

DEC 13 2007

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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NOT FOR PUBLICATION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. EW-07-1210-KMoJ  
 )  
 SPOKANE RACEWAY PARK, INC., ) Bk. No. 06-01966  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 ROBERT E. KOVACEVICH, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 JOHN D. MUNDING, Chapter 11 )  
 Trustee, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on November 30, 2007  
at Seattle, Washington

Filed - December 13, 2007

Appeal from the United States Bankruptcy Court  
for the Eastern District of Washington

Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and JURY, Bankruptcy Judges.

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

1 Debtor is a closely held corporation that filed for chapter  
2 11 reorganization while it was a party to numerous lawsuits  
3 pending in both federal and state court. Through mediation,  
4 partial settlement of the disputes between the debtor and its  
5 partnership, on the one hand, and the opposing party, on the  
6 other hand, was reached. The bankruptcy court granted the  
7 chapter 11 trustee's motion to approve the settlement over  
8 objection by the appellant creditor, who was also a shareholder,  
9 officer, and former attorney of debtor.

10 As there has not been a stay pending appeal of the court  
11 order, the settlement has been concluded in circumstances that  
12 would be difficult to unravel. Accordingly, we DISMISS this  
13 appeal as moot.

14 Alternatively, we AFFIRM the trial court's approval of the  
15 trustee's motion to approve the settlement agreement.

#### 17 FACTS

18 Spokane Raceway Park, Inc. ("SRP") was formed as a closely  
19 held corporation in the state of Washington in 1971 to manage and  
20 oversee the development of a motor racing stadium complex on 640  
21 acres of vacant land located in the vicinity of Airway Heights,  
22 Washington.

23 After SRP's formation, Washington Motorsports Limited  
24 ("WML"), a general partnership, was created to own, develop,  
25 operate, and be the general manager of the motor racing stadium  
26 to be known as "Spokane Raceway Park." WML owns the land upon  
27 which the raceway was constructed. SRP was designated as WML's  
28 sole general partner.

1 In 1994, SRP entered into an agreement with the Kalispel  
2 Tribe of Indians ("Tribe") creating a joint venture known as the  
3 KNAEZ Joint Venture ("Joint Venture") to develop, for profit, a  
4 business enterprise zone of 20 acres of a 40-acre property  
5 adjacent to the Spokane Raceway Park.<sup>1</sup> The 40-acre property is  
6 currently the subject of litigation in state court.

7 A number of other agreements and leases were entered into  
8 between the parties.

9 As a result of various disputes, SRP, WML, and the Tribe  
10 have been involved in various legal actions pending in state and  
11 federal court since 2003: (1) the United States District Court  
12 for the Eastern District of Washington, Kalispel v. Spokane  
13 Raceway Park, Inc., Case No. 03-CV-0423-EFS ("Federal Court  
14 Action"); (2) the Spokane County Superior Court, Spokane Raceway  
15 Park, Inc. v. Kalispel Tribe of Indians, Case No. 03-02-07706-7  
16 ("State Court Action"); (3) the Spokane County Superior Court,  
17 Materne, et al. v. Spokane Raceway Park, Inc., Case No. 03-  
18 2068564 ("Receivership Action"); and (4) the United States  
19 Bankruptcy Court for the Eastern District of Washington, In re  
20 Spokane Raceway Park, Inc., Case No. 06-01966-PCW11 ("Bankruptcy  
21 Case").

22 On August 17, 2006, SRP filed for chapter 11 bankruptcy  
23 relief in Washington. The bankruptcy court appointed appellee  
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25 <sup>1</sup>Previously, SRP, as general partner of WML, gift-deeded the  
26 40-acre property to the United States in trust for the Tribe. In  
27 1996, the Bureau of Indian Affairs proclaimed the entire 40-acre  
28 property to be part of the Kalispel Indian Reservation. WML owns  
the other land immediately to the north and west of the 40-acre  
property, on which SRP operated its raceway complex.

1 John D. Munding ("trustee") as the chapter 11 trustee, pursuant  
2 to 11 U.S.C. § 1104.

3 In the State Court Action, the state court entered an order  
4 dissolving the Joint Venture, on October 22, 2004 (Case No. 03-  
5 02-07706-7). Furthermore, in the Receivership Action, on June 1,  
6 2006, the state court determined that any interest SRP had in the  
7 Joint Venture was held for the benefit of WML. Accordingly, in  
8 the Bankruptcy Case, by order of the bankruptcy court on January  
9 30, 2007, any interest SRP may have had in the Joint Venture was  
10 abandoned from the bankruptcy estate by the trustee.

