs in the "Silver and Morningstar" cases.⁴ The email
2 then detailed how representation of G2 and its individual
3 members should be achieved and how legal costs would be divided
4 if Gurnett agreed. If Gurnett did not agree, settlement funds
5 would be used to pay the retainers for the attorneys in the
6 Silver and Morningstar matters and then the remaining balance
7 would be distributed 50/50 to CO and Goldsmith. The email
8 further provided that going forward, unless Gurnett agreed in
9 writing to pay 50% of all charges incurred by the attorneys in
10 the Silver and Morningstar matters, such amounts would be
11 deducted from the Cusumano and Atlas Free settlement funds.

12 In response, Epstein sent an email to Loomis urging him to
13 reconsider his "threat" of "misappropriating" 50% of the
14 settlement funds which had been entrusted to Baker, and to which
15 CO was entitled pursuant to the amended JDCA. Epstein further
16 maintained that Loomis' conduct "implicates a serious breach of
17 fiduciary duty and breach of trust, a serious breach of the
18 canons of ethics, conversion, and frankly, one or more crimes."

19 **4. The Morningstar recovery**

20 One of G2's clients was Morningstar Holding Corporation
21 (Morningstar). G2 successfully recovered embezzled funds for
22 Morningstar, but Morningstar sued G2, along with Goldsmith and
23 Gurnett individually, in 2010 in Idaho to avoid paying fees owed
24 to G2. G2 counterclaimed. G2 and Goldsmith retained Thomas
25 Angstman (Angstman) to represent them in the case. Goldsmith
26

27 ⁴ Silver and Morningstar were clients of G2. The
28 Morningstar matter is further described below.

1 alleges that Gurnett evaded service and was removed from the
2 case. Gurnett maintains he was never afforded the opportunity
3 to participate. A court-ordered mediation produced a settlement
4 which resulted in Morningstar paying a reduced fee to G2. In
5 June 2012, settlement proceeds were paid to Angstman for fees
6 with the remainder disbursed to Goldsmith.

7 **5. The California state court lawsuit**

8 On June 11, 2011, CO sued Goldsmith and G2 in the
9 California state court seeking the appointment of a receiver for
10 G2 due to the alleged disbursement of settlement funds in
11 violation of fiduciary obligations purportedly owed to CO.
12 The allegations included facts regarding the deterioration of
13 the parties' relationship, Goldsmith's hostile takeover of G2,
14 and Goldsmith's misappropriation of money owed to CO. Despite
15 extensive discovery, the state court declined to appoint a
16 receiver, citing lack of evidence. The case was ultimately
17 dismissed by CO's chapter 7 bankruptcy trustee.

18 **6. Goldsmith designates himself as the sole member in G2
19 in 2011, 2012, and 2013 tax returns**

20 In a 2011 tax return, Goldsmith designated himself the tax
21 matters partner and the sole member in G2. He also reported on
22 the G2 form K-1 that he was a 100% member and reported on CO's
23 K-1 that CO had no interest in G2 at any time in 2011. On the
24 2012 tax return, Goldsmith represented that he was the tax
25 matters partner and that CO was now a 0% member and Goldsmith
26 was the sole member. The 2013 tax return also showed Goldsmith
27 as the sole member in G2 and made no mention of CO anywhere. It
28 is not clear from the record when CO or its members became aware

1 of these returns.

2 **7. Failed attempts to put G2 into an involuntary**
3 **bankruptcy**

4 On February 29, 2012, CO filed an involuntary chapter 7
5 petition against G2 in the Central District of California, but
6 did not serve G2. The California bankruptcy court dismissed
7 CO's involuntary petition by order entered on May 11, 2012.

8 Before the court dismissed the February 29 involuntary
9 petition, Brent Johnson (Johnson), another alleged G2 creditor,
10 filed a second involuntary petition against G2 on April 2, 2012.
11 The lawyer for Johnson in the second involuntary case was the
12 same as that for CO in the first involuntary case. Johnson
13 moved for the appointment of an interim chapter 7 trustee to
14 take custody of G2 and intercept any settlement proceeds.
15 Gurnett supported this motion with a declaration, again
16 asserting that CO was a 50% owner in G2. On May 31, 2012, the
17 California bankruptcy court granted G2's motion to dismiss the
18 involuntary proceeding, finding that the petition had not been
19 filed by a creditor with an undisputed claim.⁵

20 **B. Bankruptcy Events**

21 On June 14, 2012, CO filed a chapter 7 petition. On
22 August 25, 2012, the chapter 7 trustee filed a notice to sell
23 CO's interest in G2. G2 made the highest offer for this asset.

24
25 ⁵ G2 then moved for attorneys' fees. On September 25, 2012,
26 the California bankruptcy court sanctioned Johnson over \$117,000
27 finding it "suspicious, at a minimum, that Johnson's counsel was
28 also C[apital] O[ptions]' counsel when it filed an involuntary
against G2" and that Johnson's "actions and motives for filing
[the bankruptcy] [were] questionable."

1 CO objected and moved to dismiss or convert the case. On
2 September 26, 2012, the bankruptcy court entered an order
3 converting CO's chapter 7 case to one under chapter 11.

4 On December 18, 2013, the United States Trustee (UST) moved
5 to convert or dismiss the case. The UST asserted that CO had
6 been in a chapter 11 proceeding for over a year and was unable
7 to reorganize. According to the UST, CO owned no real property,
8 had no secured or unsecured priority creditors, had
9 approximately \$207,000 in unsecured debt, and generated no
10 income. The UST further noted that the case involved
11 liquidation of CO's personal property such as its interest in
12 G2.

13 Thereafter, CO filed a disclosure statement (DS) and Plan
14 on February 11, 2014. The Plan was a litigation plan, dependent
15 upon recovery of approximately \$1,500,000 in assets in the hands
16 of third parties based on CO's alleged 50% membership interest
17 in G2. Around the same time, to collect these funds, CO filed
18 numerous adversary complaints against third parties, including
19 the Goldsmith/G2 and Loomis/Baker matters at issue in these
20 appeals.

21 **1. The Goldsmith/G2 adversary proceeding**

22 On February 18, 2014, CO filed an adversary complaint
23 against Angstman. Angstman filed a motion to dismiss the
24 complaint, which the bankruptcy court granted, giving CO leave
25 to amend to correct defects in the complaint.⁶

26
27
28 ⁶ The claims against Angstman were dismissed in November
2014.

