

AUG 14 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	AZ-07-1075-PaAK
	)		
COLLEGE PROPERTIES, LTD.;,	)	Bk. Nos.	05-10095
COLLEGE PROPERTIES, II, LTD.,	)		05-15155
	)		(jointly administered)
Debtors.	)		
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ANTHONY DEPETRIS and PATRICIA	)		
PALMER,	)		
	)		
Appellants,	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
v.	)		
	)		
BRIAN J. MULLEN, Chapter 11	)		
Trustee,	)		
	)		
Appellee.	)		
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Argued and Submitted on July 26, 2007  
at Phoenix, Arizona

Filed - August 14, 2007

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

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Before: PAPPAS, AHART<sup>2</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Alan M. Ahart, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This is an appeal from the bankruptcy court's approval of a  
2 settlement agreement and comprehensive release ("the SACR")  
3 entered into between the Debtors, the debtor in a related  
4 bankruptcy case, Debtors' chapter 11<sup>3</sup> trustee, and several other  
5 parties to two adversary proceedings in the bankruptcy cases. We  
6 DISMISS this appeal on the grounds of equitable mootness.

7  
8 **FACTS**

9 The settlement agreement at issue in this appeal involves  
10 complex interactions and transactions among numerous parties.

11 The Parties and the Real Property

12 Debtors College Properties, Ltd. ("CPI"), formed February 20,  
13 1985, and College Properties, II, Ltd. ("CPII"), formed June 26,  
14 1985, are limited partnerships established to acquire real  
15 property for investment purposes. The disclosure statements  
16 attached to the limited partner solicitations described these  
17 investments as "highly speculative." Investors made small down  
18 payments and additional investments over the years. Thomas  
19 D'Ambrosio ("D'Ambrosio") is the general partner of both Debtors.  
20 Appellants Anthony DePetris and Patricia Palmer, along with Landis  
21 Mitchell, were among the limited partners.<sup>4</sup>

22  
23 \_\_\_\_\_  
24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
27 enacted and promulgated prior to the effective date (October 17,  
28 2005) of the relevant provisions of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 10908,  
April 20, 2005, 119 Stat. 23.

<sup>4</sup> Although Mitchell joined with DePetris and Palmer in  
challenging the SACR in the bankruptcy court, he has not joined in  
this appeal, and has accepted the settlement agreement and  
received a distribution from Trustee.



1 officers of Montage were D'Ambrosio and Canzoneri (the controlling  
2 member of Casa Del Oro). At the time of incorporation, Montage  
3 had no assets and none of its stock was issued.

4 On or about January 30, 2003, Montage acquired three  
5 subsidiaries as part of a merger (the "Montage Merger"):  
6 Insulation Products-Arizona, Inc. ("IPAZ"), controlled by Joseph  
7 Dues (since deceased and whose interests in these disputes is  
8 represented by Luella Dues, together referred to as "Dues"); Black  
9 Mountain; and Rancho Grande Estates, Inc., controlled by  
10 D'Ambrosio Land and Development, Inc. Montage then issued two  
11 million shares of its stock to Casa Del Oro, two million shares to  
12 IPAZ, one million shares to D'Ambrosio Land and Development, Inc.  
13 and 2.5 million shares to CAH Investment, LLC ("CAH"), a legal  
14 entity with no operating business or source of income and whose  
15 only members were D'Ambrosio (67 percent interest), and Dues (33  
16 percent interest). These 7.5 million shares comprised all of the  
17 authorized, outstanding shares of Montage.

18 Pursuant to an "Assumption and Substitution of Collateral  
19 Agreement" among Montage, CAH and Debtors, CAH assumed the debt  
20 owed to Debtors on the Real Property, and Debtors agreed to  
21 release the deeds of trust and to accept a pledge of 2,025,000  
22 shares of Montage stock as substitute collateral for the debt.  
23 The "Assumption and Substitution of Collateral Agreement" was  
24 executed by D'Ambrosio as general partner of Debtors and as the  
25 managing member of CAH, as was the Montage stock pledge agreement.  
26 D'Ambrosio also executed the releases of the trust deeds. It is  
27 uncontroverted that D'Ambrosio is also the controlling person of  
28 Montage.

