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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. MT-08-1164-MoDH
)	
LAWRENCE D. WRIGHT and ANN)	Bk. No. 05-61714
MARIE WRIGHT (DECEASED),)	
)	
Debtors.)	
)	
OLYMPIC COAST INVESTMENT,)	
INC.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
DARCY M. CRUM, Chapter 7)	
Trustee,)	
)	
Appellee.)	
)	

Argued and Submitted on October 16, 2008
at Pasadena, California

Filed - November 3, 2008

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and HOLLOWELL, Bankruptcy Judges.

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

1 A creditor filed a proof of claim in the total amount of
2 \$5,587,997.76, with the secured amount listed at \$4,573,239,78,
3 and the value of its collateral listed as "unknown." Two weeks
4 later, the chapter 7 trustee moved to abandon the estate's
5 interest in the collateral, stating that the debtor had estimated
6 the value at \$50,000.00. The creditor never filed an amended
7 proof of claim indicating the amount of its unsecured deficiency.
8 Almost two years later, the trustee filed her notice of final
9 report and distribution, proposing to pay unsecured creditors a
10 dividend of 5.65 percent. The trustee did not propose to make
11 any distribution to the creditor, and instead treated the
12 creditor as a holder of an allowed secured claim in the amount of
13 \$5,587,997.76.

14 The creditor objected to the proposed distribution, arguing
15 that the balance of its claim over \$50,000 (the value placed on
16 its collateral by trustee in the motion to abandon) should have
17 been treated as unsecured and paid accordingly. The trustee
18 argued that because the creditor never filed an amended proof of
19 claim reflecting the full amount of its unsecured deficiency
20 claim, the creditor should not receive any payment as an
21 unsecured creditor. The bankruptcy court overruled the
22 creditor's objection and approved the trustee's final report and
23 proposed distribution.

24 The creditor appealed, but did not obtain a stay pending
25 appeal. Trustee has made the distributions as proposed and
26 approved, and contends that the appeal is therefore moot. We
27 DISMISS the appeal as equitably moot. Even if the appeal were
28 not equitably moot, we would affirm on the merits.

1
2 **I. FACTS**

3 Lawrence D. Wright ("Debtor") and his now-deceased wife
4 filed a chapter 7 petition on June 29, 2005. Appellee Darcy M.
5 Crum ("Trustee") was appointed as the chapter 7 trustee. In
6 Schedule A, Debtor listed certain condominium units in St. Marie,
7 Montana (the "Property"), describing the value as "unknown." In
8 Schedule F, Debtor listed appellant Olympic Coast Investment
9 ("OCI") as an unsecured creditor with a claim in the amount of
10 \$4,573,239.78.

11 OCI filed a timely proof of claim on June 1, 2006, asserting
12 a total claim in the amount of \$5,587,997.76, and a secured claim
13 in the amount of \$4,573,239.78. While OCI did not describe the
14 property securing its claim with any particularity, the proof of
15 claim stated that the collateral was "real estate" with an
16 "unknown" value and that the claim arose from a judgment. OCI
17 has never amended its proof of claim.

18 On June 16, 2006, Trustee filed a notice of her intent to
19 abandon the Property, noting that OCI had asserted a secured
20 claim in the amount of \$4,573,239.78 against the Property.
21 Trustee stated that the value of the Property was "unknown
22 (possibly \$1,000 per unit)." In her "reason for abandonment,"
23 Trustee stated that "Debtor has estimated the value of each unit
24 at \$1,000.00, \$50,000 for all 50 units. Debtor has owned these
25 units since 1999 and has been unable to market them. The debt
26 secured by the units exceeds their marketable value." No one
27 objected to the abandonment.

28 On May 19, 2008, Trustee filed her Notice of Final Report
and Proposed Distribution. Trustee proposed to pay \$43,021.29 to

1 the holders of eighteen unsecured claims. The disbursements to
2 the unsecured creditors varied in amount from \$6.72 to
3 \$38,408.60. Trustee did not list OCI as an unsecured creditor
4 and therefore did not propose to pay anything to OCI.