1 On July 29, 2014, CO filed the amended complaint which
2 added Goldsmith and G2 as defendants and asserted three claims
3 for relief against them: (1) declaratory relief seeking to
4 establish that CO held a 50% membership interest in G2;
5 (2) derivative recovery of certain settlement funds owing to G2
6 allegedly negligently disbursed by Angstman and diverted to
7 Goldsmith; and (3) turnover of G2's records.

8 On September 5, 2014, Goldsmith and G2 moved to dismiss the
9 complaint asserting that (1) the statute of frauds made the oral
10 operating agreement unenforceable; (2) the complaint was time
11 barred under California's two-year statute of limitations for
12 breach of an oral agreement; and (3) the bankruptcy court lacked
13 jurisdiction over the action.

14 Instead of responding to the motion, CO moved to disqualify
15 Osborn Maledon, counsel for Goldsmith and G2, alleging that
16 under California law the firm had an "irreconcilable conflict of
17 interest" in representing both Goldsmith and G2 in the adversary
18 proceeding. Goldsmith and G2 responded, arguing that
19 (1) Arizona law applied given that Goldsmith and G2's counsel
20 practice in Arizona; (2) CO lacked standing to allege any
21 conflict since it was not a member of G2 nor was it a client or
22 former client of Osborn Maledon; and (3) under Arizona's ethical
23 rules, there was no conflict in jointly representing Goldsmith
24 and G2 under the circumstances.

25 On November 12, 2014, the bankruptcy court heard the motion
26 for disqualification. The court noted that CO was not a client
27 or former client of the Osborn Maledon firm and that under
28 Arizona law, only in extreme circumstances should a party to a

1 lawsuit be allowed to interfere with the attorney-client
2 relationship of his opponent. In the end, the court denied the
3 motion for disqualification, finding that CO had not met its
4 burden that it had initial standing to file a disqualification
5 motion or that extreme circumstances existed such that it should
6 be allowed to file such a motion. The bankruptcy court's ruling
7 denying the motion was set forth in a minute entry dated
8 November 12, 2014. No further order was submitted to the
9 bankruptcy court.

10 Two weeks later, CO opposed the motion to dismiss by
11 responding to Goldsmith's and G2's argument regarding the two-
12 year statute of limitations under Cal. Code Civ. Proc. § 339.
13 CO argued that the two-year statute was tolled due to
14 Goldsmith's absence from California under Cal. Code Civ. Proc.
15 § 351⁷ and his active concealment of material facts that he was
16 required to disclose to CO as a 50% managing member of G2. CO
17 did not argue that a four-year statute of limitations pertaining
18 to written contracts applied or that the limitations period was
19 tolled due to the filing of the state court receivership action
20 or § 108.

21 On January 20, 2015, the bankruptcy court granted
22

23 ⁷ This statute states,
24

25 If, when the cause of action accrues against a person,
26 he is out of the State, the action may be commenced
27 within the term herein limited, after his return to the
28 State, and if, after the cause of action accrues, he
departs from the State, the time of his absence is not
part of the time limited for the commencement of the
action.

1 Goldsmith's and G2's motion to dismiss, finding that CO knew at
2 least by April 2010 when it entered into the JDCA that Goldsmith
3 disputed that it held a membership interest in G2. Therefore,
4 the complaint against Goldsmith and G2 was time barred since it
5 was filed more than two years later.

6 The court rejected CO's tolling arguments based on
7 Goldsmith's absence from the state and fraudulent concealment.
8 With respect to Goldsmith's absence from California, the
9 bankruptcy court noted inconsistencies in California case law
10 regarding the constitutionality of Cal. Code Civ. Proc. § 351.
11 In Filet Menu, Inc. v. Cheng, 71 Cal.App.4th 1276, 1282 (1999),
12 the court held Cal. Code Civil Proc. § 351 constitutional and
13 not an infringement on the commerce clause absent evidence that
14 the defendant was engaged in interstate commerce. In Heritage
15 Marketing & Insurance Services, Inc. v. Chrustawka,
16 160 Cal.App.4th 754 (2008) (followed by Dan Clark Family Ltd.
17 Partnership v. Miramontes, 193 Cal.App.4th 219 (2011)), the
18 California courts in the Fourth District invalidated the statute
19 as applied to defendants who have permanently moved out of
20 state. The Heritage court reasoned that the statute penalized
21 people who moved out of state by imposing a longer statute of
22 limitations on them in contrast to those who remained in the
23 state. The court concluded that the commerce clause protected
24 persons from such restraints on their movement across state
25 lines. 160 Cal.App.4th at 763-64; see also Abramson v.
26 Brownstein, 897 F.2d 389, 392 (9th Cir. 1990).

27 In the end, the bankruptcy court found that the tolling of
28 the statute would apply only to Goldsmith who moved from

1 California in 2010. Relying on the previously cited cases, the
2 court decided that Goldsmith's move would not toll the statute
3 of limitations because Cal. Code Civ. Proc. § 351 would impair
4 Goldsmith from engaging in interstate commerce.

5 Finally, the bankruptcy court found that CO had fallen
6 short of the requirement to provide specific facts about the
7 alleged fraudulent concealment with the same particularity as
8 would be required for a cause of action for fraud.

9 In connection with Goldsmith's and G2's other arguments,
10 the bankruptcy court concluded that it had jurisdiction over the
11 adversary proceeding because the litigation was an estate asset
12 and the only means available to fund CO's Plan.⁸ The court
13 further decided that it was not clear that the statute of frauds
14 was implicated because there was at least one writing – the 2010
15 tax return signed by Goldsmith – which indicated that CO had an
16 interest in G2. Accordingly, the bankruptcy court denied the
17 motion to dismiss without prejudice as to the statute of frauds.

18 On January 29, 2015, the bankruptcy court entered its order
19 granting the motion to dismiss on statute of limitations grounds
20 and dismissing the adversary proceeding with prejudice.