1 At the same time as the Montage Merger, Montage formed BMH,  
2 LLC ("BMH") as a wholly owned subsidiary, merged Black Mountain  
3 into BMH, and the Real Property was quitclaimed to BMH free and  
4 clear of any liens.<sup>6</sup> Shortly thereafter, BMH borrowed funds and  
5 granted the lender, the Jessen Trust, a \$1,875,000 lien on the  
6 Real Property to secure the loan.

7 As a result of the Montage Merger and the other sundry  
8 transactions described above, Debtors' Consolidated Note, which  
9 was originally protected by the trust deeds on the Real Property,  
10 was now secured by a lien on a minority interest (27 percent) of  
11 the shares of Montage (i.e., those shares owned by CAH, which was  
12 in turn owned by D'Ambrosio and Dues). Arguably, these  
13 transactions significantly increased the risk of loss to the  
14 Debtors' limited partners.

#### 15 The Pinal County Litigation

16 After learning of the Montage Merger, three limited partners  
17 of the Debtors, DePetris, Palmer and Mitchell, sued Montage,  
18 Debtors and D'Ambrosio in the Pinal County, Arizona, Superior  
19 Court. Mitchell et al. v. College Props. I Ltd. P'ship, et al,  
20 CV2-00400915 (filed August 10, 2004) (the "Pinal County  
21 Litigation"). The limited partners alleged that the Montage  
22 Merger represented a fraudulent scheme to dilute the limited  
23 partners' interests in the Real Property. They sought to undo the  
24 Montage Merger, stop any sale of the Real Property, and recover  
25 damages. Montage, Casa Del Oro and BMH joined in asserting  
26 counter-claims against the three limited partners and cross-claims

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27  
28 <sup>6</sup> We can not determine from our record whether Montage or  
Black Mountain executed this conveyance.

1 against Debtors, alleging that, acting through their general  
2 partner, D'Ambrosio, Debtors had misled them regarding Debtors'  
3 authority to enter into the Montage Merger.

4 On March 11, 2005, BMH, acting through D'Ambrosio,  
5 transferred the Real Property back to Debtors.<sup>7</sup> Debtors attempted  
6 to sell the Real Property but were unsuccessful. Debtors then  
7 filed a lawsuit against the three limited partners, seeking  
8 damages for the partners' alleged interference with the sale of  
9 the Real Property by filing the Pinal County Litigation (the  
10 "Maricopa County Litigation"). On August 19, 2005, the Maricopa  
11 County Litigation was consolidated with the Pinal County  
12 Litigation.

#### 13 The Debtors' Bankruptcy Cases

14 On June 3, 2005, CPI filed a voluntary petition for relief  
15 under chapter 11 of the Bankruptcy Code. On August 17, 2005, CPII  
16 filed a chapter 11 petition.<sup>8</sup>

17 The bankruptcy court entered orders on September 9, 2005, for  
18 joint administration of CPI and CPII, and for appointment of a  
19 chapter 11 trustee to oversee the cases. Brian J. Mullen  
20 ("Trustee") was appointed to serve as trustee for both cases on  
21 September 15, 2005.

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24 <sup>7</sup> Although it is uncontroverted that D'Ambrosio transferred  
25 ownership of the Real Property from BMH to Debtors, it is not  
clear under what legal authority he acted.

26 <sup>8</sup> D'Ambrosio's counsel admitted at the hearing on approval  
27 of the settlement agreement that the purpose of the CPI and CPII  
28 bankruptcy filings was "to place the [Real Property] under the  
protective umbrella of the bankruptcy court and allow for an  
orderly sale without interference from certain limited partners."  
Tr. Hr'g 14:3-5 (February 7, 2007).