5 OCI objected to the proposed distribution, arguing that
6 Trustee had "admitted" that the value of the Property was only
7 \$50,000 in her notice of intent to abandon. According to OCI,
8 the balance of its claim in excess of \$50,000 was unsecured; OCI
9 asserted that the unsecured amount was \$4,523,239.78, even though
10 subtracting \$50,000 from the total amount of the claim
11 (\$5,587,997.76) would equal \$5,537,997.76.² OCI argued that it
12 was entitled to in pari passu payment on its unsecured claim
13 pursuant to 11 U.S.C. § 726(a).³

15 ²Even though the total amount shown in OCI's proof of claim
16 exceeded the secured amount by more than \$1 million
17 (\$5,587,997.76 minus 4,573,239.78), OCI never argued before the
18 bankruptcy court or us that the proof of claim on its face
19 reflected an unsecured claim of at least \$1 million. Rather, OCI
20 continues to assert that its general unsecured claim is
21 \$4,523,239.78. See page 6 of OCI's Opening Brief. Responding to
22 our query at oral argument, OCI's counsel stated that OCI was
23 simply pursuing the difference between \$50,000 and its secured
24 claim (\$4,573,239.78). Because OCI did not argue that the face
25 of the proof of claim itself reflected an unsecured deficiency of
approximately \$1 million, that argument is waived. Golden v.
Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir.
BAP 2002) (issues not raised at the trial court will not be
considered for the first time on appeal; arguments not
specifically and distinctly made in an appellant's opening brief
are waived).

26 ³Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23.

1 Trustee responded that OCI never filed a proof of claim
2 specifying the amount of its unsecured claim as required by local
3 rule and that a trustee should not be required to estimate the
4 amount of an unsecured claim. In its reply, OCI contended that
5 no authority required it to amend its claim to estimate the
6 unsecured portion. OCI further contended (correctly) that the
7 local rule requiring undersecured creditors to file proofs of
8 claim stating or estimating the unsecured amounts of claims was
9 inapplicable to holders of nonconsensual judgment liens.

10 At the hearing on OCI's objection to Trustee's final report
11 and proposed distribution, the court held that "the proof of
12 claim that's filed is filed as a secured claim for the full
13 amount, including interest" and that "it's certainly not the
14 trustee's responsibility to pursue a bifurcation of a claim of a
15 secured creditor." On June 20, 2008, the bankruptcy court
16 entered an order overruling OCI's objection to the final report,
17 approving Trustee's final report and proposed distribution, and
18 authorizing Trustee to make the final distribution.

19 On June 26, 2008, OCI filed a timely notice of appeal. OCI
20 named Trustee (and her counsel) as the only other parties to the
21 appeal, although it served its notice of appeal on those
22 unsecured creditors receiving payments under Trustee's proposed
23 distribution. On July 8, 2008, OCI served on Trustee and the
24 unsecured creditors a "Response to Trustee's Designation of
25 Additional Issues on Appeal" stating that "distribution of cash
26 does not moot an appeal. The funds can be ordered disgorged from
27 the creditors to whom the Trustee paid the distribution."

28 (Emphasis in original).

1 OCI never sought a stay pending appeal. Trustee has made
2 the disbursements proposed in the final report approved by the
3 court.⁴

4 II. ISSUES

5 1. Did the trustee's distribution to creditors render this
6 appeal moot?

7 2. Did the bankruptcy court err in approving the trustee's
8 final report and final distribution?

9 III. STANDARD OF REVIEW

10 We review findings of fact for clear error and issues of law
11 de novo. Litton Loan Serv'g, LP v. Garvida (In re Garvida), 347
12 B.R. 697, 703 (9th Cir. BAP 2006). Application of basic rules of
13 procedure and construction of the Bankruptcy Code present
14 questions of law that we review de novo. Ruvacalba v. Munoz (In
15 re Munoz), 287 B.R. 546, 550 (9th Cir. BAP 2002). Mootness is a
16 question of law that we review de novo. Suter v. Goedert, 504
17 F.3d 982, 985 (9th Cir. 2007).