11 On February 1, 2007, in attempting to resolve the disputes  
12 between the Tribe and SRP and WML, the trustee, on behalf of SRP,  
13 WML's receiver, on behalf of WML, and the Tribe engaged in an  
14 all-day mediation. Partial settlement was reached, memorialized  
15 by the "Settlement Agreement and Mutual Release" ("Settlement  
16 Agreement"), which resolved certain claims between SRP and WML,  
17 on the one hand, and the Tribe, on the other hand, subject to the  
18 terms and conditions set forth therein.<sup>2</sup> However, the Settlement  
19 Agreement did not resolve any of the pending disputes in the  
20 foregoing litigation or otherwise which exist solely between SRP  
21 and WML, nor did the Settlement Agreement attempt to allocate  
22 settlement proceeds.

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24 <sup>2</sup>Under the Settlement Agreement, the Tribe released WML and  
25 SRP, and WML and SRP released the Tribe from litigation in the  
26 Federal Court Action (Case No. CS-03-0423-EFS) and in the State  
27 Court Action (Case No. 03-2-07706-7), as well as any current or  
28 potential counterclaims. The mutual releases between SRP and  
WML, on the one hand, and the Tribe, on the other hand, further  
applied to any current or potential claims in the Receivership  
Action (Case No. 03-2068564) and in the SRP Bankruptcy Case (Case  
No. 06-01966-PCW11).

1 Subject to approval by (1) the bankruptcy court in SRP's  
2 bankruptcy case, (2) the state court in the Receivership Action,  
3 and (3) the Tribal Council for the Tribe, and in exchange for  
4 mutual releases from the claims between WML and SRP on the one  
5 hand and the Tribe on the other, the Tribe agreed to pay \$2.45  
6 million to WML and SRP jointly in consideration for WML's and  
7 SRP's conveyance of their interests in approximately 2.9 acres of  
8 real property commonly known as "Pit Road," upon which the Tribe  
9 agreed to convey to WML whatever interest it had in approximately  
10 10 acres of WML's property.<sup>3</sup>

11 The trustee filed a motion seeking approval of the  
12 Settlement Agreement under Federal Rule of Bankruptcy Procedure  
13 9019 on February 15, 2007.<sup>4</sup>

14 Appellant Robert E. Kovacevich, a 10 percent shareholder of  
15 SRP who holds a general unsecured claim for unpaid attorney's  
16 fees, objected to the settlement.<sup>5</sup> Appellant also formerly  
17 served as legal counsel and tax advisor to SRP, and was an  
18 officer of SRP.

19 Appellant objected to the settlement because the Tribe  
20 allegedly owed SRP over \$17 million as a result of the

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21  
22 <sup>3</sup>Pit Road, a part of the WML property where SRP operated its  
23 raceway, runs along Sprague next to the Tribe's Northern Quest  
Casino. The casino is located on the Tribe's trust lands.

24 <sup>4</sup>Trustee's motion to approve the compromise and settlement  
25 was served on over 626 parties in interest, only four of which  
26 filed objections. By the time of the hearing, only SRP president  
and majority shareholder, Orville Moe, and appellant continued to  
oppose the settlement.

27 <sup>5</sup>Currently, there has been no objection to the proof of  
28 claim.

1 arbitrator's decision on June 8, 2005. In addition, appellant  
2 argued that the Tribe's \$2.4 million total payment to SRP and WML  
3 in consideration for 2.9 acres of Pit Road was unfair, given that  
4 the arbitrators had valued the land at \$3.1 million per acre.

5 At the request of the trustee, a briefing schedule and  
6 evidentiary hearing were set to allow the bankruptcy court to  
7 consider the merits of and objections to the proposed settlement.  
8 The appellant chose to rest on the merits of his objection in his  
9 brief, while the trustee submitted a brief and declarations in  
10 support of the motion.

11 An all-day evidentiary hearing on the motion for approval of  
12 the compromise and settlement occurred on May 10, 2007.<sup>6</sup> The  
13 bankruptcy court reviewed the briefs and evidence submitted by  
14 the parties, including direct evidence through the declarations  
15 offered by the trustee; cross examination; and exhibits from the  
16 trustee, WML's receiver, and the appellant.