1 On January 16, 2006, the consolidated Pinal County Litigation  
2 was removed to the bankruptcy court as an adversary proceeding in  
3 connection with the jointly administered chapter 11 cases. Mullen  
4 v. College Props. Ltd. P'ship, Adv. Pro. 06-00063 (henceforth, the  
5 "Pinal County Adversary"). At the time of the removal, Debtors'  
6 bankruptcy estates consisted of the Real Property and their claims  
7 in the adversary proceeding. The only creditors of the bankruptcy  
8 estates were those secured creditors holding liens on the Real  
9 Property, and the counter- and cross-claims asserted against  
10 Debtors in the Pinal County Adversary.

11 On March 10, 2006, BMH filed a chapter 11 petition, also in  
12 the Arizona Bankruptcy Court, which was assigned to the same judge  
13 presiding over the Debtors' cases.

14 On June 19, 2006, the bankruptcy court approved the sale of  
15 the Real Property for \$5,825,000. After payment of the secured  
16 lien of Jessen trust, closing costs, real estate commissions and  
17 approved administrative expenses, the remaining \$2,134,000 in sale  
18 proceeds were held by Trustee in an interest-bearing account.

19 On August 9, 2006, BMH filed an adversary complaint against  
20 Debtors and Trustee in Debtors' cases to avoid the transfer of the  
21 Real Property or, in the alternative, to avoid a preferential  
22 transfer, seeking turnover of the proceeds from the sale of the  
23 Real Property. BMH v. College Props., Ltd., et al., Adv. Proc.  
24 06-742 (the "BMH Adversary").

25 The SACR

26 By the time the BMH Adversary was commenced, the various  
27 parties in these disputes had incurred over \$800,000 in legal fees  
28 and costs. Following the sale of the Real Property and resolution

1 of the details regarding the claim of the secured creditor, the  
2 parties requested that the bankruptcy court allow them to attempt  
3 a consensual resolution of their competing claims. The bankruptcy  
4 court ordered them to attend a settlement conference with another  
5 bankruptcy judge. The parties in the three bankruptcy cases and  
6 two adversary proceedings, including DePetris, attended the  
7 settlement conference on October 26, 2006.

8         Although the initial conference did not lead to an immediate  
9 settlement, the parties continued to negotiate and eventually  
10 reached an agreement, the SACR, on January 8, 2007. The SACR  
11 provided for the exchange of complete releases among the parties  
12 as consideration for payments to them from the sale proceeds held  
13 by Trustee. Those payments included:

- 14 • \$500,000 to D'Ambrosio;
- 15 • \$325,000 to Montage and its subsidiaries, including BMH;
- 16 • \$425,000 for Trustee and professional fees; and
- 17 • \$850,000 to be distributed to the limited partners.

18 In addition to these cash payments, the other issues resolved in  
19 the SACR included:

- 20 • Trustee agreed not to seek compensation in excess of  
21 \$100,000, even though under § 326(a), he could ask for  
22 reasonable fees up to \$198,000, based on distributions.
- 23 • The parties agreed to dismiss the Pinal County Adversary.
- 24 • BMH gave up any claims to the Real Property, agreed to  
25 dismiss the BMH Adversary, and committed to seek dismissal of  
26 its bankruptcy case; and
- 27 • D'Ambrosio gave up any claims as a limited partner.

28         On February 7, 2007, the bankruptcy court conducted a hearing  
on Trustee's motion to approve the SACR. Counsel for all parties  
to the SACR, as well as counsel for DePetris and Palmer, were  
present and argued to the court. In addition, the court called

1 and examined Trustee as a witness regarding his business judgment,  
2 the Woodson/A&C factors, and the overall reasonableness of the  
3 settlement.

4 The bankruptcy court announced its decision to approve the  
5 SACR. It stated, in part:

6 I can tell you that a bankruptcy case where a  
7 property has been sold and what you're fighting  
8 over is how much the equity holders get is, by  
9 definition, a success because most bankruptcy  
10 cases where the - the investors, the limited  
11 partners, the ones who have taken the risk and  
12 get the upside, are the ones who are left  
13 holding the bag. . . .