18 IV. DISCUSSION

19 A. Jurisdiction

20 We lack jurisdiction over appeals that are moot. Baker &
21 Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake,
22 Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994). Trustee contends that
23 this appeal is moot, as OCI did not seek a stay of the order
24

25 ⁴Trustee has not stated when the payments were made and has
26 not provided any evidence of such payments apart from a statement
27 on page 2 of her brief. OCI, however, does not dispute that the
28 payments have been made, and acknowledged at oral argument that
the payments were made before it sent its notice to unsecured
creditors that their payments could be ordered disgorged.

1 approving the final account and Trustee has already made the
2 proposed distributions to creditors who are not parties to this
3 appeal.

4 As the Ninth Circuit noted in Focus Media, Inc. v. Natl.
5 Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916, 922-23
6 (9th Cir. 2004), bankruptcy appeals may become moot in one of two
7 ways. First, events may occur that make it impossible for the
8 appellate court to fashion effective relief.⁵ Focus Media, 378
9 F.3d at 922. Alternatively, an appeal may become equitably moot
10 when the “[a]ppellants have failed and neglected diligently to
11 pursue their available remedies to obtain a stay of the
12 objectionable orders of the Bankruptcy Court,” thus ‘permitt[ing]
13 such a comprehensive change of circumstances to occur as to
14 render it inequitable . . . to consider the merits of the
15 appeal.’” Id. at 923 (alterations in original) (quoting Tron v.
16 Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793,
17 798 (9th Cir. 1981)). Equitable mootness occurs “when an
18 appellant neglect[s] to obtain a stay pending appeal and the
19 rights of third parties have intervened.” Arnold & Baker Farms
20 v. U.S. (In re Arnold & Baker Farms), 85 F.3d 1415, 1419-20 (9th
21 Cir. 1996) (quoting Spirtos v. Moreno (In re Spirtos), 992 F.2d
22 1004, 1006 (9th Cir. 1993)).

23

24 ⁵This type of appeal is constitutionally moot. Church of
25 Scientology of Cal. v. U.S., 506 U.S. 9, 12 (1992). The Seventh
26 Circuit has succinctly described the difference between
27 constitutional mootness and equitable mootness: constitutional
28 mootness is characterized by an “inability to alter the outcome”
while equitable mootness involves an “unwillingness to alter the
outcome.” Matter of UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir.
1994).

1 In this case, OCI never sought a stay of the distribution to
2 other creditors. Even though a failure to obtain a stay does not
3 necessarily render an appeal moot, "it is obligatory upon [an]
4 appellant . . . to pursue with diligence all available remedies
5 to obtain a stay of execution of the objectionable order (even to
6 the extent of applying to the Circuit Justice for relief . . .)
7 if the failure to do so creates a situation rendering it
8 inequitable to reverse the orders appealed from." Roberts Farms,
9 652 F.3d at 799.

10 Here, OCI's decision not to seek a stay permitted
11 distributions to be made to other creditors who are not parties
12 to this appeal. We have noted that disbursement of funds in such
13 circumstances may moot an appeal. Lobel & Opera v. U.S. Trustee
14 (In re Auto Parts Club, Inc.), 211 B.R. 29, 33 (9th Cir. BAP
15 1997) ("[t]he disbursement of funds pending appeal may moot the
16 appeal" although that appeal was not moot because appellant had
17 been required to disgorge the funds that had then been
18 distributed to other creditors and "[t]urnabout is fair play");
19 Credit Alliance Corp. v. Dunning-Ray Ins. Co. (In re Blumer), 66
20 B.R. 109, 113 (9th Cir. BAP 1986) (effective relief is impossible
21 and appeal is moot "if funds have been disbursed to persons who
22 are not parties to the appeal"); cf. Beatty v. Traub (In re
23 Beatty), 162 B.R. 853, 856 (9th Cir. BAP 1994) ("in the absence
24 of any transfers of property or disbursements of funds, we do not
25 find that the actions of a trustee in administering the Chapter 7
26 estate constitute a sufficient change of circumstances to render
27 this appeal moot) (emphasis added), overruled on other grounds in
28

1 Rosson v. Fitzgerald (In re Rosson), -- F.3d --, 2008 WL 4330558
2 (9th Cir., Sept. 24, 2008).⁶

3 In a remarkably similar case, a chapter 7 debtor appealed a
4 final order approving a trustee's final report and proposed
5 distribution. Carr v. King (In re Carr), 321 B.R. 702 (E.D. Va.
6 2005). The debtor did not seek a stay pending appeal and the
7 trustee made the approved disbursements, including a distribution
8 to a non-party creditor. The court found that the appeal was
9 constitutionally and equitably moot.