21 On February 10, 2015, CO moved for reconsideration of the
22 court's ruling under Civil Rule 59(e), made applicable by
23 Rule 9023. There, CO argued for the first time that the
24 four-year statute of limitations under Cal. Code Civ. Proc.
25 § 337 applied to its litigation against Goldsmith and G2. CO

26
27 ⁸ Later in the hearing, counsel for Goldsmith and G2
28 indicated that they would consent to jurisdiction for purposes of
the dismissal order.

1 maintained that after formation of G2 based on an oral operating
2 agreement, Goldsmith made numerous affirmative, unambiguous,
3 written acknowledgments of the actual agreement of the parties,
4 including the emails and representations to the taxing
5 authorities as described above. Due to these writings, CO
6 argued that the four-year statute of limitations for suits on
7 written contracts should apply. CO further asserted for the
8 first time that the limitations period was tolled due to the
9 state court receivership action. As discussed below, the court
10 heard and decided the motion for reconsideration on April 21,
11 2015, in conjunction with other matters.

12 **2. The Loomis/Baker adversary proceeding**

13 On February 23, 2014, CO filed an adversary proceeding
14 against Loomis and Baker. The amended complaint alleged that
15 Loomis and Baker, as attorney members of G2 under the JDCA, owed
16 a non-waivable fiduciary duty to CO as to all matters involving
17 G2 and CO as a 50% G2 managing member. CO further alleged that
18 Loomis and Baker had received G2 funds which were disbursed to
19 Goldsmith without written authorization in violation of the
20 JDCA. According to CO, Loomis and Baker breached their
21 fiduciary duties (1) by refusing to account to CO for G2 funds
22 received; (2) by not distributing 50% of the funds received
23 pursuant to the JDCA; and (3) by misdirecting and distributing
24 all G2 funds they received, including settlement funds from
25 Cusumano and Atlas Free, to Goldsmith without CO's consent or
26 court order. Based on these facts and others, CO alleged three
27 claims for relief against Loomis and Baker: (1) turnover of
28 G2's records; (2) turnover of estate funds in the amount of

1 \$3,515,675; and (3) unspecified damages for breach of fiduciary
2 duties.

3 On April 25, 2014, Loomis and Baker filed a motion to
4 dismiss the complaint. They argued that the request for
5 turnover of G2's records was "moot" since Baker had produced
6 these documents during the state court receivership action.
7 Loomis and Baker further asserted that the second claim for
8 relief seeking turnover of "estate funds" should be dismissed
9 under Civil Rule 12(b)(6) because CO failed to allege sufficient
10 facts to establish that it was a member in G2 and entitled to
11 50% of G2's funds. According to Loomis and Baker, since there
12 was a bona fide dispute pertaining to CO's entitlement to funds
13 from G2, the claim for turnover should be dismissed. In
14 connection with the breach of fiduciary duty claim, Loomis and
15 Baker pointed to the provision in the JDCA which expressly
16 provided that no fiduciary duty arose between Loomis and Baker
17 on the one hand and CO, Gurnett and Stephenson on the other
18 hand.

19 Finally, Loomis and Baker argued that they were the wrong
20 defendants to litigate issues which were part of a long running
21 dispute between CO and G2 and Goldsmith over whether CO was a
22 legitimate member in G2 and, if so, whether it was owed any
23 distributions from G2. Loomis and Baker contended that these
24 issues were part of the Goldsmith/G2 adversary. They maintained
25 that even if CO's claims against them were viable, the issues
26 asserted in the complaint were not ripe until CO's membership
27 interest in G2 and its right to distributions were established.

28 At a hearing on July 9, 2014, the bankruptcy court denied

1 Loomis' and Baker's motion to dismiss, without prejudice, and
2 allowed the adversary proceeding against them to proceed.

3 Loomis and Baker subsequently moved for a stay of the
4 adversary proceeding pending resolution of the Goldsmith/G2
5 adversary complaint. They maintained that at least two issues
6 in that adversary were conditions precedent to the adjudication
7 of issues in the adversary against them. According to Loomis
8 and Baker, without a prior determination whether CO is a member
9 and, if so, a managing member, of G2, a corporate dispute that
10 must be litigated between CO and G2, CO could not pursue its
11 claims against them: "If CO is determined not to be a member of
12 G2, the adversary against them would be moot."

13 CO opposed the motion for a stay arguing that under the
14 JDCA, Loomis and Baker agreed in writing, along with Epstein, to
15 be joint "cashiers" of funds owed to G2. CO disputed
16 Goldsmith's contention that it had breached the JDCA or that the
17 JDCA was terminated.⁹ CO further pointed out that even if the
18 JDCA was terminated, the cashiering duties survived. According
19 to CO, these duties were independent from Goldsmith's dispute
20 over CO's membership interest in G2.

21 By agreement between the parties, a stay of the litigation
22 applied until November 12, 2014. At the November 12, 2014
23 hearing, the bankruptcy court heard, among other matters,
24 Loomis' and Baker's motion for a stay. CO argued that the stay
25 should not be imposed since the issues with Loomis and Baker

26
27 ⁹ Goldsmith evidently asserted that the JDCA was terminated
28 in writing. The parties did not cite to any portion of the
record that contained this writing.

1 arose under the JDCA and required Baker to keep any G2 funds in
2 trust. Instead, CO found out that Baker received \$171,000, and
3 that Baker and Loomis sent that check to Goldsmith who cashed
4 it. CO contended that while its membership interest would
5 determine where the funds were ultimately disbursed, the funds
6 should still have been in trust.

7 Loomis and Baker again argued that the turnover claims in
8 count one and count two of the complaint were dependent upon
9 whether or not CO was a member, or potentially a managing
10 member, before it could get either money or records. Regarding
11 the breach of the JDCA, Loomis and Baker argued that even
12 assuming CO was correct that the requirement of putting G2's
13 funds in trust survived in perpetuity, if CO was determined not
14 to be a member in G2, it was not entitled to any money in a
15 lockbox. They further asserted that CO's membership interest in
16 G2 had to be determined before it could establish damages for
17 breach of fiduciary duties. Finally, Loomis and Baker noted
18 that CO's only argument regarding specific sums due to CO was
19 related to the amended JDCA. There, the non-attorney "members"
20 in G2 agreed to have funds distributed in a certain way.
21 Accordingly, Loomis and Baker asserted: "That would be a claim
22 against Mr. Goldsmith, not a claim against Baker Hostetler."
23 After hearing argument, the bankruptcy court decided to keep the
24 stay in place pending further status conferences.