14 So, based on the presentation I've heard and the  
15 arguments and so on, my review of the record,  
16 I'll find that the Trustee's exercise - it was  
17 business judgment - satisfies the Woodson  
18 factors as required under applicable law, that  
19 it's well within the realm of reasonableness,  
20 and I'll approve the settlement.

21 Tr. Hr'g 39:11-16, 42:3-8.

22 The bankruptcy court entered an order approving the SACR on  
23 February 12, 2007, in Debtors' cases and in the BMH bankruptcy  
24 case. Appellants timely filed an appeal of the order approving  
25 the SACR in Debtors' cases on February 21, 2007. However,  
26 Appellants did not seek a stay of the bankruptcy court's order  
27 pending this appeal. Since there was no stay, Trustee and the  
28 other parties implemented the terms of the SACR. On February 27,  
2007, Trustee distributed \$500,000 to D'Ambrosio and \$325,000 to  
Montage. And on March 12, 2007, he distributed \$466,807 to 19  
different limited partners.<sup>9</sup>

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27 <sup>9</sup> While not appearing in the record, Trustee has apparently  
28 made additional distributions from the sale proceeds. At the oral  
argument before the Panel, Trustee's counsel informed the Panel  
that, as of that date, Trustee had issued a total of 57 checks to  
various parties pursuant to the SACR.

1 In addition, also pursuant to the SACR, the bankruptcy court  
2 entered orders approving stipulated motions for dismissal with  
3 prejudice of both the Pinal County Adversary and the BMH Adversary  
4 on March 26, 2007. The court also dismissed the BMH bankruptcy  
5 case on June 29, 2007, observing in its order that BMH "has been  
6 able to substantially reduce debt owed to both secured and  
7 unsecured creditors in this matter through . . . settlement  
8 agreements. As a result, the Debtor is no longer in need of  
9 bankruptcy relief and has agreed to dismissal of this case."

#### 10 11 **JURISDICTION**

12 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
13 § 1334 and under several paragraphs of § 157(b)(2). Trustee  
14 challenges our jurisdiction to review the bankruptcy court's  
15 orders approving the SACR on grounds of equitable mootness, which  
16 we discuss below. If the appeal is not moot, we have jurisdiction  
17 pursuant to 28 U.S.C. § 158(b).

#### 18 19 **ISSUES**

- 20 1. Whether this appeal is moot.  
21 2. Whether the bankruptcy court abused its discretion in  
22 approving the SACR.

#### 23 24 **STANDARDS OF REVIEW**

25 We examine our own jurisdiction, including mootness issues,  
26 de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma),  
27 324 B.R. 92, 110 (9th Cir. BAP 2005).

1 The bankruptcy court's approval of a compromise or settlement  
2 agreement is reviewed for abuse of discretion. Debbie Reynolds  
3 Hotel & Casino, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds  
4 Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001).

## 6 DISCUSSION

### 7 I.

8 This appeal is moot and is dismissed.

9 Trustee argues that we lack jurisdiction to decide this  
10 appeal because the issues are moot. We agree.

11 Equitable mootness prevents an appellate court from reaching  
12 the merits when an appellant has "'failed and neglected diligently  
13 to pursue their available remedies to obtain a stay'" and changes  
14 in circumstances "'render it inequitable to consider the merits of  
15 the appeal.'" Darby v. Zimmerman (In re Popp), 323 B.R. 260, 271  
16 (9th Cir. BAP 2005) (quoting Focus Media, Inc. v. Nat'l Broad. Co.,  
17 Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir.  
18 2004)). Our court of appeals invokes equitable mootness when an  
19 appellant fails to obtain a stay and transactions in reliance upon  
20 the order appealed have occurred which are "complex and difficult  
21 to unwind." Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d  
22 923, 933 (9th Cir. 1999). In deciding whether to exercise  
23 jurisdiction on appeal, the court of appeals cautions that we must  
24 consider the consequences of the remedy and the number of third  
25 parties who have changed their position in reliance on the order  
26 on appeal. Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi  
27 Ohana, Ltd.), 873 F.2d 1302, 1306 (9th Cir. 1989). Respect for  
28 the equitable mootness doctrine has a long history in our circuit,

