

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

In re )  
SHELDON H. CLOOBECK, )  
 )  
Debtor )  
 )  
RICHARD CLOOBECK and LYNNE )  
CLOOBECK, )  
Appellants, )  
vs. )  
TIM CORY and CLOOBECK )  
COMPANIES, LLC, )  
Appellees. )

Case No.: 2:10-cv-01278-GMN-PAL  
Bankruptcy Case No. BK-S-05-10179-BAM

**ORDER**

Before the Court is Appellants Richard Cloobek and Lynne Cloobek’s Motion to Expand the Record (ECF No. 22). Appellee Timothy S. Cory, as the Chapter 7 Trustee of the Estate of the Debtor Sheldon H. Cloobek, filed a Response on December 6, 2010 (ECF No. 25). Appellants filed a Reply on December 15, 2010 (ECF No. 27).

Also before the Court is Appellee’s Motion to Amend/Correct the Answering Brief (ECF No. 24). Appellants filed a Response on December 15, 2010 (ECF No. 26) and Appellee filed a Reply on December 21, 2010 (ECF No. 28).

**FACTS AND BACKGROUND**

This case arises as an appeal from a decision by the Bankruptcy Court to allow the Trustee (Timothy S. Cory) to sell claims that the bankruptcy estate held (or may not have held) against Richard Cloobek. Debtor Sheldon Cloobek, Richard Cloobek and Lynne Cloobek, along with other unnamed parties entered into a settlement agreement in which Sheldon Cloobek released all known or unknown claims against his son, Richard Cloobek. Timothy

1 S. Cory (hereinafter "Trustee") motioned the Bankruptcy Court to approve the settlement  
2 agreement on March 2, 2007 pursuant to the Bankruptcy Court's authority to approve the  
3 compromise of claims under Federal Rule of Bankruptcy Procedure 9019 (Bk. Ct. Dkt. #434,  
4 ECF No. 15-8). The Bankruptcy Court approved the settlement agreement at a hearing on the  
5 subject on April 19, 2007 (Bk. Ct. Dkt. #464, ECF No. 15-12; Bk. Ct. Dkt. #469, ECF No. 15-  
6 13).

7 Nearly three (3) years later, Sheldon Cloobek (hereinafter "Debtor") wrote to the  
8 Trustee requesting that he abandon the estate's claims against Richard Cloobek. The Trustee  
9 filed a notice of intent to abandon on April 6, 2010 (Bk. Ct. Dkt. #579, ECF No. 15-14).  
10 Concerned that someone might try to pursue the estate claim, Richard Cloobek and Lynne  
11 Cloobek offered to purchase the claims from the Trustee for \$5,000 notwithstanding the  
12 settlement agreement. The Trustee withdrew the notice of intent to abandon the claims and  
13 moved to sell the claims to Richard Cloobek and Lynne Cloobek (Bk. Ct. Dkt. #580, ECF  
14 No. 15-15; Bk. Ct. Dkt. #581, ECF No. 15-16). Four (4) hours later, the Trustee amended the  
15 motion to reflect an overbid of \$100,000 from the Cloobek Companies, a business managed  
16 by Stephen Cloobek (Bk. Ct. Dkt. # 583, ECF No. 15-17). Richard Cloobek and Lynne  
17 Cloobek then contested the amended sale motion asserting that (1) the Trustee no longer  
18 owned the Debtor's claims against Richard Cloobek; (2) the purported claims were already  
19 subject to a settlement agreement that already had been approved and reduced to final  
20 judgment; (3) the sale of settled claims would result in a multiplication of litigation; and  
21 (4) the sale was contrary to the principles of equity (Bk. Ct. Dkt. #592, ECF No. 15-18).

22 The Bankruptcy Court held a hearing on the motion to sell Debtor's claims against  
23 Richard Cloobek on June 29, 2010 (Bk. Ct. Dkt. #600, ECF No. 15-20). The Court granted  
24 the Trustee's motion to sell the claims and found that the Trustee's duty to maximize the estate  
25

1 outweighed the public policy with respect to selling assets that may foment or cause litigation  
2 elsewhere. (*Id.*).

3 Appellants filed this appeal on July 29, 2010. The parties submitted their Opening,  
4 Answering and Reply briefs (ECF No. 14, 16 and 21). Appellants subsequently filed their  
5 Motion to Expand the Record (ECF No. 22). The Trustee then filed the Motion to Amend the  
6 Answering Brief (ECF No. 24) partly in response to Appellants' Motion to Expand.

### 7 **DISCUSSION**

#### 8 **A. Motion to Expand the Record**

9 Federal Rule of Appellate Procedure 10(e) states in relevant part:

10 (2) If anything material to either party is omitted from or misstated  
11 in the record by error or accident, the omission or misstatement may  
12 be corrected and a supplemental record may be certified and  
13 forwarded:

14 (A) on stipulation of the parties;

15 (B) by the district court before or after the record has been  
16 forwarded; or

17 (C) by the court of appeals.

18 (3) All other questions as to the form and content of the record must  
19 be presented to the court of appeals.

20 This Court has held that Appellate Rule 10(e) is applicable to it on appeals from bankruptcy  
21 court. *Grantham v. Cory (In re Flamingo 55, Inc.)*, Case No. 2:05-cv-01521-RLH-GWF, 2006  
22 WL 2432764, \*4 (D.Nev. Aug. 21, 2006). "Rule 10(e) cannot be used to add to or enlarge the  
23 record on appeal to include material which was not before the district court." *United States v.*  
24 *Walker*, 601 F.2d 1051, 1054 (9th Cir.1979).