25 On January 21, 2015, the bankruptcy court issued an order
26 requiring CO to pay the filing fee of \$293 for filing the
27 complaint within fourteen days of the order. CO responded by
28 filing a motion to extend the time for paying the filing fee and

1 requested a status conference. Loomis and Baker objected to the
2 extension of time, but did not object to a status hearing. In
3 the objection, Loomis and Baker stated that at the status
4 hearing they intended to reargue that the adversary proceeding
5 should be dismissed since the court found that CO was barred by
6 the statute of limitations from litigating its membership
7 interest in G2. Since the membership interest was a condition
8 precedent to CO's claims against Loomis and Baker, they again
9 argued that the adversary proceeding should be dismissed. At a
10 subsequent hearing, the bankruptcy court set oral argument for
11 the motion to extend the time to pay the filing fee on April 21,
12 2015, but did not set the reargument of the motion to dismiss on
13 calendar.

14 As discussed below, the bankruptcy court dismissed the
15 adversary complaint against Loomis and Baker after denying CO's
16 motion for reconsideration in the Goldsmith/G2 matter at the
17 April 21, 2015 hearing.

18 **3. The plan of reorganization**

19 CO filed its DS and Plan in February 2014. Loomis and
20 Baker, as well as other defendants in other adversary
21 proceedings, asked CO to include in its DS and Plan a statement
22 that approval of the DS or confirmation of the Plan would not
23 adjudicate any facts or legal issues or constitute their consent
24 to jurisdiction or venue. On April 29, 2014, the bankruptcy
25 court ordered CO to resolve the issue with the defendants in the
26 adversary proceedings and if no resolution could be reached, to
27 include an insert in its DS and Plan describing the adversary
28 defendants' position.

1 On October 6, 2014, CO filed an amended DS and Plan.¹⁰ The
2 amended DS and Plan did not mention the adversary defendants'
3 position as required by the bankruptcy court's order. The
4 bankruptcy court entered an order approving the amended DS on
5 October 7, 2014.

6 Loomis, Baker, Goldsmith and G2 objected to the
7 confirmation of CO's amended Plan arguing, among other things,
8 that CO could not use its amended Plan to create jurisdiction
9 and/or venue in the adversary proceedings against them, or
10 determine facts and/or legal issues that could have a preclusive
11 effect in the adversary proceedings. They also argued that the
12 amended Plan was not feasible given that it was relying on
13 future and speculative recoveries from the various adversary
14 proceedings. As discussed below, the bankruptcy court held a
15 final hearing on plan confirmation on April 21, 2015.

16 **4. The April 21, 2015 hearing**

17 On April 21, 2015, the bankruptcy court heard CO's motion
18 for reconsideration in the Goldsmith/G2 matter and held a final
19 hearing on confirmation on CO's amended Plan. The stay of the
20 Loomis/Baker matter was also continued to that date.

21 In connection with CO's motion for reconsideration, the
22 court opined that it was inclined to deny the motion since CO's
23 argument regarding the four-year statute of limitations was
24 available at the time of the original briefing. CO's counsel

25
26 ¹⁰ On September 12, 2014, CO filed an amended DS which
27 included an insert, drafted and provided by Baker's counsel, that
28 described Baker's and the other adversary defendants' position.
However, this insert was later omitted from the amended DS that
was approved by the bankruptcy court.

1 acknowledged that his argument regarding the four-year statute
2 of limitations "should have been made out of the gate." The
3 bankruptcy court commented that if the argument should have been
4 raised earlier, it was too late to raise it in a reconsideration
5 motion. Although counsel responded by alluding to
6 misinterpretation of the law or miscarriage of justice, the
7 court declined to accept those theories. The bankruptcy court
8 observed that any movant could advance a set of arguments, and,
9 if they lost the argument at the first hearing, they could
10 advance a second set of arguments later on and say: "If you
11 don't consider these new arguments, it'll be a miscarriage of
12 justice."

13 For these reasons, the bankruptcy court denied the motion
14 for reconsideration. The court noted that the complaint stated
15 that G2's operating agreement has at all times been oral. Next,
16 the court pointed out that at no time did CO argue the four-year
17 statute of limitations applied, instead asserting that the two-
18 year statute had not run due to Goldsmith's absence from the
19 state and his active concealment of material facts. The court
20 concluded by stating that a motion for reconsideration may not
21 be used to raise arguments or present evidence for the first
22 time when they could reasonably have been raised earlier in the
23 litigation, citing Marlyn Nutraceuticals, Inc. v. Mucos Pharma
24 GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

25 Following resolution of CO's motion for reconsideration in
26 the Goldsmith/G2 matter, the bankruptcy court denied CO's oral
27 motion for a stay of the various adversary proceedings while CO
28 appealed the bankruptcy court's ruling in the Goldsmith/G2

1 matter. The court then concluded that since CO's litigation
2 against Loomis/Baker was contingent on the establishment of its
3 membership interest in G2 it could not state a claim which
4 entitled it to relief. The court dismissed the adversary
5 proceeding without prejudice.

6 Next, addressing plan confirmation, the bankruptcy court
7 stated that it was not feasible because the only viable
8 litigation regarding CO's membership and right to distributions
9 from G2 had been dismissed. The court also found the Plan was
10 not filed in good faith and could not meet the requirement under
11 § 1129(a) (9) (A) to pay administrative claimants in full on the
12 effective date. The court therefore denied confirmation.

13 In addressing dismissal of the case, the bankruptcy court
14 opined that it was not a useful exercise to keep the bankruptcy
15 case open when the only possibility for a plan was to be
16 successful in appellate litigation. The court decided that
17 conversion was not an option since there was already one unpaid
18 chapter 7 trustee and there was no reason to run up any
19 additional costs. The bankruptcy court dismissed the case
20 without prejudice.

21 On April 28, 2015, the bankruptcy court entered the
22 dismissal order in the Loomis/Baker matter. On April 29, 2015,
23 the bankruptcy court entered the Plan Denial Order. On the same
24 date, the bankruptcy court entered the order denying CO's motion
25 for reconsideration in the Goldsmith/G2 matter. CO timely filed
26 an appeal from each of these orders on May 12, 2015.