17 Subsequently, the bankruptcy court made oral findings of  
18 fact and conclusions of law on May 15, 2007. After examining  
19 whether the Settlement Agreement is fair and equitable, and  
20 taking into account the four factors required by the Ninth

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22 <sup>6</sup>Because of appellant's status as an insider of SRP, at the  
23 evidentiary hearing, the bankruptcy court first dealt with the  
24 issue of whether the appellant, as debtor's former lawyer, who  
25 holds a general unsecured claim under the Bankruptcy Code, had a  
26 right to object to the debtor's proposed settlement of litigation  
27 where the appellant holding the unsecured claim formerly  
28 represented the debtor in that litigation. Although it  
recognized issues of potential conflicts of interest and issues  
of attorney-client privilege, the bankruptcy court concluded that  
the appellant, even though he was former counsel for debtor, may  
file the objection to the motion to approve the settlement (which  
he did), and may participate in the proceeding regarding such  
motion, in his capacity as an unsecured creditor of SRP.

1 Circuit: (1) the probability of success in litigation; (2) the  
2 difficulty of collection; (3) the complexity and expense of  
3 litigation; and (4) interests of the creditors,<sup>7</sup> the bankruptcy  
4 court concluded that the compromise was fair and equitable as to  
5 SRP, and approved the Settlement Agreement.

6 The bankruptcy court's order authorizing compromise of  
7 claims and approving the Settlement Agreement was entered on May  
8 17, 2007.

9 Also, within the same period of time, the state court in the  
10 Receivership Action heard a similar motion filed by WML's  
11 receiver regarding approval of the same Settlement Agreement.  
12 The state court granted approval of the Settlement Agreement as  
13 to WML after the bankruptcy court approved the settlement.

14 Appellant timely appealed the bankruptcy court's order.

15 There has been no stay pending appeal of this court order.

#### 16 17 JURISDICTION

18 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
19 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
20

#### 21 ISSUES

22 (1) Whether this appeal is moot.

23 (2) Whether the court erred in approving the Settlement  
24 Agreement between WML and SRP, on the one hand, and the Kalispel  
25 Tribe of Indians, on the other hand, based on the evidence  
26 presented.

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28 <sup>7</sup>See Martin v. Kane (In re A & C Props.), 784 F.2d 1377,  
1381 (9th Cir. 1986).

1 STANDARD OF REVIEW

2 Mootness is a jurisdictional issue that we may raise and  
3 resolve sua sponte. S. Or. Barter Fair v. Jackson County, Or.,  
4 372 F.3d 1128, 1133 (9th Cir. 2004).

5 The bankruptcy court's decision to approve the Settlement  
6 Agreement is reviewed for abuse of discretion. A & C Props., 784  
7 F.2d at 1380; Goodwin v. Mickey Thompson Entm't Group, Inc. (In  
8 re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415 (9th Cir.  
9 BAP 2003) ("Mickey Thompson").

10 A bankruptcy court abuses its discretion if it bases its  
11 decision on an erroneous view of the law or clearly erroneous  
12 factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,  
13 405 (1990). Otherwise, we must have a definite and firm  
14 conviction that the bankruptcy court committed a clear error of  
15 judgment in the conclusion it reached upon a weighing of the  
16 relevant factors. Mickey Thompson, 292 B.R. at 420.

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18 DISCUSSION

19 Beyond the appellant's position that he opposes the  
20 Settlement Agreement, it is difficult to follow his arguments.  
21 Providing neither citations to the record nor adequate excerpts  
22 of record in support of his position on appeal, the appellant  
23 appears to be challenging the underlying factual findings of the  
24 bankruptcy court. Instead of providing arguments for reversal of  
25 the court's decision, the appellant merely reargues the merits  
26 and contends that the trustee was negligent and foolish in  
27 failing to properly perform his duties.



1 In response, the trustee contends that the bankruptcy court  
2 was correct in determining that the settlement was fair and  
3 equitable in light of the four required factors. In addition,  
4 the trustee argues that the present appeal is frivolous and  
5 requests that the appellant be required to show cause why  
6 sanctions should not be levied against appellant and his attorney  
7 pursuant to Federal Rule of Bankruptcy Procedure 8020. However,  
8 the trustee did not file a separate motion required by Rule 8020.

9 We first recognize that the issue is moot in light of recent  
10 developments. However, regardless of the mootness issue, we  
11 nevertheless hold that the bankruptcy court did not abuse its  
12 discretion in approving the settlement. Finally, we address the  
13 trustee's argument that the present appeal is frivolous and  
14 warrants sanctions.

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16 I

17 A case becomes moot when the issues presented are no longer  
18 live or the parties lack a legally cognizable interest in the  
19 outcome. Kescoli v. Babbitt, 101 F.3d 1304, 1308 (9th Cir.  
20 1996). An appeal is moot and vulnerable to dismissal if an event  
21 occurs while the case is pending on appeal that makes it  
22 impossible for the court to grant any effectual relief whatsoever  
23 to a prevailing party. IRS v. Pattullo (In re Pattullo), 271  
24 F.3d 898, 901 (9th Cir. 2001).