25 Plaintiff motions this court to "expand the record to include the transcript of the  
examination of Richard Cloobek taken in the bankruptcy case but not part of the record  
below." (Motion to Expand, 2:1-3, ECF No. 22). Plaintiff argues that this transcript is material  
to show that the allegations put forth by the Trustee in the Answering Brief are unfounded.  
Plaintiff asserts that the Court has discretion to review the entire record from below including

1 transcripts referenced by the parties. *See Brown v. Home Ins. Co.*, 176 F.3d 1102, 1104 n.2  
2 (8th Cir. 1999), citing Fed. R. App. P. 30(a)(2). The introduction of the deposition also may  
3 “correct an omission and to permit a more accurate understanding of the material facts” or  
4 when “any difference arises as to whether the record truly discloses what occurred in the  
5 district court.” *Id.*, citing Fed. R. App. P. 10(e); *Hatco Corp. v. WR Grace & Co.-Conn.*, 859  
6 F. Supp. 769, 772 (D.N.J. 1994). Plaintiff explains that this Court has approved  
7 supplementation of the record to add documents considered by the bankruptcy court but not  
8 fully in the record prior to the appeal. *Grantham*, 2006 WL 2432764 at \*3-5; *see also In re*  
9 *Lathrop Mobile Investors*, 55 B.R. 766, 767 n.1 (BAP 9th Cir. 1985) (noting appellate court  
10 can order transcript to supplement record).

11 Contrary to what Appellants assert, *Grantham* did not allow supplementation of the  
12 record to add documents that were not fully in the record prior to the appeal. That court  
13 actually found that the document that the appellants were seeking to admit was found within  
14 the record before the court entered its order. Furthermore, *In re Lathrop Mobile Investors* adds  
15 nothing to Appellants’ arguments, because all the Court did in that case was order a transcript  
16 of a hearing of the lower court.

17 Appellants do not provide any evidence that the transcript of the examination of  
18 Richard Cloobek was in the record before the Bankruptcy Court made its ruling. In fact,  
19 Appellants actually state that the transcript was not part of the record below. The Court’s  
20 review of the Bankruptcy record does not reveal that the transcript was in the record before the  
21 Bankruptcy Court’s ruling on the Motion to Sell.

22 Appellee contends that the transcript is immaterial to the Bankruptcy Court’s decision  
23 to grant the Trustee’s motion to sell. Appellee argues that Appellants misperceived their  
24 argument in their answering brief and claim that they have made no arguments concerning the  
25 merits of any claims against Richard Cloobek. Appellee states that such an argument is not

1 necessary to the Trustee’s position that the Bankruptcy Court properly authorized the sale of  
2 whatever claims the bankruptcy estate holds against Richard Cloobek. In response, Appellee  
3 offers to amend their answering brief to clarify any misunderstandings. In the alternative,  
4 Appellee moves to expand the record to include documents involving an arbitration award  
5 obtained by Richard Cloobek against Stephen Cloobek and certain Cloobek entities and the  
6 complaint underlying the judgment. Appellee explains that this is necessary to make the  
7 record more complete regarding conflicting testimony of Richard Cloobek with respect to his  
8 assets. However, Appellee has not provided any evidence that these documents were in the  
9 record before the Bankruptcy Court made its decision either.

10       Having reviewed the briefs and arguments of the parties, the Court denies Appellants’  
11 motion to expand the record. It appears that the Bankruptcy Court did not consider the  
12 transcript at the time it made its decision and the Court cannot find the transcript on the  
13 Bankruptcy Court’s docket.<sup>1</sup> *See Walker*, 601 F.2d at 1055 (“We are here concerned only with  
14 the record before the trial judge when his decision was made.”). Likewise, the Court cannot  
15 grant Appellee’s motion to expand the record to include the arbitration documents if they were  
16 not before the Bankruptcy Court. Therefore the Court denies the motions to expand the record  
17 without prejudice. The parties are free to file amended motions if they can show that the  
18 documents they wish to supplement were before the Bankruptcy Court when it made its  
19 decision.

20 **B. Motion to Amend**

21       As explained *supra*, Appellee offered to amend the answering brief to take out any  
22 misperceived allegations of fraud against Richard Cloobek. However, the Court denies  
23

---

24 <sup>1</sup> While Appellants have made somewhat persuasive arguments under other circuit’s precedence, this Court is bound by  
25 Ninth Circuit precedence to the contrary. Furthermore, the Court does not find that the transcript is material because at the  
hearing before the Bankruptcy Court, there was no argument that Richard Cloobek in fact lied in his deposition. Instead,  
the Appellees argued that there is only an allegation that he lied. The Bankruptcy Court did not base its ruling on the  
merits of the allegation.

1 Appellee's motion to amend the answering brief. Appellees cite to no authority that would  
2 enable them to amend their brief. The Court has been put on notice of the conflicting  
3 arguments regarding the 'allegations of fraud' through the parties' various motions. In light of  
4 the Court denying Appellants' motion to expand it also appears unnecessary to amend the  
5 Answering Brief because to do so will only delay the litigation because Appellants would then  
6 be required to file a new Reply Brief.

7 **CONCLUSION**

8 **IT IS HEREBY ORDERED** that Appellants Richard Cloobek and Lynne Cloobek's  
9 Motion to Expand the Record (ECF No. 22) is **DENIED without prejudice**.

10 **IT IS FURTHER ORDERED** that Appellee's Motion to Amend/Correct the  
11 Answering Brief (ECF No. 24) is **DENIED without prejudice**.

12 DATED this 19th day of May, 2011.

13  
14  
15   
16 \_\_\_\_\_  
17 Gloria M. Navarro  
18 United States District Judge  
19  
20  
21  
22  
23  
24  
25