27 **II. JURISDICTION**

28 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

1 §§ 1334 and 157(b)(2)(L) and (O). We have jurisdiction under
2 28 U.S.C. § 158.

3 **III. ISSUES**

4 A. Whether the bankruptcy court erred by finding that
5 CO's claims against Goldsmith and G2 were time barred under
6 California's two-year statute of limitations relating to oral
7 contracts;

8 B. Whether the bankruptcy court abused its discretion in
9 denying CO's motion for reconsideration of its ruling that CO's
10 claims against Goldsmith/G2 were time barred;

11 C. Whether the bankruptcy court abused its discretion in
12 denying CO's motion to disqualify the attorneys for Goldsmith
13 and G2 in the Goldsmith/G2 adversary proceeding;

14 D. Whether the bankruptcy court erred by dismissing the
15 Loomis/Baker adversary proceeding;

16 E. Whether the bankruptcy court abused its discretion
17 denying confirmation of CO's Plan; and

18 F. Whether the bankruptcy court abused its discretion in
19 dismissing CO's bankruptcy case.

20 **IV. STANDARDS OF REVIEW**

21 A bankruptcy court's decision as to whether a claim is
22 barred by the statute of limitations is reviewed de novo. Santa
23 Maria v. Pac. Bell, 202 F.3d 1170, 1175 (9th Cir. 2000). The
24 bankruptcy court's decision whether a statute of limitations has
25 been equitably tolled is generally reviewed for an abuse of
26 discretion, unless the facts are undisputed, in which event the
27 legal question is reviewed de novo. Id.

28 A bankruptcy court's denial of a motion for reconsideration

1 is reviewed for abuse of discretion. First Ave. W. Bldg., LLC
2 v. James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th
3 Cir. 2006).

4 A bankruptcy court's order denying disqualification of
5 professionals is also reviewed for an abuse of discretion.
6 COM-1 Info, Inc. v. Wolkowitz (In re Maximus Computers, Inc.),
7 278 B.R. 189, 194 (9th Cir. BAP 2002).

8 "The ultimate decision to confirm a reorganization plan is
9 reviewed for an abuse of discretion." Computer Task Group, Inc.
10 v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003).

11 A determination that a plan meets the requisite confirmation
12 standards necessarily requires a bankruptcy court to make
13 certain factual findings, which are reviewed for clear error.

14 Id.

15 We review the bankruptcy court's decision to dismiss a case
16 for abuse of discretion. Leavitt v. Soto (In re Leavitt),
17 171 F.3d 1219, 1223 (9th Cir. 1999).

18 To determine whether the bankruptcy court abused its
19 discretion, we conduct a two-step inquiry: (1) we review de novo
20 whether the bankruptcy court "identified the correct legal rule
21 to apply to the relief requested" and (2) if it did, whether the
22 bankruptcy court's application of the legal standard was
23 illogical, implausible or "without support in inferences that
24 may be drawn from the facts in the record." United States v.
25 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

26 Findings of fact are reviewed under a clearly erroneous
27 standard. A court's factual determination is clearly erroneous
28 if it is illogical, implausible, or without support in the

1 record. Id.

2 We review a dismissal under Civil Rule 12(b)(6) de novo.
3 Barnes v. Belice (In re Belice), 461 B.R. 564, 572 (9th Cir. BAP
4 2011) (citing AlohaCare v. Haw. Dept. of Human Services,
5 572 F.3d 740, 744 n.2 (9th Cir. 2009)). "When we conduct a de
6 novo review, 'we look at the matter anew, the same as if it had
7 not been heard before, and as if no decision previously had been
8 rendered, giving no deference to the bankruptcy court's
9 determinations.'" Id.

10 V. DISCUSSION

11 **A. The bankruptcy court properly applied California's two-year 12 statute of limitations and did not abuse its discretion in denying CO's motion for reconsideration (BAP No. 15-1167).**

13 CO's amended complaint alleged that "G2's operating
14 agreement has at all times been oral." The complaint further
15 alleged that the "G2 operating agreement provided that Goldsmith
16 and Stephenson would be member managers."

17 Cal. Corp. Code § 17701.02(s) provides:

18 An 'Operating agreement' means the agreement, whether
19 or not referred to as an operating agreement and
20 whether oral, in a record, implied, or in any
21 combination thereof, of all the members of a limited
22 liability company, including a sole member
The term 'operating agreement' may include, without
23 more, an agreement of all members to organize a
24 limited liability company pursuant to this title.

25 The operating agreement is a contract among LLC members
26 that governs the members' rights and obligations and is
27 construed according to general principles of contract law.
28 Ratliff v. Cochis Agric. Properties, LLC (In re Ratliff),
2010 WL6259955, at *7 (9th Cir. BAP October 13, 2010) (citing
1 Larry E. Ribstein & Robert R. Keatinge, Limited Liability

1 Companies § 4:16 (2003)). Under California law, it is the
2 policy of the limited liability statutes and the state "to give
3 maximum effect to the principles of freedom of contract and to
4 the enforceability of operating agreements." See Cal. Corp.
5 Code § 17701.07(a).

6 In California, the limitations period for breach of an oral
7 contract is two years. Cal. Code Civ. Proc. § 339. Although CO
8 did not plead a breach of contract claim, it sought a
9 declaration that it was a member of G2 entitled to 50% of any
10 distributions that went to G2's members. The underlying basis
11 for the requested declaration was necessarily based on the oral
12 operating agreement. Therefore, the related request for
13 declaratory relief is governed by the same statute of
14 limitations for oral contracts. See United Pacific-Reliance
15 Ins. Co. v. DiDomenico, 173 Cal.App.3d 673, 676-77 (1985);
16 Leahey v. Dep't of Water and Power of City of L.A.,
17 76 Cal.App.2d 281, 286 (1946).