1 predating the Bankruptcy Code. Ewell v. Diebert (In re Ewell),  
2 958 F.2d 276, 280 (9th Cir. 1992) (appeal held moot because  
3 transfer of property had already occurred as of time appellant  
4 sought stay pending appeal); Mann v. Alexander Dawson, Inc. (In re  
5 Mann), 907 F.2d 923, 925 (9th Cir. 1990) (appeal of order modifying  
6 stay held moot for failure to seek stay pending appeal); Trone v.  
7 Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793,  
8 797-98 (9th Cir. 1981) (in a pre-code case, appeal was moot  
9 because large number of third parties had relied on finality of  
10 bankruptcy court's order); BC Brickyard Assocs., Ltd. v. Ernst  
11 Home Ctr., Inc. (In re Ernst Home Ctr., Inc.), 221 B.R. 243, 247  
12 (9th Cir. BAP 1998) (transfer of real property after denial of  
13 committee's motion for stay pending appeal); cf. Popp, 323 B.R.  
14 260, 272 (appeal not equitably moot because it was a simple  
15 transaction involving only one third party).

16 Appellants did not seek a stay pending appeal. The SACR  
17 resolves complex issues involving a significant number of parties,  
18 many of whom have now acted in reliance on the bankruptcy court's  
19 order.

20 For example, 20 limited partners are involved in CPI; CPII  
21 has 16 limited partners. Relying on the bankruptcy court's  
22 approval of the SACR, and Appellants' decision not to seek a stay  
23 pending appeal, Trustee has distributed over \$1.2 million in  
24 settlement funds to D'Ambrosio (\$500,000), Montage (\$325,000) and  
25 19 of the limited partners (\$466,807). In addition, three  
26 different bankruptcy cases have been impacted by the settlement  
27 and the bankruptcy court's orders. Indeed, the BMH bankruptcy  
28 case was dismissed by the bankruptcy court expressly because the

1 SACR provided sufficient funds to BMH such that it no longer  
2 needed bankruptcy relief. And, based upon their execution of the  
3 SACR, Trustee and the other parties have stipulated to dismissal  
4 with prejudice of the two adversary proceedings where the  
5 principal disputes in these cases were to be litigated.

6 In this instance, we think the bankruptcy court's orders  
7 would be extraordinarily difficult to unwind, with more than a  
8 significant potential for inequity in doing so, even if it were  
9 possible. Simply put, if this Panel were to reverse the  
10 bankruptcy court's approval of the SACR, to provide effective  
11 relief, the Panel may be required to order disgorgement of over  
12 \$1.2 million distributed by Trustee via dozens of separate  
13 disbursements. It is unclear how the Panel could reverse the  
14 effects of the dismissal of the adversary proceedings "with  
15 prejudice," or the voluntary dismissal of the BMH bankruptcy  
16 case.<sup>10</sup> Given the long history of litigation among the parties,  
17 and that the limited partners have waited over 20 years for a  
18 return on their investments, we think it improbable that the  
19 parties could be restored to the status quo ante without  
20 substantial prejudice and inequity.<sup>11</sup>

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22 <sup>10</sup> We have little information about the BMH bankruptcy case  
23 in the record of this appeal. However, at oral argument, counsel  
24 for BMH represented that all creditors of BMH had been paid,  
25 presumably using the funds received from the settlement, and that  
the bankruptcy case was closed.

26 <sup>11</sup> While we do not purport to find facts, we note that  
27 Trustee's special litigation counsel estimates that reopening the  
28 various litigations could require as much as \$500,000 in new legal  
costs, in addition to the \$800,000 that has already been incurred.  
At oral argument, Trustee's counsel informed the Panel that there  
were insufficient funds in the Debtors' bankruptcy estates to  
pursue such litigation, and that most of the remaining funds were  
earmarked for payment of accrued administrative expenses.