10 The Carr court noted that the principle of equitable
11 mootness "applies with particular force when 'a party, seeking a
12 return to the status quo ante, sits idly by and permits
13 intervening events to extinguish old rights and create new
14 ones.'" Id. at 706, quoting Mac Panel Co. v. Va. Panel Corp., 283
15 F.3d 622, 625 (4th Cir. 2002). In deciding whether the appeal
16 was equitably moot, the court considered four factors:

- 17 (1) whether the appellant sought and obtained a stay;
18 (2) whether the . . . equitable relief ordered has been
19 substantially consummated;
20 (3) the extent to which the relief requested on appeal
21 would affect the success of the . . . other equitable
22 relief granted; and

22 ⁶In an unpublished non-precedential decision, the Ninth
23 Circuit held an appeal of an order approving a trustee's final
24 report was mooted by disbursements to other creditors. Schafler
25 v. Spear (In re Schafler), 280 Fed.Appx. 648 (9th Cir. 2008)
26 ("because disbursement under the final report was not stayed and
27 all disbursements were made to entities that were not party to
28 the appeal, the BAP properly concluded that any challenge to the
final report was moot"). Although the unpublished decision is
not binding, we cite it for its persuasive value. See Fed. R.
App. P. 32.1 and 9th Cir. Rule 36-3(b) (allowing courts to cite
to unpublished decisions issued after January 1, 2007).

1 (4) the extent to which the relief requested on appeal
2 would affect the interests of third parties.

3 Carr, 321 B.R. at 707. Here, as in Carr, the first, second and
4 fourth factors weigh in favor of dismissing the appeal as
5 equitably moot. OCI did not seek a stay, the distributions
6 proposed in the final report have been completed, and reversal
7 would adversely affect the rights of non-parties to this appeal,
8 who would have to disgorge payments received.

9 OCI cites Ninth Circuit cases acknowledging that
10 disbursement of funds, in and of itself, does not preclude
11 effective relief because Trustee could seek disgorgement of the
12 funds paid. See, e.g., U.S. v. Arkison (In re Cascade Roads,
13 Inc.), 34 F.3d 756, 761 (9th Cir. 1994); Salomon v. Logan (In re
14 Int'l Environ. Dynamics, Inc.), 718 F.2d 322, 325-26 (9th Cir.
15 1983) (where funds have been disbursed to a party to the appeal,
16 the appellate court has the ability to "fashion effective relief
17 by remanding with instructions to the bankruptcy court to order
18 the return of erroneously disbursed funds."). We agree; we could
19 fashion effective relief and the appeal is therefore not
20 constitutionally moot. It is, however, equitably moot, as OCI
21 did not take the simple steps to seek a stay of the appeal and
22 prevent the intervention of the rights of third parties. OCI's
23 inaction permitted "such a comprehensive change of circumstances
24 to occur as to render it inequitable . . . to consider the merits
25 of the appeal.'" Focus Media, 378 F.3d at 923 (alterations in
26 original).

27 Unlike in Cascade Roads and International Environmental
28 Dynamics, the trustee here has actually made disbursements to

1 creditors who are not parties to this appeal; the rights of third
2 parties have intervened.⁷ In Cascade Roads, the government paid a
3 claims court judgment to the trustee, but notified the trustee
4 that it would seek to recover any judgment proceeds that he had
5 distributed if it were successful in its appeal of the judgment.
6 Cascade Roads, 34 F.3d at 761. The trustee, who was a party to
7 the appeal, retained the proceeds and did not distribute them to
8 creditors. Id. at n.4. The Ninth Circuit could therefore
9 “fashion effective relief by ordering the trustee to return the
10 judgment.” Id. In International Environmental Dynamics, unlike
11 here, the creditor who received the distribution was a party to
12 the appeal, so effective relief was possible. Int’l Environ.
13 Dynamics, 718 F.2d at 325-26.