18 Generally, the statute of limitations "begins to run upon
19 the occurrence of the last element essential to the cause of
20 action." Brisbane Lodging, L.P. v. Webcor Bldrs., Inc.,
21 216 Cal. App.4th 1249, 1257 (2013). However, the time period
22 may be tolled where the plaintiff does not immediately discover
23 or suspect that wrongdoing has occurred. Id. Under the
24 discovery rule, a cause of action accrues when the "plaintiff
25 either (1) actually discovered his injury and its negligent
26 cause or (2) could have discovered injury and cause through the
27 exercise of reasonable diligence. . . ." Id. The discovery
28 rule has been applied in "cases where it is manifestly unjust to

1 deprive plaintiffs of a cause of action before they are aware
2 that they have been injured." Id. However, a plaintiff is
3 "under a duty to reasonably investigate. A suspicion of
4 wrongdoing, coupled with a knowledge of the harm and its cause,
5 will commence the limitations period and those failing to act
6 with reasonable dispatch will be barred." Id. A cause of
7 action invariably accrues when there is a remedy available.
8 Baker v. Beech Aircraft Corp., 39 Cal.App.3d 315, 321 (1974).

9 Here, the bankruptcy court found that CO knew by no later
10 than April 20, 2010 – at the time Gurnett, Stephenson, and CO
11 entered into the JDCA with Goldsmith – that Goldsmith disputed
12 CO's asserted 50% membership interest in G2. The JDCA
13 explicitly stated that Goldsmith disputed that CO or Stephenson
14 (Capital Parties) had any ownership interest in G2, that neither
15 of the Capital Parties had any right to share in any fees paid
16 to or owing to G2 by any clients, and that neither of the
17 Capital Parties had any separate or independent right to direct,
18 manage, or control the enforcement or disposition of any G2
19 claims against G2, clients or any other third party. As the
20 bankruptcy court found, this was direct notice to CO that there
21 was a dispute regarding its membership in G2 and entitlement to
22 distributions. Accordingly, the bankruptcy court correctly
23 found that the two-year limitation period applied to the oral
24 operating agreement and CO's last day to file a complaint for
25 any claims against Goldsmith and G2 would have been April 20,
26 2012. This date was before CO's chapter 7 bankruptcy case was
27 filed and more than two years before the amended complaint was
28 filed.

1 To show error on appeal, CO makes several tolling and other
2 arguments.

3 **1. The fraudulent concealment discovery rule**

4 CO also argues that the relevant statute of limitations was
5 tolled under the fraudulent concealment discovery rule. To
6 support this tolling argument, CO maintains that LLC members are
7 fiduciaries to each other, Goldsmith never "unconditionally"
8 refuted CO's membership interest until the 2014 tax returns, and
9 Goldsmith concealed G2's books, records, and finances. CO
10 further argues that if the amended complaint did not
11 sufficiently plead fraud, it could have been amended.¹¹

12 The principle of fraudulent concealment - a well
13 established ground for equitable tolling in California is
14 similar to the discovery rule. A defendant's fraud in
15 concealing a cause of action against him tolls the applicable
16 statute of limitations, but only for that period during which
17 the claim is undiscovered by the plaintiff or until such time as

18
19 ¹¹ In connection with the request for declaratory relief,
20 the amended complaint alleges that (1) the terms of Angstman's
21 representation of G2 in the Morningstar matter have been actively
22 concealed from plaintiff by Angstman and Goldsmith; (2) the
23 factual basis for Goldsmith's claim to \$130,000 of the G2 funds
24 (the distribution from Morningstar) has been actively concealed
25 from plaintiff by Angstman and Goldsmith; (3) Angstman concealed
26 from plaintiff the fact of the transfer of G2 funds and the
27 details thereof; (4) Goldsmith persuaded Angstman to divert G2's
28 Morningstar Idaho settlement funds in violation of Goldsmith's
statutory fiduciary duty to plaintiff as a member of G2; (5) the
location of the G2 funds from all sources, transferred by
Angstman has, at all times, been concealed by Angstman and
Goldsmith from plaintiff. Given the pleading standards for
tolling a limitations period under a fraudulent concealment
theory which we discuss below, these allegations are
insufficient.

1 plaintiff, by the exercise of reasonable diligence, should have
2 discovered it. Fuller v. First Franklin Fin. Corp., 216 Cal.
3 App.4th 955, 962 (2013); Sanchez v. S. Hoover Hosp., 18 Cal.3d
4 93, 99 (1976). The burden of pleading and proving belated
5 discovery of a cause of action falls on the plaintiff. Inv'rs
6 Equity Life Holding Co. v. Schmidt, 195 Cal.App.4th 1519, 1533
7 (2011).

8 When a plaintiff alleges the fraudulent concealment of
9 a cause of action, the same pleading and proof is
10 required as in fraud cases: the plaintiff must show
11 (1) the substantive elements of fraud, and (2) an
12 excuse for late discovery of the facts. With respect
13 to the fraud itself, '[w]here there is a duty to
14 disclose, the disclosure must be full and complete,
15 and any material concealment or misrepresentation will
16 amount to fraud sufficient to entitle the party
17 injured thereby to an action.' As for the belated
18 discovery, the complaint must allege (1) when the
19 fraud was discovered; (2) the circumstances under
20 which it was discovered; and (3) that the plaintiff
21 was not at fault for failing to discover it or had no
22 actual or presumptive knowledge of facts sufficient to
23 put him on inquiry.

24 Cnty. Cause v. Boatwright, 124 Cal.App.3d 888, 900 (1984).

25 A plaintiff who fails to sufficiently plead such facts
26 should normally be permitted to amend his or her complaint to do
27 so. The record does not show that CO moved to amend its
28 complaint to plead fraudulent concealment of the claims for
relief. Further, although California's LLC law may have made
Goldsmith a fiduciary to other members of G2, CO does not point
to evidence in the record showing Goldsmith's active concealment
of his dispute regarding CO's membership interest in G2.
Finally, other than conclusory allegations that Goldsmith
concealed G2's books, records, and finances, CO does not suggest
there are additional facts it could plead to satisfy the

1 fraudulent concealment discovery rule. CO does not tell us the
2 time or manner of discovery or say it was not aware of facts to
3 make a reasonably prudent person sufficiently suspicious to
4 investigate further.

5 In short, CO has not shown in what manner it could amend
6 its complaint to meet the pleading requirements under the
7 fraudulent concealment discovery rule. Regardless, any amended
8 complaint could not plead around the fact that CO was on notice
9 no later than April 2010 that Goldsmith explicitly disputed CO's
10 membership interest in G2. Therefore, the bankruptcy court
11 correctly found that tolling of the two year statute of
12 limitations for oral contracts was not proper under CO's
13 fraudulent concealment theory.