1 We have held that an appeal is moot where the failure to  
2 obtain a stay causes "such a comprehensive change of circumstances  
3 as to make it inequitable to consider the merits of the appeal."  
4 Beatty v. Traub (In re Beatty), 162 B.R. 853, 856 (9th Cir. BAP  
5 1994). This is such a case. We therefore conclude that this  
6 appeal must be DISMISSED on the grounds of equitable mootness.<sup>12</sup>

7 II.

8 The bankruptcy court did not abuse its discretion in approving  
9 the Settlement Agreement and Comprehensive Release.

10 Though the issues on appeal are equitably moot, the Panel  
11 deems it appropriate under the circumstances to discuss the

12 \_\_\_\_\_  
13 <sup>12</sup> Given our decision, we need not decide Trustee's Motion to  
14 Dismiss this appeal filed on April 30, 2007. In his Motion,  
15 Trustee argued to dismiss not only for equitable mootness, but  
16 also because the appeal constituted an improper collateral attack  
17 on the bankruptcy court's order approving SACR in the BMH  
18 bankruptcy case, an order not appealed. While we agree with  
19 Trustee's equitable mootness argument above, we reach no decision  
20 concerning Trustee's collateral attack argument.

21 With his Motion to Dismiss, Trustee also submitted a Motion  
22 to Supplement the Record on Appeal, asking leave to include in the  
23 record: (1) the Notice of Trustee's Compliance with Settlement  
24 Agreement and Comprehensive Release; (2) correspondence from  
25 Trustee's and D'Ambrosio's counsel to Appellants' counsel  
26 regarding the distributions; and (3) the orders dismissing with  
27 prejudice the Pinal County Adversary and the BMH Adversary.  
28 Appellants did not oppose the Motion to Supplement. Then, on July  
17, 2007, Trustee also submitted a Request for Judicial Notice,  
asking us to take notice of the order dismissing the BMH  
bankruptcy case entered on June 29, 2007. Appellants also did not  
object to the Request.

Although we do not ordinarily consider documents that were  
not available to the bankruptcy court at the time it entered the  
order that is on appeal, Morrison v. Hall, 261 F.3d 896, 900 n.4  
(9th Cir. 2001), we "may take judicial notice of court filings and  
other matters of public record." Reyn's Pasta Bella, LLC v. Visa  
USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006). The orders  
dismissing the adversary proceedings and closing the BMH  
bankruptcy case are clearly matters of public record, and are  
relevant to the mootness issues on appeal. Thus, we may and do  
take judicial notice of these orders. However, we do not find it  
necessary or appropriate to take judicial notice of, or include in  
the record, the Notice of Trustee's Compliance or the  
correspondence among the parties.

1 merits. Thus, even if this appeal were not moot, we would  
2 conclude that the bankruptcy court did not abuse its discretion in  
3 approving the SACR.

4 The authority for the bankruptcy court's approval of a  
5 compromise is Rule 9019(a): "On motion by the trustee and after  
6 notice and a hearing, the court may approve a compromise or  
7 settlement. . . ." The bankruptcy court is vested with  
8 considerable discretion in approving compromises and settlements.  
9 Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610,  
10 620 (9th Cir. 1988). To approve a compromise, the bankruptcy  
11 court must be satisfied that its terms are "fair, reasonable and  
12 equitable." Martin v. Kane (In re A&C Props.), 784 F.2d 1377,  
13 1382 (9th Cir. 1986). To determine the reasonableness of a  
14 proposed compromise by a trustee, the bankruptcy court should  
15 consider several factors:

16 (a) The probability of success in the  
17 litigation; (b) the difficulties, if any, to  
18 be encountered in the matter of collection;  
19 (c) the complexity of the litigation involved,  
20 and the expense, inconvenience and delay  
necessarily attending it; (d) the paramount  
interest of the creditors and a proper  
deference to their reasonable views in the  
premises.