25 Although the appellant appeals the court order approving the  
26 Settlement Agreement, the order was not stayed pending this  
27 appeal. Thus, the trustee was free to act, and the settlement  
28 has been concluded. The appellant did not offer any contrary

1 evidence that the agreement between SRP and WML, on the one hand,  
2 and the Tribe, on the other hand, has not been concluded. Nor,  
3 after being asked at oral argument, did he offer any meaningful  
4 suggestion as to how effective appellate relief could be  
5 afforded.

6 We lack jurisdiction to hear a moot appeal and are persuaded  
7 that it is moot. See Pattullo, 271 F.3d at 901. Accordingly, we  
8 dismiss this appeal as moot.

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10 II

11 In the alternative, if the appeal is not moot, then we  
12 nevertheless hold that the bankruptcy court did not abuse its  
13 discretion in granting the trustee's motion for approval of the  
14 Settlement Agreement.

15 The bankruptcy court has great latitude in the approval of  
16 compromise agreements, as long as it is fair and equitable to the  
17 creditors. Woodson v. Fireman's Fund Ins. Co. (In re Woodson),  
18 839 F.2d 610, 619 (9th Cir. 1987).

19 In determining whether a settlement is fair and equitable,  
20 the court must consider the following four factors:

21 (a) the probability of success in litigation;

22 (b) the difficulties, if any, to be encountered in the  
23 matter of collection;

24 (c) the complexity of the litigation involved, and the  
25 expense, inconvenience, and delay attending it; and

26 (d) the paramount interest of the creditors and a proper  
27 deference to their reasonable views in the premises.

28 Woodson, 839 F.2d at 620; A & C Props., 784 F.2d at 1381; Mickey

1 Thompson, 292 B.R. at 420.

2 In applying the four required factors to the evidence  
3 presented during the day-long evidentiary hearing, the parties'  
4 briefs, declarations, and exhibits, the bankruptcy court  
5 concluded that the Settlement Agreement was fair and equitable as  
6 to SRP and subsequently approved it.

7 Reviewing each of the factors examined by the bankruptcy  
8 court, we hold that the bankruptcy court did not abuse its  
9 discretion in this regard. The court made sufficient factual  
10 findings to support its conclusion that the Settlement Agreement  
11 was fair and equitable and should be approved. See A & C Props.,  
12 784 F.2d at 1383.

13  
14 A

15 As to the first factor, the bankruptcy court concluded that  
16 the probability of SRP's success in litigation was uncertain.

17 When assessing a compromise, courts need not rule upon  
18 disputed facts and questions of law, but rather need only canvass  
19 the issues. Burton v. Ulrich (In re Schmitt), 215 B.R. 417, 423  
20 (9th Cir. BAP 1997). A mini-trial on the merits is not required.  
21 Id.

22 In determining that the possibility of debtor's success in  
23 litigation was questionable, the court discussed the complex  
24 issues involved in the two underlying lawsuits (Federal Court  
25 Action and State Court Action). The court noted that the  
26 complicated factual disputes embedded in the lengthy relationship  
27 between the Joint Venture and the Tribe would require significant  
28 discovery efforts and significant amount of trial time to

1 resolve.

2 Although the appellant attempts to argue the merits and  
3 raise factual disputes in his brief, it was sufficient for the  
4 court merely to detail the numerous issues without conducting a  
5 mini-trial on the merits.

6 By weighing the complexity of the issues involved in the  
7 pending actions, the court did not err in its determination that  
8 SRP's probability of success in litigation was uncertain.

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10 B

11 The court then examined the difficulty of collecting any  
12 judgment by noting that the issue of the Tribe's sovereign  
13 immunity may apply, which also complicates SRP's likelihood of  
14 success on the merits.

15 By determining that collection of any judgment against the  
16 Tribe could be difficult and would require litigation  
17 specifically relating to those collection efforts, the court  
18 considered evidence of the Joint Venture agreement provision that  
19 limited the Tribe's liability by providing that the Tribal trust  
20 lands or proceeds therefrom could not be used to pay any  
21 resulting judgment.<sup>8</sup>

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23 <sup>8</sup>The relevant portion of the Joint Venture agreement  
24 limiting the Tribe's liability provides:

25 In no event will a decision against the Tribe subject  
26 Tribal trust lands or proceeds from those lands to be a  
27 part of a judgment.

28 Appellee's E.R. Tab 18 at 268 (Decl. of James H. Jordan Re  
Reasonableness of Settlement, Attach. 2 at 5).





1 that acreage, WML does.<sup>9</sup> Consequently, as to the debtor SRP, the  
2 court determined that the settlement was fair and equitable.