14 **2. Section 108**

15 Raised for the first time on appeal, CO maintains that
16 § 108 tolled the two-year statute of limitations. In general,
17 we do not consider issues raised for the first time on appeal,
18 although we have discretion to hear previously unconsidered
19 claims when the issue presented is purely one of law and does
20 not depend on the factual record developed in the bankruptcy
21 court. Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir.
22 2004). Section 108 tolls a statute of limitations period that
23 has not expired before the date of the filing of the petition.
24 § 108(a). As discussed above, the two-year statute of
25 limitations expired prior to the filing of CO's petition. Thus,
26 § 108 does not apply as a matter of law.

27 **3. Goldsmith's absence from California**

28 In its reply brief, CO argues that the bankruptcy court

1 erred by finding that Goldsmith's absence from California did
2 not toll the statute of limitations. CO maintains that the
3 court found Cal. Code Civ. Proc. § 351 inapplicable since it
4 impaired Goldsmith's engaging in interstate commerce, but there
5 is nothing in the record that shows Goldsmith engaged in
6 interstate commerce at any time. We do not consider arguments
7 raised for the first time in reply and therefore there is no
8 need to address this contention. See United States v. Gianelli,
9 543 F.3d 1178, 1184 n.6 (9th Cir. 2008); Sophanthavong v.
10 Palmateer, 378 F.3d 859, 871-72 (9th Cir. 2004) (refusing to
11 reach argument raised for the first time in a reply brief). The
12 Ninth Circuit explained in Tovar v. United States Postal Service
13 that it is improper to raise new arguments in a reply brief
14 because the opposing party is deprived of an opportunity to
15 respond. 3 F.3d 1271, 1273 n.3 (9th Cir. 1993).

16 **4 The motion for reconsideration: tolling due to the**
17 **state court receivership action and applicability of**
18 **the four-year statute of limitations for written**
19 **contracts**

19 CO argues on appeal that the state court receivership
20 action tolled the two-year statute of limitations. CO further
21 asserts that the four-year statute of limitations applicable to
22 written contracts applies due to Goldsmith's representations in
23 emails and tax returns that CO was a member in G2 with a 50%
24 interest. Both these arguments were raised for the first time
25 in CO's motion for reconsideration. The bankruptcy court
26 properly rejected the untimely arguments on the basis that they
27 could reasonably have been raised earlier in the litigation.
28 Marlyn Nutraceuticals Co., Inc., 571 F.3d at 880.

1 To avoid this result, CO argues on appeal that the
2 applicability of the four-year statute of limitations was
3 "sufficiently developed" for the bankruptcy court to address
4 this issue in its motion for reconsideration. In this regard,
5 CO points to the bankruptcy court's comments when it considered
6 the statute of frauds as a basis for dismissal of the complaint.
7 In declining to dismiss the complaint on statute of frauds
8 grounds, the bankruptcy court observed that there was some
9 written evidence of CO's membership in G2 due to the 2010 tax
10 return and the Schedule K-1. CO maintains that these findings
11 were sufficient to require the application of California's four-
12 year limitations statute. We find this argument is not properly
13 before us.

14 Whether the emails and tax returns constituted sufficient
15 writings to satisfy the statute of frauds was not argued in the
16 context of the statute of limitations. Moreover, the matter was
17 not briefed and the case law supporting CO's position on the
18 applicability of the four-year statute of limitations was not
19 cited until the motion for reconsideration. Therefore, the
20 issue was not raised sufficiently to permit the bankruptcy court
21 to rule upon it. Under these circumstances, our abuse of
22 discretion review precludes us from reversing the bankruptcy
23 court's decision to decline to address issues raised for the
24 first time in a motion for reconsideration. 389 Orange St.
25 Partners v. Arnold, 179 F.3d 656, 666 (9th Cir. 1999).

26 In sum, we conclude that (1) the bankruptcy court properly
27 dismissed the adversary complaint against Goldsmith and G2
28 because it was time barred under California's two-year statute

1 of limitations relating to oral contracts; (2) the bankruptcy
2 court did not abuse its discretion in refusing to apply any of
3 the tolling doctrines asserted; and (3) the bankruptcy court did
4 not abuse its discretion in denying CO's motion for
5 reconsideration based on its untimely arguments.

6 **5. Denial of CO's motion for disqualification is moot**

7 The bankruptcy court's order dismissing CO's adversary
8 complaint against Goldsmith and G2 with prejudice was a final
9 order. As a final order it incorporates and brings up for
10 review the preceding non-final order denying CO's motion to
11 disqualify Goldsmith's and G2's counsel, Osborn Maledon. We
12 conclude that disqualification of Osborn Maledon based on a
13 claimed conflict of interest is moot in light of the bankruptcy
14 court's proper dismissal of the adversary complaint on statute
15 of limitations grounds. Due to the dismissal, even if we were
16 to reverse the bankruptcy court's denial of CO's
17 disqualification motion, the reversal would not afford CO any
18 effectual relief.

19 **B. The bankruptcy court did not err by dismissing the**
20 **Loomis/Baker adversary complaint under Civil Rule 12(b) (6)**
(BAP No. 15-1165).

21 **1. Jurisdiction**

22 We first briefly address our jurisdiction over this appeal.
23 The order dismissing this adversary proceeding was without
24 prejudice. Generally, "[a]n order dismissing a complaint
25 without prejudice is an interlocutory order." In re Belice,
26 461 B.R. at 571-72. Here, however, the dismissal without
27 prejudice was basically in lieu of staying the adversary
28 proceeding pending CO's appeal of the Goldsmith/G2 matter. In

1 other words, if CO prevailed in its appeal of the Goldsmith/G2
2 matter, it could proceed to establish its membership interest in
3 G2 and then reinstate the Loomis/Baker adversary proceeding
4 which contained claims dependent upon that interest. Since CO
5 has not been successful in its appeal of the Goldsmith/G2
6 matter, we conclude that the bankruptcy court's dismissal of the
7 Loomis/Baker adversary proceeding without prejudice is
8 sufficiently final to support our jurisdiction.¹²