14 For the foregoing reasons, we believe the appeal is
15 equitably moot and therefore will DISMISS it. Even if the appeal
16 were not moot, we would affirm on the merits for the reasons set
17 forth in the next section.

18 **B. The Merits**

19 The parties did not cite any cases directly on point, but we
20 found and adopt the persuasive analysis of other courts holding
21 that a trustee does not have to make distributions to an
22 undersecured creditor who did not amend its claim to assert or
23 estimate the unsecured portion.

24

25 ⁷OCI’s purported warning to creditors of a possible
26 disgorgement if it prevailed on appeal is not sufficient to
27 defeat equitable mootness. The warning was interjected into a
28 response to a designation of issues on appeal; the creditors were
not parties to the appeal. OCI acknowledged at oral argument
that the warning was not given before the distribution.

1 In In re Padget, 119 B.R. 793 (Bankr. D. Colo. 1990), an
2 undersecured creditor filed a secured claim in the debtor's
3 chapter 7 case. The creditor never supplemented or amended its
4 claim to reflect the unsecured deficiency amount. The trustee
5 issued his final report treating the claim as secured and
6 excluding the creditor from the list of unsecured creditors
7 receiving distributions. After the final report was approved and
8 the distributions made, the creditor sought reconsideration,
9 arguing that "(1) after it timely filed its proof of claim in the
10 case, denoted as a secured claim, it did not need to file an
11 amended or supplemental proof of claim to reflect its subsequent
12 status as an unsecured, or undersecured, creditor and, (2) before
13 distribution of estate proceeds, the [t]rustee is responsible for
14 examining and ascertaining the legal status of each claimant in
15 the estate and properly distributing the estate's proceeds to all
16 creditors with unsecured and undersecured claims."⁸ Id. at 794.
17 Both arguments are similar to those advanced by OCI here.

18 The Padget court framed the issue as follows: "must a
19 trustee pay an undersecured creditor from proceeds of the estate
20 when the creditor filed a proof of claim as a secured creditor?"
21 Id. The court answered "no":

22 For the reasons set forth in this Opinion, the
23 Court concludes that a creditor filing a proof of claim
24 denoted a secured claim shall be treated as a creditor
25 with only a secured claim by the trustee for purposes
of distribution of estate assets. A creditor with an
undersecured or unsecured claim, or a creditor with a

26 ⁸Like OCI here, the creditor's position was predicated on
27 section 506(a); the creditor contended that as a matter of law,
28 its claim was bifurcated into secured and unsecured portions and
the trustee must therefore treat the claim as unsecured. Id.

1 secured claim that devolves into an undersecured or
2 unsecured claim, must timely file an amended, or
3 supplemental, proof of claim - or otherwise provide
4 legally sufficient notice of same to the trustee - in
5 order to be treated as an unsecured creditor of the
6 estate and receive a pro rata distribution of estate
7 proceeds.

8 Id. at 795 (emphasis in original).

9 In support of its holding, the Padget court first observed
10 that Rule 3002(a) requires an unsecured creditor to file a proof
11 of claim in order for the claim to be allowed and paid.⁹ The
12 court also noted that under section 502(a), the creditor's
13 statement of the amount and character of its claim is
14 presumptively valid and deemed allowed in the absence of an
15 objection. The creditor could not change the status of its claim
16 after allowance unless it filed a timely amendment or
17 supplemental claim.

18 Like the creditor in Padget, OCI argues that Trustee is
19 obligated to allow the unsecured amount of OCI's claim,
20 particularly when Trustee filed a notice of abandonment
21 acknowledging that the secured debt on the Property exceeded the
22 value of the Property. The Padget court, not persuaded by a
23 similar argument, held that a trustee is not required to either

24 ⁹Section 501(a) provides that a creditor "may" file a proof
25 of claim. The legislative comments to subsection (a) note that
26 it is permissive only and does not require filing of a claim.
27 Nonetheless, the comments provide that the Bankruptcy Rules and
28 "practice under the law" will guide creditors as to the necessity
of filing a claim. "In general, however, unless a claim is
listed in a chapter 9 or chapter 11 case and allowed as a result
of the list, a proof of claim will be a prerequisite to allowance
for unsecured claims, including priority claims and the unsecured
portion of a claim asserted by the holder of a lien." Hist. and
Stat. Notes Accompanying 1978 Revisions (emphasis added).