3 The court noted that the state court Receivership Action was  
4 still pending and in the process of evaluating the Settlement  
5 Agreement from the perspective of WML. In fact, after the  
6 bankruptcy court's approval of the settlement, the state court  
7 has also approved the Settlement Agreement as to WML.

8 While creditors' objections to a compromise are afforded due  
9 deference, such objections are not controlling. A & C Props.,  
10 784 F.2d at 1382. And, while the court must preserve the rights  
11 of creditors, it must also weigh certain factors to determine  
12 whether the compromise is in the best interest of the bankrupt  
13 estate. Id.

14 In addressing the creditors' objections, the court also  
15 considered the interest of SRP as the bankrupt estate and  
16 determined the settlement was fair and equitable as to SRP. We  
17 agree.

18 The court also noted that the Settlement Agreement was not  
19 intended to be a global settlement among all parties, and thus,  
20 it did not affect the claims in litigation among the remaining  
21 parties.

22 While an approval of a compromise, without a factual  
23 foundation sufficient to establish that it is fair and equitable,  
24 may constitute an abuse of discretion, the record in the case  
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26 <sup>9</sup>The situation was further clouded by SRP's potential  
27 additional exposure due to its status as WML's former general  
28 partner and the state court's ruling that SRP had breached its  
fiduciary duties.

1 before us provides a solid factual foundation to support the  
2 bankruptcy court's approval of the compromise. See A & C Props.,  
3 784 F.2d at 1383.

4 The appellant did not articulate a coherent explanation of  
5 the threat posed to his claim by the compromise. See id. at  
6 1384.

7 The policy of the law favors compromise over litigation, and  
8 so long as the bankruptcy court amply considered the various  
9 factors that determined the reasonableness of the compromise, the  
10 court's decision will be affirmed. A & C Props., 784 F.2d at  
11 1381.

12 Thus, we hold that the court did not abuse its discretion in  
13 approving the settlement because the court examined all four  
14 factors adequately in making a full and independent assessment  
15 that the compromise was fair and equitable. This determination  
16 is supported by the record, including record of the day-long  
17 evidentiary hearing. Id. at 1384.

### 18 19 III

20 In his brief, the trustee requests that we find the present  
21 appeal frivolous and impose sanctions against the appellant and  
22 his attorney, pursuant to Rule 8020. The trustee contends that  
23 the appellant's brief does not comply with bankruptcy appellate  
24 procedure, does not apply the appropriate standard of review,  
25 mischaracterizes the bankruptcy court's ruling, improperly  
26 reargues the issue de novo without citations to evidence in  
27 support of his arguments, misstates facts, and is a personal  
28 attack on the trustee himself.



1 Rule 8020 allows the bankruptcy appellate panel to award  
2 sanctions for a frivolous appeal only after a separately filed  
3 motion or notice from the bankruptcy appellate panel and  
4 reasonable opportunity to respond. Fed. R. Bankr. P. 8020;  
5 Simpson v. Burkart (In re Simpson), 366 B.R. 64, 77 (9th Cir. BAP  
6 2007). This Rule is strictly enforced. Tanzi v. Comerica Bank-  
7 California (In re Tanzi), 297 B.R. 607, 613 (9th Cir. BAP 2003).  
8 A request for sanctions in a party's appellate brief is  
9 insufficient to allow for the imposition of sanctions. Simpson,  
10 366 B.R. at 77.

11 No separate motion was filed requesting that sanctions be  
12 imposed for an allegedly frivolous appeal. Thus, although we  
13 recognize the inadequacy of appellant's brief, appellant was not  
14 given sufficient notice and opportunity to respond to the  
15 request. Tanzi, 297 B.R. at 613. Accordingly, we deny the  
16 trustee's request for sanctions without prejudice.

17  
18 CONCLUSION

19 Without a stay pending appeal, the Settlement Agreement  
20 between SRP and WML, on the one hand, and the Tribe, on the other  
21 hand, has been concluded in circumstances too complex to be  
22 unraveled. Thus, we DISMISS this appeal as moot.

23 Alternatively, if the appeal is not moot, we AFFIRM the  
24 trial court's approval of the Settlement Agreement. The court  
25 adequately examined the various factors in making its assessment  
26 that the settlement was fair and equitable as to the debtor SRP.  
27 Thus, the court did not abuse its discretion in approving the  
28 Settlement Agreement between WML and SRP, on the one hand, and

1 the Kalispel Tribe of Indians, on the other hand, based on the  
2 evidence presented.

3 Further, we deny the trustee's request for sanctions,  
4 without prejudice, as procedurally incorrect.

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