9 **2. The parties' arguments**

10 CO argues on appeal that the bankruptcy court erred in
11 dismissing the Loomis/Baker adversary proceeding in its entirety
12 because not all of the relief sought was dependent upon a
13 finding that CO had a membership interest in G2. Specifically,
14 under the JDCA, Loomis and Baker as attorney members had the
15 authority and obligation to act jointly, unanimously, and in
16 writing to place any and all funds which are paid to G2 into one
17 or more bank accounts requiring the signatures of all attorney
18 members for withdrawals, subject to the effect of any future
19 court order to the contrary. This provision survived
20 termination of the agreement. According to CO, under the
21 amended JDCA, the attorney members were supposed to escrow the
22 settlement funds from third parties, including those received
23 from Atlas Free and Cusumano. CO further maintains that under
24

25 ¹² Even if this were not the case, under Rule 8003, we may
26 treat a notice of appeal as a motion for leave to file an
27 interlocutory appeal. As it would be in everyone's best interest
28 to decide this appeal now, we grant leave to appeal to the extent
it is necessary. See Travers v. Dragul (In re Travers), 202 B.R.
624, 626 (9th Cir. BAP 1996).

1 the amended JDCA, it was the client members who would direct
2 them to distribute fifty percent of those funds to CO and fifty
3 percent to Goldsmith within two days of receipt. CO argued that
4 Loomis and Baker breached the JDCA by announcing in an email
5 that they intended to misapply the Cusumano/Atlas Free funds by
6 making various deductions. CO points out that its counsel
7 immediately objected to this arrangement, but none of the
8 Cusumano/Atlas Free funds were ever distributed to it.

9 In response, Loomis and Baker maintain that this "secondary
10 claim" fails because (1) CO never raised this argument in its
11 complaint against Loomis and Baker and (2) the provision in the
12 amended JDCA upon which CO relies imposes obligations solely on
13 the "client members" under the contract, not on Loomis and Baker
14 who were expressly defined as the attorney members. Therefore,
15 since Loomis and Baker had no contractual obligation to turn
16 over any settlement funds allegedly owed to CO under the amended
17 JDCA, the claim fails as a matter of law.

18 In reply, CO argues that the JDCA was breached because
19 Loomis and Baker did not hold funds paid to G2 in escrow as
20 required by the agreement and the amended JDCA which
21 incorporated those terms. CO asserts that while the amended
22 JDCA provided that the client members would cause the
23 disbursement of the Cusumano/Atlas Free settlement funds, Loomis
24 and Baker ignored their obligation to hold the funds under the
25 JDCA. CO further contends that a plain reading of the JDCA and
26 the amendment establish that Goldsmith and CO were to direct the
27 attorney members to disburse the settlement funds. In sum, CO
28 maintains that Loomis and Baker completely ignored the issue of

1 their unconditional, contractual obligation to hold G2 funds
2 until a court says "disburse" or Goldsmith and CO agreed in
3 writing to a disbursement, as set forth in the JDCA.

4 **3. Analysis**

5 While the parties make numerous arguments supporting their
6 positions regarding the proper interpretation of the JDCA and
7 its amendment, the bankruptcy court never interpreted those
8 agreements because it was unnecessary to reach these issues.
9 The amendment was not pled in the complaint and the central
10 issue was whether the claims asserted were dependent upon CO's
11 membership interest in G2.

12 In "Count One" of the amended complaint, CO seeks the
13 turnover of G's books, records, accounts, ledgers, and other
14 records. CO alleges in ¶ 23: "As a 50% member of G2, plaintiff
15 is entitled to the information contained in the foregoing
16 records of G2 in the custody of Loomis and Baker." In "Count
17 Two" of the amended complaint, CO seeks the turnover of estate
18 funds and alleges in ¶ 26: "Plaintiff . . . alleges that
19 defendants Loomis and Baker have received . . . not less than
20 \$3,515,675, subject to proof at trial, which comprises property
21 of this estate by reason of being plaintiff's 50% share of G2
22 funds" Finally, in "Count Three" of the amended
23 complaint, CO seeks damages for fiduciary misconduct. CO
24 alleges that Loomis and Baker owed a fiduciary duty to it at all
25 times with respect "to the plaintiff's share" of G2 funds
26 received. Taken together, these allegations show that all of
27 CO's claims for relief depended upon its membership interest in
28 G2. Without such an interest, it could not possibly win relief

1 against Loomis and Baker on the asserted claims. Accordingly,
2 as a matter of law, the bankruptcy court's dismissal was
3 proper.¹³

4 **C. The bankruptcy court did not abuse its discretion in**
5 **denying confirmation of the Plan or in dismissing the**
6 **underlying bankruptcy case (BAP No. 15-1166).**

7 **1. Jurisdiction**

8 Denial of plan confirmation is an interlocutory order.
9 Bullard v. Blue Hills Bank, 135 S.Ct. 1686, 1693-94, 1696
10 (2015). Moreover, as noted above, the dismissal of the
11 underlying case without prejudice, also an interlocutory ruling,
12 was done to allow CO to reinstate the case in the event it
13 prevailed on appeal in the Goldsmith/G2 matter. Under
14 Rule 8003, we may treat a notice of appeal as a motion for leave
15 to file an interlocutory appeal. Because we have decided that
16 CO's adversary proceeding against Loomis and Baker was properly
17 dismissed, there is no possibility that CO could fund a plan.
18 There is thus no ground for the case to be reinstated. As it
19 would be in everyone's best interest to decide this appeal now,
20 we grant leave to appeal to the extent it is necessary. See
21 In re Travers, 202 B.R. at 626.

22 **2. The merits**

23 Turning to the merits of the court's decisions to deny Plan
24 confirmation and dismiss the bankruptcy case, there is no basis

25 ¹³ CO did not request leave to amend its complaint at any
26 time, either in response to the initial motion to dismiss or
27 after it received notice that Loomis/Baker intended to reargue
28 that motion. As a consequence, dismissal without a provision
regarding leave to amend was a proper ruling of the court based
on the issues before it.

1 to find an abuse of discretion with either decision. Without a
2 membership interest in G2, CO has no money to fund a plan, so
3 denial of confirmation and dismissal were the logical rulings.
4 Therefore, we summarily affirm.

5 **VI. CONCLUSION**

6 For the reasons stated, we AFFIRM the bankruptcy court's
7 decisions in these three related appeals.

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