1 pay the unsecured portion of the creditor's claim or else object
2 to the creditor's secured claim. A "trustee should not, and is
3 not charged with the obligation to, examine a claim with a
4 purpose and view to increasing the claim or improving a
5 claimant's status over that asserted by other creditors." Id. at
6 799.

7 It is not a trustee's duty to protect individual
8 creditors against the consequences of failing to file a
9 claim, filing a late claim, filing an insufficient
10 claim, or failing to properly assert a deficiency
11 claim. It is a trustee's principal duty to object to
12 unsubstantiated, excessive, or unallowable claims.

11 Id.

12 Citing Padget, the Tenth Circuit Court of Appeals also held
13 that a creditor who filed a timely secured proof of claim must
14 amend its claim to assert the unsecured, undersecured portion or
15 move for valuation of its collateral. Agricredit Corp. v.
16 Harrison (In re Harrison), 987 F.2d 677, 680 (10th Cir. 1993).
17 The Tenth Circuit acknowledged that under section 506, the
18 creditor's claim was unsecured to the extent that the amount
19 exceeded the value of the property. That, in and of itself, did
20 not require the trustee to provide for payment of the unsecured
21 portion absent an amendment by the creditor to its secured proof
22 of claim or the filing of a motion to value the security. Id.

23 Montana's Local Rule 3001-1 is consistent with these
24 decisions:

25 An undersecured claim which requires an allowance for a
26 deficiency resulting from the enforcement of a security
27 agreement, shall be accompanied by excerpts of the
28 security and perfection documents that are directly
germane to establishing the claim, by a summary of the
remaining principal balance of the debt, together with
the amount of accrued unpaid interest claimed, and the

1 total amount alleged due, as well as a description of
2 the security, and if repossession has occurred, the
3 date of repossession or seizure, whether the sale was
4 public or private, the date of sale, sale price, person
5 to whom sold, the date notice of the sale was given to
6 the debtor and to the trustee, and an itemization of
7 the credit allowed toward the original debt. If
8 repossession has not occurred, the estimated time for
9 the proposed method of liquidating the security must be
10 given. The creditor must file a proof of claim stating
11 the dollar amount of the claim which is unsecured (or a
12 good faith estimate, with details providing the basis
13 for such estimate).

8 Local Rule 3001-1 of the Bankruptcy Court for the District of
9 Montana (emphasis added). OCI contends that Montana Local Rule
10 3001-1 is inapplicable because its security interest did not
11 arise out of a security agreement but out of a judgment. OCI is
12 correct; technically the rule does apply only to undersecured
13 deficiency claims "resulting from the enforcement of a security
14 agreement." Nonetheless, the principles set forth in Padget and
15 presumably underlying the local rule are consistent with the
16 bankruptcy court's conclusion here that any undersecured creditor
17 should file a claim for the unsecured portion of its claim (or a
18 valuation motion) in order to participate in any distribution to
19 unsecured creditors.¹⁰

20 While Padget and Harrison are not binding on the panel,
21 their reasoning is sound and persuasive. If we had not opted to

23 ¹⁰At oral argument, Trustee stated and OCI agreed that
24 Trustee had encouraged OCI to amend its claim but OCI refused.
25 Had OCI simply amended its claim to assert such a deficiency, the
26 amendment could have related back to its original proof of claim
27 and been deemed timely. In re Spurling, 391 B.R. 783 (Bankr.
28 E.D. Tenn. 2008) (unsecured deficiency claims filed after bar
date related back to filing of original secured proof of claim;
because trustee did not show any inequity in allowing creditors
to amend the secured claims, the court overruled the trustee's
objection to the claims).

1 dismiss this appeal as equitably moot, we would affirm the
2 bankruptcy court's holding that "it's certainly not the trustee's
3 responsibility to pursue a bifurcation of a claim of a secured
4 creditor."

5 **V. CONCLUSION**

6 For the foregoing reasons, we DISMISS this appeal as
7 equitably moot.

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