21 Id.<sup>13</sup>

22 The bankruptcy court explicitly acknowledged the primacy of  
23 the Woodson factors in its ruling: "I find that the Trustee's  
24 exercise - it was business judgment - satisfies the Woodson  
25 factors as required under applicable law, that it's well within

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26  
27 <sup>13</sup> These factors were repeated in a later court of appeals  
28 decision, Woodson, 839 F.2d at 720, and are now frequently  
referred to as the Woodson factors. See also Goodwin v. Mickey  
Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group,  
Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003).

1 the realm of reasonableness, and I'll approve the settlement."  
2 Tr. Hr'g 42:3-8. The record amply supports the bankruptcy court's  
3 conclusion that the settlement was fair and reasonable according  
4 to Woodson.

5 The bankruptcy court had a wealth of information before it  
6 regarding the events leading to the settlement and the SACR.  
7 These facts included the complete docket with all pleadings from  
8 the Pinal County Litigation, all pleadings filed in the Debtors'  
9 bankruptcy cases, and the uncontradicted testimony of Trustee at  
10 the February 7, 2007 hearing, together with the arguments of  
11 counsel.<sup>14</sup>

12 Besides the Real Property, the only asset in the Debtors'  
13 estates would have been any recovery in the Pinal County  
14 Adversary. Trustee argued that the primary goal of this action  
15 had already been achieved before the SACR was negotiated - the  
16 Real Property had been reconveyed to Debtors, it was sold, and the  
17 funds were under Trustee's control. Continuing with the Pinal  
18 County Adversary raises difficulties in proving any claim for  
19 damages, and in defending the bankruptcy estates against the  
20 claims of the other litigants. Many of the claims in the Pinal  
21 County Adversary involved allegations of malfeasance by  
22 D'Ambrosio. Counsel for D'Ambrosio elaborated on the difficulties  
23 of proving malfeasance by D'Ambrosio:

24 Mr. D'Ambrosio made many tough decisions through  
25 the years, and that would be the subject of the  
26 underlying litigation that the trustee would  
have to evaluate as things progressed. . . .

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27 <sup>14</sup> In addition, the bankruptcy judge presiding in Debtors'  
28 cases is the same judge assigned to the BMH bankruptcy case, and  
is therefore presumably aware of issues raised in that bankruptcy  
case that may be relevant in Debtors' cases.

1 Now if this case were to be litigated, the  
2 central issue would be, did Mr. D'Ambrosio  
3 violate the business judgment rule or was the  
4 diminishment of funds available for distribution  
5 to the limited partners and the limited  
6 partnerships a result of certain interfering  
7 limited partners who sought to inject  
8 themselves, contrary to Arizona law, into the  
9 management of the limited partnership?

6 Tr. Hr'g 13:19-22, 15:6-12.

7 Given that D'Ambrosio would be the focus of any renewal of  
8 the Pinal County Adversary, Trustee pointed out two other  
9 problems. First, D'Ambrosio is 80 years old and in poor health;  
10 this could lead to difficulties in a prolonged litigation.  
11 Second, a former employee of D'Ambrosio had stolen or destroyed  
12 allegedly vital business records relating to Debtors and those  
13 records had not been recovered or replaced. The employee,  
14 Geraldine Draper, was sentenced to seven years in prison for  
15 embezzlement. According to counsel for D'Ambrosio, this theft  
16 creates "huge evidentiary hurdles in proving any case for  
17 malfeasance against the general partner." In short, there was  
18 adequate evidence before the bankruptcy court to allow it to  
19 conclude that the first Woodson factor, a lack of probability of  
20 success on the merits, had been shown by Trustee.

21 There was also ample evidence submitted regarding the second  
22 Woodson factor, difficulty of collection. Trustee argued that he  
23 applied his business judgment in deciding that collection from  
24 D'Ambrosio would not be worth the cost and effort needed to obtain  
25 any recovery. Trustee reasoned that, "While Mr. D'Ambrosio may  
26 possess sufficient assets to satisfy a potential judgment, the  
27 other parties asserting claims against the estate could ultimately  
28 succeed on their claims, thus negating any potential recovery by

1 the estates on claims [against D'Ambrosio]." The Trustee was also  
2 well aware that the BMH Adversary posed a potential for removing  
3 all proceeds from the sale of the Real Property from the Debtors'  
4 estates. Finally, Trustee noted that the SACR's provision whereby  
5 D'Ambrosio gave up his limited partnership rights (and possible  
6 additional \$300,000 compensation) provided a greater pro-rata  
7 share to Debtors' other limited partners. Thus, the bankruptcy  
8 court, relying on the business judgment of Trustee, could conclude  
9 that the second Woodson factor, collectibility, weighed against  
10 attempted collection from D'Ambrosio.

11 There is little doubt that the third Woodson factor, the  
12 complexity of the litigation involved and the expense,  
13 inconvenience and delay necessarily attending it, favored approval  
14 of SACR. The bankruptcy court was given uncontroverted evidence  
15 that the litigation costs to that date had reached \$800,000, and  
16 had reasoned arguments from qualified counsel that additional  
17 costs could reach \$300,000 - \$500,000. The bankruptcy estates had  
18 limited assets available to fund any future litigation.  
19 Litigating the two adversary proceedings would be complex because  
20 they involve three bankruptcy cases, numerous parties and  
21 entities, and could require production of thousands of documents  
22 and records originating over two decades. According to Trustee's  
23 special counsel, further litigation could involve, in addition to  
24 attorney's fees, upwards of 15 depositions, expert witness fees,  
25 appraisals, court costs and related expenses even before the trial  
26 could begin. After the trial, given the litigious history of  
27 these proceedings, a lengthy appeal could not be ruled out.

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1           The bankruptcy court therefore had more than sufficient  
2 evidence in the record to support a ruling that the third Woodson  
3 factor also favored approval of the SACR: the complexity of the  
4 litigation involved and the expense, inconvenience and delay  
5 necessarily attending it.

6           Finally, based on the record, the fourth Woodson factor, the  
7 paramount interest of those impacted by the SACR, in these cases,  
8 the limited partners,<sup>15</sup> and giving proper deference to their  
9 reasonable views, is promoted by approving the SACR.

10           D'Ambrosio, at the request of Trustee, canvassed the limited  
11 partners as to their views on the SACR. A solid majority (75 of  
12 105 partnership units voting) favored approval of the SACR. The  
13 bankruptcy court also was given evidence that a majority of the  
14 limited partners opposed the Pinal County Litigation when it was  
15 commenced, opposed Appellants' attempt at class certification in  
16 state court, and supported D'Ambrosio's proposal to place Debtors  
17 in chapter 11 so that the Real Property could be sold.

18           The SACR provides a return of equity to the limited partners,  
19 along with some interest payments. The bankruptcy court was aware  
20 that the limited partners entered into their partnership  
21 agreements knowing that the venture was "highly speculative." The  
22 court pointed out that a return of equity to the owners of a  
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24           <sup>15</sup> The facts here are not typical of those envisioned by the  
25 A&C Props. or Woodson courts. In this case, the creditors were  
26 never consulted for the simple reason that their claims were fully  
27 protected by liens on the Real Property and they have been fully  
28 paid. However, we believe that the spirit of our circuit's case  
law would dictate that where, as here, the creditors are fully  
paid and it is the equity holders whose interests are at risk,  
that our analysis under the fourth Woodson factor should address  
the rights of those equity holders, here, the limited partners of  
the Debtors.

1 bankrupt company is rare, but not as rare as a bankruptcy that  
2 returns equity and interest. The bankruptcy court had solid  
3 justification for finding that the SACR promoted the interests of  
4 equity.

5 In short, the bankruptcy court did not abuse its discretion  
6 in deciding to approve the SACR.

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**CONCLUSION**

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This appeal is DISMISSED based upon equitable mootness.

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